NOT DESIGNATED FOR PUBLICATION

No. 124,857

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

REGINALD A. KANE,
Appellant,

v.

STATE OF KANSAS,
Appellee.

MEMORANDUM OPINION

Appeal from Sedgwick District Court; KEVIN J. O'CONNOR, judge. Submitted without oral argument. Opinion filed December 1, 2023. Affirmed.

Gerald E. Wells, of Jerry Wells Attorney-at-Law, of Lawrence, for appellant.

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

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

PER CURIAM: Reginald A. Kane appeals the district court's summary denial of his K.S.A. 60-1507 motion, in which he asserted several ineffective assistance of trial counsel and judicial misconduct claims. On appeal, Kane mostly repeats his assertions without addressing the reasoning behind the court's decision or explaining why he believes the court erred. We find his arguments to be conclusory, unsupported by pertinent legal authority, and unpersuasive. We see no error and affirm the district court.

UNDERLYING PROCEEDINGS

A jury convicted Kane of multiple crimes committed in 2017, including attempted first-degree murder, aggravated battery, aggravated robbery, kidnapping, three counts of aggravated assault, aggravated burglary, and criminal possession of a weapon by a felon. The facts underlying these crimes, which are not relevant to Kane's claims on appeal, are set forth in this court's decision affirming his convictions. *State v. Kane*, 57 Kan. App. 2d 522, 524, 532, 455 P.3d 811 (2019).

After an unsuccessful direct appeal, Kane moved for relief under K.S.A. 60-1507, asserting nine ineffective assistance of trial counsel claims, five judicial misconduct claims, and one cumulative error claim. The State responded in detail, explaining why Kane was not entitled to relief on any of his claims. The district court summarily denied Kane's motion, adopting the State's arguments in support of this decision.

Kane now appeals, arguing he provided a sufficient factual basis to justify an evidentiary hearing to explore his claims, a new trial, or a new restitution hearing. We do not find Kane is entitled to any of the relief he seeks.

ANALYSIS

A district court can take three routes when deciding a K.S.A. 60-1507 motion:

> "'(1) The court may determine that the motion, files, and case records conclusively show the prisoner is entitled to no relief and deny the motion summarily; (2) the court may determine from the motion, files, and records that a potentially substantial issue exists, in which case a preliminary hearing may be held. If the court then determines there is no substantial issue, the court may deny the motion; or (3) the court may determine from the motion, files, records, or preliminary hearing that a substantial issue is presented requiring a full hearing.' [Citations omitted.]" *State v. Adams*, 311 Kan. 569, 578, 465 P.3d 176 (2020).

The standard of review an appellate court applies in reviewing the denial of a K.S.A. 60-1507 motion depends on which of these routes the district court used. *Adams*, 311 Kan. at 578. If a district court summarily denies the motion, as the district court did here, the appellate court conducts a de novo review to determine whether the motion, files, and records of the case conclusively establish that the movant is not entitled to relief. *Beauclair v. State*, 308 Kan. 284, 293, 419 P.3d 1180 (2018).

The movant bears the burden of establishing that an evidentiary hearing is warranted. *Noyce v. State*, 310 Kan. 394, 398, 447 P.3d 355 (2019). To meet this burden, the movant's contentions must be more than conclusory. *Holmes v. State*, 292 Kan. 271, Syl. ¶ 2, 252 P.3d 573 (2011). As a result, the movant must set forth either an evidentiary basis to support those contentions or a basis must be evident from the record. *Thuko v. State*, 310 Kan. 74, 80, 444 P.3d 927 (2019). If this showing is made, the district court must hold a hearing unless the motion is a second or successive motion seeking similar relief. *Sola-Morales v. State*, 300 Kan. 875, 881, 335 P.3d 1162 (2014). But no evidentiary hearing is warranted if the court can conclusively determine from the motion, files, and records that the movant is not entitled to relief or if the motion, files, and records do not provide a sufficient factual basis to justify a hearing. 300 Kan. at 885; *Sullivan v. State*, 222 Kan. 222, 223-24, 564 P.2d 455 (1977).

Ineffective assistance of counsel claims

We review each of Kane's claims individually to determine whether he established he is entitled to relief. As for the ineffective assistance of counsel claims, Kane must establish that (1) his counsel's performance was deficient under the totality of the circumstances and (2) he was prejudiced because of that performance. *State v. Salary*, 309 Kan. 479, 483, 437 P.3d 953 (2019).

Under the first prong of the *Strickland* test, a defendant must show that counsel's representation fell below an objective standard of reasonableness, considering all the circumstances. *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Judicial scrutiny of counsel's performance must be highly deferential. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Furthermore, appellate courts must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Edgar v. State*, 294 Kan. 828, 838, 283 P.3d 152 (2012).

Prosecutor's comments about the State's burden of proof

Kane first asserts the prosecutor misstated the law when describing the burden of proof to prospective jurors during voir dire. Kane contends his counsel was ineffective because he failed to object to the alleged misstatement.

While discussing the State's burden during voir dire, the prosecutor stated to a prospective juror: "And so do you understand that the State does not have a burden beyond all doubt?" Kane contends this description of the burden of proof "diminish[es] the appropriate standard." The district court disagreed, finding the prosecutor's differentiation between "reasonable doubt" and "all doubt" is valid. Therefore, it determined Kane's trial counsel was not ineffective for failing to object to the prosecutor's statement.

Kane repeats his contention on appeal without addressing the district court's findings. But his argument is unpersuasive because we do not find the prosecutor erred in describing the State's burden. The prosecutor correctly informed prospective jurors that the State bears the "highest burden" of "beyond a reasonable doubt" and declined to

define the standard of proof. And it is permissible for a prosecutor to "point[] out that beyond [a] reasonable doubt does not mean beyond all doubt." *Mitchell-Pennington v. State*, No. 115,407, 2017 WL 1104599, at *9 (Kan. App. 2017) (unpublished opinion). In 2013, the Kansas Supreme Court found it is generally not prosecutorial misconduct for a prosecutor to explore the differences between proof beyond a reasonable doubt and proof beyond all doubt. *State v. Stevenson*, 297 Kan. 49, 53, 298 P.3d 303 (2013). If a prosecutor notes that the State's burden of proof is not beyond all doubt, a prosecutor does not "attempt to define the concept of reasonable doubt, diminish the State's burden of proof, or otherwise suggest to the jury that it might convict on anything less than proof beyond a reasonable doubt." *State v. Brown*, No. 113,551, 2016 WL 3659792, at *2 (Kan. App. 2016) (unpublished opinion).

Since the prosecutor did not misstate the law, Kane's counsel was not ineffective for failing to object. We affirm the district court's denial of this claim.

Prosecutor's comments about jury nullification

Kane next argues that his trial counsel was ineffective for failing to object to the prosecutor's statements during voir dire concerning jury nullification. The district court ruled that the prosecutor's statements to prospective jurors were accurate and not prejudicial, so Kane's trial counsel was not ineffective for failing to object.

Jury nullification is defined as the "'knowing and deliberate rejection of the evidence or refusal to apply the law.'" *State v. Boothby*, 310 Kan. 619, 632, 448 P.3d 416 (2019) (quoting Black's Law Dictionary 1026 [11th ed. 2019]). Kane argues two statements by the prosecutor were improper. First, Kane challenges the prosecutor's speeding ticket analogy. Second, Kane asserts that it was improper for the prosecutor to tell prospective jurors that it is the duty of the Legislature to change the law. The prosecutor stated:

> "[Prospective juror], if you don't like the law—say there's a law you don't like, I will tell you mine is speeding because, you know, I get speeding tickets. But the bottom line is, you know, if it says it's 70, and you—you're back there with eleven other people and you think it should be 90 or 30 whatever it should be, you and eleven other people don't get to go back there and change the law. Are you okay with that?
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> . . . .
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> "If you don't like the law, the legislation—legislature—legislators, they change the law, not jurors. You okay with that?"

The Kansas Supreme Court has explained that the "'[t]reatment of legal points in the course of voir dire examination should be strictly confined to those inquiries bearing on possible bias in relation to the issues of the case.'" *State v. Simmons*, 292 Kan. 406, 412, 254 P.3d 97 (2011) (quoting ABA Standards for Criminal Justice, Prosecution Function and Defense Function, Standard 3-5.3[c] [3d ed. 1993]). Yet our Supreme Court has also held that during voir dire: "It is not a misstatement of law 'to tell[] a jury to follow the law.'" *State v. Patterson*, 311 Kan. 59, 70-71, 455 P.3d 792 (2020) (quoting *Boothby*, 310 Kan. at 632); see also *State v. Boyd*, No. 118,925, 2019 WL 2312875, at *4 (Kan. App. 2019) (unpublished opinion) (collecting cases from our court discussing various prosecutors' valid statements instructing the jury to follow the law).

Kane's arguments are akin to the arguments made in *Boyd*. In both cases the prosecutor told prospective jurors that if they disagreed with the law, they must still follow it, giving examples of laws they might personally disagree with. And both prosecutors addressed that it is the Legislature's duty—not jurors—to change the law. 2019 WL 2312875, at *3. Similarly, in another case, a prosecutor stated: "'Does everyone understand that even if you don't agree with the laws . . . that the only way to fix that is to go to your legislature, go to your Congress person to champion them to make a different law?'" *State v. Alvarez*, No. 112,637, 2016 WL 1169395, at *7 (Kan. App. 2016) (unpublished opinion).

We did not find the prosecutor's statements in *Boyd* or *Alvarez* to be objectionable, nor do we question the statements here. And since we again do not find Kane's counsel was ineffective for failing to raise a baseless objection, we affirm the district court's denial of this claim as well.

Breakdown in communication

Kane also argues that his trial counsel was ineffective because he alleges his counsel never communicated with him about trial strategy or preparedness. While he does not explain on appeal how this alleged breakdown in communication prejudiced him, he told the district court he was prejudiced because his counsel waived opening statements. The problem with this argument—as the State pointed out below—is Kane's counsel did make an opening statement.

Kane does not explain why the district court was wrong to deny his claim for being conclusory and unsupported by the record. He cannot satisfy either prong of the *Strickland* test and, as a result, we affirm the district court's denial of this claim.

Failure to object to an unspecified affidavit

Kane next argues his trial counsel was ineffective for not objecting to a warrant issued by the district court which was allegedly based on an improper affidavit. Kane claims this warrant "was based on information and belief, not facts." This is the same argument he made in his original motion.

The State responded to Kane's argument below by pointing out that Kane failed to specify which affidavit he was challenging—the affidavit attached to a search warrant issued in the case or the one attached to the complaint. And Kane has failed to correct this

defect on appeal. He does not identify which affidavit he is referencing, nor does he provide any citation to the record where such affidavit could be located.

Movants are not entitled to evidentiary hearings when they offer conclusory statements that are unsupported with an evidentiary basis. *Mundy v. State*, 307 Kan. 280, 304, 408 P.3d 965 (2018). Kane failed to properly support his argument and failed to explain how the district court erred in denying this claim on that basis. Instead, he simply repeats the same argument he made below without acknowledging the defect noted by the State or the basis for the district court's decision.

Further, in his motion, Kane cited a civil divorce case for the proposition that the warrant at issue was improperly verified. The State responded by explaining that both possible warrants Kane could be referencing were criminal warrants and thus governed by criminal warrant statutes. And it pointed out that these warrants complied with the criminal warrant statutory requirements. Kane does not address this argument on appeal, explain why the district court was incorrect to rely on it, or cite any legal authority.

Kane has failed to properly support his argument on appeal because he did not (1) identify the affidavit he is challenging, (2) cite the location in the record where we could find the affidavit to review and determine whether his claim has merit, (3) cite pertinent legal authority to support his claim, or (4) explain how the district court erred in denying his claim. We therefore affirm the district court's decision on this basis.

Stipulation

Kane also argues that his trial counsel was ineffective for "stipulating to a gun crime." Kane notes that he pleaded not guilty to all charges, including the charge for possession of a gun by a felon. He contends his counsel's stipulation to an element of this crime—that Kane had a prior conviction that prohibited him from possessing a firearm at

the time of the crime—contradicted Kane's "not guilty position as to all charges" and was therefore prejudicial to Kane's "not guilty stan[ce]."

As the State pointed out below, it could have proven this element of the charged crime by introducing a journal entry of conviction of Kane's underlying felony—aggravated robbery—which was a charge Kane was also facing at this trial. But Kane's stipulation to this element of the crime kept that evidence out of the trial, avoiding its prejudicial effect. The district court correctly concluded his counsel's trial strategy on this issue was sound and in no way deficient. And Kane failed to show how he was prejudiced by the stipulation since the State still had to prove the remaining two elements of this crime: that Kane possessed a weapon and this possession occurred on June 9, 2017, in Sedgwick County.

What is perhaps the most troubling about this claim is the record shows Kane agreed to the stipulation after extensive discussion with the district court. In fact, the judge explained the stipulation to Kane and asked Kane over a dozen questions about it. Not only did Kane agree to the stipulation, but he also agreed the stipulation would benefit him and not prejudice him. The judge explained to Kane the beneficial aspect of the stipulation: that the jury would not "hear that you possessed a gun in your prior conviction or there was a gun involved." When the judge asked Kane if he understood why a defendant would agree to such a stipulation, Kane responded, "Yes." Kane fails to address or even acknowledge this is in the record on appeal.

Kane fails to prove his counsel's performance was either ineffective or prejudicial, and so we affirm the district court's denial of this claim as well.

Witness' lack of legal counsel

Kane also contends that his attorney was ineffective for failing to object to Kane's girlfriend not having counsel when she invoked her Fifth Amendment rights while testifying at his trial. After questioning Kane's girlfriend about this invocation, the court determined her Fifth Amendment rights were not implicated because her involvement was limited to rendering medical aid to Kane after the incident and was thus not criminal. Again, Kane does not address this argument on appeal or the court's denial of his claim on this basis. And he provides no legal authority—either below or on appeal—for the assertion that his girlfriend had the right to counsel at his trial.

A failure to support an argument with pertinent authority is like failing to brief the issue. *State v. Tague*, 296 Kan. 993, 1001, 298 P.3d 273 (2013). Kane also fails to establish how he was prejudiced under the *Strickland* standard because his testifying girlfriend did not have counsel at *his* trial. See 466 U.S. at 687. We find Kane's argument is improperly briefed and therefore abandoned and affirm the court's denial of his claim on that basis.

Failure to object to admission of a telephone conversation

Kane asserted below that his trial counsel should have objected to a recorded phone conversation between Kane and his girlfriend that Kane contended was played to jurors. Yet, as the State pointed out below, the record does not support this assertion: The conversation was never played for the jury.

On appeal, Kane makes an entirely different argument. He now claims his trial counsel was ineffective for not objecting to a "line of questioning" that discussed the phone conversation.

Appellate courts should "generally refuse to consider an issue on appeal if it has not been raised in the district court." *State v. Johnson*, 293 Kan. 959, 964, 270 P.3d 1135 (2012). There are limited exceptions to this general rule. *State v. Allen*, 314 Kan. 280, 283, 497 P.3d 566 (2021). But if a litigant makes an argument for the first time on appeal and fails to explain why an exception should apply, then an appellate court does not have to consider the argument. *State v. Williams*, 298 Kan. 1075, 1085, 319 P.3d 528 (2014). If no explanation is provided, then the appellate court can deem the party's argument waived or abandoned. 298 Kan. at 1085.

Kane provides no explanation why he did not make this argument below, nor does he even acknowledge that he raises a new argument on appeal. Therefore, we find his argument is unpreserved and provides no basis to reverse the district court's denial of his motion.

Jury instructions

Kane argues that his attorney was ineffective for failing to object to "incomplete jury instructions." Kane states that "there were no jury instruction[s] that informed the jury how they as jurors were to deliberate the issues [and] jurors were not informed on the importance of not giving up the individual vote due to majorities [*sic*] vote." But Kane provided no suggested jury instructions below or on appeal, nor does he point to any legal authority requiring jury instructions to contain a statement informing jurors to not surrender their individual vote for the consensus of the jury's majority. An argument raised without pertinent authority or without analysis explaining why it is "sound despite a lack of supporting authority" is inadequately briefed and thus abandoned. *In re Adoption of T.M.M.H.*, 307 Kan. 902, Syl. ¶ 6, 416 P.3d 999 (2018). We find this argument is improperly briefed and therefore abandoned and affirm the court's denial of his claim on that basis.

Restitution

For Kane's last ineffective assistance of counsel claim, Kane argues his trial counsel was ineffective for failing to object to the district court's restitution order as unworkable. At Kane's sentencing hearing, the State requested Kane pay $79,642.91 in restitution. The potential unworkability of the State's restitution request was mentioned twice throughout the hearing—but only by the State's attorney. The State's attorney told the district court:

> "And finally, Your Honor, we're asking the Court to adopt the restitution that is being asked in this particular case. It's my understanding—and Mr. Cotton [Kane's attorney] can correct me if I'm wrong—but they don't necessarily contest the amounts that are being asked. They may ask the Court to find it unworkable. I would ask the Court not to do that.
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> . . . .
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> "Again, I don't believe there is any dispute as far as the figures are concerned. It's just a matter of whether the Court finds it unworkable."

Later, while delivering Kane's sentence, the district court asked Kane's trial counsel:

> "[THE COURT:] The restitution figures—and I understand there is not an objection to the numbers; is that correct?
>
> "MR. COTTON: That's correct, Your Honor.
>
> "THE COURT: I'll make a finding, I'll order the restitution as according to the numbers that [the State's attorney] put on the record."

K.S.A. 2022 Supp. 21-6604(b)(1) provides that a sentencing court "shall" order restitution, unless it "finds compelling circumstances that would render restitution unworkable." Restitution is thus the rule and not the exception. *State v. Holt*, 305 Kan. 839, 842, 390 P.3d 1 (2017). The defendant bears the burden to present evidence of compelling circumstances that prove unworkability. *State v. Alcala*, 301 Kan. 832, 840,

348 P.3d 570 (2015). Imprisonment alone cannot render restitution unworkable. *State v. Tucker*, 311 Kan. 565, 567-68, 465 P.3d 173 (2020).

Kane argues that his counsel should have objected to the district court's restitution order as unworkable because "counsel should have known" of Kane's "indigent status." But indigent status is not reason enough to find a restitution order unworkable. See *State v. Meeks*, 307 Kan. 813, 820-21, 415 P.3d 400 (2018) (holding that a restitution order was valid when movant "showed his immediate financial incapacity but did not provide evidence to show that he would be unable to pay restitution after his release from prison"). Kane offered no other circumstances below that rendered the restitution order unworkable. We therefore affirm the district court's denial of this claim.

Judicial misconduct claims

Kane argues in his K.S.A. 60-1507 motion the district court engaged in five counts of judicial misconduct. Kane contends the district court improperly denied a continuance, wrongfully rejected a motion for a new trial, incorrectly convicted Kane of the same offense, wrongfully split one continuous act into aggravated robbery and aggravated battery, and wrongfully split one continuous act into attempted first-degree murder and aggravated battery. Not only are Kane's judicial misconduct allegations conclusory because of a failure to argue prejudice, but these claims are unreviewable because they are mere trial errors that should have been argued on direct appeal.

This court is barred from reviewing any of Kane's judicial misconduct claims that could have been brought on direct appeal. The "judgment of the reviewing court is res judicata as to . . . issues that could have been presented, but were not presented," on direct appeal. *State v. Johnson*, 269 Kan. 594, 601, 7 P.3d 294 (2000). Kane seemingly agrees with the State that these five judicial misconduct claims are mere trial errors. Rather than demonstrating how the district court's denial prejudiced Kane, Kane asserts

that if this court does not opine on the merits, he will simply file another K.S.A. 60-1507 motion arguing his appellate counsel was ineffective during his direct appeal.

Kane does not provide an explanation why he should be allowed to make these judicial misconduct claims in his K.S.A. 60-1507 motion. A K.S.A. 60-1507 motion "cannot serve as a vehicle to raise an issue that should have been raised on direct appeal, unless the movant demonstrates exceptional circumstances excusing earlier failure to bring the issue before the court." *Rowland v. State*, 289 Kan. 1076, 1087, 219 P.3d 1212 (2009) (citing Kansas Supreme Court Rule 183[c][3] [2008 Kan. Ct. R. Annot. 247]). This exception requires the movant to bear the burden of establishing such circumstances exist. See *Moncla v. State*, 285 Kan. 826, 831, 176 P.3d 954 (2008). Kane does not acknowledge or name any exception to the general rule.

Even if Kane's judicial misconduct allegations are not mere trial errors, we decline to review them because they are conclusory. Conclusory contentions without an evidentiary basis are insufficient for a movant to receive an evidentiary hearing. *Swenson v. State*, 284 Kan. 931, 938, 169 P.3d 298 (2007). If a movant accuses the district court of judicial misconduct, then the movant bears the "burden of establishing that misconduct occurred and that the misconduct prejudiced the party's substantial rights." *State v. Miller*, 308 Kan. 1119, 1154, 427 P.3d 907 (2018). All five of Kane's conclusory judicial misconduct claims establish no prejudice that impaired Kane's ability to receive a fair trial.

We find Kane's counts of judicial misconduct are conclusory and unreviewable since the allegations should have been brought on direct appeal. We affirm the district court's denial of all five of these claims.

Cumulative error claim

Kane's final argument is that he is entitled to an evidentiary hearing because "an accumulation of multiple trial errors" deprived him of effective assistance of counsel. The test for cumulative error is whether the totality of the circumstances establish the defendant was substantially prejudiced by cumulative errors and was denied a fair trial. *Holt*, 300 Kan. at 1007. One error cannot support reversal under the cumulative effect rule. *State v. Cofield*, 288 Kan. 367, 378, 203 P.3d 1261 (2009). Since Kane cannot demonstrate even one error in his K.S.A. 60-1507 motion, the cumulative error doctrine is inapplicable.

Affirmed.