

NOTICE

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IN THE COURT OF APPEALS OF THE STATE OF ALASKA

JEFFERY K. HOLT,

Appellant,

v.

STATE OF ALASKA,

Appellee.

Court of Appeals No. A-13832
Trial Court No. 3HO-14-00132 CI

MEMORANDUM OPINION

No. 7048 — March 8, 2023

Appeal from the Superior Court, Third Judicial District,
Homer, Charles T. Huguelet and Bride Seifert, Judges.

Appearances: Jeffery K. Holt, *in propria persona*, Kenai,
Appellant. Diane L. Wendlandt, Assistant Attorney General,
Office of Criminal Appeals, Anchorage, and Treg R. Taylor,
Attorney General, Juneau, for the Appellee.

Before: Allard, Chief Judge, and Harbison and Terrell, Judges.

Judge HARBISON.

Jeffery K. Holt was convicted, following a jury trial, of one count of first-degree sexual assault and four counts of second-degree sexual assault.¹ Holt appealed,

¹ Former AS 11.41.410(a)(1) (2011) and former AS 11.41.410(a)(3) (2011), respectively.

and this Court affirmed his convictions.² Holt subsequently filed an application for post-conviction relief. The superior court initially dismissed some of Holt’s claims for post-conviction relief, and then, after conducting an evidentiary hearing, the court denied Holt’s remaining claims.

In this appeal, Holt challenges the superior court’s order denying his application for post-conviction relief. In particular, he contends that the superior court erred by concluding that he had not proved that his trial attorney provided him ineffective assistance of counsel. For the reasons explained in this opinion, we reject these challenges and affirm the superior court’s order.

Factual and procedural background

The facts of the incident leading to Holt’s convictions are more fully described in the opinion we issued resolving Holt’s direct appeal, but we will summarize them here for convenience.³

At the time of the incident, K.J. was living in Homer and she had agreed to allow Holt to stay in her home while he was in town for a fishing trip. K.J. considered Holt to be a friend and felt comfortable allowing this.

When Holt arrived at K.J.’s home, he brought groceries and two bottles of alcohol — gin and raspberry vodka. K.J. began cooking dinner and fixed herself a drink. After they ate and cleaned the dishes, K.J. went to her computer to check her email. Holt remained in the kitchen where he fixed a second drink for K.J. The drink Holt mixed was an odd color; it was bright red and K.J. thought it tasted like cough syrup. Although K.J. remembered drinking only about half of the drink, the drink “just floored” her.

² *Holt v. State*, 2019 WL 1503918 (Alaska App. Apr. 3, 2019) (unpublished).

³ *See id.* at *1-3.

Sometime after Holt gave K.J. this drink, he came over to the computer desk where K.J. was sitting. As K.J. turned toward him, Holt grabbed her jaw and forced his penis into her mouth. K.J. was able to pull away from him, and she went to the kitchen counter where she picked up her cell phone and attempted to text a friend, but she was unable to send a coherent text. K.J. then made her way to the bathroom but fell as she tried to walk there. Holt helped her in the bathroom and then to the couch afterward.

Although K.J. had only a limited memory of what happened after this, she recalled Holt removing her clothes and performing oral sex on her. K.J. tried to tell him to stop, but her words did not make any sense. She also remembered Holt putting his fingers inside her vagina and rectum. While this was happening, K.J. passed out.

When K.J. regained consciousness, Holt was kneeling in front of her and his penis was inside her vagina. She began crying and managed to say “don’t do this, don’t do this.” In response, Holt stopped and told K.J. “I’m sorry . . . I didn’t mean to hurt you.” At some point, Holt began masturbating while sitting in front of the computer, and during that time, K.J. managed to text “rape 911” to the same friend she tried contacting earlier. Holt later inserted his penis into her vagina a second time, and when K.J. told Holt he was hurting her, he stopped, and then masturbated next to her until he ejaculated.

K.J. reported the incident, and she was examined by a nurse at South Peninsula Hospital. The nurse found various bruises and abrasions on K.J.’s body, including red marks on her chin. The nurse also found redness and abrasions on K.J.’s genitals. Blood and urine samples were collected from K.J. The results of the lab tests run on those samples showed that K.J.’s blood alcohol level was 0.155 percent. The tests also showed K.J. had paracetamol (Tylenol) in her system, but K.J. denied having knowingly taken any Tylenol that evening.

When Holt was contacted by the troopers, he claimed that he and K.J. had previously had a sexual relationship and that they had consensual sex on the day in question.

Holt was indicted on five counts of first-degree sexual assault. Counts I through IV of the indictment were based on the acts of penetration that occurred after K.J. required Holt's assistance in going to the bathroom. Count V pertained to Holt's act of forcing his penis into K.J.'s mouth when she was sitting at the desk, which occurred earlier in the evening.

During the grand jury proceedings, the prosecutor originally proposed four charges of second-degree sexual assault and one charge of attempted second-degree sexual assault, under a theory of incapacitation. But the prosecutor informed the grand jury that it could indict Holt for first-degree sexual assault if the evidence supported such charges. The prosecutor explained that an offender was guilty of first-degree sexual assault if they engaged in sexual penetration of a person "without consent," and that "without consent" could mean either (1) "that a person with or without resisting, is coerced by the use of force against a person or property, or by the express or implied threat of death, imminent physical injury, or kidnapping to be inflicted on anyone," or (2) that the person "is incapacitated as a result of an act of the defendant."⁴ The grand jury ultimately indicted Holt on five counts of first-degree sexual assault, but the indictment did not indicate whether the charges against Holt were based on the "use-of-force" theory of "without consent" or the "incapacitated-by-the-defendant" theory.

Prior to trial, Holt's defense attorney moved to dismiss all five counts of the indictment, and acknowledged both theories of "without consent" in the motion. The trial court denied this motion, and the matter proceeded to a jury trial.

⁴ Former AS 11.41.410(a)(1) (2011); former AS 11.41.470(8) (2011).

At trial, the State's theory of prosecution was that Holt sexually assaulted K.J. after giving her a drink he had spiked, likely with cough syrup, in order to incapacitate her. But at the conclusion of the State's case, Holt moved for a judgment of acquittal on the charges of first-degree sexual assault, arguing that there was insufficient evidence that he had caused K.J.'s incapacitation. The trial court agreed that the evidence was insufficient to support this theory for any of the five counts, noting the absence of substances other than alcohol and Tylenol in K.J.'s blood.

The State then chose not to pursue the first-degree sexual assault charges for Counts I through IV. Instead, it asked the court to instruct the jury on the lesser included offense of second-degree sexual assault (*i.e.*, sexual penetration of an incapacitated person) for those counts. For Count V — the count based on Holt's act of penetrating K.J.'s mouth with his penis while she was seated at the computer desk — the State proceeded on the use-of-force theory of "without consent" for first-degree sexual assault.

Holt's attorney objected to the jury being instructed on the lesser included offenses for Counts I through IV. He argued that Holt could have been indicted under the use-of-force force theory of first-degree sexual assault, that K.J.'s testimony during grand jury supported such a theory, and that second-degree sexual assault was not a lesser included offense under that theory. The defense attorney claimed that allowing the State to go forward on a new theory of "without consent" (*i.e.*, an incapacitation theory) would be a fatal variance from the indictment. But after confirming that the grand jury had never specified the factual basis for its "without consent" finding, and also confirming that this case had primarily been litigated as an incapacitation case, the trial court overruled this objection.

After the State called its witnesses, Holt chose to testify on his own behalf, and his attorney called him as the first defense witness. Holt told the jury that he and K.J. had consensual sex on the night of the incident. Holt stated that he had only seen K.J. consume two drinks (though she might have had more). He testified that he did not

believe that she was substantially more intoxicated than he was, but he also described K.J. as having inexplicable and exaggerated emotions on the evening of the incident, coupled with a marked lack of coordination.

The second defense witness was Betty Monsour, a forensic toxicologist. Monsour testified that she had performed a retrograde analysis based on K.J.'s lab tests, and calculated that K.J. would have had an approximate blood alcohol content of 0.28 percent at the time of the "911 rape" text. Monsour estimated that K.J. would need to consume in excess of fifteen drinks to reach that blood alcohol level.

According to Monsour, K.J.'s blood alcohol content showed that K.J. would have been intoxicated and would have been exhibiting signs of disorientation, mental confusion, and vertigo. Her emotions would have been exaggerated, and she would have less physical coordination. But only if K.J.'s blood alcohol content surpassed 0.30 percent (assuming she was not a novice drinker) would she enter the "stupor" stage of intoxication, verging on "incapacitation" in the statutory sense.

Monsour also testified that the only other drug found in K.J.'s system was Tylenol, which would not have appreciably impacted her level of impairment. There were no date rape drugs identified by K.J.'s blood test. When asked about Wellbutrin (an antidepressant that K.J. had admitted to taking), Monsour testified that the combination of Wellbutrin and alcohol was highly dangerous and could result in side effects like confusion, delusions, and hallucinations.

Following deliberations, the jury convicted Holt of all five counts — one count of first-degree sexual assault for the forced fellatio that occurred at the computer desk (Count V), and four counts of second-degree sexual assault for the later acts of sexual penetration that occurred when K.J. was incapacitated (Counts I through IV).

Holt appealed, and while his appeal was pending, he filed an application for post-conviction relief, arguing, *inter alia*, that he received ineffective assistance from his trial counsel. As part of his application, he filed an affidavit from his defense attorney.

Before we issued our opinion in Holt’s direct appeal, the superior court dismissed some of Holt’s post-conviction relief claims. Then, after we issued our opinion affirming Holt’s convictions, the court conducted an evidentiary hearing.

The superior court then denied Holt’s remaining post-conviction relief claims, and this appeal followed. On appeal, Holt argues that the superior court erred by denying his claims alleging ineffective assistance of counsel.

Why we affirm the superior court’s denial of Holt’s ineffective assistance of counsel claims

On appeal, Holt renews his arguments that his trial attorney provided him ineffective assistance of counsel.⁵ Holt’s arguments may be grouped into claims relating to six aspects of the attorney’s representation of him: the attorney’s decision to call the toxicology expert as a witness, his advice regarding a plea offer, his evidentiary decisions, his alleged failure to adequately explain the timing of the events to the jury, his failure to file certain motions, and the cumulative error resulting from the alleged deficiencies in the representation. For the reasons we are about to explain, we reject Holt’s arguments and affirm the judgment of the superior court.

Defense toxicology expert

Holt first challenges his attorney’s decision to call forensic toxicologist Betty Monsour to testify as an expert witness. He contends that the decision to call Monsour as a defense witness was incompetent because Monsour’s testimony contradicted Holt’s, making him look like a liar, and also established that K.J. was

⁵ See *Risher v. State*, 523 P.2d 421, 424-25 (Alaska 1974) (holding that, to prove an ineffective assistance of counsel claim, an applicant must show: (1) the attorney’s performance fell below the standard of minimal competence expected of an attorney experienced in criminal law; and (2) “create a reasonable doubt that the incompetence contributed to the outcome”).

incapacitated when Holt had sex with her, helping to prove that he committed second-degree sexual assault.

Holt acknowledges that his trial attorney had a tactical reason for eliciting Monsour's testimony. Indeed, the attorney explained during the superior court proceedings that his strategy was to argue that K.J. was intoxicated (but not incapacitated) by her voluntary ingestion of alcohol and Wellbutrin, which caused her to forget that she had consented to have sex with Holt. Thus, to establish that his attorney's decision to call Monsour as a witness was ineffective, Holt must show that this decision was one that no reasonably competent attorney would have made under the circumstances.⁶

To this end, Holt relies heavily on the testimony that Marcelle McDannel, an experienced criminal attorney, provided during the evidentiary hearing. McDannel was qualified as an expert witness, and she testified that, in her opinion, no competent defense attorney would have called both Monsour and Holt as witnesses. McDannel clarified, however, that it would not have been incompetent for the attorney to call either Holt or Monsour alone. Rather, it was the decision to call them both, and the subsequent damage that decision dealt to Holt's credibility, that was ineffective.

But the superior court disagreed, finding that Holt did not meet his burden of showing that no reasonably competent attorney would have pursued this strategy. This finding is well supported by the record.

Contrary to Holt's assertions on appeal, Monsour's testimony did not conclusively establish that Holt was a liar. While Holt said he had only seen K.J. consume two drinks, he acknowledged that she could have consumed more alcohol without his knowledge. Moreover, Holt's description of K.J.'s exaggerated emotions and lack of coordination was consistent with Monsour's description of a person who is intoxicated by alcohol. And importantly, Monsour was very clear that, though K.J.'s

⁶ See *State v. Jones*, 759 P.2d 558, 569-70 (Alaska App. 1988).

blood alcohol level suggested that K.J. would have been highly intoxicated, she likely was not in a “stupor” (*i.e.*, incapacitated).

In addition, Monsour’s testimony about K.J. consuming in excess of fifteen drinks was effective impeachment evidence, as it suggested that K.J. had not been truthful to the jury about her own voluntary intoxication on the night of the incident.

We therefore conclude that the superior court did not err in finding that Holt failed to establish that his attorney’s decision to call Monsour to testify at trial was incompetent.

Advice regarding the State’s plea offer

Holt next argues that the superior court erred in rejecting his claim that his trial attorney was ineffective for failing to adequately advise him regarding the State’s plea offer.

Holt was initially charged with one count of second-degree sexual assault under the theory that he had sex with K.J. while she was incapacitated. Before indicting Holt, the State offered, in writing, to reduce the charge to one count of third-degree sexual assault if Holt would plead guilty, with a recommended sentence of 7 years’ incarceration with 4 years suspended (3 years to serve), followed by 10 years’ probation. Holt rejected the offer, and the case proceeded to grand jury, which resulted in an indictment on five counts of first-degree sexual assault.

At the evidentiary hearing, Holt testified he had not seen the State’s written plea offer until after the trial had concluded. Holt said that he had met with his attorney in person and the two had discussed the offer verbally, but his attorney had never shown him the written paperwork. Holt testified that his understanding of the offer was that he was to plead guilty to five counts of third-degree sexual assault, with a possible sentence of 2 to 12 years’ incarceration on each charge. He said that he rejected the offer because he thought it would mean spending between 10 and 60 years

in prison, and at his age he might as well fight the charges. (Holt was fifty-nine at the time of the evidentiary hearing.) According to Holt, he asked his attorney about making a counteroffer, but his attorney advised him there was no point and that the counteroffer would only “fall on deaf ears.”

Holt’s trial attorney did not testify at the evidentiary hearing, but the deposition he gave as part of the post-conviction relief proceedings was introduced as evidence and reviewed by the superior court. The attorney’s version of events differed markedly from Holt’s.

Holt’s attorney testified that he discussed the offer with Holt in person on the same day it was faxed over from the prosecutor. The attorney said that he went over the offer with Holt in detail and explained that it was to plead down the one charge of second-degree sexual assault to third-degree sexual assault for 7 years’ incarceration with 4 years suspended (3 years to serve). The attorney said that he explained the probation term, the fact that Holt would have to register as a sex offender, and the meaning of good time and its impact on the time he would actually serve in jail if he accepted the deal. According to the attorney, Holt thought the offer over and decided to reject it: “Mr. Holt had said . . . I’ve had time to think about this; I am not willing to accept any offer. I’m innocent of any wrongdoing, and I will not admit guilt to a sexual assault that did not occur.”

To gauge Holt’s commitment to this position, Holt’s attorney asked him if he could make the State a counteroffer. The attorney suggested a possible plea agreement in which Holt would plead guilty to one count of harassment, explaining it was only a class B misdemeanor and the maximum sentence would be 90 days in jail. According to Holt’s attorney, Holt was adamant that he would not plead guilty to any charge, no matter how insignificant.

Holt’s attorney testified that he thought he had given Holt a copy of the written plea offer but could not say so with certainty. The attorney expressly refuted Holt’s claim that Holt thought the offer was to plead guilty to five counts of third-degree

sexual assault, with a potential sentence of 60 years in total. The attorney pointed out that, at the time the State extended this offer, there was only a single charge against Holt. Thus, neither he nor Holt anticipated the possibility of there being five sexual assault charges until Holt's indictment, over a month later.

The superior court found Holt's attorney's testimony to be the more credible. The court found it particularly probative that, at the time Holt and his attorney discussed the State's offer, Holt had only been charged with a single count of second-degree sexual assault. Consequently, the superior court rejected Holt's claim that his attorney had provided ineffective advice regarding the plea offer.⁷

On appeal, Holt maintains that the United States Supreme Court's decision in *Missouri v. Frye* prohibits courts from relying on the testimony of trial counsel to establish that a plea offer was conveyed, and instead requires documentary evidence to refute a defendant's testimony that the offer was not conveyed.⁸ According to Holt, the absence of such evidence means he must prevail on his claim of ineffective assistance.

But *Frye* holds that constitutionally effective assistance imposes a duty on counsel "to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused."⁹ Contrary to Holt's assertions on appeal, *Frye* does not specify the means and manner of such communication, nor does it require counsel to prepare written documentation of the discussions with their client.

Holt's trial attorney testified that he communicated the State's offer to Holt and advised him regarding the consequences of accepting or rejecting it. This is

⁷ See AS 12.72.040 (establishing that the post-conviction relief applicant bears the burden of proving all factual assertions by clear and convincing evidence).

⁸ *Missouri v. Frye*, 566 U.S. 134 (2012).

⁹ *Id.* at 145.

precisely what *Frye* requires. The superior court found the attorney's testimony more credible than Holt's, and this finding is not clearly erroneous.¹⁰

Holt also appears to argue that a trial attorney's failure to provide a client with a written copy of a plea offer constitutes *per se* ineffective assistance of counsel. He relies on two federal cases for this proposition, *United States v. Busse* and *United States v. Wilson*.¹¹

But *Wilson* does not mention a written copy of the plea agreement as factoring into the case at all.¹² And *Busse* similarly does not provide support for Holt's argument. In *Busse*, the federal district court held that it was ineffective for counsel not to inform his client of the mandatory nature of the sentencing guidelines and their impact on the case when advising the client whether to accept a plea agreement or proceed to trial.¹³ Although the court acknowledged that trial counsel failed to give the client a copy of the plea agreement, the district court did not hold that this failure was, in and of itself, incompetent.¹⁴

We therefore conclude that the superior court did not err when it found that Holt failed to establish that his trial attorney was incompetent in advising him regarding the State's initial plea offer.

¹⁰ See *Maloney v. State*, 667 P.2d 1258, 1267-68 (Alaska App. 1983) (fact-finder's credibility determinations are entitled to broad deference on appeal).

¹¹ *United States v. Busse*, 814 F. Supp. 760 (E.D. Wis. 1993); *United States v. Wilson*, 719 F. Supp. 2d 1260 (D. Or. 2010).

¹² *Wilson*, 719 F. Supp. 2d at 1263-77.

¹³ *Busse*, 814 F. Supp. at 764.

¹⁴ *Id.* at 761-62, 764.

Evidentiary decisions

Holt next argues that his trial attorney made several incompetent evidentiary decisions. First, Holt claims that his attorney was ineffective for failing to use a “mountain of evidence” at his disposal. We question whether this issue — which was raised only in Holt’s initial, *pro se* application for post-conviction relief and was not incorporated into Holt’s later pleadings or raised at the evidentiary hearing — was preserved for appeal. Indeed, because Holt’s final application incorporated all previous applications *except* his original *pro se* filing, the superior court never ruled on this claim.¹⁵

But even if this claim was preserved, we conclude that Holt failed to meet his burden of proving it. Holt contends that he hired “multiple investigators from across Alaska and the lower 48 states seeking usable information concerning the alleged victim,” and that he obtained such information.

But when a defendant claims that their trial counsel was ineffective for failing to present important evidence, it is their burden to “furnish the court with affidavits, depositions, or reports of the witnesses who stand ready to provide this evidence — or, failing this, the defendant must explain to the court why the witnesses’ statements are unobtainable.”¹⁶ Holt has not met this burden,¹⁷ and accordingly he has

¹⁵ Generally, when a party fails to obtain a ruling on an issue it means they have failed to preserve that issue for appeal. *Marino v. State*, 934 P.2d 1321, 1327 (Alaska App. 1997).

¹⁶ *Allen v. State*, 153 P.3d 1019, 1025 (Alaska App. 2007) (citing *Rhames v. State*, 1993 WL 13156663, at *1 (Alaska App. Apr. 7, 1993) (unpublished), and *Elson v. State*, 1993 WL 13156823, at *15 (Alaska App. July 28, 1993) (unpublished)).

¹⁷ Holt’s only evidentiary support for this argument consists of references to two moments in K.J.’s trial testimony. In the first, Holt’s attorney asked K.J. whether it was true she had worked as a stripper in Colorado. The prosecutor objected to the relevance of the question, and the trial court sustained the prosecutor’s objection. In the second, K.J. mentioned in passing that she knew the defense had sent an investigator to Colorado.

failed to establish that his attorney was incompetent for not using the evidence Holt alleges he had collected.¹⁸

Second, Holt argues that his attorney was incompetent for failing to act on “newly discovered evidence” — specifically, an email sent to the trial judge by a man named Stan Anderson.

Anderson sent the trial judge this unsolicited email approximately six months after Holt was found guilty. Anderson informed the judge that he had lived with K.J. briefly during the time Holt was on trial and said he had observed her exhibit certain negative behaviors. After receiving Anderson’s email, the judge forwarded it to the parties, notifying them that he would not consider the email for any purpose.

As part of his application for post-conviction relief, Holt obtained an affidavit from Anderson elaborating on some of the claims made in Anderson’s email. Only one aspect of Anderson’s affidavit would have been admissible and relevant to Holt’s trial: Anderson’s claim that K.J. struggled with alcohol abuse. Such a claim, if substantiated, could have been used to impeach K.J.’s testimony that she was not a heavy drinker.

But Holt’s trial attorney did in fact impeach K.J.’s self-assessment of her own drinking through Monsour’s retrograde analysis of K.J.’s blood alcohol content. And under Alaska law, evidence which is merely cumulative and impeaching is not generally considered “newly discovered” as the term is used in the post-conviction relief context.¹⁹ Holt thus failed to demonstrate that no reasonably competent attorney would have declined to act upon the post-verdict receipt of Anderson’s email.

Neither exchange amounts to proof of admissible evidence necessary to support a claim for post-conviction relief.

¹⁸ See *Allen*, 153 P.3d at 1027.

¹⁹ See *Salinas v. State*, 373 P.2d 512, 514 (Alaska 1962); *Hall v. State*, 446 P.3d 373, 376 (Alaska App. 2019).

Finally, Holt argues on appeal that his attorney was incompetent for failing to file pretrial motions challenging the State’s “chain of evidence” regarding K.J.’s blood samples. According to Holt, had his attorney done more, the defense could have obtained additional blood testing to reveal the level of Wellbutrin or other substances in K.J.’s system. Holt maintains that he was “‘possibly’ prejudiced” by this failure.

But Holt did not specify — either in the superior court or on appeal — what additional steps a reasonably competent attorney would have taken in this situation. Holt accordingly did not demonstrate that his attorney’s handling of the issue was incompetent.²⁰

For these reasons, we perceive no error in the superior court’s order rejecting Holt’s claims that his trial attorney’s evidentiary decisions amounted to ineffective assistance of counsel.

Defense timeline of events

Holt next claims that his trial attorney was ineffective for failing to establish a concrete timeline of events for the jury. According to Holt, had his attorney established such a timeline it would have become clear that Count V (the count of forced fellatio for which Holt was convicted of first-degree sexual assault) did not occur until several hours *after* K.J.’s second drink. Holt believes that this would have put the conduct alleged in Count V within the same period of incapacitation in which Counts I through IV took place. He maintains that, had his attorney established such a timeline, the court would have granted his motion for judgment of acquittal on Count V, along

²⁰ See *State v. Jones*, 759 P.2d 558, 568, 573 (Alaska App. 1988) (explaining that the burden is on the applicant to demonstrate that their attorney’s representation fell to “a level of performance that no reasonably competent attorney would provide” and that, to prove prejudice, an applicant must make some specific factual showing that counsel’s incompetence had an actual, adverse impact on the case).

with the other four counts of first-degree sexual assault, and Holt would thus not have any first-degree sexual assault convictions.

But the superior court found that Holt failed to state a *prima facie* case as to this claim, and we agree.²¹ Even if his attorney had constructed such a timeline, the evidence with respect to Count V would have been sufficient to convict Holt of first-degree sexual assault. K.J. testified that Holt “‘grabbed’ her jaw and ‘forced oral sex.’” When K.J. was examined at the hospital afterwards, the nurse observed bruises on K.J.’s face and redness on her jaw. Indeed, it was for these reasons that this Court upheld Holt’s first-degree sexual assault conviction on direct appeal.²²

We therefore conclude that Holt did not demonstrate that he was prejudiced by his attorney’s failure to establish a more concrete timeline of events, even assuming that a reasonably competent attorney in his attorney’s position would have done so.²³

Unfiled motions

Next, Holt argues that his trial attorney was ineffective for failing to file a variety of motions before, during, and after trial. As with his other claims of ineffective assistance, Holt bears the burden of showing that his attorney was incompetent for not filing these motions, and that this incompetence actually prejudiced him.²⁴ And in the

²¹ See *David v. State*, 372 P.3d 265, 269 (Alaska App. 2016) (recognizing that this Court reviews *de novo* the legal question of whether a post-conviction relief applicant has set forth a *prima facie* case for relief).

²² *Holt v. State*, 2019 WL 1503918, at *4 (Alaska App. Apr. 3, 2019) (unpublished).

²³ See *Jones*, 759 P.2d at 573 n.7 (applicant for post-conviction relief has the affirmative burden of demonstrating prejudice by showing that counsel’s alleged failure contributed to their conviction).

²⁴ See *State v. Steffensen*, 902 P.2d 340, 342 (Alaska App. 1995) (explaining that, to prove prejudice, the defendant must establish that there is at least a reasonable possibility

context of motion practice, the defendant must show that a motion, if filed, would have been granted, and also that the granted motion would have appreciably impacted the outcome of their case.²⁵

First, Holt claims that his attorney was ineffective for failing to file a motion for a new trial. To prevail, Holt must demonstrate that, if the attorney had moved for a new trial, the motion would have been granted. But Holt does not articulate the standard for granting a new trial, discuss what grounds might have justified such a motion in his case, or address why the court would have been inclined to grant the motion had it been made. We therefore conclude that Holt has not met his burden of demonstrating prejudice.

Second, Holt claims that his attorney was ineffective for failing to file a motion to clarify the indictment or have it dismissed for insufficiency. But Holt has not articulated *why* his attorney should have moved to clarify the indictment. As this Court noted on direct appeal, the attorney’s litigation of the case demonstrated that he understood the theories of sexual assault at play in the case and was prepared to litigate against them.²⁶ Holt has provided no evidence that a reasonably competent attorney would nevertheless have moved to clarify the indictment. Therefore, he has failed to meet his burden of demonstrating ineffective assistance of counsel on this ground.²⁷

that, but for the attorney’s incompetence, the outcome would have been different) (citing *Risher v. State*, 523 P.2d 421, 425 (Alaska 1974)).

²⁵ See *Shetters v. State*, 751 P.2d 31, 36 (Alaska App. 1988) (in the context of a motion to dismiss an indictment, defendant must show that the motion would have been granted and, if granted, would have prevented reindictment); *Steffensen*, 902 P.2d at 342 (“[A] defendant is not prejudiced by a defense attorney’s failure to file a suppression motion if, after the motion is fully heard, the court finds that the motion should be denied.”).

²⁶ *Holt*, 2019 WL 1503918, at *3-4.

²⁷ On appeal, Holt claims that his post-conviction expert, McDannel, opined that his trial attorney was ineffective for failing to “gain clarification of the indictment.” Holt has misrepresented the record. McDannel was very clear at the evidentiary hearing that the

Holt also alleges that his trial attorney's failure to clarify or dismiss the indictment left him unable to challenge what he considers to be a fatal variance between the first-degree sexual assault offenses charged by the grand jury in Counts I-IV and the second-degree sexual assault counts for which he was convicted. But, on direct appeal, Holt did in fact argue that there was a fatal variance between his indictment and convictions.²⁸ This Court rejected Holt's contention, concluding that Holt had been on notice that second-degree sexual assault was a lesser included offense of first-degree sexual assault as indicted, and that there was no fatal variance.²⁹ Therefore Holt's claim of prejudice is without merit.

To the extent that Holt alleges he was generally prejudiced by his trial attorney's failure to move to dismiss the indictment, this claim fails as well. To demonstrate prejudice Holt must establish that such a motion would have been granted and, if granted, would have prevented his reindictment.³⁰ Holt was found guilty beyond a reasonable doubt of one count of first-degree sexual assault (for forcing K.J. to engage in oral sex) and four counts of second-degree sexual assault (for having sex with K.J. while she was incapacitated). Thus, even if Holt had been successful in dismissing the indictment, the State would have been able to re-indict Holt on the charges for which he was ultimately convicted. Holt therefore cannot demonstrate that he was prejudiced by his attorney's decision not to file a motion to dismiss the original indictment.³¹

only aspect of the attorney's advocacy she was prepared to comment upon was his decision to call the forensic toxicologist, Monsour.

²⁸ *Holt*, 2019 WL 1503918, at *4.

²⁹ *Id.*

³⁰ *Shettlers*, 751 P.2d at 36.

³¹ Holt appears to be raising a separate, stand-alone challenge to the adequacy of the original indictment to support his convictions for second-degree sexual assault. According to Holt, because the grand jury indicted him on five counts of first-degree sexual assault without specifying whether it was under a use-of-force theory or an incapacitation theory,

Third, Holt argues that his trial attorney was incompetent for failing to move for a mistrial or request a continuance after it became clear that the trial court was going to allow an instruction on second-degree sexual assault as a lesser included offense. But as the attorney explained in his affidavit, he and Holt discussed moving for a mistrial and decided against it.

According to Holt’s attorney, Holt did not want to move for a mistrial “in light of the fact that he was comfortable with the jury and [the defense’s] preparation.” Moreover, the prosecutor had only been recently assigned to the case, and Holt and the attorney agreed she would likely only be more prepared if the case was delayed. And finally, Holt had been on bail for two years awaiting trial, was eager to have the case concluded, and was concerned about financial hardship should he have to start the trial over.

Holt never provided an alternative version of events, nor did he rebut any of his attorney’s factual allegations. The superior court therefore concluded that Holt had failed to meet his burden of rebutting the presumptions of competence and sound tactics.³² We agree, and reject this claim of error.

the original indictment was insufficient to put Holt on notice that he could be prosecuted for second-degree sexual assault as a lesser included offense. But Holt raised this claim in his direct appeal — arguing that the indictment was insufficient and therefore there was a fatal variance between the charges for which he was indicted and the crimes for which he was ultimately convicted. And this Court resolved this claim when we concluded that there was no fatal variance and thus, as a necessary corollary, that the original indictment was sufficient to put Holt on notice that second-degree sexual assault was a lesser included offense of first-degree sexual assault as indicted. *Holt*, 2019 WL 1503918, at *4. Because this claim was raised and resolved on direct appeal, Holt cannot relitigate the issue as part of his post-conviction relief application. *See* AS 12.72.020(a)(2).

³² *See State v. Jones*, 759 P.2d 558, 569 (Alaska App. 1988) (“In the absence of evidence ruling out the possibility of a tactical reason to explain counsel’s conduct, the presumption of competence remains unrebutted and operates to preclude a finding of ineffective assistance.”).

Cumulative error

Lastly, Holt argues that his trial attorney's cumulative errors, when taken in the aggregate, constitute ineffective assistance of counsel. This Court has said that the doctrine of cumulative error is better thought of as the doctrine of cumulative prejudice. "It applies only when real errors have been identified and the remaining question is whether these errors, in combination, were so prejudicial as to undermine the trustworthiness of the underlying judgment (even though each error, taken individually, might not require reversal)."³³

As we have mentioned, Holt failed to demonstrate that his trial attorney was incompetent in (1) calling both Holt and Monsour to testify at trial; (2) advising him regarding the State's initial plea offer; (3) failing to use present certain evidence; and (4) failing to move for a mistrial. Because Holt has not demonstrated any errors regarding these claims, the doctrine of cumulative error does not apply to them.

For Holt's remaining claims, we have declined to decide whether Holt established incompetence on the part of his attorney and instead have concluded that he failed to establish prejudice. But each claim that we have resolved on prejudice grounds was related to a discrete, narrow issue: his attorney's failure to establish a concrete timeline of events at trial; his attorney's failure to file a motion for a new trial; and his attorney's failure to move to clarify or dismiss the indictment. We have explained why Holt failed to show prejudice for each of these claims, and after reviewing the entire record, for those same reasons we conclude that any alleged incompetence on these issues did not combine in such a way as "to undermine the trustworthiness of the underlying judgment." We therefore reject Holt's claim of cumulative error.

Conclusion

The judgment of the superior court is AFFIRMED.

³³ *State v. Savo*, 108 P.3d 903, 916 (Alaska App. 2005).