DA 19-0487

IN THE SUPREME COURT OF THE STATE OF MONTANA

2021 MT 143N

MARKUS HENDRIK KAARMA,

Petitioner and Appellant,

v.

STATE OF MONTANA,

Respondent and Appellee.

APPEAL FROM: District Court of the Fourth Judicial District,
In and For the County of Missoula, Cause No. DV 18-1294
Honorable Ed McLean, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Wendy Holton, Attorney at Law, Helena, Montana

For Appellee:

Austin Knudsen, Montana Attorney General, Jonathan Krauss, Assistant Attorney General, Helena, Montana

Kirsten H. Pabst, Missoula County Attorney, Matt Jennings, Chief Criminal Deputy County Attorney, Missoula, Montana

Submitted on Briefs: April 14, 2021

Decided: June 8, 2021

Filed:

Clerk

Justice Ingrid Gustafson delivered the Opinion of the Court.

¶1 Pursuant to Section I, Paragraph 3(c), Montana Supreme Court Internal Operating Rules, this case is decided by memorandum opinion and shall not be cited and does not serve as precedent. Its case title, cause number, and disposition shall be included in this Court's quarterly list of noncitable cases published in the Pacific Reporter and Montana Reports.

¶2 Petitioner and Appellant Markus Hendrik Kaarma (Kaarma) appeals the July 26, 2019 Order Denying Petition for Post-Conviction Relief issued by the Fourth Judicial District Court, Missoula County. We affirm.

¶3 In April 2014, Kaarma's Missoula home, which he shared with his partner Janelle Pflager (Pflager) and their infant son, was burglarized twice when they left their garage door partially open. After the two burglaries, Kaarma repeatedly expressed his anger and told people he was going to shoot the burglars and was wanting to kill some kids with his shotgun. Kaarma and Pflager installed security cameras and placed a purse with identifying information in the garage. Kaarma also threatened a lawn maintenance worker, who was hired to spray his lawn, with a shotgun.

¶4 In the early morning hours of April 27, 2014, Kaarma and Pflager were home watching a movie. Pflager went to smoke in the garage, where she partially opened the garage door for ventilation. After finishing her cigarette, Pflager went back inside the house but did not shut the garage door. While in the house a short time later, Kaarma and Pflager saw an intruder enter their garage on the security camera. Kaarma grabbed his shotgun, went out the front door of the house, turned and stood in front of the garage door.

Kaarma told police he shouted and then heard a voice or "metal on metal" sound come from inside the garage. Kaarma told police he thought he was "going to die" and then started firing into the garage. Kaarma fired three shots in quick succession, then took a slight pause before firing the fourth and final shot into the garage. The intruder, a 17-year-old foreign exchange student from Germany named Diren Dede (Dede), was shot twice—once in the arm and once in the head—and died.

¶5 Kaarma was later arrested and charged with deliberate homicide for shooting and killing Dede. The matter went to trial in December 2014. The jury convicted Kaarma of deliberate homicide. Kaarma moved for a new trial, which the District Court denied. The District Court sentenced Kaarma to 70 years at the Montana State Prison. Kaarma then appealed to this Court, raising numerous issues, and we affirmed his conviction in 2017. *State v. Kaarma*, 2017 MT 24, 386 Mont. 243, 390 P.3d 609. Relevant to this proceeding, one issue raised by Kaarma in his direct appeal was whether the District Court abused its discretion by instructing the jury on justifiable use of force in defense of a person. *See Kaarma*, ¶ 13. We reviewed the instructions given at trial and determined the "instructions given were a full and fair instruction on the applicable law of the case." *Kaarma*, ¶ 27. We declined to review Kaarma's claim the District Court erred "by declining to instruct the jury that, as a matter of law, burglary is a forcible felony." *Kaarma*, ¶ 28. Kaarma filed a petition for rehearing, which we denied. *State v. Kaarma*, No. DA 15-0214, Order (Mont. Mar. 21, 2017). Kaarma then filed a petition for a writ of certiorari at the United States Supreme Court, which was also denied. *Kaarma v. Montana*, 2017 U.S. LEXIS 5701 (U.S., Oct. 2, 2017).

¶6 On September 18, 2018, Kaarma filed a Petition for Post-Conviction Relief in the District Court. Kaarma alleged he received ineffective assistance of counsel from his trial counsel—Paul Ryan, Brian Smith, Katie Lacny, Lisa Kauffman, and Nate Holloway. He further asserted he received ineffective assistance of counsel on appeal. The District Court ordered the State to file a response. On November 23, 2018, the District Court issued an Order Preserving Defense Counsel from Disciplinary or Malpractice Claims, allowing Kaarma's counsel to respond to Kaarma's ineffective assistance of counsel claims. Kaarma's counsel thereafter filed affidavits refuting Kaarma's claims. After receiving extensions, the State filed the State's Response to Petition for Post-Conviction Relief on April 29, 2019. The District Court held a hearing on Kaarma's petition on July 18, 2019, and issued its Order Denying Petition for Post-Conviction Relief on July 26, 2019. Kaarma appeals the denial of his petition for postconviction relief.

¶7 We review a district court's denial of a petition for postconviction relief to determine whether the court's findings of fact are clearly erroneous and whether its conclusions of law are correct. *Marble v. State*, 2015 MT 242, ¶ 13, 380 Mont. 366, 355 P.3d 742. Claims of ineffective assistance of counsel constitute mixed questions of law and fact which we review de novo. *Whitlow v. State*, 2008 MT 140, ¶ 9, 343 Mont. 90, 183 P.3d 861 (citing *State v. Racz*, 2007 MT 244, ¶ 13, 339 Mont. 218, 168 P.3d 685).

¶8 Kaarma alleges he received ineffective assistance of counsel because his trial counsel misunderstood the law of justifiable use of force and mismanaged their defense due to this misunderstanding; his counsel was ineffective for failing to object to statements made by the prosecution; and the District Court erred by not instructing the jury burglary

is a forcible felony as a matter of law. Kaarma asserts, to the extent those issues are record-based, his appellate counsel was ineffective for failing to raise them on direct appeal. Finally, Kaarma alleges he is entitled to a new trial based on cumulative error.

¶9 This Court has adopted the two-pronged test of *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984), in judging ineffective assistance of counsel claims. *State v. Crider*, 2014 MT 139, ¶ 34, 375 Mont. 187, 328 P.3d 612 (citing *State v. Kougl*, 2004 MT 243, ¶ 11, 323 Mont. 6, 97 P.3d 1095). In order to show ineffective assistance of counsel, "a defendant must prove both (1) that counsel's performance was deficient, and (2) that counsel's deficient performance prejudiced the defense." *State v. Ward*, 2020 MT 36, ¶ 18, 399 Mont. 16, 457 P.3d 955 (quoting *Crider*, ¶ 34). The question we must answer when deciding an ineffective assistance of counsel claim "is whether counsel's conduct fell below an objective standard of reasonableness measured under prevailing professional norms and in light of the surrounding circumstances." *Whitlow*, ¶ 20. In analyzing prejudice, the defendant must show a "reasonable probability that the result of the proceeding would have been different but for counsel's deficient performance." *State v. Brown*, 2011 MT 94, ¶ 12, 360 Mont. 278, 253 P.3d 859 (citation omitted).

¶10 We begin with Kaarma's ineffective assistance of counsel claims. "[A] petitioner seeking to reverse a district court's denial of a petition for postconviction relief based on a claim of ineffective assistance of counsel bears 'a heavy burden.'" *Hamilton v. State*, 2010 MT 25, ¶ 12, 355 Mont. 133, 226 P.3d 588 (quoting *Whitlow*, ¶ 21). "[A] reviewing court 'must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance' and the defendant 'must overcome the presumption

that, under the circumstances, the challenged action might be considered sound trial strategy.'" *Whitlow*, ¶ 21 (quoting *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065). Kaarma was represented by a team of five attorneys at trial. During the settling of jury instructions, Kaarma's counsel attempted to only have the jury instructed on justified use of force in defense of occupied structure, rather than instructed on both that and justified use of force in defense of person. As part of this attempt, counsel withdrew their proposed jury instruction—Instruction No. 20—on justified use of force in defense of person. One of Kaarma's attorneys, Brian Smith, told the District Court, "[s]o what we didn't appreciate until we're settling instructions is this idea that Montana -- we just didn't get that technical -- has two justifiable use of forces."

¶11 Kaarma argues the statement from Smith shows his defense team was ineffective as they did not understand the differences between justified use of force in defense of person and justified use of force in defense of occupied structure. Montana's justified use of force in defense of person statute states:

> A person is justified in the use of force or threat to use force against another when and to the extent that the person reasonably believes that the conduct is necessary for self-defense or the defense of another against the other person's imminent use of unlawful force. However, the person is justified in the use of force likely to cause death or serious bodily harm only if the person reasonably believes that the force is necessary to prevent imminent death or serious bodily harm to the person or another or to prevent the commission of a forcible felony.

Section 45-3-102, MCA. Meanwhile, the justified use of force in defense of occupied structure statute states:

> (1) A person is justified in the use of force or threat to use force against another when and to the extent that the person reasonably believes that the

> use of force is necessary to prevent or terminate the other person's unlawful entry into or attack upon an occupied structure.
>
> (2) A person justified in the use of force pursuant to subsection (1) is justified in the use of force likely to cause death or serious bodily harm only if:
>
> (a) the entry is made or attempted and the person reasonably believes that the force is necessary to prevent an assault upon the person or another then in the occupied structure; or
>
> (b) the person reasonably believes that the force is necessary to prevent the commission of a forcible felony in the occupied structure.

Section 45-3-103, MCA. The District Court found Smith's statement not to be evidence of deficient performance, but when taken in context, an attempt by counsel to prevent the jury from being instructed on the justified use of force in defense of person statute, § 45-3-102, MCA. We agree with the District Court. Our review of the record shows this statement from Smith came during Kaarma's attempt to have the jury only instructed on justified use of force in defense of occupied structure. The attempt failed, and the District Court instructed the jury on both self-defense statutes.

¶12 Kaarma's counsel failed in their attempt to only have the jury instructed on justified use of force in defense of occupied structure, but Kaarma has failed to demonstrate "counsel's conduct fell below an objective standard of reasonableness measured under prevailing professional norms and in light of the surrounding circumstances." *Whitlow*, ¶ 20. Under the circumstances, counsel's conduct may well be considered sound trial strategy as they were faced with the unenviable task of attempting to get only their preferred instructions regarding justified use of force in defense of occupied structure before the jury in the face of Kaarma's statements before the incident that he wanted to kill

kids with his shotgun, which were followed by him shooting and killing Dede with his shotgun and then telling the police he feared for his life. "Montana allows a person to use force to defend himself or herself in a degree commensurate with the threat of harm the person faces." *State v. Stone*, 266 Mont. 345, 347, 880 P.2d 1296, 1298 (1994). Kaarma was able to fully present his theory he was justified in his use of deadly force to stop Dede's burglary of his open garage. The jury rejected that theory and convicted him of deliberate homicide. Kaarma's counsel was both able to argue their theory of the case and for their preferred jury instructions. Neither was outside the bounds of reasonableness, and, regarding the jury instructions, we have already determined the "instructions given were a full and fair instruction on the applicable law of the case." *Kaarma*, ¶ 27.

¶13 Kaarma also argues his counsel was ineffective for failing to object to several statements made by prosecutors at trial. He has failed to demonstrate, however, that further objections by his counsel would have been sustained by the District Court or that counsel's failure to object fell below an objective standard of reasonableness and was outside the wide range of reasonable professional assistance. Furthermore, he has failed to show that, even if some of those objections would have been sustained, they would have changed the outcome of the trial in any way. On this record, we cannot find such "missed" objections would have changed the outcome of the trial. Thus, Kaarma has failed to demonstrate either deficient performance or prejudice in this regard.

¶14 Because Kaarma failed to prove the first prong of the *Strickland* test—deficient performance by his counsel—it is unnecessary for this Court to address the second prong regarding prejudice. *Adams v. State*, 2007 MT 35, ¶ 22, 336 Mont. 63, 153 P.3d 601.

Kaarma "bore the burden to overcome the presumption that his counsel acted in a reasonable, professional manner." *Sartain v. State*, 2012 MT 164, ¶ 44, 365 Mont. 483, 285 P.3d 407 (quoting *Sellner v. State*, 2004 MT 205, ¶ 48, 322 Mont. 310, 95 P.3d 708). He failed to meet his burden here and the District Court correctly rejected his ineffective assistance of counsel claims.

¶15 Kaarma also asserts the District Court erred by failing to instruct the jury that burglary is a forcible felony as a matter of law. Before trial, the State filed a motion in limine seeking a ruling that burglary is not a forcible felony as a matter of law and Kaarma filed a motion in limine seeking a ruling that burglary is a forcible felony. The District Court denied both motions and repeatedly stated whether Dede's burglary on April 27, 2014, was a forcible felony was a matter for the jury to decide. This argument—whether burglary is a forcible felony as a matter of law—could have been, should have been, and was raised on direct appeal. *See Kaarma*, ¶ 28. In our decision, however, we incorrectly stated Kaarma withdrew his proposed instruction that burglary is a forcible felony. In fact, as recognized by the District Court in its Order Denying Petition for Post-Conviction Relief, Kaarma's instruction that burglary is a forcible felony was refused by the District Court. Counsel for Kaarma did state they "withdrew" the instruction during the settling of instructions, but was quickly corrected by the Clerk of Court, who informed the judge he had already refused that instruction.

¶16 "Grounds for relief 'that were or could reasonably have been raised on direct appeal may not be raised, considered or decided in a proceeding' for [postconviction] relief." *Rukes v. State*, 2013 MT 56, ¶ 8, 369 Mont. 215, 297 P.3d 1195 (quoting § 46-21-105(2),

MCA). Here, Kaarma did raise this issue on direct appeal. After our decision incorrectly stated Kaarma withdrew his proposed instruction that burglary is a forcible felony, he again raised the issue in his petition for rehearing. We denied his petition. *State v. Kaarma*, No. DA 15-0214, Order (Mont. Mar. 21, 2017). Kaarma's argument the District Court erred by declining to instruct the jury that burglary is a forcible felony is not appropriate in a postconviction proceeding as it was already raised, repeatedly, on direct appeal. *Rukes*, ¶ 8. Moreover, we have already determined the "instructions given were a full and fair instruction on the applicable law of the case." *Kaarma*, ¶ 27. In addition, "forcible felony" is defined in statute as "any felony which involved the use or threat of violence against any individual." Section 45-3-101(2), MCA. Burglary, meanwhile, occurs when a person "knowingly enters or remains unlawfully in an occupied structure and: (a) the person has the purpose to commit an offense in the occupied structure; or (b) the person knowingly or purposely commits any other offense within that structure." Section 45-6-204(1), MCA. We have not previously declared burglary to be a forcible felony as a matter of law and the plain language of the burglary statute does not require the "use or threat of violence against any individual" such that it would be a forcible felony. The District Court did not err in rejecting Kaarma's argument in this regard and allowing the parties to argue whether Dede's entrance of Kaarma's garage on the night he was shot was, in fact, a forcible felony under Montana law. The District Court properly instructed the jury on the definitions of both "burglary" and of "forcible felony" and then let the jury determine whether the facts of the case met the definitions.

¶17 Kaarma also alleges he received ineffective assistance of counsel on appeal. "The criteria for establishing ineffective assistance of appellate counsel are the same as those used to establish ineffective assistance of trial counsel[.]" *DuBray v. State*, 2008 MT 121, ¶ 31, 342 Mont. 520, 182 P.3d 753, *overruled in part on other grounds by Marble*, ¶ 31. Here again, Kaarma must show both "(1) that counsel's performance was deficient, and (2) that counsel's deficient performance prejudiced the defense." *Ward*, ¶ 18. The question we must answer "is whether counsel's conduct fell below an objective standard of reasonableness measured under prevailing professional norms and in light of the surrounding circumstances." *Whitlow*, ¶ 20. We cannot find Kaarma received ineffective assistance of counsel on appeal. Appellate counsel has no constitutional obligation to raise every non-frivolous argument on appeal and the presumption of effective assistance of counsel is only overcome when ignored issues are clearly stronger than those presented. *DuBray*, ¶ 31 (citations omitted). The District Court reviewed the affidavit of Kaarma's appellate counsel and noted counsel clearly explained his decision-making, appropriately narrowed the issues to those most likely to succeed, and filed an over-length appellate brief raising more issues than recommended by M. R. App. P. 12(1)(b). The District Court found appellate counsel's advocacy was "exemplary, not deficient." Our review of the record similarly finds no deficient performance by appellate counsel. Counsel narrowed the issues on appeal to those most likely to succeed. Counsel partially succeeded, as we found the District Court abused its discretion regarding the testimony of one witness, *Kaarma*, ¶ 87, though we ultimately determined the error was harmless. *Kaarma*, ¶ 91. Kaarma has not shown his appellate counsel acted outside of the wide range of reasonable professional

assistance or that he was prejudiced by counsel narrowing the issues in the manner he did. Indeed, Kaarma has not succeeded on those issues in either his petition for postconviction relief before the District Court or on appeal here.

¶18 The cumulative error doctrine mandates reversal of a conviction where numerous errors, when taken together, have prejudiced a defendant's right to a fair trial. *State v. Smith*, 2020 MT 304, ¶ 16, 402 Mont. 206, 476 P.3d 1178 (citing *State v. Cunningham*, 2018 MT 56, ¶ 32, 390 Mont. 408, 414 P.3d 289). "The defendant must establish prejudice; a mere allegation of error without proof of prejudice is inadequate to satisfy the doctrine." *Cunningham*, ¶ 32 (citation omitted). A defendant is entitled to a fair trial, not to a trial free from errors. *Cunningham*, ¶ 32. The cumulative effect of errors will "rarely merit reversal[.]" *Smith*, ¶ 17 (citing *Cunningham*, ¶ 33).

¶19 Here, Kaarma is not entitled to a reversal of his conviction on the basis of cumulative error. We have determined both that Kaarma's counsel was not ineffective and that the District Court's instructions gave the jury a full and fair instruction on the applicable law of the case. Kaarma received a fair trial and has failed to demonstrate prejudice which would require reversal.

¶20 Kaarma has not met the "heavy burden" of establishing he received ineffective assistance from either his trial or his appellate counsel. In addition, the District Court's instructions were "a full and fair instruction on the applicable law of the case," *Kaarma*, ¶ 27, and the District Court did not err by declining to instruct the jury that burglary is a forcible felony as a matter of law. Finally, as we have not found error, Kaarma is not

entitled to a reversal based on cumulative error. The District Court correctly denied Kaarma's petition for postconviction relief.

¶21 We have determined to decide this case pursuant to Section I, Paragraph 3(c) of our Internal Operating Rules, which provides for memorandum opinions. In the opinion of the Court, the case presents a question controlled by settled law or by the clear application of applicable standards of review.

¶22 Affirmed.

/S/ INGRID GUSTAFSON

We concur:

/S/ LAURIE McKINNON
/S/ BETH BAKER
/S/ DIRK M. SANDEFUR
/S/ JIM RICE