529 P.3d 159 (Table)
Unpublished Disposition
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NOT DESIGNATED FOR PUBLICATION
Court of Appeals of Kansas.

Jeremy FILBERT, Appellant,

v.

STATE of Kansas, Appellee.

No. 125,155
|
Opinion Filed May 19, 2023.

Appeal from Wyandotte District Court; Wesley K. Griffin, judge.

Attorneys and Law Firms

Jonathan Laurans, of Kansas City, Missouri, for appellant.

Claire Kebodeaux, assistant district attorney, Mark A. Dupree Sr., district attorney, and Derek Schmidt, attorney general, for appellee.

Before Isherwood, P.J., Malone and Warner, JJ.

MEMORANDUM OPINION

Per Curiam

***1** Jeremy Filbert appeals the summary denial of his K.S.A. 60-1507 motion, in which he claimed that his trial attorney provided ineffective assistance of counsel. He asserts that the district court erred when it denied his request without an evidentiary hearing. We agree. Filbert's motion provides a factual basis for his claims that warrants evidentiary examination, and the record does not conclusively show his claims lack merit. Under these circumstances, K.S.A. 60-1507 indicates that an evidentiary hearing is the default, not the exception. We thus reverse the district court's summary denial of Filbert's motion and remand for an evidentiary hearing to assess his claims.

Factual and Procedural Background

Filbert was convicted of sex crimes against J.F., his 12-year-old half-sister. The abuse surfaced in September 2015 after Filbert, who was 27, made comments to a coworker about J.F. that suggested Filbert was interested in a sexual relationship with her. Concerned, the coworker secretly recorded one of these conversations and alerted their supervisor. Filbert did not confess to sexually abusing J.F. in these conversations, but he expressed a potential desire to do so.

After the coworker's disclosure, the Kansas Department for Children and Families (DCF) sent someone to investigate the situation. When asked about any inappropriate behavior by Filbert, J.F. disclosed that he had sexually abused her regularly since he had moved into the family home a few months earlier. This abuse included multiple instances of penetrative vaginal sex, from around May 2015 up until a few days before this conversation with DCF in September 2015. Besides this several-month period of abuse, J.F. also said that Filbert had inappropriately touched her once in 2012 and exposed himself to her once earlier in 2015.

A few weeks after DCF received these initial disclosures, J.F. participated in a videotaped forensic interview with Erin Miller-Weiss, a social worker and child-interview specialist. In this interview, J.F. disclosed in more detail being raped and sodomized by Filbert in the family home and barn over the summer of 2015. J.F. also stated that Filbert took pictures on his phone of her getting out of the shower and in sexual positions.

A week after the forensic interview, J.F. had a physical examination with Dr. Terra Frazier, a child-abuse pediatrician at Children's Mercy Hospital. Physically, J.F. presented as normal overall. Her hymen was intact, with a “deep notch” on the bottom left part of it. According to Dr. Frazier, there is “no expert consensus opinion” about notches like this, which could result from trauma or just be a natural feature the child is born with. Thus, Dr. Frazier could not say whether the notch resulted from sexual abuse, some other cause, or whether J.F. was born with it. Dr. Frazier thus diagnosed J.F. with child sexual abuse based solely on J.F.'s disclosures.

As part of the criminal investigation, Kansas City, Kansas police searched the home and barn where J.F. stated the abuse occurred, but the search yielded no forensic evidence of sexual abuse. Police also found no evidence of sex crimes on Filbert's phone.

***2** The State then charged Filbert with multiple counts of rape, aggravated criminal sodomy, and aggravated indecent liberties with a child. Filbert's attorney throughout the investigation and prosecution was Carl Cornwell.

Filbert's trial and convictions

The case went to a jury trial in October 2016, about a year after J.F. disclosed the sexual abuse. Before trial, the State had notified Cornwell that it intended to present expert testimony from Dr. Frazier and Miller-Weiss—the forensic interviewer. Cornwell did not file any pretrial objections to this testimony or request a hearing to examine either witness' qualifications or reliability.

Before jury selection on the first day of trial, the State specified that Dr. Frazier would testify that 95% of child-sex-abuse physical examinations show normal findings and that the best evidence of abuse is the child's disclosures. Cornwell objected to the testimony about relying on disclosures but did not challenge the 95% testimony. As to Miller-Weiss, Cornwell argued that her testimony did not involve expert matters and thus she should only be a fact witness. After some discussion, the district court made no definitive ruling on these issues—though it strongly suggested that Miller-Weiss was not an expert—and as to Dr. Frazier, Cornwell stated he would "just wait until we get there" to see what the testimony would be.

Dr. Frazier later testified about her examination of J.F. and the normal findings for J.F.'s genitalia. As expected, Dr. Frazier explained that an intact hymen does not mean there was no sexual contact, stating that "90 to 95 percent of the time, even after multiple episodes of penetrative vaginal sexual contact, the hymen is normal." She explained that these numbers were "national statistics based on research" from "various studies." And she confirmed that J.F.'s child-sexual-abuse diagnosis was thus based on her disclosures, or the "history provided." Cornwell did not object to this testimony or address these statistics during his brief cross-examination of Dr. Frazier.

Miller-Weiss also testified. Given the district court's ambiguous pretrial comments, it was unclear whether Miller-Weiss was testifying as an expert or a lay witness, though earlier that day a detective had testified that the child interviewers in sex-abuse cases are expert witnesses. Miller-Weiss testified about her own qualifications—including testifying as an expert in multiple other cases—interview methods, and her interview with J.F. The jury then watched a video of the interview. Cornwell did not object to Miller-Weiss' testimony, and his brief cross-examination did not address her qualifications or interview methods.

Along with the video of the forensic interview, the jury heard live testimony from J.F., who described the sexual abuse. J.F. reiterated that Filbert had raped and sodomized her over a several-month period and that he had sexually abused her on the two earlier occasions. She also testified that she knew what an erection was and that she was "pretty sure" Filbert had one when he abused her.

Filbert presented two witnesses—himself and his ex-girlfriend. His ex-girlfriend testified that Filbert could not get an erection and that they tried to have sex many times but never could because of this issue. Filbert also testified about his impotence, which resulted from a back injury during his military service. He had received erectile-disfunction pills but testified that they did not work so he gave them to his father. Filbert's father and one of Filbert's brothers, who were both called as witnesses for the State, corroborated this testimony: Filbert's father confirmed that Filbert had given him the medication, and both the father and brother testified that Filbert had discussed his impotence with them. According to the brother, Filbert told him that he "couldn't feel anything down there" and that he could get an erection but would not feel it.

***3** The jury convicted Filbert of two counts of rape, three counts of aggravated criminal sodomy, and one count of aggravated indecent liberties with a child. The district court imposed concurrent life sentences on each count, with no possibility of parole for 25 years. On direct appeal, this court affirmed Filbert's convictions and sentences. *State v. Filbert*, No. 117,326, 2018 WL 2375261 (Kan. App. 2018) (unpublished opinion), *rev. dismissed as improvidently granted* 311 Kan. 1047 (2020).

Filbert's K.S.A. 60-1507 motion

In November 2020, Filbert filed a motion under K.S.A. 60-1507, alleging that his trial attorney, Cornwell, provided constitutionally deficient representation. Relevant here, Filbert claimed:

- Cornwell failed to properly investigate and challenge Dr. Frazier's testimony and consult an expert to rebut her medical opinions. In support, Filbert attached a report from Dr. Gregory Gilbert, a physician and Stanford Medical School professor who disputed many of Dr. Frazier's conclusions, calling her testimony that 90-95%

of child rape victims do not show any physical signs of abuse "inaccurate" and disputing her diagnosis. Dr. Gilbert attested that he—along with other physicians he knows—would have testified to the same at Filbert's trial.

- Cornwell failed to properly investigate and challenge Miller-Weiss' testimony and her child-interview techniques and consult an expert to rebut her testimony. In support, Filbert attached a report from Dr. Robert Barnett, a Kansas psychologist who claimed that Miller-Weiss' interview techniques were suggestive and based on a discredited protocol that is not peer reviewed, thus making the forensic interview "open to criticism."

- Cornwell failed to present corroborating evidence of Filbert's impotence. In support, Filbert attached paperwork from the Department of Veterans Affairs (VA) noting that he had erectile dysfunction, which he asserts would have lent credibility to the testimony about his impotence.

- Cumulative error when considering all of Cornwell's missteps together.

The State never responded to Filbert's motion, and in February 2022 the district court summarily denied it without holding a hearing. The judge that rejected Filbert's K.S.A. 60-1507 motion also presided over his trial.

In denying Filbert's motion, the district court found that his claims about Dr. Frazier's testimony lacked merit, characterizing Filbert's claims as "broad and conclusory." The court did not discuss the proffered evidence from Dr. Gilbert. As to the claim about Miller-Weiss' testimony, the district court found that she had not testified, or been requested to testify, as an expert—only as a fact witness, which Kansas law permits. And the court found that Dr. Barnett's report and opinions were unsupported in Kansas law, not credible, and would not have been admissible.

The district court also found the claim about impotence documentation to lack merit, citing the fact that Cornwell presented other evidence on this point—through witness testimony—so more evidence about it would have made no difference. And because the court found Filbert's individual claims to lack merit, it rejected his cumulative-error claim. Filbert appeals.

Discussion

Filbert argues that the district court erred in summarily dismissing his claims that Cornwell was ineffective related to Dr. Frazier's testimony, Miller-Weiss' testimony, and the documentation of Filbert's impotence. He asserts that these three allegations—individually and cumulatively—warranted an evidentiary hearing. Other claims from Filbert's motion are not at issue on appeal. See *Nguyen v. State*, 309 Kan. 96, 108, 431 P.3d 862 (2018) ("[A]n issue not raised or briefed is deemed waived and abandoned.").

***4** K.S.A. 60-1507 provides a collateral vehicle for those convicted of crimes to challenge the fairness of the underlying proceedings. See K.S.A. 2022 Supp. 60-1507(a). When someone files a motion under K.S.A. 60-1507, the district court generally must "grant a prompt hearing" to "determine the issues and make findings of fact and conclusions of law" necessary to resolve the allegations raised. K.S.A. 2022 Supp. 60-1507(b).

K.S.A. 60-1507 presumes that holding an evidentiary hearing to resolve a movant's disputed factual allegations is not the exception, but the rule. A district court may only bypass a hearing when "the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." K.S.A. 2022 Supp. 60-1507(b). A third option available to the district court is to hold a preliminary hearing and appoint an attorney to represent the movant if the motion, files, and records raise a " 'potentially substantial issue.' " *Hayes v. State*, 307 Kan. 9, 12, 404 P.3d 676 (2017).

When the court denies a K.S.A. 60-1507 motion without holding a hearing—as the district court did here—the appellate court is in just as good a position as the district court to consider the motion's merits. This court thus reviews the district court's rulings de novo. *Grossman v. State*, 300 Kan. 1058, 1061, 337 P.3d 687 (2014). A movant still must allege facts—such as names of witnesses or other sources of evidence—that warrant a hearing. *Mundy v. State*, 307 Kan. 280, 304, 408 P.3d 965 (2018); *Swenson v. State*, 284 Kan. 931, 938, 169 P.3d 298 (2007). Conclusory allegations with no evidentiary basis in the record are not enough to carry the movant's burden. *Mundy*, 307 Kan. at 304.

Filbert's claims in this appeal all allege, to some extent, that he was deprived of a fair trial because his trial attorney provided constitutionally deficient representation. The Sixth

Amendment to the United States Constitution guarantees criminal defendants the effective assistance of an attorney. See U.S. Const. amend. VI; *Strickland v. Washington*, 466 U.S. 668, 684-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). A person asserting the denial of that right must show that his or her attorney's performance was constitutionally deficient, and that this deficiency prejudiced the person so much as to deprive him or her of a fair trial. 466 U.S. at 687; *Chamberlain v. State*, 236 Kan. 650, 656-57, 694 P.2d 468 (1985) (adopting the *Strickland* approach in Kansas).

An attorney provides constitutionally deficient representation when his or her conduct was objectively unreasonable. *Edgar v. State*, 294 Kan. 828, 838, 283 P.3d 152 (2012). Courts are highly deferential when reviewing an attorney's performance and make every effort " 'to eliminate the distorting effects of hindsight.' " 294 Kan. at 838. Accordingly, a strong presumption exists that the attorney performed reasonably. 294 Kan. at 838. Under the prejudice inquiry, a person must show " 'a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different.' " 294 Kan. at 838.

With these principles in mind, we turn to Filbert's claims of error in this appeal: that Cornwell provided ineffective assistance of counsel in his handling of Dr. Frazier's testimony, Miller-Weiss' testimony, and the documentation of Filbert's impotence.

1. *Dr. Frazier's Testimony*

***5** Filbert alleges that Cornwell should have done more to challenge Dr. Frazier's testimony about J.F.'s lack of vaginal injuries. He asserts Cornwell should have at least consulted an expert to better dispute Dr. Frazier's opinions before and during trial. He also claims that Cornwell could have moved to disqualify some of Dr. Frazier's opinions from being presented to the jury.

To support these claims, Filbert attached an expert report disputing Dr. Frazier's opinions to his motion. The author of the report, Dr. Gilbert, reviewed documents including medical records from J.F.'s examination and J.F.'s and Dr. Frazier's trial testimony. He found Dr. Frazier's "blanket statement of there being an intact hymen in 90-95% of cases" to be "inaccurate" given studies showing a higher likelihood of injury when—as with J.F.—there were multiple instances of forced or unwanted penetration over several months. And Dr. Gilbert noted that child victims who knew their assailants—like J.F. and Filbert—were more likely to have hymenal injuries.

Dr. Gilbert also criticized the lack of urgency with which J.F. was examined after her disclosures. And he concluded that it was questionable for Dr. Frazier to diagnose child sexual abuse based on second-hand information from the forensic interview—that is, from "history [that Dr. Frazier] did not obtain from the patient." Thus, without more information, "the only diagnosis [Dr. Frazier could] truly make [was] normal well child exam." Dr. Gilbert attached the published studies he relied on to his report.

Given Dr. Gilbert's report, Filbert's assertions that Cornwell should have at least consulted an expert to challenge the State's medical expert are sufficient to raise a factual question about the reasonableness of Cornwell's representation. In a case with no physical evidence, Cornwell never challenged the lone medical expert's claim that less than 10% of child rape victims show any bodily signs of penetration. Dr. Gilbert would have disputed that testimony, and he asserts that many other experts in this area of medicine would have, too. This is not to say that Dr. Frazier was wrong—only that her claims were disputable. But without an evidentiary record, there is no way to know whether or why Cornwell failed to consult an expert to challenge Dr. Frazier's testimony.

The allegations in Filbert's motion also demonstrate that such a failure could have prejudiced him. The State's main evidence against Filbert was J.F.'s disclosures and testimony, Filbert's comments to his coworker about J.F., and Dr. Frazier's testimony that J.F.'s lack of any physical injury mirrors 95% of child rape victims and that the disclosures alone justified a child-sexual-abuse diagnosis. On Filbert's side, there was only the testimony of Filbert, his ex-girlfriend, and his family members saying he was impotent.

Evidence from someone like Dr. Gilbert could have credibly disputed Dr. Frazier's opinions. Indeed, Dr. Gilbert stated that it is not a near certainty that a victim like J.F. will have no injuries and that, in his opinion, there was not enough from the examination to justify the diagnosis.

Cornwell alluded to some of these points during his closing argument and cross-examination, but arguments from an attorney on issues of specialized medical knowledge would not have been as influential as an expert like Dr. Gilbert. Under these circumstances, an evidentiary hearing was

necessary to determine what strategy, if any, was behind Cornwell's decision-making on this issue.

***6** Caselaw also suggests that an evidentiary hearing was the proper course here. See *Skaggs v. State*, 59 Kan. App. 2d 121, 479 P.3d 499 (2020), *rev. denied* 313 Kan. 1042 (2021). There, Skaggs filed a K.S.A. 60-1507 motion along with an attached expert report disputing trial testimony about the victim's hymenal injuries and noting that the existence of a hymen contradicted the kind of sexual contact alleged. 59 Kan. App. 2d at 126-27. This court, citing the expert report, reversed and remanded for a hearing to determine whether Skaggs' previous attorney's failure consult such an expert was unreasonable. 59 Kan. App. 2d at 134; see also *Albright v. State*, No. 90,216, 2004 WL 1041350 (Kan. App.) (unpublished opinion) (finding ineffectiveness when the movant's trial attorney failed to at least consult a competing expert to dispute testimony from the State's expert on a significant issue requiring specialized knowledge), *rev. denied* 278 Kan. 843 (2004).

Applying these principles here, Filbert has presented an expert report disputing the expert testimony from trial about the lack of injuries to the victim's hymen. Dr. Frazier testified that "the characteristics of [the hymen] allow it to heal quickly so maybe there was an injury at one point in time and you just can't see it," even after "repeated episodes of penetrative trauma," which resembles the testimony at issue in *Skaggs*. And the competing expert in *Skaggs* disputed the idea that a hymen could grow back, stating " '[a]fter three months of sexual activity of the nature described by [the victim], she would have no hymen left—not even one with "notching." ' " 59 Kan. App. 2d at 127. Filbert's proffered expert report on J.F.'s lack of injuries warranted a hearing to at least determine whether Cornwell consulted an expert on this issue and, if not, why he did not.

Filbert also asserts that Cornwell should have tried to exclude Dr. Frazier's testimony altogether before trial. A district court must ensure that proposed expert testimony is reliable and relevant. See K.S.A. 2022 Supp. 60-456(b); see also *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589-93, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). A party can request a hearing to challenge the reliability of proposed expert testimony—often called a *Daubert* hearing. See *State v. Aguirre*, 313 Kan. 189, 205, 485 P.3d 576 (2021).

Filbert claims Cornwell should have challenged Dr. Frazier's testimony in a *Daubert* hearing before trial. Cornwell's only pretrial objections to her testimony came the morning of trial when he orally objected to testimony about diagnosing child sexual abuse based on disclosures alone. Cornwell told the court that he "[didn't] have an issue" with Dr. Frazier testifying that 95% of child rape victims show no physical injuries.

Kansas courts have admitted comparable expert testimony before, though these cases generally involved testimony that "most" rape victims lack hymenal injuries, or that an intact hymen does not disprove rape—not that 90-95% of child rape victims lack any physical signs. See, e.g., *State v. Britt*, 295 Kan. 1018, 1022, 287 P.3d 905 (2012) (lack of injury was "not probative" of whether assault occurred); *Dodge v. State*, No. 119,028, 2019 WL 638126, at *9 (Kan. App. 2019) (unpublished opinion) (intact hymen "is not determinative of whether vaginal penetration has occurred"); *State v. Williams*, No. 114,962, 2017 WL 2832629, at *2 (Kan. App.) (unpublished opinion) ("most" victims have a normal exam), *rev. denied* 307 Kan. 993 (2017); but see *State v. Cunningham*, No. 110,640, 2016 WL 97846, at *2 (Kan. App. 2016) (unpublished opinion) (only 5-10% of victims showed physical injuries), *rev. denied* 305 Kan. 1253 (2017).

These cases show that experts have reached different conclusions on this question. Experts—including Dr. Gilbert—agree that rape can occur without injury to a child's hymen, but that consensus seems to fall apart when determining how often that happens and under what circumstances. Dr. Frazier testified that almost all child victims—90 to 95%—show no physical injuries, but Dr. Gilbert thinks that is inaccurate in J.F.'s situation. Given this disagreement, at least consulting someone like Dr. Gilbert for a pretrial challenge could have helped the district court more closely examine the basis for Dr. Frazier's opinions and confirm their reliability.

***7** But because the district court never held an evidentiary hearing on Filbert's K.S.A. 60-1507 motion, it is impossible to know why Cornwell never sought a *Daubert* hearing. On the current record, we cannot find that Cornwell acted reasonably in this regard because we have no insight into his thought processes—whether he considered challenging Dr. Frazier's testimony before trial, whether he failed to consult an expert about doing so, or whether he chose not to as part of a considered strategy.

In evaluating prejudice, the district court—the same judge who presided over Filbert's prosecution—found that a competing defense expert "would not have led to an order

by this Court that [Dr. Frazier] would not be allowed to testify regarding the medical examination of the child victim." But the court never addressed Dr. Gilbert's report or the specific testimony at issue: the percentage of child victims who present without injuries.

Instead, the district court relied on two appellate decisions in rejecting Filbert's claims on this issue. See *Williams*, 2017 WL 2832629; *Cunningham*, 2016 WL 97846. One case involved competing expert opinions about how often child victims lack injuries, and the issue on appeal was whether it was proper to allow the State to present rebuttal testimony on that issue. *Cunningham*, 2016 WL 97846, at *3-6. But there is no rebuttal evidence at issue here, and there were no competing experts at trial. Filbert's trial involved one medical expert —Dr. Frazier—and no defense witness disputed her claims. We do not read *Cunningham* to support, let alone require, summary denial of Filbert's claims.

In *Williams*, the State presented testimony from an examining physician who stated that most sexual-abuse victims have a normal examination. 2017 WL 2832629, at *2. On appeal, this court found the physician's testimony was admissible and did not improperly opine on whether the victim was raped. 2017 WL 2832629, at *7-9. But Filbert does not argue Dr. Frazier improperly opined on whether J.F. had been raped; he asserts his attorney should have done more to challenge Dr. Frazier's opinions. Like *Cunningham*, *Williams* ultimately involved whether expert testimony was admissible, not whether the defense attorney was ineffective for not challenging that testimony.

The district court also cited Williams' later K.S.A. 60-1507 appeal. *Williams v. State*, No. 121,237, 2020 WL 4249692 (Kan. App. 2020) (unpublished opinion). There, Williams argued his attorney should have consulted an expert to better challenge the victim, and this court affirmed a finding that the attorney was not ineffective for not " 'further pushing' " the victim. 2020 WL 4249692, at *1, *3-4. But the district court had rejected Williams' claim *after an evidentiary hearing*, leaving this court with a record including testimony from the attorney explaining his strategy. 2020 WL 4249692, at *1-2. No such record exists here because the district court never held a hearing. And Filbert argues his attorney should have better challenged the State's expert, not the victim. Williams' cases are distinguishable from Filbert's.

The record here does not conclusively show that Filbert deserves no relief on his claims related to Dr. Frazier's testimony. Kansas law thus required the district court to hold a hearing on those claims. See K.S.A. 2022 Supp. 60-1507(b).

2. *Miller-Weiss' Testimony*

Filbert also argues that Cornwell was ineffective by failing to consult an expert about the forensic-interviewing techniques Miller-Weiss used to obtain J.F.'s disclosures. He asserts that consulting such an expert could have helped challenge Miller-Weiss' testimony before and during trial, including opposing her supposed expert designation. In support, Filbert attached an expert report to his motion challenging the techniques and questions Miller-Weiss used with J.F. The State argues that Miller-Weiss' testimony was admissible whether or not she testified as an expert.

***8** Our review of the record shows that there was confusion surrounding the nature of Miller-Weiss' testimony at trial. After the State proposed Miller-Weiss as an expert, Cornwell objected to that designation. The district court did not make a definitive ruling. But Miller-Weiss could have testified regardless of her designation. "Expert testimony is not necessarily required as a foundation for introducing a child witness' interview into evidence." *State v. Ballou*, 310 Kan. 591, Syl. ¶ 4, 448 P.3d 479 (2019). An expert designation is unnecessary to admit a child's forensic interview "that does not include opinions or other testimony based on scientific, technical, or other specialized knowledge." 310 Kan. 591, Syl. ¶ 3. Thus, no matter her designation, Miller-Weiss would have been able to provide background and fact testimony about the forensic interview before the jury watched it. See 310 Kan. at 608 (analyzing similar testimony).

Whether Cornwell should have consulted a child-interview expert about J.F.'s forensic interview is another question —a question dependent on the facts of this case. If a defendant is convicted of child sex crimes based "primarily on the testimony of the victim," then failing to challenge the reliability of earlier disclosures in a forensic interview can impair the ability to challenge the victim's trial testimony. *Mullins v. State*, 30 Kan. App. 2d 711, 717, 46 P.3d 1222, *rev. denied* 274 Kan. 1113 (2002). Failing to consult an expert about those earlier disclosures or the interview techniques employed may constitute ineffective assistance of counsel in some cases. See 30 Kan. App. 2d at 717-18.

But because there was no evidentiary hearing, there is no way to know whether or why Cornwell failed to consult an expert on this issue. Filbert's motion included a report from one such expert, Dr. Barnett, who critiqued Miller-Weiss'

interview techniques as suggestive and unreliable. The district court discredited Dr. Barnett's report because "he has testified almost exclusively for the defense and appears to be the expert of choice for the Board of Indigents' Defense Services." The court also noted that Dr. Barnett could not have testified about J.F.'s truthfulness.

An evidentiary hearing would have been the better forum to evaluate Dr. Barnett's opinions. Testifying often for criminal defendants says nothing about the merits of his conclusions. And any excerpt from the report being inadmissible would not render all of Dr. Barnett's opinions inadmissible—like his core thesis that Miller-Weiss used a flawed interview protocol. And more to the point, an evidentiary hearing would have provided an opportunity for Cornwell to explain whether he considered consulting an expert to help evaluate and cross-examine Miller-Weiss regarding her interviewing techniques.

In sum, Filbert's claim about Miller-Weiss' expert designation lacks merit because she could have testified about the interview as a fact witness. But his claim about consulting an expert to challenge her interview techniques and J.F.'s disclosures warranted an evidentiary hearing.

3. *Documentation of Filbert's Impotence*

Filbert asserts that Cornwell was ineffective for failing to present documentary evidence of Filbert's impotence to the jury. Filbert attached this evidence—VA records noting that Filbert had erectile disfunction—to his motion. The district court found, and the State now argues, that Cornwell introduced evidence of impotence in other ways, so Filbert's motion did not show Cornwell's failure to introduce this evidence affected the outcome of the trial.

Cornwell had these documents before trial but did not try to admit them. When the parties and the court discussed the documents before trial, the State argued they were inadmissible to show a diagnosis, and Cornwell agreed, stating that he would instead rely on testimony from Filbert and his ex-girlfriend to show impotence. The district court thus never ruled on the documents' admissibility.

***9** Once again, without a record from an evidentiary hearing, we cannot determine whether Cornwell acted reasonably in handling these documents. It may have been a reasonable strategic decision not to try to admit them, but there is no way to know on the current record. The district court and State argue there was no prejudice because Cornwell presented other evidence of Filbert's impotence through testimony. But official documentation would have corroborated this testimony and avoided the credibility concerns that can come with live witnesses—especially when one of those witnesses is the defendant. This claim warranted an evidentiary hearing.

Because we have determined that Filbert's claims individually warranted a hearing, we need not decide his final claim that the cumulative effect of Cornwell's alleged errors warranted a hearing.

When a court is faced with disputed factual allegations regarding a defense attorney's trial decisions, K.S.A. 2022 Supp. 60-1507(b) requires an evidentiary hearing "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." Filbert's K.S.A. 60-1507 motion raises factual claims regarding the reasonableness of his attorney's representation at trial. Thus, the district court erred when it summarily denied the claims Filbert raises on appeal without an evidentiary hearing. We reverse the district court's decision and remand so the court can hold an evidentiary hearing to assess Filbert's claims.

Reversed and remanded with directions.

All Citations

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