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United States Court of Appeals
Tenth Circuit

August 6, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

JERAD KEITH GRAVITT,

Petitioner - Appellant,

v.

CARL BEAR, Warden, Joseph Harp Correctional Center,

Respondent - Appellee.

No. 20-6156
(D.C. No. 5:19-CV-00551-R)
(W.D. Oklahoma)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **HARTZ**, **KELLY**, and **McHUGH**, Circuit Judges.

Petitioner Jerad Keith Gravitt, a prisoner in state custody proceeding with the assistance of counsel, seeks a Certificate of Appealability ("COA") to challenge the district court's denial of his 28 U.S.C. § 2254 petition for a writ of habeas corpus. We deny Mr. Gravitt a COA on his sole claim: that he was denied effective assistance of appellate counsel on direct appeal of his state conviction.

* This order is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Federal Rule of Appellate Procedure 32.1 and Tenth Circuit Rule 32.1.

I. BACKGROUND

A. Factual History[1]

On May 4, 2014, Mr. Gravitt and his girlfriend walked into a Walgreens store in Oklahoma City, Oklahoma. The two loitered for a while, and a Walgreens employee, Rhonda Webber, suspected they were planning to steal items. Mr. Gravitt went to the restroom; after ten minutes, Ms. Webber asked Walgreens's pharmacist, Troy Davis, to check on him. As Mr. Davis approached the bathroom, Mr. Gravitt exited and re-joined his girlfriend. Believing the two were intoxicated and concerned they would drive, Mr. Davis approached the pair and asked if he could get them a cab. They declined. Ms. Webber instructed Mr. Davis to call the police.

Mr. Gravitt and his girlfriend walked outside.[2] Believing they had shoplifted, Ms. Webber followed. She asked them to return the items they took. Mr. Gravitt handed her the items, and, after she turned, he ran up behind her and said, "I'll give you a reason to call the cops." App. Vol. 3 at 22. Mr. Gravitt then jumped up, kicked a trash can over in front of her, lost his balance, and hit her arm. Mr. Gravitt had a knife in his hand, and Ms. Webber mistakenly believed she had been stabbed.

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[1] Pursuant to 28 U.S.C. § 2254(e), we must presume the correctness of facts found by the state courts. Here, however, no state court found facts relating to Mr. Gravitt's underlying offense, so we rely on the undisputed facts. Accordingly, except as otherwise noted, these facts are taken from the district court's order, which drew them from Mr. Gravitt's habeas petition and noted they were undisputed by the parties. Mr. Gravitt also does not dispute these facts in his briefing before this court.

[2] The facts in this paragraph are drawn from Ms. Webber's trial testimony. Mr. Gravitt does not dispute them in his briefing before this court.

Mr. Davis then called the police. Officer Tyler Duncan found the couple approximately three blocks away. Upon seeing Officer Duncan, Mr. Gravitt's girlfriend dropped her belongings and put her hands in the air. Mr. Gravitt, however, walked away from Officer Duncan, despite the latter's commands to stop moving. Mr. Gravitt then pulled out a gun and shot at Officer Duncan three times. No bullets hit Officer Duncan, but one flew by his head and hit his patrol car's windshield. Mr. Gravitt then took off running. Mr. Gravitt was initially able to evade the officers, but police ultimately found and arrested him.

B. Procedural History

1. State Court Proceedings

a. Trial

Mr. Gravitt was tried before a jury in Oklahoma state court on charges of (1) assault with a dangerous weapon and (2) shooting with intent to kill.[3] William Foster served as Mr. Gravitt's trial counsel. Mr. Foster's defense strategy was voluntary intoxication—that is, he planned to argue Mr. Gravitt was so intoxicated he could not form the specific intent necessary to be convicted of these crimes.

As recounted by the Oklahoma state trial court, Mr. Foster presented the following evidence of Mr. Gravitt's intoxication at trial:

> [Mr. Gravitt's] testimony regarding his ingestion of large quantities of heroin and Xanax shortly before the offenses were committed and his

[3] Mr. Gravitt was also charged with, and convicted by the jury of, possession of a firearm after a former felony conviction. This count is not relevant to Mr. Gravitt's arguments in support of a COA, however, so we do not discuss it further.

> reported inability to remember anything that happened that night; the testimony of [Mr. Gravitt's] then-girlfriend, who also testified to the large quantities of drugs she and [Mr. Gravitt] took that evening; testimony from two Walgreens['] employees, who both testified to [Mr. Gravitt's] strange behavior and their belief that he was intoxicated; the testimony of Officer Duncan, who testified he believed [Mr. Gravitt] was "on something" and had a "crazed look" in his eyes when he fired a gun at him three times; and the video recording of [Mr. Gravitt's] interview with detectives following his arrest wherein he appears to have difficulty staying awake or recalling details from that night and his speech is noticeably slurred.

App. Vol. 1 at 160. Although Mr. Foster considered retaining an expert to testify regarding Mr. Gravitt's intoxication and its effect on his mental state, Mr. Foster believed the above evidence would be sufficient to support a voluntary-intoxication jury instruction and an ultimate acquittal.

The trial court denied Mr. Foster's request for a jury instruction, however, reasoning that although the evidence supported that Mr. Gravitt was intoxicated, the evidence did not support a finding that he could not form the requisite intent to commit the charged offenses. The jury rejected Mr. Gravitt's voluntary-intoxication defense, convicting him on all counts. The trial court sentenced Mr. Gravitt to 45 years' imprisonment.

b. Direct appeal

Mr. Gravitt filed a direct appeal in the Oklahoma Court of Criminal Appeals ("OCCA"), with Andrea Miller serving as his counsel. Ms. Miller argued, among other things, that the state trial court committed reversible error by failing to give a voluntary-intoxication instruction to the jury based on the evidence presented at trial. She did not argue Mr. Foster was ineffective for failing to call an expert witness.

In resolving Mr. Gravitt's direct appeal, the OCCA explained "[t]he test for whether sufficient evidence has been introduced to instruct the jury on voluntary intoxication is whether the evidence establishes a *prima facie* case of voluntary intoxication as defined by law." App. Vol. 1 at 83. The OCCA concluded "[t]he trial court did not abuse its discretion" in refusing to give the requested instruction in Mr. Gravitt's case, "as the evidence showed that [he] 'was not in the advanced state of intoxication he attempt[ed] to assert' at trial." *Id.* at 84 (quoting *Turrentine v. State*, 965 P.2d 955, 969 (Okla. Crim. App. 1998)). The OCCA accordingly rejected Ms. Miller's argument and affirmed Mr. Gravitt's convictions.

c. Post-conviction proceedings before the state trial court

Mr. Gravitt filed an application for post-conviction relief in the state trial court. In his application, Mr. Gravitt argued he received ineffective assistance from Ms. Miller, his direct appellate counsel. Specifically, he argued Ms. Miller failed to challenge the effectiveness of his trial counsel, Mr. Foster, regarding Mr. Foster's failure to retain an expert to testify about his level of intoxication and its impact on his ability to form intent.

The trial court conducted an evidentiary hearing on this issue. At the hearing, Mr. Gravitt presented the testimony and amended report of a neuropharmacologist, Jonathan Lipman, Ph.D., to support his claim. Dr. Lipman testified that, had he been called as a trial witness, he would have opined that the "combined effect of alcohol, heroin and Xanax [in Mr. Gravitt's system] . . . deprived [him] of the clarity of mind and requisite cognitive function necessary to consciously fire the weapon with the

intent to kill Officer Duncan, or to consciously assault and injure Ms. Webber."[4] App. Vol. 1 at 159.

Mr. Foster also testified at the evidentiary hearing. He explained "the defense in [Mr. Gravitt's] case had from the very beginning been that of voluntary intoxication." *Id.* at 159–60. He further testified he had

> consider[ed] obtaining an expert witness in support of the defense. But from his evaluation of the case, combined with his knowledge and prior experience in dealing with the defense of voluntary intoxication, he believed the evidence that would come out at trial was itself sufficient to support a voluntary intoxication jury instruction.

Id. at 160. Finally, Mr. Foster testified that, "had he known th[e trial court] would not give the requested instruction, he would have elected to retain an expert witness such as Dr. Lipman." *Id.* "[F]rom his perspective at the time," however, "he believed it would have been an unnecessary expenditure of funds to hire an expert in light of the evidence." *Id.*

Appellate counsel Ms. Miller also testified. Like Mr. Foster, she stated "she did not consult with an expert witness" and "believed the evidence presented at trial supported an instruction on voluntary intoxication." *Id.* at 161. She considered this argument "to be the strongest argument on [direct] appeal, and she [had] believed the [OCCA] would reverse and remand the case for a new trial based on that claim." *Id.*

In a written order, the trial court denied Mr. Gravitt's application for post-conviction relief. Citing the standard the Supreme Court set forth in *Strickland v.*

[4] In this section, all quotations to witnesses' testimony from the evidentiary hearing are taken from the trial court's post-conviction decision.

Washington, 466 U.S. 668, 687 (1984), the trial court explained that, to prove his ineffective assistance of counsel claim, Mr. Gravitt was required to show both that his "counsel's assistance was deficient and that the deficiency caused prejudice." App. Vol. 1 at 159. The trial court concluded Mr. Gravitt failed to show Mr. Foster's performance was deficient; it therefore did not reach *Strickland*'s prejudice prong. Because Mr. Gravitt failed to show his trial counsel was ineffective, the trial court stated "[i]t follows, then, that his claim of ineffective assistance of appellate counsel on that ground also fails." *Id.* at 161.

d. Post-conviction proceedings before the OCCA

Mr. Gravitt appealed the trial court's post-conviction decision to the OCCA. In its decision resolving his appeal, the OCCA first set forth the relevant standards for evaluating ineffective assistance of appellate counsel claims:

> [P]ostconviction claims of ineffective assistance of appellate counsel are reviewed under the standard for ineffective assistance of counsel set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *See Smith v. Robbins*, 528 U.S. 259, 289 (2000) ("[Petitioner] must satisfy both prongs of the *Strickland* test in order to prevail on her claim of ineffective assistance of appellate counsel."). Under *Strickland*, a petitioner must show both (1) deficient performance, by demonstrating that counsel's conduct was objectively unreasonable, and (2) resulting prejudice, by demonstrating a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 687–89. We recognize that "[a] court considering a claim of ineffective assistance of counsel must apply a 'strong presumption' that counsel's representation was within the 'wide range' of reasonable professional assistance." *Harrington v. Richter*, 562 U.S. 86 (2011) (quoting *Strickland*, 466 U.S. at 689).

Id. at 203–04.

The OCCA observed that Mr. Gravitt could not prevail on his ineffective assistance of *appellate* counsel claim unless he demonstrated his *trial* counsel was ineffective. *Id.* at 206 (noting the trial court concluded "there could be no relief based on [Mr.] Gravitt's ineffective assistance of appellate counsel claim if the underlying claim of ineffective assistance of trial counsel had no merit"); *see also id.* at 201–03 (stating "[i]n a most thorough and complete order . . . , [the trial court] denied [Mr.] Gravitt's request for relief"; summarizing the trial court's reasoning; and concluding "[w]e agree"). The OCCA concluded he failed to make that showing. The court agreed with the trial court that Mr. Gravitt had "failed to show that [Mr.] Foster's actions were unreasonable in light of the facts and circumstances of the case, including the trial testimony regarding [Mr.] Gravitt's intoxication and [Mr.] Foster's experience in presenting this defense on numerous occasions." *Id.*; *see also id.* at 201–03. Because Mr. Gravitt failed to show his trial counsel performed deficiently, the OCCA denied Mr. Gravitt's ineffective assistance of appellate counsel claim.

2. Federal District Court Proceedings

Mr. Gravitt filed a 28 U.S.C. § 2254 habeas application asserting an ineffective assistance of appellate counsel claim.[5] The assigned magistrate judge recommended that the application be denied. Mr. Gravitt timely filed objections.

[5] Mr. Gravitt also brought claims based on (1) the Oklahoma trial court's refusal to instruct the jury on the defense of voluntary intoxication, and (2) cumulative error. He seeks a COA from this court, however, only on the ground of ineffective assistance of appellate counsel.

The district court adopted the magistrate judge's recommendation, and it denied a COA in the same order. In denying Mr. Gravitt's application, the district court reasoned, *inter alia*, that "at the time of Mr. Gravitt's trial, it was not a requirement that counsel obtain expert testimony evidence when putting on a voluntary intoxication defense." *Id.* at 269 (citing *Jackson v. State*, 964 P.2d 875, 892 (Okla. Crim. App. 1998)). Relatedly, the district court cited Mr. Foster's testimony that he had previously obtained voluntary-intoxication instructions in cases where he had not presented an expert and that he "believed the other [trial] evidence was enough to pursue the defense of voluntary intoxication." *Id*.

The district court accordingly concluded "the OCCA's determination—that Mr. Foster employed reasonable trial strategy in choosing not to retain an expert—was not contrary to, nor an unreasonable application of[,] *Strickland*." *Id.* The district court entered judgment dismissing Mr. Gravitt's application by separate order the same day. Mr. Gravitt timely filed the instant request for a COA.

II. DISCUSSION

Mr. Gravitt seeks a COA on the ground that his appellate counsel in his direct appeal provided ineffective assistance of counsel. We begin by setting forth the standards applicable to the COA inquiry. Next, we summarize the general legal standards pertaining to ineffective assistance of counsel claims. Finally, we apply these standards to Mr. Gravitt's claim. We hold no reasonable jurist could disagree with the district court's conclusion that the OCCA's denial of Mr. Gravitt's ineffective assistance of appellate counsel claim was not contrary to, nor an

unreasonable application of, Supreme Court precedent. We therefore deny Mr. Gravitt a COA.

A. Certificate of Appealability

Without a COA, we do not possess jurisdiction to review the denial of a petition for a writ of habeas corpus. *Miller-El v. Cockrell*, 537 U.S. 322, 335–36 (2003). Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a COA "may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "The COA inquiry . . . is not coextensive with a merits analysis." *Buck v. Davis*, 137 S. Ct. 759, 773 (2017). Rather, "[a]t the COA stage, the only question is whether the applicant has shown that 'jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.'" *Id.* (quoting *Miller-El*, 537 U.S. at 327).

When a state prisoner challenges his conviction, and the asserted grounds for relief have been adjudicated on their merits by a state court, we must incorporate AEDPA deference into our COA inquiry. *See Dockins v. Hines*, 374 F.3d 935, 938 (10th Cir. 2004). Under AEDPA, a federal district court cannot grant habeas relief on a claim the state court has adjudicated on the merits unless the state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254(d)(1), or "was based on an unreasonable determination of the facts in light of

the evidence presented in the State court proceeding," *id.* § 2254(d)(2). When the district court has denied habeas relief because the petitioner failed to overcome AEDPA, our COA decision requires us to determine whether reasonable jurists could debate the district court's application of AEDPA to the state court's decision. *See Miller-El*, 537 U.S. at 336.

B. General Legal Standards Regarding Ineffective Assistance of Counsel

Mr. Gravitt asserts he received ineffective assistance of appellate counsel. The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend. VI. The Supreme Court has held "the right to counsel is the right to the effective assistance of counsel." *Strickland*, 466 U.S. at 686 (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970)). The Due Process Clause of the Fourteenth Amendment guarantees criminal defendants the right to effective assistance of counsel on their first appeal as of right. *Evitts v. Lucey*, 469 U.S. 387, 396–97 (1985).

"We review claims of ineffective assistance of counsel according to the two-pronged test in [*Strickland*]." *United States v. Barrett*, 985 F.3d 1203, 1221 (10th Cir. 2021) (alteration in original) (quotation marks omitted). "Under this test, the defendant must show [(1)] that his counsel's performance 'fell below an objective standard of reasonableness,' and [(2)] that the deficient performance resulted in prejudice." *Id.* (quoting *Strickland*, 466 U.S. at 688). "Courts are free to address these two prongs in any order, and failure under either is dispositive." *United States v. Holloway*, 939 F.3d 1088, 1102 (10th Cir. 2019) (quotation marks omitted); *see also*

Robbins, 528 U.S. at 289 (holding the defendant "must satisfy both prongs of the *Strickland* test in order to prevail on his claim of ineffective assistance of appellate counsel").

"To establish deficient performance, 'the defendant must show that counsel's representation fell below an objective standard of reasonableness.'" *Smith v. Sharp*, 935 F.3d 1064, 1089 (10th Cir. 2019) (quoting *Strickland*, 466 U.S. at 688), *cert. denied*, 141 S. Ct. 186 (2020). Courts must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Strickland,* 466 U.S. at 689 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)). In *Wiggins v. Smith*, the Supreme Court explained that where counsel's "strategic choices [are] made after less than complete investigation," they "'are reasonable' only to the extent that 'reasonable professional judgments support the limitations on investigation.'" 539 U.S. 510, 526 (2003) (quoting *Strickland*, 466 U.S. at 690–691); *see also Strickland*, 466 U.S. at 690 ("In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments."). "An [ineffective assistance of counsel] claim premised on a lack of investigation is governed by the same *Strickland* standards as all other [ineffective assistance of counsel] claims." *Davis*, 943 F.3d at 1299–300 (citing *Rompilla v. Beard*, 545 U.S. 374, 380–81 (2005)).

C. Analysis

Mr. Gravitt argues Ms. Miller, his appellate counsel, was ineffective because she did not argue his *trial* counsel was ineffective for failing to present expert testimony that Mr. Gravitt's intoxication prevented him from forming the intent necessary for conviction on two of his counts. Mr. Gravitt agrees with the district court and the OCCA that, because his ineffective assistance of appellate counsel claim turns on the merits of his trial counsel's performance, "disposition of the ineffective assistance of trial counsel claim will resolve the ineffective assistance of appellate counsel claim." Aplt. Br. at 26; *see also Davis v. Sharp*, 943 F.3d 1290, 1299 (10th Cir. 2019) ("[A]ppellate [ineffective assistance of counsel] claims premised on the failure to raise an issue on appeal turn largely on the merits of the issue not raised."), *cert. denied*, 141 S. Ct. 452 (2020); *Hooks v. Ward*, 184 F.3d 1206, 1221 (10th Cir. 1999) (noting that with a claim of ineffective assistance of appellate counsel for failure to raise an issue, courts "look to the merits of the omitted issue").

The district court held the "OCCA's determination—that Mr. Foster employed reasonable trial strategy in choosing not to retain an expert—was not contrary to, nor an unreasonable application of," Supreme Court precedent. App. Vol. 2 at 269. We conclude no reasonable jurist could debate the district court's holding regarding Mr. Gravitt's trial counsel, and our conclusion as to this issue disposes of Mr. Gravitt's ineffective assistance of appellate counsel claim. We therefore deny him a COA.

Mr. Gravitt offers several arguments in support of his contention that jurists of reason could debate whether Mr. Foster's performance was objectively reasonable under the circumstances of his case. None is persuasive.

Mr. Gravitt first argues reasonable counsel should have known that, under Oklahoma law, expert testimony was required to receive a voluntary-intoxication jury instruction. Specifically, he notes that in *Malone v. State*, a defense expert "testified that he did not think [the defendant] could have formed the intent to commit first-degree murder," and the trial judge gave a voluntary-intoxication jury instruction. 168 P.3d 185, 195 (Okla. Crim. App. 2007). Conversely, in *Cuesta-Rodriguez v. State*, no expert testified, and the OCCA held the trial court did not abuse its discretion by denying the defendant's request for such an instruction, reasoning the evidence did "not rise to the level of making a prima facie showing that [the defendant] was so intoxicated that he was incapable of forming criminal intent." 241 P.3d 214, 224 (Okla. Crim. App. 2010). Mr. Gravitt points out that "[t]he 'losing' *Cuesta* decision and 'winning' *Malone* case were both available to" Mr. Foster before trial, and Mr. Gravitt argues Mr. Foster's "failure to understand he had the same 'no expert' deficiency as *Cuesta*" constituted deficient performance. Aplt. Br. at 27–28.

Contrary to Mr. Gravitt's assertions, *Malone* and *Cuesta-Rodriguez* do not establish that Oklahoma law requires an expert to secure a voluntary-intoxication jury instruction. In neither case did the OCCA hold that expert testimony was necessary, and indeed the court has suggested the opposite. In *Malone*, for example, the court explained:

> Voluntary intoxication instructions should be given when evidence has been introduced at trial that is adequate to raise that defense, i.e., to establish a prima facie case of voluntary intoxication, as that defense is defined under our law. As we have emphasized in the past and in regard to other affirmative defenses, "*[t]he evidence of the defense may come from any source*."

168 P.3d at 196–97 (emphasis added) (footnotes omitted) (quoting *Jackson*, 964 P.2d at 892). In Mr. Gravitt's case, the OCCA, on direct appeal, again repeated this standard, stating "[t]he test for whether sufficient evidence has been introduced to instruct the jury on voluntary intoxication is whether the evidence establishes a *prima facie* case of voluntary intoxication as defined by law." App. Vol. 1 at 83. And it repeated the principle that "[t]he evidence may come from *any source*." *Id.* (emphasis added). Thus, under Oklahoma law, the standard for whether sufficient evidence has been introduced to instruct the jury on voluntary intoxication is whether the evidence establishes a *prima facie* case of voluntary intoxication, and this evidence may come from *any* source—an expert is not required. Mr. Gravitt's contrary assertion is further belied by the fact that Mr. Foster has secured such an instruction in previous cases, without the use of an expert. *See* App. Vol. 4 at 106 ("Q: Have you had cases where voluntary intoxication was the defense, where the instruction was given without an expert being presented? A: Yes.").

If an expert were indeed necessary to secure a voluntary-intoxication jury instruction under Oklahoma law, resolution of Mr. Gravitt's request for a COA would be more straightforward. This court has held counsel performs deficiently under *Strickland* where he fails to call an expert despite asserting a defense that the state

courts have held requires expert testimony. *See Paine v. Massie*, 339 F.3d 1194, 1202 (10th Cir. 2003) (holding that counsel was ineffective for failing to call an expert on battered woman syndrome because "the professional standard in Oklahoma for an attorney representing a battered woman claiming self-defense" requires counsel, under the state's caselaw, to "put on an expert to explain [battered woman syndrome] to the jury"). As discussed above, however, no such requirement exists under Oklahoma law with respect to the defense of voluntary intoxication.

Mr. Gravitt makes an additional argument based on Mr. Foster's purported ignorance of Oklahoma law. He contends that "[e]ven prior to *Malone* and *Cuesta-Rodriguez*," Mr. Foster's "performance obligation" was set in *Fitzgerald v. State*, 972 P.3d 1157, 1169 (1998), where "the OCCA established the Oklahoma standard that expert testimony is required to explain technical facts that are beyond the knowledge of an ordinary layman." Aplt. Br. at 28–29.

Although Mr. Gravitt emphasizes the jury possessed merely "layman . . . knowledge" and therefore would not know precisely how the substances Mr. Gravitt ingested, in the quantities he ingested them, would affect his mind, Aplt. Br. at 33, 36, reasonable counsel could conclude that even laymen would know that heroin, Xanax, and alcohol are serious intoxicants when taken in combination and in large quantities. Furthermore, the jury was presented with: (1) the video of Mr. Gravitt's interview following his arrest, in which he "has difficulty staying awake, difficulty recalling the details of that night[,] and his speech was noticeably slurred," App. Vol. 1 at 205; (2) Ms. Webber's testimony that he "smelled of alcohol, had beet-red eyes,

she believed him to be intoxicated," and at one point "was concerned he had passed out," Aplt. Br. at 6; (3) Mr. Davis's testimony that he believed Mr. Gravitt to be intoxicated; (4) Officer Duncan's testimony that "he believed Mr. Gravitt was 'on something' and that he had a crazed look in his eyes, App. Vol. 1 at 205; (5) Mr. Gravitt's and his girlfriend's consistent testimony about their drug consumption; and (6) Mr. Gravitt's further testimony that he "had no memory of what happened" due to his drug consumption, Aplt. Br. at 10. Under these circumstances, Mr. Foster's decision not to call an expert to testify about the effect of Mr. Gravitt's intoxication on his mental state was not objectively unreasonable.[6]

Finally, Mr. Gravitt argues the OCCA unreasonably applied Supreme Court precedent holding that "'strategic choices made after less than complete investigation are reasonable' only to the extent that 'reasonable professional judgments support the limitations on investigation.'" *Id.* at 31 (quoting *Wiggins v. Smith*, 123 S. Ct. 2527, 2637 (2003)).[7] He claims Mr. Foster's "pretrial investigation did not reflect

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[6] Mr. Gravitt also argues that this court's decisions in *Paine v. Massie*, 339 F.3d 1194 (10th Cir. 2003), and *Dunn v. Roberts*, 963 F.2d 308 (10th Cir. 1992), "demonstrate Mr. Foster's pre-trial decision to rely on unknown layman juror[s'] knowledge" to determine the effect of Xanax and heroin on Mr. Gravitt's brain "was objectively unreasonable." Aplt. Br. at 32–33. *Paine* and *Dunn* involved battered woman's syndrome, however, not drug consumption. These cases do not demonstrate that the OCCA unreasonably applied Supreme Court precedent in concluding that Mr. Foster was not deficient in failing to retain an expert under the quite different circumstances of Mr. Gravitt's case.

[7] Mr. Gravitt cites the Supreme Court's decisions in *Sears v. Upton*, 561 U.S. 945 (2010), and *Rompilla v. Beard*, 545 U.S. 374 (2005), for the same proposition as he cites *Wiggins v. Smith*, 123 S. Ct. 2527 (2003). *See* Aplt. Br. at 31–32 (citing *Sears*, 561 U.S. at 954, for the proposition that "the Supreme Court has rejected any

reasonable professional judgment" and was "not 'informed'" because his pretrial reasoning consisted of deciding to merely "let the layman jury figure [the case] out for themselves, from their own experiences with drug addiction, from watching TV[,] or reading a book." *Id.*; *see also id.* at 45 (asserting "Mr. Foster . . . chose to rely [on] jurors watching television, books[,] and family members to explain how the dosage of Xanax and heroin affected [Mr. Gravitt's] brain.").

Mr. Gravitt misstates the record. Mr. Foster's decision not to retain an expert was not based simply on a determination that the jury could figure the case out for themselves based on television, books, or their own experiences. Rather, as the OCCA noted, and as discussed above, Mr. Foster believed the considerable evidence presented at trial would be sufficient to support a voluntary-intoxication defense. *See* App. Vol. 4 at 114 ("Q: What about the evidence at trial was there that would make the jury be able to determine that it was impossible for Mr. Gravitt to form intent based on the ingestion of those drugs? A: His own testimony. The fact that he was suffering from a blackout and had no recollection of the events . . . and then the corroboration from all the witnesses that testified that he was intoxicated to varying degrees throughout the evening and was still intoxicated after the fact."). And this judgment was in turn based on his extensive experience as a defense attorney, experience that included securing a

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suggestion counsel's decision was 'justified by a tactical decision' when counsel did not 'fulfill their obligation to conduct a thorough investigation,'" and citing *Rompilla*, 545 U.S. at 395–96 (O'Connor, J., concurring), for its statement that counsel's "failure to investigate and discover evidence 'was the result of inattention, not reasoned strategic judgment'"). We therefore need not engage in a separate analysis of Mr. Gravitt's arguments with regard to this precedent.

voluntary-intoxication jury instruction in similar cases in which he did not introduce an expert. *See id.* at 106 (Mr. Foster's testimony that he had secured voluntary-intoxication jury instructions in previous cases in which he had not introduced an expert).

In sum, reasonable jurists could not conclude the OCCA unreasonably applied Supreme Court precedent in holding Mr. Foster's performance was not "unreasonable in light of the facts and circumstances of the case, including the testimony regarding [Mr.] Gravitt's intoxication and [Mr.] Foster's experience in presenting this defense on numerous occasions." App. Vol. 1 at 206. Accordingly, neither could a reasonable jurist conclude Ms. Miller's failure to raise an ineffective assistance of trial counsel claim on direct appeal was deficient. *See Davis*, 943 F.3d at 1299–300; *Hooks*, 184 F.3d at 1221. Because we conclude jurists of reason could not debate the district court's denial of Mr. Gravitt's ineffective assistance of counsel claim based on *Strickland*'s performance prong, we need not reach the prejudice prong. *See, e.g.*, *Robbins*, 528 U.S. at 289 (holding the defendant "must satisfy *both* prongs of the *Strickland* test in order to prevail on his claim of ineffective assistance of appellate counsel" (emphasis added)).

III. CONCLUSION

For the foregoing reasons, we **DENY** Mr. Gravitt's request for a COA and **DISMISS** this matter.

Entered for the Court

Carolyn B. McHugh
Circuit Judge