NOT DESIGNATED FOR PUBLICATION

No. 125,024

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

HECTOR RODRIGUEZ-MANJIVAR,
Appellant,

v.

STATE OF KANSAS,
Appellee.

MEMORANDUM OPINION

Appeal from Meade District Court; SIDNEY R. THOMAS. Opinion filed March 3, 2023. Affirmed.

Derek W. Miller, of Miller & French, LLC, of Liberal, for appellant.

Clay A. Kuhns, county attorney, and *Derek Schmidt*, attorney general, for appellee.

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

PER CURIAM: Hector Antonio Rodriguez-Manjivar appeals the district court's denial of his K.S.A. 60-1507 motion after an evidentiary hearing. He claims that the district court should have granted his requested relief because his trial attorney was constitutionally ineffective in two respects—for failing to request a unanimity instruction and for presenting a deficient strategy at trial. After carefully reviewing the record and the parties' arguments, we agree with the district court that Rodriguez-Manjivar has not shown that his trial attorney provided constitutionally deficient representation. We thus affirm the district court's decision.

FACTUAL AND PROCEDURAL BACKGROUND

Rodriguez-Manjivar was convicted after a jury trial of aggravated indecent liberties with a child. This court affirmed his conviction and sentence on direct appeal, and the facts giving rise to his offenses were laid out in our opinion in that case. See *State v. Rodriguez-Manjivar*, No. 120,039, 2019 WL 5089751, at *1-3 (Kan. App. 2019) (unpublished opinion).

Highly summarized, the case involved an encounter on April 1, 2017, between Rodriguez-Manjivar, who was 52 years old, and a 13-year-old girl while they were putting together bedframes at an apartment in Plains. When the resident of the apartment stepped out to run an errand, Rodriguez-Manjivar and the girl were assembling a frame in a bedroom next to the kitchen. Rodriguez-Manjivar stood behind the girl, rubbed his hands on her body, grabbed her buttocks, and squished her breasts.

The girl exited the bedroom and ran into the kitchen. Rodriguez-Manjivar followed her into the kitchen, where he made sexual noises and asked her if she shaved her vagina. Then he put his hand inside her pants in an attempt to insert his fingers into her vagina. He again rubbed his hands on her body, grabbed her buttocks, and squished her breasts. The girl pushed Rodriguez-Manjivar away from her, went into the bedroom, and locked the door.

The State charged Rodriguez-Manjivar with aggravated indecent liberties with a child under K.S.A. 2016 Supp. 21-5506(b)(3)(A), alleging he repeatedly touched the breast, vaginal area, and buttocks area of a child. Rodriguez-Manjivar retained attorney Aaron Gipson to represent him, and the case proceeded to a jury trial. The defense strategy at trial appears to have been twofold—attempting to downplay the evidence of the touching by describing any contact as "accidental" and questioning the victim's credibility.

At trial, one of the investigating deputies testified during cross-examination that Rodriguez-Manjivar told the deputy in an interview that he touched the girl by accident. According to the deputy, Rodriguez-Manjivar claimed the girl was playing with handcuffs on the headboard, which caused the headboard to fall down. Rodriguez-Manjivar stated that he accidentally brushed her on the waist area when he tried to keep the headboard from falling.

In closing argument, Rodriguez-Manjivar's attorney focused on the girl's credibility. After summarizing her testimony, the attorney argued that inconsistencies in her statements "aren't minor discrepancies and that's not a matter of being consistent." Although the attorney did not explicitly mention the word "accident" in his closing argument, his thesis was that only Rodriguez-Manjivar and the girl knew what happened and that the girl was not accurately describing the events.

The jury convicted Rodriguez-Manjivar of aggravated indecent liberties with a child, and he was sentenced to 155 months' imprisonment and lifetime postrelease supervision. Rodriguez-Manjivar appealed his conviction and sentence, arguing that the State presented insufficient evidence, the trial court erred by not issuing a unanimity instruction, and the district court erred by admitting evidence of prior bad acts. This court affirmed his conviction. See 2019 WL 5089751, at *9.

Rodriguez-Manjivar, through counsel, then filed a K.S.A. 60-1507 motion alleging that his retained trial attorney, Gipson, was ineffective. Relevant to this appeal, the motion argued that Gipson was ineffective for failing to request a unanimity instruction and failing to present a clear defense.

The district court held an evidentiary hearing on this motion. The district court found that Rodriguez-Manjivar had not shown that his trial attorney was deficient for

failing to request a unanimity instruction because this was not a multiple-acts case, and the court concluded that the attorney's defense strategy was simple but not constitutionally ineffective. Rodriguez-Manjivar appeals both rulings.

DISCUSSION

When a district court denies a K.S.A. 60-1507 motion after holding an evidentiary hearing—as the district court did here—appellate courts review factual findings for substantial competent evidence, then determine whether those findings support the district court's legal conclusions. *State v. Adams*, 297 Kan. 665, Syl. ¶ 1, 304 P.3d 311 (2013). "Substantial competent evidence is legal and relevant evidence a reasonable person could accept to support a conclusion." *State v. Talkington*, 301 Kan. 453, Syl. ¶ 3, 345 P.3d 258 (2015). Appellate courts do not reweigh the evidence, assess witness credibility, or resolve evidentiary conflicts. 301 Kan. 453, Syl. ¶ 3. Legal conclusions are subject to unlimited review. *Adams*, 297 Kan. 665, Syl. ¶ 1.

The Sixth Amendment to the United States Constitution guarantees criminal defendants "the Assistance of Counsel" for their defense. U.S. Const. amend. VI. This assistance must be "reasonably effective," because the failure to provide effective assistance of counsel deprives a defendant of a fair trial in violation of the Sixth Amendment. *Strickland v. Washington*, 466 U.S. 668, 687, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

To determine whether an attorney's performance constitutes ineffective assistance of counsel, courts examine whether the attorney's representation was deficient and whether any constitutionally defective representation prejudiced the defendant. 466 U.S. at 687. That is, the defendant must show (1) the attorney's actions were objectively unreasonable under the totality of the circumstances, and (2) but for those actions, there is

a reasonable probability that the outcome would have been different. 466 U.S. at 687; *Chamberlain v. State*, 236 Kan. 650, Syl. ¶ 3, 694 P.2d 468 (1985) (adopting *Strickland*).

Under *Strickland*'s effectiveness inquiry, courts' review of an attorney's actions is "highly deferential"; in other words, there is "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Chamberlain*, 236 Kan. 650, Syl. ¶ 3. Courts must examine the representation from the attorney's perspective at the time of trial "'to eliminate the distorting effects of hindsight.'" *Edgar v. State*, 294 Kan. 828, 838, 283 P.3d 152 (2012). Matters of trial strategy, such as what witnesses to call or what motions to file, are decisions for the attorney, and courts will defer to the attorney's discretion. 294 Kan. at 838-39. Other decisions, such as whether a defendant will testify, are ultimately up to the defendant. 294 Kan. at 838.

Strickland's second consideration—prejudice—focuses "'on the fundamental fairness of the proceeding.'" *Balbirnie v. State*, 311 Kan. 893, 900, 468 P.3d 334 (2020) (quoting *Strickland*, 466 U.S. at 696). To show a reasonable probability the outcome would have been different but for an attorney's deficient representation, there must be "'a probability sufficient to undermine confidence in the outcome.'" *Chamberlain*, 236 Kan. at 655. Appellate courts consider all the evidence before the jury, with prejudice more likely when the verdict has little evidentiary support rather than a verdict "'with overwhelming record support.'" *Balbirnie*, 311 Kan. at 899 (quoting *Strickland*, 466 U.S. at 695-96).

Against this backdrop, Rodriguez-Manjivar argues his trial attorney was ineffective for two reasons: *First*, he asserts that his trial attorney should have requested a unanimity instruction at trial. *Second*, he asserts that his trial attorney did not present a clear defense at trial because the attorney's strategy was too difficult to discern.

1. *Rodriguez-Manjivar's claim regarding the need for a unanimity instruction was already examined and resolved against him during his direct appeal.*

Rodriguez-Manjivar first challenges his trial attorney's failure to request a unanimity instruction at trial. He claims that the State presented evidence of three potential acts of inappropriate touching—two on April 1, 2017 (the touching in the bedroom and the touching in the kitchen) and one sometime before that incident (an allegation that Rodriguez-Manjivar touched the girl's foot or leg under the table at some earlier date)—that could each constitute the crime charged.

In their briefs and at the evidentiary hearing in this matter, the parties both argued at length about whether a unanimity instruction was appropriate under the legal framework discussed in *State v. Voyles*, 284 Kan. 239, 244-45, 160 P.3d 794 (2007) (holding that the State in multiple-acts cases must elect which act it is relying on or a unanimity instruction must be issued to tell the jury to specify which act constitutes the crime of conviction). But this question was considered in detail and ultimately resolved by this court in Rodriguez-Manjivar's direct appeal. *Rodriguez-Manjivar*, 2019 WL 5089751, at *3-6; see *Grossman v. State*, 300 Kan. 1058, Syl. ¶ 3, 337 P.3d 687 (2014) (a movant cannot relitigate an issue decided on direct appeal).

For example, the panel in Rodriguez-Manjivar's direct appeal specifically considered and rejected his assertion that the State offered three potential criminal acts, finding that only the April 1 touchings were at issue:

> "Rodriguez-Manjivar alleges the jury heard evidence of three separate acts. He claims his conduct on April 1, 2017, constitutes two acts. He also points to evidence that he had touched H.Z. [the 13-year-old girl] before the April 1 incident. Specifically, during cross-examination, defense counsel asked H.Z., 'Had [Rodriguez-Manjivar] ever touched you anywhere on you before April 1st?' and H.Z. responded affirmatively. He then asked, 'Where had [Rodriguez-Manjivar] touched you?' and she responded, 'My legs

> when we were eating dinner. Like, he would, like, play with my leg, like, my feet and stuff.'
>
> "The State did not present evidence of possible criminal conduct occurring before April 1, 2017. And the State did not argue this conduct was criminal. The State also made clear in opening statement and closing argument that it was relying on the April 1 incident." 2019 WL 5089751, at *4.

The panel in that case also found that the two touchings on April 1—in the bedroom and in the kitchen—were close enough in time that they "most likely" did not require a unanimity instruction. 2019 WL 5089751, at *5; see also 2019 WL 5089751, at *6 (noting the incidents were at most 40 minutes apart). And the panel concluded that even if the incidents could have been seen as multiple acts, the absence of a unanimity instruction was harmless:

> "The danger in cases like *Voyles* is a mixed verdict in which the jury convicts on a charge even though it did not unanimously agree on the occurrence of any one act supporting that charge. But a mixed verdict was much less likely here. Only one victim testified about two touchings occurring in the same apartment within 40 minutes at most. H.Z.'s testimony was generally consistent. Rodriguez-Manjivar has not explained how some of the jurors could have believed the touching in the bedroom occurred but the one in the kitchen did not, while other jurors could have believed the touching in the kitchen occurred but the one in the bedroom did not. As a result, he has failed to show the jury would have reached a different verdict if the district court had given a unanimity instruction." 2019 WL 5089751, at *7.

Rodriguez-Manjivar does not discuss this previous resolution of the issue in his brief. Instead, he merely explains that because his attorney failed to request a unanimity instruction at trial, the appellate court was required to review the claim for clear error, which presents a higher hurdle to reverse a conviction than if the instruction had originally been requested. See *State v. Williams*, 295 Kan. 506, 510, 286 P.3d 195 (2012). But after holding an evidentiary hearing on Rodriquez-Manjivar's motion, the district court came to the same conclusion as the panel—that the facts in this case showed a

continuous course of action that did not give rise to a multiple-acts problem and that, even if such a problem arose, the failure to provide the instruction was harmless.

A person convicted of a crime cannot repackage the issues considered and determined on direct appeal in a later K.S.A. 60-1507 motion. See *Drach v. Bruce*, 281 Kan. 1058, Syl. ¶ 14, 136 P.3d 390 (2006). Our review of the record and the briefs show that this is indeed what Rodriguez-Manjivar is seeking to do here, and we decline to reconsider the previous panel's lengthy analysis and conclusion. And Rodriguez-Manjivar still offers no explanation regarding how a unanimity instruction could have changed the result of his trial—a showing that is required both when alleging instructional error and when challenging the effectiveness of trial counsel.

The facts of this case did not require a unanimity instruction, and thus Rodriguez-Manjivar has not shown that his attorney erred in not requesting such an instruction at trial.

2. *The trial attorney's defense strategy was not constitutionally deficient.*

Rodriguez-Manjivar also argues that his trial attorney's performance was constitutionally deficient because he did not present a coherent defense to the jury. In his brief, Rodriguez-Manjivar points to this court's opinion on direct appeal, which opined that "the exact nature of [the attorney's] defense is not entirely clear from the record." *Rodriguez-Manjivar*, 2019 WL 5089751, at *6. Rodriguez-Manjivar expands upon this observation in his briefs, claiming his trial attorney did not identify a main argument in his opening statement (as he did not give an opening statement), in cross-examination, or in his closing argument.

The nature of the attorney's defense strategy was a focus at the evidentiary hearing on Rodriguez-Manjivar's K.S.A. 60-1507 motion, where the attorney testified. The

attorney explained that his strategy was to argue that Rodriguez-Manjivar accidentally touched the girl. The attorney acknowledged that he did not make an opening statement and did not claim either act was an accident during closing argument. But the attorney stated that he felt like his strategy came through in cross-examination of the investigating deputy, where twice the deputy stated Rodriguiz-Manjivar had claimed the touching was accidental. The attorney testified that he did not give an opening statement because he did not feel the need. And he did not argue that it was an accident in closing because he felt like the jurors "had all the information" they needed to support that defense. Instead, at that point, he focused on the credibility of the victim, noting that only two people (Rodriguez-Manjivar and the girl) knew what happened, and she was not providing an accurate description of the events.

We acknowledge, as Rodriguez-Manjivar points out in his brief and as the previous panel noted during his direct appeal, that the attorney's strategy is not always apparent from the written trial record. Indeed, after hearing the attorney's explanation of his defense strategy, the district court questioned the attorney about his admission that he did not attempt to convince the jury that the touchings were accidental. The court asked him, "your entire theory of defense is it is an accident, but you didn't do anything to try to convince the jury that it was an accident. Do you agree with me?" The attorney responded, "Yes, sir."

Yet after considering all the evidence, the district court concluded that Rodriguez-Manjivar had not shown that his attorney's trial strategy amounted to constitutionally deficient representation. It reasoned that the trial attorney chose a simple strategy—to argue that the victim lacked credibility in closing—which can sometimes show that something was an accident. The court stated, "whether it was accidental or the victim should be questioned are similar in nature to the defense that he presented." And the district court pointed out that this court emphasized on direct appeal that the case boiled down to a credibility assessment of Rodriguez-Manjivar and the girl.

The district court did not explicitly make a finding on the trial attorney's decision to forgo his opening statement. But not giving an opening statement is not automatically deficient representation. *State v. Orr*, 262 Kan. 312, 330, 940 P.2d 42 (1997). And the court ultimately found the attorney's defense was discernable as a theory of credibility, and that Rodriguez-Manjivar had not overcome the strong presumption that his attorney's strategy fell within a wide range of reasonable performances.

Rodriguez-Manjivar cites *Wilson v. State*, 51 Kan. App. 2d 1, 340 P.3d 1213 (2014), *rev. denied* 301 Kan. 1053 (2015), to support his argument that his trial attorney was ineffective. But that case does not address whether counsel can be ineffective for failing to present a clear strategy. Rather, it found Wilson's trial attorney was ineffective because there was no reasonable explanation for why he failed to more thoroughly cross-examine the State's eyewitness, and he failed to present a tape recording and a letter that would discredit the eyewitness' testimony implicating Wilson in the murder. 51 Kan. App. 2d at 17, 21-23. These instances showed that Wilson's trial attorney failed to properly investigate the facts of the case. 51 Kan. App. 2d at 19 (concluding that together, trial attorney's errors satisfied the prejudice prong of *Strickland*).

While it is true that Rodriguez-Manjivar's attorney could have presented his theory of defense more clearly, the district court is correct that the strategy the attorney employed was not constitutionally deficient. The attorney focused his defense on discrediting the girl's account of the incident, which was that Rodriguez-Manjivar touched her with a sexual intent. This focus was reasonable given that the entire case hinged on her credibility, as compared with Rodriguez-Manjivar's previous statements during the investigation. The benefit of hindsight shows that this focus could have been emphasized more—or differently—throughout the case, but such considerations cannot be the guidepost for a court reviewing a K.S.A. 60-1507 motion. See *Edgar*, 294 Kan. at

838. We agree with the district court that Rodriguez-Manjivar has not shown that his trial attorney's strategy was constitutionally deficient.

Finally, Rodriguez-Manjivar argues in passing that his trial attorney was ineffective because he opened the door to K.S.A. 60-455 evidence—generally inadmissible evidence of other crimes or civil wrongs—when he asked the victim on cross-examination if Rodriguez-Manjivar had ever touched her previously without knowing the answer. But the district court persuasively found that even without knowing the answer, the attorney's question was reasonable under the circumstances. If the girl had responded that there were no previous contacts, her answer "would boost the credibility" of Rodriguez-Manjivar. If the girl responded that there were previous incidents—such as the leg-touching she ended up referencing—the attorney could argue that the girl was not being credible as she continued to "feel safe to be around him" until the April 1 incident. While asking a question on cross-examination that an attorney does not know the answer to is a strategic gamble, we agree that there was a reasonable explanation for the attorney's question. The district court did not err when it found Rodriguez-Manjivar had failed to show his attorney provided ineffective assistance of counsel on this ground.

Rodriguez-Manjivar has the burden both in his K.S.A. 60-1507 motion and on appeal to demonstrate that constitutionally deficient representation deprived him of a fair trial and affected the jury's verdict. He has not done so. The district court did not err when it denied Rodriguez-Manjivar's K.S.A. 60-1507 motion.

Affirmed.