NOT DESIGNATED FOR PUBLICATION

No. 115,662

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

FIDELIS K. THUKO,
Appellant,

v.

STATE OF KANSAS,
Appellee.

MEMORANDUM OPINION

Appeal from Sedgwick District Court; JAMES R. FLEETWOOD, judge. Opinion filed June 23, 2017. Affirmed.

Michael P. Whalen and *Krystle M.S. Dalke*, of Law Office of Michael P. Whalen, of Wichita, for appellant.

Lance J. Gillett, assistant district attorney, *Marc Bennett*, district attorney, and *Derek Schmidt*, attorney general, for appellee.

Before GARDNER, P.J., PIERRON, J., and BURGESS, S.J.

Per Curiam: Fidelis K. Thuko appeals the district court's summary denial of his second K.S.A. 60-1507 motion, arguing the court erred by failing to appoint him counsel after receiving the State's response to his motion and by summarily denying his motion without a hearing. We affirm.

Thuko was convicted by a jury of rape and attempted rape on January 21, 2005. He was sentenced to 202 months in prison and 36 months of postrelease supervision. He appealed his convictions. *State v. Thuko*, No. 94,228, 2007 WL 92642 (Kan. App. 2007)

(unpublished opinion) (*Thuko I*). On appeal, Thuko argued his statutory and constitutional rights to a speedy trial were violated. In addition, he argued there was prosecutorial misconduct, which denied him a fair trial. Lastly, Thuko argued there was cumulative error which resulted in the denial of his right to a fair trial. The *Thuko I* court found there was no merit in Thuko's claims and affirmed the district court. 2007 WL 92642, at *4.

Thuko filed a K.S.A. 60-1507 motion, and the district court summarily dismissed it. *Thuko v. State*, No. 101,168, 2010 WL 1253623 (Kan. App. 2010) (unpublished opinion) (*Thuko II*). The district court ruled that it could not consider the question of DNA evidence testing through his habeas corpus motion and stated he must file a motion in his criminal case for such relief. On March 26, 2010, the *Thuko II* court reversed that portion of the case and remanded for the district court to reconsider that issue. 2010 WL 1253623, at *1. However, the *Thuko II* court affirmed the remaining issues. 2010 WL 1253623, at *1. The remaining claims Thuko argued were: (1) he was denied effective assistance of counsel at trial; (2) he was denied a fair trial when the district court failed to properly answer a jury question; (3) he was denied effective appellate counsel; and (4) the State withheld exculpatory evidence.

In regard to the jury question, Thuko argued he was denied his right to a fair trial because the district court failed to answer a jury question. He complained "that when the jury asked for a definition of overcome by force the district court did not guide the jury with an answer." 2010 WL 1253623, at *4. The trial court referred the jury to the jury instructions. Thuko argued trial counsel was ineffective for not objecting to the district court's answer. He stated his trial attorney was present, but he was not. The *Thuko II* court determined, as to all claims except for DNA, that the district court correctly dismissed Thuko's K.S.A. 60-1507 motion. 2010 WL 1253623, at *5.

Thuko appealed the district court's determination that he was not entitled to DNA testing. *Thuko v. State*, No. 106,535, 2012 WL 5974014 (Kan. App. 2012) (unpublished opinion) (*Thuko III*). On this appeal, Thuko argued: "(1) the district court did not follow the mandate in *Thuko II* by holding an evidentiary hearing; (2) the district court erred in denying DNA testing; and (3) appointed counsel provided ineffective assistance at the remand hearing." 2012 WL 5974014, at *1. On November 21, 2012, the *Thuko III* court found that the issues had no merit and affirmed. 2012 WL 5974014, at *7.

On December 30, 2014, Thuko filed his second K.S.A. 60-1507 motion. He stated there was newly discovered evidence that he and his attorney were not present during the jury questions. In addition, he argued the district court failed to issue a lesser included offense jury instruction and his counsel failed to raise the multiplicity argument.

On May 19, 2015, the district court requested a response from the State to Thuko's K.S.A. 60-1507 motion. On July 1, 2015, the State responded to the motion and argued the district court should find Thuko was not entitled to relief because his motion was untimely and successive. The State further argued the motion was untimely because Thuko did not file his motion within the 1-year time limitation, did not request the application of the manifest injustice exception, and did not explain his delay in filing his new claims. In addition, it argued there were no exceptional circumstances identified regarding why the court should hear the successive motion.

On July 10, 2015, the district court summarily denied Thuko's K.S.A. 60-1507 motion. The court stated Thuko had failed to bring the motion within 1 year of the final order. Further, Thuko did not request the application of the manifest injustice exception and did not explain the delay in filing his new claims. The court also found the petition was successive and Thuko had not established exceptional circumstances.

Thuko appeals and argues the district court violated his due process rights when it failed to appoint him counsel after receiving the State's response to his K.S.A. 60-1507 motion; and the court erred when it summarily denied his K.S.A. 60-1507 motion without a hearing. We affirm.

In order to be granted relief under K.S.A. 60-1507, Thuko must establish by a preponderance of the evidence one of the following: (1) "the judgment was rendered without jurisdiction"; (2) "the sentence imposed was not authorized by law or is otherwise open to collateral attack"; or (3) "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. 60-1507(b).

A district court has three options when handling 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.]" *Sola-Morales v. State*, 300 Kan. 875, 881, 355 P.3d 1162 (2014).

The standard of review depends upon which of these options a district court uses. 300 Kan. at 881. When the district court summarily denies a K.S.A. 60-1507 motion, an appellate court conducts de novo review to determine whether the motion, files, and records of the case conclusively establish that the movant is not entitled to relief. 300 Kan. at 881.

To avoid a summary denial of a K.S.A. 60-1507 motion, Thuko bears the burden of establishing that he is entitled to an evidentiary hearing. This burden requires that Thuko's assertions be more than conclusory statements. He must either set forth an evidentiary basis to support the assertions or the bases must be evident from the record. 300 Kan. at 881 (quoting *Holmes v. State*, 292 Kan. 271, 274, 252 P.3d 573 [2011]).

A defendant is entitled to the appointment of counsel when there is a hearing at which the State is represented by counsel. *State v. Nunn*, 247 Kan. 576, Syl. ¶ 8, 802 P.2d 547 (1990). Black's Law Dictionary defines "hearing" as a judicial session held for the purpose of deciding issues of fact or law. Black's Law Dictionary 836 (10th ed. 2014). Further, there is only a statutory right to counsel if the petition presents substantial questions of law or triable issues of fact. K.S.A. 22-4506(b).

Thuko argues due process entitled him to have counsel appointed prior to the district court summarily denying his motion. Here, the district court received Thuko's K.S.A. 60-1507 motion and requested a response from the State. The State responded with its formal response, and the district court then made its decision to summarily deny Thuko's motion. No hearing was ever held on the motion. In fact, Thuko acknowledges no hearing was held but asserts the State's response had the same effect as a hearing. Because Thuko was only entitled to the appointment of counsel if a hearing was held, the district court was not required to appoint him counsel as no hearing was held on his motion. The district court is affirmed.

Thuko next argues the district court erred when it summarily denied his K.S.A. 60-1507 motion without a hearing.

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Manifest Injustice

K.S.A. 60-1507(f)(1) provides the 1-year time limitation applicable to K.S.A. 60-1507 motions. It states:

> "Any action under this section must be brought within one year of: (i) The final order of the last appellate court in this state to exercise jurisdiction on a direct appeal or the termination of such appellate jurisdiction; or (ii) the denial of a petition for writ of certiorari to the United States supreme court or issuance of such court's final orders following granting such petition." K.S.A. 60-1507(f)(1).

The 1-year time limitation may be extended only to prevent manifest injustice. K.S.A. 60-1507(f)(2). This court has interpreted manifest injustice to mean obviously unfair or shocking to the conscience. *Ludlow v. State*, 37 Kan. App. 2d 676, 686, 157 P.3d 631 (2007).

When determining whether a movant has suffered manifest injustice, this court should look at the totality of the circumstances, considering whether:

> "(1) the movant provides persuasive reasons or circumstances that prevented him or her from filing the 60-1507 motion within the 1-year time limitation; (2) the merits of the movant's claim raise substantial issues of law or fact deserving of the district court's consideration; and (3) the movant sets forth a colorable claim of actual innocence, *i.e.*,

> factual, not legal, innocence." *Vontress v. State*, 299 Kan. 607, 616, 325 P.3d 1114 (2014).

All of the factors need not be given equal weight, and no single factor is dispositive. 299 Kan. at 616.

Here, the Kansas Supreme Court denied review of Thuko's direct appeal on May 9, 2007. 284 Kan. at 951. Because Thuko did not petition for writ of certiorari to the United States Supreme Court, he had until May 9, 2008, to file his K.S.A. 60-1507 motion. See K.S.A. 60-1507(f)(1)(i). Thuko did file a timely K.S.A. 60-1507 motion which was affirmed in part and remanded on March 26, 2010. *Thuko II*, 2010 WL 1253623, at *1. The motion in this case was not filed until December 30, 2014, over 6 and 1/2 years late. In order to overcome his untimeliness, Thuko must demonstrate manifest injustice.

Thuko first argues he only recently discovered evidence regarding jury questions which prevented him from filing his motion within the 1-year time frame. He claims neither he nor his trial attorney were present during all communications between the district court and jury during the jury questions. The jury questions that Thuko argues are recently discovered evidence are: (1) whether not saying no is the same as saying yes or giving consent; (2) the definition of being overcome by force; and (3) whether a 12-0 vote was necessary for a guilty or not guilty verdict.

There are two requirements that must be met in order for a district court to grant a motion for a new trial based on newly discovered evidence. First, Thuko "'must establish the newly proffered evidence is indeed "new," in that it could not, with reasonable diligence, have been produced at trial.'" *State v. Trammell*, 278 Kan. 265, 283, 92 P.3d 1101 (2004). Second, the evidence must be of such materiality that there is a reasonable

probability it would produce a different result at a retrial. 278 Kan. at 283.

Thuko cannot overcome the first requirement, that the evidence is indeed new and could not, with reasonable diligence, have been produced at trial. In *Thuko II*, Thuko argued he was denied his right to a fair trial because the district court failed to answer a jury question. He stated the district court did not guide the jury with an answer, but referred it to the jury instructions. 2010 WL 1253623, at *4. The jury questions that Thuko argued were new evidence in *Thuko II* were the definitions for consent and being overcome by force. The *Thuko II* court determined the district court had correctly dismissed the claim. 2010 WL 1253623, at *5.

Here, Thuko objects to two jury questions he already challenged in *Thuko II*. He attempts to raise the same issues from his first K.S.A. 60-1507 motion but adds an additional jury question. If Thuko was aware of the first two jury questions in his first motion, he was aware of the third question he brought in this motion. Because the first two questions were already brought in the first motion, they are not newly discovered evidence. The third question is not newly discovered evidence, as it could have reasonably been previously raised in the first motion. Because there is no newly discovered evidence, Thuko did not demonstrate manifest injustice based on newly discovered evidence.

Thuko then argues we should find manifest injustice because the district court did not instruct the jury on a lesser included crime.

When looking at jury instructions, we follow a three-step process:

> "'(1) determining whether the appellate court can or should review the issue, *i.e.*, whether there is a lack of appellate jurisdiction or a failure to preserve the issue for appeal; (2) considering the merits of the claim to determine whether error occurred below; and (3)

> assessing whether the error requires reversal, *i.e.*, whether the error can be deemed harmless.'" *State v. Charles*, 304 Kan. 158, 165, 372 P.3d 1109 (2016) (quoting *State v. Williams*, 295 Kan. 506, 510, 286 P.3d 195 [2012]).

The first and third step are interrelated "'in that whether a party has preserved a jury instruction issue will affect our reversibility inquiry at the third step.'" *Charles*, 304 Kan. at 165 (quoting *State v. Bolze-Sann*, 302 Kan. 198, 209, 352 P.3d 511 [2015]).

The Kansas Supreme Court has consistently held that a lesser included offense must not require proof of any element not necessary in the greater crime charged. See *State v. Daniels*, 223 Kan. 266, 270, 573 P.2d 607 (1977); see also *State v. Bailey*, 223 Kan. 178, 183, 573 P.2d 590 (1977). "[F]or a lesser included offense to be factually appropriate, there must be actual evidence in the record, together with reasonable inferences to be drawn from the actual evidence, that would reasonably support a conviction for the lesser crime." *State v. Wade*, 295 Kan. 916, 926, 287 P.3d 237 (2012).

Thuko argues the physical contact between him and the victim constituted battery as opposed to rape and the district court erred by not instructing the jury on a lesser included crime. Thuko states the physical contact to the victim was done in a reckless, rude, and insolent manner. This is one of the definitions of battery under K.S.A. 2016 Supp. 21-5413(a). However, there is no such requirement in the elements necessary to establish the crime of attempted rape. See K.S.A. 2016 Supp. 21-5503(a); see also K.S.A. 2016 Supp. 21-5301. Because a lesser included offense must not require proof of any element not necessary in the greater crime charged—here attempted rape—battery is not a lesser included crime. See *Daniels*, 223 Kan. at 270; see also *Bailey*, 223 Kan. at 183. Therefore, the district court was not required to instruct the jury on battery.

Thuko failed to demonstrate that manifest injustice existed and therefore the 1-year time limitation must not be extended. The district court is affirmed.

Exceptional Circumstances

Under K.S.A. 60-1507(c), a court is not required to entertain successive motions on behalf of the same prisoner. *State v. Trotter*, 296 Kan. 898, 904, 295 P.3d 1039 (2013). A movant is presumed to have listed all the grounds for relief. 296 Kan. at 904. Therefore, a subsequent motion need not be considered absent a showing of exceptional circumstances. *State v. Kelly*, 291 Kan. 868, 872, 248 P.3d 1282 (2011). Exceptional circumstances "'are unusual events or intervening changes in the law which prevent a movant from reasonably being able to raise all of the trial errors in the first post-conviction proceeding.' [Citation omitted.]" *Woodberry v. State*, 33 Kan. App. 2d 171, 175, 101 P.3d 727 (2004).

Thuko argues that "justice requires consideration of his claims" even though it was his second K.S.A. 60-1507 motion. In arguing exceptional circumstances, Thuko states his counsel was ineffective for failing to bring the multiplicity argument and the lesser included jury instruction argument on direct appeal. To prevail on a claim of ineffective assistance of 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*, 300 Kan. at 882 (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]).

Judicial scrutiny of counsel's performance in a claim of ineffective assistance of counsel is highly deferential and requires consideration of all the evidence before the judge or jury. The reviewing court must strongly presume that counsel's conduct fell within the broad range of reasonable professional assistance. *State v. Kelly*, 298 Kan. 965, 970, 318 P.3d 987 (2014). To establish prejudice, the defendant must show a reasonable

probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different, with a reasonable probability meaning a probability sufficient to undermine confidence in the outcome. *State v. Sprague*, 303 Kan. 418, 426, 362 P.3d 828 (2015).

If counsel has made a strategic decision after making a thorough investigation of the law and the facts relevant to the realistically available options, then counsel's decision is virtually unchallengeable. Strategic decisions made after a less than comprehensive investigation are reasonable exactly to the extent a reasonable professional judgment supports the limitations on the investigation. *State v. Cheatham*, 296 Kan. 417, 437, 292 P.3d 318 (2013) (citing *Strickland*, 466 U.S. at 690-91).

"[A] failure to adequately brief an issue results in abandonment or waiver." *State v. Logsdon*, 304 Kan. 3, 29, 371 P.3d 836 (2016). The Kansas Supreme Court has also held that "a point raised only incidentally in a brief but not argued there is deemed abandoned. [Citations omitted.]" *Cooke v. Gillespie*, 285 Kan. 748, 758, 176 P.3d 144 (2008).

Thuko mentions his appellate attorney was ineffective for failing to raise issues on direct appeal, but he never gives an analysis of why his counsel was ineffective. He never established the required elements from *Strickland* and only raises this issue incidentally in his brief but does not argue it. Therefore, this issue is abandoned and we will not consider it.

In addition, Thuko's claim of ineffective assistance of counsel must not be considered an exceptional circumstance. Thuko would have been able to bring this claim against his counsel in the first K.S.A. 60-1507. It does not constitute unusual events or intervening changes in the law. See *Woodberry* 33 Kan. App. 2d at 175. No exceptional

circumstances exist in this case and, therefore, this motion is successive. The district court is affirmed.

Affirmed.