Court of Appeals of Kansas.

Jason E. MASHANEY, Appellant,
v.
STATE of Kansas, Appellee.
No. 101,978.
Sept. 17, 2010.

Appeal from Sedgwick District Court; Anthony J. Powell, Judge.
Michael P. Whalen, of Law Office of Michael P. Whalen, of Wichita, for appellant.

Matt J. Moloney, assistant district attorney, Nolo Tedesco Foulston, district attorney, and Steve Six, attorney general, for appellee.

Before RULON, C.J., GREENE, J., and KNUDSON, S.J.

MEMORANDUM OPINION

GREENE, J.

*1 Jason Mashaney appeals the district court's denial of his K.S.A. 60–1507 motion after hearing arguments of counsel. Mashaney argues that the court erred in refusing to conduct an evidentiary hearing on his claims that counsel on his direct appeal was ineffective for failing to present a number of claims that his trial counsel was ineffective. We agree with Mashaney that an evidentiary hearing was warranted, so we reverse the judgment and remand for further proceedings.

Factual and Procedural Background

On October 3, 2003, the State charged Mashaney with one count of aggravated criminal sodomy and one count of aggravated indecent liberties with a child for acts committed against his 5–year–old daughter, A.A., on September 26 or 27, 2003. The complaint was later amended to add an additional alternative count of aggravated indecent liberties. After the first trial ended in a mistrial, the case proceeded to a second jury trial.

The Second Jury Trial before Honorable Rebecca Pilshaw

A.A.'s mother testified at trial that she dropped A.A. off at Mashaney's apartment on the evening of September 26, 2003, to spend the night with Mashaney and A.A.'s half-siblings. Mother and Mashaney were no longer romantically involved, and Mashaney had little if any parental involvement with A.A. In fact, Mother testified that Mashaney's involvement with A.A. was so limited that A.A. called another man "Daddy." Mashaney's counsel, Sarah Sweet–McKinnon, did not object to these statements.

Mother testified that when she picked A.A. up the following morning, A.A. was not as talkative as normal. Later in the day during a bath, A.A. asked Mother if she could tell her something and A.A. told her, "Jason touched me." A.A. indicated to her mother that Mashaney put his finger in her "bottom" and licked her from her bottom to her back. A.A. also told her that Mashaney removed her underpants, touched her vagina with his finger and then licked the finger.

Prior to A.A.'s testimony at trial, the district court admonished A.A. to sit still and speak to the jury. Early in its examination of A.A., the State asked A.A. if she knew the difference between the truth and a lie. A.A. said that she did and that it would be a lie to say that she had black pants on when she really had blue pants. Apparently satisfied with the answer, the State continued direct examination. This was the extent of the competency evaluation made by either of the parties. A.A. then testified that "in the night [Mashaney] licked [her] private part, and in the morning he licked [her] bottom." At the conclusion of A.A.'s testimony, the district court told her:

> "You know what? I do think you're the best at testifying. You really stayed still much longer than I thought you ever would. You did a very nice job, and you said yes most of the time or no instead of shaking or nodding your head. I think you did a good job, and I'm very pleased. Thank you for coming here today."

*2 Sweet–McKinnon did not object to this statement.

Wichita Police Detective Thomas Krausch, who had conducted an interview with A.A. during a police investigation, was asked "in your experience and training is bed-wetting a common symptom of children who have been sexually abused?" Sweet–McKinnon did not object to this question and Krausch answered "yes." A few minutes later, when the conversation turned to a metal box that Mashaney had given to A.A. on the night in question, the State asked Krausch whether it was also "common in your experience with perpetrators to groom victims with presents or gifts?" Sweet–McKinnon did not object to this question and Krausch answered in the affirmative.

In his testimony, Mashaney tried to demonstrate positive fathering credentials. He testified that although no child support order had been entered against him, he tried to support his children financially. He stated that it bothered him that A.A. did not call him "Daddy." He denied assaulting A.A. and stated that he tried to contact police to discuss the situation.

On cross-examination, the State questioned the level of cooperation Mashaney claimed to have given police during the investigation. Over Sweet–McKinnon's objection, the State asked Mashaney who accompanied him to the police interview. Mashaney answered that he took his attorney. The State questioned Mashaney regarding his interview with Detective Krausch:

"Q: "It is true, is it not, that when the detective confronts you with the information that [A.A.] has said she's been molested by you, you denied it at first; isn't that right?

"A: Yes.

"Q: And then after that your lawyer takes over and says, 'That's it. We're done.' Isn't that correct?"

The district court overruled Sweet–McKinnon's general objection to this question, and Mashaney answered in the affirmative.

During its rebuttal closing argument, the State, making ostensible reference to the diminutive appearance and youth of the mother of two of Mashaney's children, asked the jury to "[c]ompare the size, the littleness of a child to how young [Mashaney] is, how young the women they were [*sic*] when he started with them." Sweet–McKinnon did not object to this statement. The prosecutor then emphasized that Mashaney had eight children by four different women and began sexual activities with these women "that [were] 14 and 15 years old." Finally, the prosecutor also reminded the jury that Mashaney "came with a lawyer" to the police interview.

The jury convicted Mashaney of one count of aggravated criminal sodomy and one count of aggravated indecent liberties. Sweet–McKinnon filed a motion for new trial and judgment of acquittal on the ground, among others, that the district court improperly praised A.A. for her testimony and that praise may have influenced the weight and credibility given to A.A.'s testimony. The district court denied the motion.

The Presentencing Motion to Set Aside the Verdict Due to Ineffective Assistance of Trial Counsel

*3 Prior to sentencing, Mashaney filed a pro se motion to set aside the verdict for insufficient assistance of counsel. Mashaney made a number of general allegations that Sweet–McKinnon's representation was deficient, including her alleged failure to challenge Krausch's credentials, to investigate and call witnesses, to file defense motions, and to discredit prosecution witnesses.

The district court appointed Mashaney new counsel and held an evidentiary hearing on the motion on November 17, 2004. Sweet–McKinnon was the sole witness. Mashaney's new counsel, Richard Ney, questioned Sweet–McKinnon on a number of alleged deficiencies.

Ney first asked Sweet–McKinnon why she did not object to statements concerning Mother and Mashaney's relative ages at the time they became involved. Sweet–McKinnon testified that she did not believe their ages to be a core issue of the case and chose strategically not to object. Sweet–McKinnon

provided the same justification for not objecting to testimony concerning the number of children Mashaney had and his low level of involvement with them. Sweet–McKinnon did testify to her belief that this testimony could have been prejudicial.

Sweet–McKinnon testified that she did not examine A.A.'s capacity to testify because A.A. appeared to know the difference between the truth and a lie. Sweet–McKinnon testified further that she did not contemporaneously object to the district court's comments to A.A. because she did not want to draw attention to them. However, she did request a new trial on the basis that the court's comments were prejudicial.

Ney next asked Sweet–McKinnon why she failed to object to Krausch's testimony that bedwetting is a common symptom of abuse and that perpetrators groom their victims with gifts. Sweet–McKinnon admitted that Krausch had not been expressly qualified as an expert, but that she believed the questions related to Krausch's experience over years of working with children. Sweet–McKinnon admitted that there was no strategic reason for her failure to object.

Sweet–McKinnon also testified that she objected to the State's questioning of Mashaney with regard to the alleged child support order and SRS involvement in the case. She testified that she did not object to further questions about Mashaney's lack of involvement with his children and that A.A. did not call him "Daddy." She gave no further explanation for failing to object to those questions.

Ney then asked Sweet–McKinnon about the State's inquiry of Mashaney about his lawyer's termination of the police interview. Sweet–McKinnon stated that she generally objected to the question because she "didn't believe it was appropriate for the State to make comment or question on the fact that Jason had exercised a constitutional right." She did not explain why her objection failed to state this basis. Sweet–McKinnon stated that she did not file a motion in limine to prevent the State from asking such a question because she believed that the exercise of a constitutional right "could not be commented on by the State was so readily known that it wasn't necessary to file a pretrial motion," under *Doyle v. Ohio,* 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976).

*4 Ney's final relevant area of questioning surrounded Sweet–McKinnon's failure to investigate or present the findings of child psychologist Dr. Richard C. Gilmartin. Gilmartin made initial findings in the case based upon A.A.'s emergency room records. In a letter to Sweet–McKinnon, Gilmartin expressed an opinion that A.A. had ingested some type of drugs that called into doubt her description of the assault. Even though Gilmartin's opinion was favorable to the defense, Sweet–McKinnon did not follow-up on the letter. Sweet–McKinnon testified that she did not pursue Gilmartin's opinion because it was based upon a limited knowledge of the case gained from a limited amount of documentation she had been able to forward to him. Sweet–McKinnon further testified that

Gilmartin's opinion created the inference that A.A. was lying about the assault. Sweet–McKinnon believed that this testimony would be improper because an expert cannot testify on the credibility of other witnesses.

Ruling from the bench at sentencing, the same district judge who presided over Mashaney's trial denied Mashaney's motion. The court first found that it did not praise the substance of A.A.'s testimony but rather the manner of her testimony. The court then addressed the State's comment about Mashaney's counsel's termination of the police interview. The court found that in testifying about his level of cooperation with police by emphasizing his efforts to contact police, Mashaney had opened the door to questions about his level of cooperation with police, including questions requiring him to admit his invocation of Fifth and Sixth Amendment rights to have a lawyer present and to terminate the interview. The court found generally that, while "some things could have been done differently and perhaps better," none of the other incidents were the result of incompetence. The district court did not make a journal entry including findings of fact and conclusions of law, instead the denial is recorded on a motion minutes sheet.

The district court then sentenced Mashaney to 442 months in prison.

Postconviction, Direct Appeal, and K.S.A. 60–1507 Motion

Mashaney appealed his conviction and sentence to this court in *State v. Mashaney,* No. 94,298, unpublished opinion filed April 13, 2007. In his direct appeal, Mashaney made two claims of prosecutorial misconduct for statements and questions not at issue here. Mashaney made no claim of ineffective assistance of counsel. A panel of this court affirmed Mashaney's conviction. Slip op. at 17.

Mashaney filed a petition for relief under K.S.A. 60–1507 on April 11, 2008. In the accompanying memorandum, Mashaney alleged numerous instances of ineffective assistance of his appellate counsel. A different district judge denied the motion after hearing arguments of counsel.

Mashaney appeals the district court's ruling.

Are Mashaney's Claims of Ineffective Assistance of Appellate Counsel Properly Before this Court?

*5 The State initially suggests that this court is procedurally barred from addressing the merits of Mashaney's claims because he "had a full opportunity to litigate his claims ... at a presentencing evidentiary hearing," and "the law of the case doctrine should be applied to avoid relitigation of these matters," citing *State v. Collier,* 263 Kan. 629, 631, 952 P.2d 1326 (1998). Moreover, the State argues that if we review the merits of these issues, "the district court's findings at a presentencing hearing (on the ineffectiveness of his trial counsel) will be rendered meaningless," citing *Rice v. State,* 37 Kan.App.2d 456, 154 P.3d 537, *rev. denied*

284 Kan. 946 (2007). To the extent this issue requires this court to interpret and apply K.S.A. 60–1507 and Supreme Court Rule 183 (2009 Kan. Ct. R. Annot. 251), our review is unlimited. *Double M. Constr. v. Kansas Corporation Comm'n,* 288 Kan. 268, 271, 202 P.3d 7 (2009).

First, we must reject the State's assertion that the doctrine of law of the case bars any consideration of these issues on appeal. This panel is unaware of any authority suggesting that the decision of the district court on any matter may not be considered on appeal by reason of the application of this doctrine. Certainly, *Collier* does not stand for this proposition; there, the result of a prior sentencing *appeal* was held to bar further consideration of certain aspects of the sentencing in a later *appeal. Collier* does not suggest that a district court's presentencing rulings on ineffectiveness of trial counsel are barred by the law of the case doctrine when raised in a postconviction motion, especially where the gravamen of the motion is that counsel on the direct appeal failed to seek direct appellate review of the issues. The State's proposed application of the doctrine makes little sense to this panel because it is essentially antithetical to appellate review.

Next, we must reject the State's assertion that this appeal parallels the situation in *Rice* and should be controlled by the panel's analysis and decision in that case. In *Rice,* a panel of this court rejected a movant's claims of ineffective assistance of trial and appellate counsel that were raised in a K.S.A. 60–1507 petition after *some* of movant's previous claims of ineffective assistance of counsel had been rejected on direct appeal. *Rice,* 37 Kan.App.2d at 457, 464–65, 154 P.3d 537. Consequently, the panel found that the movant's attempt to relitigate previously decided claims was barred by Rule 183(c)(3), but the distinguishing factor here is that Mashaney has never gained appellate review of *any* of his ineffective assistance claims.

Finally, we note that our Supreme Court has held that ineffective assistance of appellate counsel in failing to raise an issue on appeal can amount to an exceptional circumstance that can overcome what would otherwise be a procedural default. *Bledsoe v. State,* 283 Kan. 81, 88–89, 150 P.3d 868 (2007). Thus, even if we were to find that Mashaney's failure to seek direct appellate review of his ineffective assistance claims should pose a procedural bar, his claims that appellate counsel was ineffective in this regard serves to constitute exceptional circumstances that excuse any procedural default. Supreme Court Rule 183(c)(3) 2009 Kan. Ct. R. Annot 252.

*6 If we were to hold that a failure of appellate counsel to raise claims of ineffective assistance of trial counsel are barred from consideration on a 60–1507 motion because they could have been raised previously, we would effectively deny the movant any appellate consideration of these claims whatsoever. We decline to hold that two layered and progressive claims of ineffective assistance, one layer challenging the assistance of trial counsel prior to sentencing and one layer on postconviction motion challenging failure to appeal the first layer, result in a

barrier to any appellate review of the claims.

For all these reasons, we hold that Mashaney is not barred from our review of his claims that appellate counsel was ineffective for failing to raise the ineffectiveness of trial counsel on direct appeal.

Did the District Court Err in Denying Mashaney's Motion Without an Evidentiary Hearing?

Mashaney makes claims of ineffective assistance of appellate counsel for failing to include alleged deficiencies by his trial counsel in the direct appeal.

Standards of Review

When the district court denies relief under K.S.A. 60–1507 based solely upon counsel's legal argument at a nonevidentiary hearing and the court's review of the files and records of the case, an appellate court is in as good a position as the district court to consider the merits. Thus, appellate review is de novo. See *Barr v. State,* 287 Kan. 190, 196, 196 P.3d 357 (2008) (citing *Bellamy v. State,* 285 Kan. 346, 354, 172 P.3d 10 [2007]).

> "To establish ineffective assistance of counsel on appeal, defendant must show '(1) counsel's performance, based upon the totality of the circumstances, was deficient in that it fell below an objective standard of reasonableness, and (2) the [defendant] was prejudiced to the extent that there is a reasonable probability that, but for counsel's deficient performance, the appeal would have been successful.' [Citations omitted.]" *State v. Smith,* 278 Kan. 45, 51–52, 92 P.3d 1096 (2004).

The failure of appellate counsel to raise an issue on appeal is not, per se, ineffective assistance of counsel. *Laymon v. State,* 280 Kan. 430, 439, 122 P.3d 326 (2005). However,

> " 'In an appeal from a criminal conviction, appellate counsel should carefully consider the issues, and those that are weak or without merit, as well as those which could result in nothing more than harmless error, should not be included as issues on appeal. Likewise, the fact that the defendant requests such an issue or issues to be raised does not require appellate counsel to include them, Conscientious counsel should only raise issues on appeal which, in the exercise of reasonable professional judgement, have merit.' [Citation omitted.]' " *Laymon,* 280 Kan. at 440, 122 P.3d 326.

A defendant must establish two things to succeed on a claim of ineffective assistance of counsel. First, the defendant must establish that counsel's performance was constitutionally deficient. This requires a showing that counsel made errors so serious that his or her performance was less than that guaranteed to the defendant by the Sixth Amendment to the United States Constitution.

Second, the defendant must establish that counsel's deficient performance prejudiced the defense. This requires a showing that counsel's errors were so serious as to deprive the defendant of a fair trial. *Harris v. State,* 288 Kan. 414, 416, 204 P.3d 557 (2009).

A. Alleged failure of trial counsel to properly object to a violation of Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976), and failure of appellate counsel to include this claim on appeal.

*7 Mashaney first alleges that trial counsel was deficient for failing to properly object or seek an *in limine* order on the alleged *Doyle* violation created by the State's question about Mashaney's termination of his interview by police. It appears that Mashaney's specific complaint centers on the State's question to him about his attorney's termination of his interview with Krausch after Mashaney was asked whether he denied A.A.'s allegations of molestation. The State asked Mashaney,

> "Q. It is true, is it not, that when the detective confronts you with the information that [A.A.] has said she's been molested by you, you denied it at first; isn't that right?
>
> "A. Yes.
>
> "Q. And then after that your lawyer takes over and says, 'That's it. We're done.' Isn't that correct?"

Defense counsel objected generally to this question, and the court overruled the objection. Mashaney then responded, "I guess. I—yes."

The district court rejected Mashaney's claim that his counsel was ineffective in failing to either object with specificity or to file a pretrial motion in limine under *Doyle.* The court's reasoning is set forth in the final journal entry as follows:

> "10. In his current motion, movant claims appellate counsel had a duty to raise this issue on appeal, as he argues the issue 'would have had a probable result of success on appeal.' This claim fails. In denying movant's previous motion alleging ineffective assistance of trial counsel, the court noted that movant testified at length on direct examination regarding his alleged efforts to contact police upon learning of his daughter's accusations. The trial court ruled that because movant's strategy was to suggest that he fully cooperated with police in an attempt to tell his story, it was appropriate to allow the State to place movant's interview with police in context.
>
> "11. Our Supreme Court has indicated that in certain circumstances the State is allowed to introduce evidence of defendant's post-arrest silence for impeachment purposes in responding to arguments made by the defense. See

State v. Brinkley, 256 Kan. 808, 820–821, 888 P.2d 819 (1995).

"12. As the district court found, the State was entitled to explore the full context of movent's interview with police because movant opened the door to this line of inquiry. Movant attempted to portray himself as fully cooperative and testified that he desperately tried to tell his story to police. Such testimony was misleading, and the court properly allowed the State to impeach movant's testimony by pointing out, through cross-examination, that movant and his attorney actually terminated his interview with police.

"13. Because the trial court properly admitted the testimony at issue, there was no *Doyle* violation and such an argument would not have been successful on appeal. As noted, appellate counsel has no duty to raise issues that are weak or without merit. Significantly, movant offers scant argument with respect to this issue, beyond citing general case law regarding *Doyle* violations.

*8 14. In any event, movant still is not entitled to relief on his claim of ineffective assistance of appellate counsel because any error in admitting the evidence was harmless. See *State v. Murray,* 285 Kan. 503, 526–527, 174 P.3d 407 (2008)."

The district court's reliance on *State v. Brinkley,* 256 Kan. 808, 888 P.2d 819 (1995), was misplaced for two reasons. In *Brinkley,* the defendant attempted to use his exercise of his *Miranda* rights *in his favor*—a significant distinction from the situation before us here. And in *Brinkley,* counsel's failure to object barred the defendant's challenge on direct appeal to the evidence of his assertion of his rights. 256 Kan. at 820–21, 888 P.2d 819. *Brinkley* does not stand for the proposition that a defendant opens the door to evidence of his assertion of rights by suggesting that he generally cooperated with authorities.

Remaining for consideration for the court is whether defense counsel's general objection without specificity of basis should be considered ineffective counsel under these circumstances. Clearly, our Supreme Court has recently clarified that a timely and specific objection under K.S.A. 60–404 must be lodged by the defendant at trial in order to preserve a *Doyle* issue for appellate review when the alleged error arises during a prosecutor's questioning of a witness. *State v. King,* 288 Kan. 333, 336, 204 P.3d 585 (2009). Moreover, the statute requires the objection "make clear the specific ground of objection," and failure to do so does not preserve the issue for appeal. See *State v. Woolverton,* 35 Kan.App.2d 478, 484–85, 131 P.3d 1253 (2006), *aff'd* 284 Kan. 59, 159 P.3d 985 (2007). We are not convinced that a general objection was adequate here, but we express no opinion without further factual development.

Although the district court found that any *Doyle* violation was harmless, the court's citation and reliance on *State v. Murray,* 285 Kan. 503, 526–27, 174 P.3d 407 (2008), was also misplaced. *Murray* emphasizes that " 'each case must be

scrutinized and viewed in the light of the trial record as a whole, not on each isolated incident viewed by itself.' " 285 Kan. at 527, 174 P.3d 407. But in *Murray,* the error was rendered harmless by the facts that the prosecutor did not comment further about the implications that may arise from the assertion of the defendant's rights, and a general instruction regarding the defendant's rights against self-incrimination was given to the jury. In contrast, here the prosecutor *did* comment about Mashaney's assertion of rights in the rebuttal closing argument, and there was no such instruction given. We are not satisfied that the district court's summary denial of Mashaney's motion reflects the level of scrutiny required in assessing the harm of a *Doyle* violation. See *State v. Pruitt,* 42 Kan.App.2d 166, 172–73, 211 P.3d 166 (2009).

Due to the misplaced reliance on both *Brinkley* and *Murray,* the need for further factual development as to the lack of specific objection, and the need for some testimony of appellate counsel as to the circumstances and reasoning behind a decision to abandon the issue on appeal, as well as the need for more careful scrutiny of the harm or lack thereof, we believe that summary denial of Mashaney's motion was premature.

B. Failure of trial counsel to object to improper expert testimony, and failure of appellate counsel to include this claim on appeal

*9 Mashaney next argues that trial counsel was ineffective for failing to object to Krausch's statements regarding the correlation between bedwetting and sexual abuse and the tendency of abusers to groom their victims with gifts. Mashaney argues that the testimony was an opinion that Krausch was not qualified to give. The State argues that the testimony was properly admitted.

The district court rejected this claim, reasoning:

> "17. A review of the record indicates that Krausch testified as to his training and experience in dealing with child victims. On cross-examination, defense counsel asked Krausch to answer a question based on his experience working EMCU. Moreover, defense counsel asked Drausch whether, at the time he interviewed the victim, he was aware that the victim was still wetting the bed. The prosecutor asked Krausch to answer the questions at issue based on his training and experience, the same technique utilized by defense counsel. As noted, Krausch testified as to a recent training seminar that he had attended. He also testified that he had been a police officer for fourteen years. Regardless of whether he was formally qualified as an expert, as a detective with EMCU, Krausch was clearly qualified to answer the questions at issue. According, appellate counsel had no duty to raise this issue on appeal, as it would not have afforded movant relief."

The admissibility of opinion testimony is governed by K.S.A. 60–456 which states:

"(a) If the witness is not testifying as an expert his or her testimony in the form of opinions or inferences is limited to such opinions or inferences as the judge finds (a) may be rationally based on the perception of the witness and (b) are helpful to a clearer understanding of his or her testimony.

"(b) If the witness is testifying as an expert, testimony of the witness in the form of opinions or inferences is limited to such opinions as the judge finds are (1) based on facts or data perceived by or personally known or made known to the witness at the hearing and (2) within the scope of the special knowledge, skill, experience or training possessed by the witness.

"(c) Unless the judge excludes the testimony he or she shall be deemed to have made the finding requisite to its admission.

"(d) Testimony in the form of opinions or inferences otherwise admissible under this article is not objectionable because it embraces the ultimate issue or issues to be decided by the trier of the fact."

We respectfully disagree that Krausch was qualified for these opinions. The only foundation for Krausch's opinions was his experience in dealing with sexual assault cases as a police detective; he is not personally knowledgeable as to why A.A. wets the bed or why Mashaney gave her the gift. Furthermore, the opinions offered require some clinical or practical knowledge.

The record indicates that while Krausch had been a police officer for 14 years at the time of trial and had worked in the Exploited and Missing Children's Unit for a portion of that time, there is no other evidence in the record that would support a finding that Krausch is qualified as an expert in the behavioral patterns of child sexual abuse victims and perpetrators. Indeed, Krausch testified that, "[p]rior to this case, I had not received any specific investigative training on children which was partly why [the accompanying social worker] took the lead in the interview" of the child. Krausch's own testimony thus indicated that he was not an expert. We conclude he should not have been allowed to testify as such. See *State v. Shadden,* 290 Kan. ––––, ––––, 235 P.3d 436 (2010) (holding that police officer's opinion concerning the relationship between field sobriety test result and specific blood alcohol content based upon training and experience was erroneously admitted without proper scientific foundation). We conclude that trial counsel was deficient in failing to object to these questions.

*10 Moreover, it cannot be said the evidence admitted was harmless. The only evidence against Mashaney in this case was the word of A.A .; there was no physical evidence to corroborate A.A.'s accusation. This case presented to the jury a pure credibility contest. Krausch's testimony affected the relative credibility of the accuser and accused and was highly prejudicial, especially because it was offered under the guise of the "expert."

First, the proffered correlation between bedwetting and sexual abuse creates the inference that A.A. was sexually abused because she wet the bed, thus bolstering her credibility. But this correlation is highly misleading. A.A.'s mother testified that, prior to the alleged abuse, A.A. contracted impetigo after getting bitten by a mosquito on the bottom "and she had pottied herself one night, and it had got infected." Indeed, A.A. was suffering from the impetigo rash on the night of the alleged abuse. As such, there is evidence in the record of A.A.'s bedwetting *prior* to the alleged abuse, but there is no evidence of her bedwetting *after* the abuse. Consequently, not only is the basis for Krausch's opinion unsupported by the record, it is very misleading because it implies that the bedwetting was caused by the alleged abuse.

Krausch's testimony concerning the correlation between gift-giving and sexual abuse is similarly prejudicial. While the relationship between gift-giving and sexual abuse may make sense in the context of a stranger who has no reason to give a child a gift other than to entice them to consent to or not report abuse, that correlation is much more tenuous and attenuated in the context of a parental relationship, where the giving of gifts is a normal practice. While Krausch's testimony creates the inference that Mashaney gave A.A. the metal box to entice her into or to conceal sexual abuse, there are many more reasons for a father to give his daughter a gift that are entirely innocent and valued by society. Mashaney testified that he was trying to return to the good graces of his daughter —giving a gift is a natural method of accomplishing that goal. Krausch's testimony led the jury to believe that normal parental activity is a coercive act by an abuser. Furthermore, Krausch offered no clinical or statistical support for this bald assertion. This statement improperly bolstered A.A.'s credibility, damaged Mashaney's, and was prejudicial.

Even though this testimony consisted of two isolated statements made during a 2–day trial, their admission cannot be considered harmless error due to the highly prejudicial bolstering of the accuser's testimony in a trial where credibility of that accuser was critical. Consequently, because trial counsel could provide no strategic explanation for her failure to object, there was every reason to conduct an evidentiary proceeding to examine why this issue was abandoned by appellate counsel.

C. Failure of trial counsel to pursue potentially favorable expert testimony, and failure of appellate counsel to include this claim on appeal.

*11 Mashaney next argues that trial counsel was ineffective because she did not pursue the opinion of Dr. Gilmartin, whose initial impression of the case appeared to be favorable to the defense. The State counters that trial counsel's decision not to use the expert was a strategic decision that was guided by professional judgment.

The district court rejected Mashaney's claim of ineffective assistance of appellate counsel for failing to raise this issue on appeal, reasoning as follows:

> "19. At the evidentiary hearing on movant's previous motion, trial counsel testified that she contacted a child psychologist before trial. Counsel sent the psychologist the victim's emergency room records, and the psychologist responded with a letter in which he expressed doubt about the victim's accusations. Trial counsel did not try to present this evidence at trial because she did not believe the evidence would be admitted based on the psychologist's limited knowledge of the case. Counsel further testified that she believed a health care provider is not allowed to testify as to the credibility of a victim and thus did not believe the psychologist would be allowed to testify.
>
> "20. The record refutes movant's assertion that trial counsel 'completely ignored' the psychologist's letter. Rather, counsel chose not to pursue the matter based on a strategic decision she arrived at through her professional opinion. Legal determinations of this sort are well within the bailiwick of counsel. See *State v. McKessor,* 246 Kan. 1, 12, 785 P.2d 1332 (1990). (A defendant who accepts counsel has no right to conduct his own trial or dictate the procedural course of his representation by counsel.) Trial counsel, not movant, was entitled to decide which witnesses to present at trial. As such, appellate counsel could not have prevailed on a claim that trial counsel was ineffective for failing to present a specific witness. Accordingly, appellate counsel had no duty to raise the issue."

Again, we respectfully disagree. Although a well-based strategy decision by counsel is often not viewed as ineffective assistance of counsel, we have consistently held that a misinformed or vacuous strategy decision must not escape a full investigation for its ineffectiveness. See *Rowland v. State,* 289 Kan. 1076, 1086, 219 P.3d 1212 (2009) (counsel's decision does not necessarily merit a strategic label merely because it fell within the broad category of decisions not specifically reserved to his or her client; to be strategic, a choice must have been made by counsel after thorough investigation of law and facts relevant to plausible options).

Here, it appears that trial counsel believed that her potential expert's testimony would be limited to credibility opinions that would be inadmissible. We agree with Mashaney, however, in suggesting on appeal that the expert's testimony would not have been so limited and that the expert may have testified that Mashaney's conduct was unlikely given the circumstances, that the child was drugged at the time of her exam at the hospital, or that the child's skin condition was so gross that a person could not have found pleasure in committing the alleged acts. Unfortunately, the district court hearing the evidence on the "strategy decision" made absolutely no findings and conclusions on this claim, thus, crippling both the review of the later claim and our appellate review. See Supreme Court Rule 183G); *State v. Moncla,* 269 Kan. 61,4 P.3d 618 (2000).

*12 Needless to say, we cannot conclude that the district court's summary denial of this claim was sound. An evidentiary hearing wherein both trial and appellate counsel are able to testify regarding their conduct, investigation, and ultimate decisions was critical to a considered analysis of Mashaney's claim.

D. Failure of trial counsel to object to improper testimony and commentary concerning Mashaney's character, and failure of appellate counsel to include this issue on appeal.

Mashaney cites a number of instances from trial where prejudicial information pertaining to his character was introduced in witness testimony or comments by the State and was not objected to by his trial counsel. He claims that the failure of his trial counsel to object to these instances was deficient and prejudicial.

The specific instances Mashaney alleged in his 1507 memorandum include testimony about Mashaney's children with other women, his lack of contact with his children, child support papers filed after the incident, his alleged predilection for small women, and that some of his children do not call him "Daddy."

The district court summarized Mashaney's claims in this regard, and rejected them, reasoning:

> "28. Movant notes that the State admitted evidence of 'other children with different women, lack of contact with his children, child support papers filed after the alleged incident, an implied predilection for "small" women and the failure of his children to call him daddy.'
>
> "29. At the evidentiary hearing, trial counsel testified that part of the defense strategy was to portray movant as a good father. Counsel indicated that she and her client discussed this strategy, and that movant planned to testify about his children. Accordingly, counsel did not feel the need to object when the State admitted evidence of movant's relationships with his children.
>
> "30. Defense counsel, upon consulting with her client, made a tactical choice on how to defend movant against the charges. Given the theory of defense and the nature of the charges, the evidence introduced by the State was clearly relevant and admissible. Trial counsel knew as much and therefore did not lodge futile objections. Because the evidence was properly admitted, appellate counsel had no duty to challenge it on appeal.
>
> "31. At trial, the defense called Nicole Hand as a witness. Hand met movant when she was fifteen and is the mother of two of movant's children. On cross-examination, the State asked Hand how tall she was and how much she weighed at the time of trial, and how much she weighed when she first met movant Hand indicated she was 5'3" and weighed 81 pounds at the time of trial, and weighed approximately 96 or 97 pounds when she met movant. In her closing argument,

the prosecutor linked Hand's diminutive stature and her fragile emotional state on the stand, noting that Hand dissolved into tears while testifying. In her rebuttal closing, the prosecutor asked the jury to 'Compare the size ... of a child to how young he is, how young the women they [*sic*] were when he started with them.'

*13 "32. In a case in which movant was charged with sexually abusing a five-year-old girl, it was relevant for the State to introduce evidence showing that movant had a history of being involved with small, young females. Moreover, it was movant who called Hand as a witness. Once Hand took the stand, the jurors were able to view her with their own eyes. Had the State not questioned Hand about her size, the jury still would have been able to see that she was a small woman. As such, movant cannot show that he was in any way prejudiced by the evidence at issue, and appellate counsel was not ineffective for failing to present this issue on appeal. The result of trial would not have been different had Hand not testified about her height and weight.

"33. Movant also suggests appellate counsel should have argued trial counsel was ineffective for failing to object when the State admitted evidence of movant's relationship with the victim's mother and for failing to utilize evidence indicating that the victim's mother lied when she testified that she and movant only had sex on one occasion. "34. At trial, the victim's mother testified that she met movant when she was fourteen and movant was 'almost' eighteen. She testified that a few weeks after meeting movant, she had sex with him for the only time. The victim's mother found out she was pregnant on movant's eighteenth birthday.

"35. At the evidentiary hearing Ney admitted a police report into evidence indicating that the victim's mother told police that she and movant had sex eight times. The State stipulated that trial counsel would have had the police report in her possession before trial. Trial counsel testified that she did not specifically recall looking at the police report before trial, but indicated that she did not cross-examine the victim's mother about the number of time[s] she and movant had sex as a matter of trial strategy.

"36. Movant never denied being the victim's biological father. As such, it is safe to conclude that the jury was already aware that movant had sex with the victim's mother. The State explored the history of movant's relationship with the victim and the victim's mother in order to show that movant had limited involvement in their lives after the victim's mother became pregnant. This evidence was relevant and probative because movant attempted to defend himself against the charges by portraying himself as a good father.

"37. Movant fails to explain how he was prejudiced by the fact trial counsel did not attempt to impeach the victim's mother concerning the number of times she and movant had sex. Indeed, counsel could well have decided that her client

would look worse in the jury's eyes if they heard evidence indicating that he had sex with a 14–year–old girl on numerous occasions. In any event, because movant fails to explain how he was prejudiced by this evidence, he cannot show that appellate counsel had a duty to raise the matter on appeal."

*14 Because we have already determined that an evidentiary hearing was warranted here, we will not examine each of the alleged instances where failure of trial counsel to object may have constituted ineffective assistance of trial counsel, but it is clear to this court from the numerous evidentiary references to Mashaney's sexual preferences and his sexual appetite with consenting partners that the State was permitted to paint a derogatory picture of Mashaney with irrelevant and prejudicial testimony. We fundamentally disagree with the district court in its conclusions that Mashaney's preferences and sexual history with teenage women of diminutive size was "relevant" and "probative" to the charge that he sexually molested a 5–year–old child. Although it appears that trial counsel may have interposed an initial general objection to some of this testimony, we are not convinced that Mashaney's appellate counsel was effective in completely disregarding this claim on appeal. Clearly, an evidentiary hearing would have assisted both the district court and this court in examining the propriety of the decisions made by Mashaney's appellate advocate.

E. Failure of trial counsel to object to the district court's praise of the child victim's performance while testifying at trial, and failure of appellate counsel to include this issue on appeal.

Mashaney finally argues that trial counsel was ineffective for failing to object to the district court's praise of A.A. after her testimony and, consequently, failed to preserve the issue for appellate review. The State argues that the trial court's comments were not improper and that trial counsel was not deficient for failing to object.

As stated above, the district court told A.A. at the conclusion of her testimony:

"You know what? I do think you're the best at testifying. You really stayed still much longer than I thought you ever would. You did a very nice job, and you said yes most of the time or no instead of shaking or nodding your head. I think you did a good job, and I'm very pleased. Thank you for coming here today."

Although Mashaney's trial counsel made no objection to the court's remarks, the comments were challenged in the motion for new trial and thus preserved for appeal. Yet, appellate counsel did not include this issue on direct appeal.

In rejecting Mashaney's claim that his appellate counsel should have challenged the court's comments in the direct appeal, the district court reasoned as follows:

"40. At the evidentiary hearing, trial counsel testified that she did not object to the court's comments because she did not want to draw the jury's attention to the matter. In denying relief, the trial court made extensive findings on this issue. The court noted that when the victim took the stand, the court told the victim that she would need to sit still and talk loudly while testifying. The court stated that it always uses this approach when young children testify. With respect to the court's comments at the end of the victim's testimony, the court noted that the remarks were not directed at the substance of the testimony; rather, the court simply praised the victim's manners.

*15 "41. A review of the transcripts clearly supports the court's finding on this issue. Simply put, no juror could have reasonably believed that the judge was commenting on the substance of the victim's testimony. Because this issue would have succeeded on appeal, appellate counsel had no duty to raise the issue."

We respectfully disagree that "this issue would not have succeeded on appeal" because our court has previously held that a trial court's statement that the child witness had "answered all of the questions truthfully" amounted to an erroneous endorsement of the witness' credibility and deprived the defendant of his constitutional right to a fair trial. See *State v. Chappell,* 26 Kan.App.2d 275, 280–81, 987 P.2d 1114, rev. denied 268 Kan. 850 (1999). We believe that the district court's statement to the child here that "you're the best at testifying" and "you did a very nice job" and "I think you did a good job" clearly served as an erroneous endorsement of the child's testimony in a case where credibility was critical. An evidentiary hearing was warranted to explore the reasoning of appellate counsel in failing to include a challenge to the trial court's comments.

F. Failure of trial counsel to challenge A.A.'s capacity to testify.

Mashaney finally argues that trial counsel was ineffective for failing to challenge A.A.'s capacity to testify and for allowing the State to ask A.A. if she could tell between the truth and a lie in front of the jury. Mashaney claims that appellate counsel was ineffective for failing to raise this argument on appeal. We disagree.

We are guided by this court's opinion in *State v. Sherrod,* 40 Kan.App.2d 564, 194 P.3d 593 (2008), rev. denied 288 Kan. 835 (2009). In *Sherrod,* the defendant argued that the prosecutor engaged in misconduct by asking a child witness, the accuser in a sex crime case, if she understood her duty to tell the truth. The appellate panel found that this question was permissible because, under K.S.A. 60–417, a witness is required to understand the duty to tell the truth. Questions that establish a foundation for the witness' recognition of this duty are appropriate. 40 Kan.App.2d at 568, 194 P.3d 593. But see *Chappell,* 26 Kan.App.2d at 281, 987 P.2d 1114 (holding that voir dire of child witness' capacity should be held outside presence of the jury).

This case is similar to *Sherrod* in that the State's questions established a foundation for A.A.'s recognition of her duty to be truthful. Recognition of the difference between the truth and a lie appears to be a necessary predicate to the duty to be truthful. In this respect, the questions appear to be permissible.

Concerning trial counsel's alleged failure to challenge A.A.'s capacity, it first appears that A.A. was in fact competent to testify and that any challenge to her capacity would likely have been unsuccessful. Mashaney presents no basis for a finding that A.A. did not have testimonial capacity. Trial counsel was not deficient in failing to independently challenge A.A.'s capacity. As a result, appellate counsel was not ineffective for failing to raise this issue on direct appeal.

Summary and Conclusion

*16 As demonstrated by our analysis of each claim made by Mashaney in his motion, we believe that many of these claims may have been successful on appeal. We have also respectfully questioned the district court's summary conclusions as to ineffectiveness and prejudice, and we have determined that some of the caselaw relied upon by the district court was not dispositive. Clearly, both trial and appellate counsel were apparently available to testify, and factual issues as to the decisions made by each were critical to an analysis on the merits of Mashaney's motion. The gravity of Mashaney's claims and the multiple claims of potential ineffectiveness of his appellate counsel justified an evidentiary hearing.

Here, the district judge hearing Mashaney's motion was not the same judge who conducted the trial or heard the testimony prior to sentencing on the ineffective assistance claims lodged against trial counsel and is therefore entitled to no special deference. See *Gilkey v. State,* 31 Kan.App.2d 84, 85, 60 P.3d 347 (2003). The district court's conclusions of law on Mashaney's 60–1507 motion are not fully supported and were in large part conclusory and premature without a full evidentiary hearing. For all these reasons, we are compelled to reverse the district court's summary denial of Mashaney's motion and remand for an evidentiary hearing to address all claims of ineffective assistance of appellate counsel.

Reversed and remanded.