NO. 1008970

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

TUCKER KAHLER,

Petitioner.

ON DISCRETIONARY REVIEW FROM
THE COURT OF APEALS, DIVISION II
Court of Appeals No. 54942-5-II
Clallam County Superior Court No. 19-1-00419-05

ANSWER TO PETITION FOR REVIEW

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I. IDENTITY OF RESPONDENT

The respondent is the State of Washington. The answer is filed by Clallam County Deputy Prosecuting Attorney Jesse Espinoza.

II. COURT OF APPEALS DECISION

The State respectfully requests this Court to deny review of the Court of Appeals decision in *State v. Kahler*, No. 54942-5-II (Mar. 8, 2022), a copy of which is attached to the petition for review.[1]

On appeal, Kahler argued that his counsel's performance was ineffective because counsel decided not "to present evidence from defense counsel's own Facebook page that could have corroborated Kahler's testimony that N.T.'s Facebook profile said she was 18." *Id.* at 3.

[1] *See also State v. Kahler*, 2022 WL 683133, at *1 (Wn. App. Div. 2, 2022).

Kahler argues this decision was defective because N.T.'s Facebook profile as shown on counsel's Facebook page on the day of trial could have reasonably convinced the jury that N.T.'s purported age of 18 on her Facebook profile was publicly viewable and was thus viewed by Kahler prior to the charged incident about a year prior to the trial. Kahler argues that defense counsel's Facebook page as seen on counsel's own phone corroborated his testimony that he saw N.T.'s Facebook profile stating that her age was 18 prior to the incident a year earlier. Kahler argues that there was a reasonable probability that this evidence could have convinced the jury that Kahler reasonably believed that N.T. was 18 when he had sexual intercourse with her based upon what he claimed to see on N.T.'s Facebook profile.

The Court of Appeals, Division II, in conformity with well-established principles held that Kahler's claim of ineffective assistance of counsel failed because trial counsel's decision to not introduce evidence related to his own Facebook

page appeared to be to be a legitimate trial strategy resulting immediately from a last minute conversation with Kahler. *State v. Kahler*, 2022 WL 683133, at *3 (Wn. App. Div. 2, 2022).

The Court of Appeals also held that even if counsel's performance was deficient, Kahler still failed to show prejudice for three reasons. *Id.* at *3.

First, pointing out that "Facebook privacy settings are changeable," the probative value of defense counsel's Facebook page the day of trial was low because "it would have only shown that N.T.'s birthdate was publicly viewable at the time of the trial" rather than on the day Kahler claimed to have seen the profile a year prior. *Id.*

Second, there were other sources of information from which the jury could evaluate the reasonableness of Kahler's purported belief that N.T. was eighteen especially because "N.T. testified in the courtroom where the jury was able to directly observe her." *Id.*

Third, defense counsel appropriately minimized the importance of the State's Facebook exhibit. This exhibit was a screenshot taken the day of the trial from Detective Arand's cell phone that showed that N.T.'s date of birth on her Facebook profile was not visible on his Facebook page. The *Kahler* Court found that defense counsel minimized this evidence by "soliciting and emphasizing testimony that it did not establish what was publicly viewable at the time of the incident." *Id.* at *3.

III. COUNTERSTATEMENT OF THE ISSUES

1. The Court of Appeals determined that the facts on record show that counsel's change of direction decision, immediately following a private conversation with his client, to not introduce counsel's Facebook page on his own phone as it existed on the day of trial could be characterized as a legitimate trial strategy.

   Should this Court should decline to accept review because the petition fails to establish that the Court of

Appeal's decision regarding Kahler's claim of ineffective assistance is inconsistent with established case law or involves a novel issue such that it presents a significant question of law under the state and federal constitutions?

IV. STATEMENT OF THE CASE

The State charged Kahler with Rape in the Second Degree with forcible compulsion and Rape in the Third Degree alleging that Kahler raped N.T. on July, 21, 2019 when she was between 14 and 16 years old. CP 107–08, 109–12. Kahler was brought to trial about a year after the incident and on Aug. 6, 2020 the jury found Kahler guilty of Count II, Rape in the Third Degree, but not guilty of Count 1, Rape in the Second Degree. RP 74–75.

N.T. was 14 years old in July 2019 and in between her eighth and ninth grade school years when she was approached by Kahler in a Walmart store in Sequim, Washington. RP 273, 275–76. N.T. was with her Grandma, Ms. Baublits, but at the time when Kahler approached her, Baublits was on the other

side of the door talking with someone else while N.T. was standing alone by the carts by the entrance near the garden center. RP 276.

Kahler somehow bumped into N.T. as she was talking on her Grandma's phone. RP 277. N.T. said sorry and continued talking on her Grandma's phone when Kahler asked her for her phone number. RP 277. N.T. gave Kahler her Grandma's phone number because she did not have a phone of her own. RP 277. Kahler asked N.T. when she could meet up with him. RP 283. N.T. told him that she could sneak out that night. RP 283. The two made plans to meet that night. RP 283. N.T. testified that when Kahler first asked for her phone number he also asked her how old she was. RP 283. N.T. told Kahler that she was 14 years old. RP 283.

The brief conversation ended when N.T.'s Grandma came back and Kahler left. RP 278. N.T. testified that she and her Grandma left soon after. RP 277. Kahler did not introduce himself or speak to N.T.'s Grandma; he simply left when she

returned. RP 278. Kahler texted N.T. on her Grandma's phone using Facebook Messenger a few minutes after she left the store with her Grandma. RP 278. Kahler contacted her on Facebook Messenger because N.T. told him it would work easier for her. RP 279.

N.T. stated that Kahler never sent her a friend request and Kahler himself did not seem to have a Facebook profile but one wasn't needed for them to communicate with Facebook Messenger. RP 280–81.

N.T. explained that Facebook has a few security settings. RP 282. The "Friends" security setting would only let N.T.'s friends to see her posts. RP 282. The "Friends of Friends" setting would let N.T.'s friends and their friends to see N.T.'s posts. RP 282. Then the "public" setting allows any member of the public to see N.T.'s posts. RP 282.

Later that night, N.T. called Kahler around 11 p.m. just before she snuck out because she was going to cancel but Kahler was already there. RP 285–286. N.T. exited the back of

the house to avoid the cameras and lights in the front of the house. RP 286. Kahler gave a White Claw alcoholic beverage to N.T. when she got into his Silver Subaru. RP 287.

N.T. and Kahler decided to go to the spit known as Ediz Hook in P.A. which is a long road with water on both sides and a building with lights that could be seen at the end. RP 289. N.T. said it was her idea to go to the spit. RP 324.

Ultimately, N.T. testified that she and Kahler had sexual intercourse in the front seat and again in the back seat. RP 295–298. Kahler's defense at trial was reasonable mistake of age, that N.T. was at least 16 years of age or was less than 48 months younger than Kahler based on representations by N.T. CP 93.

At trial, N.T. identified State's Ex. 13 as containing information from her Facebook profile showing her date of birth to be December 30, 2000. RP 309. N.T. explained that she used that date because she was told not to use her real birth date on social media and she never changed it because she forgot

about it. RP 309. N.T., without stating what her security settings actually are, testified that State's Ex. 13 shows her security settings and she has never changed them because she doesn't use Facebook although she uses Facebook Messenger. RP 310.

On cross examination, defense counsel asked N.T. "Okay and is it fair to say that if somebody looked you up, that based on the information that you gave, that your age would have been 18 at that time?" RP 321. N.T. responded "Yes." RP 321.

Kahler maintained during his jury trial that the day he met N.T. at the Walmart in Sequim. RP 483. According to Kahler, N.T. walked past him and then came back and started talking to him. RP 484. Kahler told N.T. that she was cute and he asked her for her phone number. RP 485. Kahler also asked her how old she was and Kahler claims N.T. told him she was 18 years of age. RP 485. N.T. gave Kahler her phone number and then Kahler went to a coffee shop where he texted her and

they arranged to get together at 9:30 p.m. RP 487. N.T. told Kahler to use Facebook Messenger to contact her. RP 488.

Kahler testified that he looked at N.T.'s profile and her age and testified that it said "eighteen" in bold brackets. RP 492. Then when asked about the specific date of N.T.'s birth as shown on N.T.'s profile Kahler then corrected himself and testified that he believed N.T.'s profile stated her birthdate as 2000, December 30. RP 492. Kahler also said that the information was all public. RP 492. It was also Kahler's opinion that N.T. looked to be 18 years old. RP 493.

Kahler admitted to having sexual intercourse twice with N.T. in his car at Ediz Hook that very night. RP 504–05. Kahler was 26 years old during the charged incident and 27 years old when he testified. RP 508.

During the trial, the State called upon two law enforcement witnesses that examined N.T.'s Facebook account. N.T. gave her Facebook credentials to Detective Ordona, Port Angeles Police Dept. so that Ordona could log into N.T.'s

Facebook account with her permission. RP 401. Ordona logged into N.T.'s Facebook account and looked at N.T.'s profile information and took screenshots that show N.T.'s profile information and her privacy settings which show who has access to that information. RP 401. Ordona testified that in order to view N.T.'s privacy settings, he was logged into N.T.'s account with her permission and had to go into her privacy settings. RP 401, 402, 404.

Ordona's screenshot of N.T.'s Facebook privacy settings was admitted in evidence as State's Ex. 13. RP 404. Exhibit 13 shows N.T.'s relationship status and hometown was available to the public but the security setting for her date of birth was set to *friends of friends*. *See* State's Ex. 13; RP 405. When defense counsel asked Ordona whether he knew if N.T.'s date of birth was ever public in the past, Ordona testified that he didn't know. RP 405. More specifically, Ordona did not know if her personal information was public or private on July 21, 2019. RP 405.

On rebuttal, Port Angeles Police Dept. Detective Arand testified that he was familiar with Facebook and had access to a Facebook account. RP 528. Earlier that same day on Aug. 5, 2020 before testifying, Det. Arand looked up N.T.'s profile and took a screenshot, State's Ex. 39, showing that N.T.'s date of birth was not visible. RP 437, 530. Det. Arand testified that he was not N.T.'s friend or friend of a friend on Facebook. RP 530.

That same day during the trial, defense counsel claimed that he also looked up N.T.'s profile and it did show her date of birth. RP 537. Defense counsel maintained that he was not a friend of N.T.'s and not a friend of a friend as the display on the page does not show any mutual friends. RP 537. Defense counsel maintained that this has always been the case, that he could see N.T.'s date of birth, since the day he was assigned to the case which was on Jan. 24, 2020. RP 537; Supp. Designation of CP sub no. 28, Order Appointing Attorney.

Defense counsel made an offer of proof with Det. Arand on the stand showing that Det. Arand could testify that he saw defense counsel's Facebook account and that he could see N.T.'s age in her Facebook profile. RP 533–32.

With Det. Arand on the stand, defense counsel had Det. Arand search counsel's Facebook account on counsel's phone to see if N.T.'s name was listed as a friend and according to Det. Arand, N.T. was not listed as a friend of defense counsel. RP 534–35. "Although Detective Arand did not confirm that defense counsel did not have mutual friends with N.T., defense counsel stated twice that he did not." *Kahler*, at *1.

Defense counsel then had Det. Arand use Det. Arand's phone to do the same search which resulted in no personal information being visible for N.T. RP 537.

The court was going to allow defense counsel to examine Det. Arand about being able to see N.T.'s age in her Facebook profile on counsel's phone. RP 538. The court suggested that

defense counsel could ask Det. Arand questions and ask him to get into counsel's Facebook account. RP 538.

Defense counsel then admitted that he was becoming more uncomfortable about asking Det. Arand about being able to see N.T.'s age on her profile on counsel's own phone. RP 543. Defense counsel was of the belief that something was off and had to have happened to allow him to see N.T.'s age on his own Facebook account but N.T.'s age did not appear in Det. Arand's account. RP 543. Counsel also suggested he could just ask Det. Arand if he had looked at any other Facebook accounts and whether he was able to see N.T.'s date of birth. RP 542. The trial court was going to be fine with that suggestion. RP 542.

Then defense counsel, confused how his account would show N.T.'s age but Det. Arand's didn't, stated that he just checked again to make sure that he and N.T. did not have friends in common and stated, "but we have no friends in common that I could see." RP 542. Kahler interjected and asked

if he could speak to his attorney. RP 543. Kahler and defense counsel spoke privately in a jury room and when they came out counsel stated, "Okay, Your Honor, what I am going to do is just cross examine Detective Arand on that and I can see all kinds of problems with me trying to introduce my own Facebook page." RP 543.

The court pointed out that Detective Ordona was already on record saying that he had looked at N.T.'s profile but could only do it one point in time. RP 543. Defense counsel responded, "Exactly and that's really what we're gonna be arguing. I think that makes more sense, because I just don't, the more I thought about it, I just don't feel comfortable with this because something is just - - I just looked, I don't see that we have any mutual friends in common, but something had to have happened to where I could see it and Detective Arand can't . . . ." RP 543–44.

The trial proceeded and defense counsel cross examined Det. Arand asking if the screenshot of N.T.'s Facebook profile

(State's Ex. 39) was taken that very morning. RP 544. Det. Arand replied that was correct. RP 544. Defense counsel then asked, "So, the fact that you cannot see her birth date really only means that today you can't see it?" RP 544. Det. Arand responded that counsel was correct. RP 544. Det. Arand admitted that he didn't know what N.T.'s Facebook security settings were in the past and that he didn't know whether N.T.'s date of birth was visible on July 21, 2019. RP 544.

The jury found Kahler guilty of Count II, Rape in the Third Degree but returned a verdict of not guilty for Count I, Rape in the Second Degree. CP 74–75.

V. ARGUMENT

A. THE PETITION FOR REVIEW FAILS TO ESTABLISH ANY OF THE CRITERIA GOVERNING THIS COURT'S ACCEPTANCE OF REVIEW.

RAP 13.4(b) sets forth the considerations governing this Court's acceptance of review:

A petition for review will be accepted by the Supreme Court only:

> If the decision of the Court of Appeals is in conflict with a decision by the Supreme Court; or
>
> If the decision of the Court of Appeals is in conflict with a decision of another division of the Court of Appeals; or
>
> If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
>
> If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

1. **The petition should be denied because the Court of Appeals decision finding that Kahler's ineffective assistance claim failed is consistent with well-settled case law and therefore does not present a significant question of law involving the state or federal constitutions.**

The petitioner claims that the Court of Appeals decision regarding Kahler's ineffective assistance of counsel claim involves a significant question of law under the state and federal constitutions. The petitioner's argument fails because the Court of Appeals decision was consistent with well-established case law regarding ineffective assistance and does not present any new question of law.

A defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the U.S. Constitution and article I, section 22 of the Washington Constitution. *State v. Grier*, 171 Wn.2d 17, 32, 246 P.3d 1260 (2011). To prevail on a claim of ineffective assistance of counsel, a defendant must show both deficient performance on the part of counsel and that the deficient performance caused prejudice to the defendant. *Id.* at 32–33.

Counsel's performance is deficient if it falls below an objective standard of reasonableness. *Id.* at 33. Courts begin with a strong presumption that counsel's performance was reasonable. *Id.*

"'When counsel's conduct can be characterized as legitimate trial strategy or tactics, performance is not deficient.'" *Id.* (quoting *State v. Kyllo*, 166 Wn.2d 856, 863, 215 P.3d 177 (2009)). A defendant may overcome this strong presumption by showing no "'conceivable legitimate tactic

explaining counsel's performance.'" *Id.* (quoting *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)).

"'The relevant question is not whether counsel's choices were strategic, but whether they were reasonable.'" *Grier*, 171 Wn.2d at 34 (quoting *Roe v. Flores–Ortega*, 528 U.S. 470, 481, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000)).

"An attorney need not pursue an investigation that would be fruitless, much less one that might be harmful to the defense." *Matter of Lui*, 188 Wn.2d 525, 548–49, 397 P.3d 90 (2017) (citing *Harrington v. Richter*, 562 U.S. 86, 108, 131 S.Ct. 770, 789 (2011)).

To establish prejudice, the defendant must show "a reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different." *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). "'A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Grier*, 171 Wn.2d at

34 (quoting citing *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 2066, 80 L.Ed.2d 674 (1984)).

Kahler claims that defense counsel's decision to not introduce evidence that N.T.'s birthdate was viewable on N.T.'s Facebook profile as seen on counsel's Facebook page in 2020 was deficient. Kahler argues that this evidence would have suggested that N.T.'s profile was publicly viewable which in turn would corroborate Kahler's testimony that in July 2019 he was able to view N.T.'s date of birth on her Facebook profile. Kahler argues this evidence would have made Kahler's testimony that he reasonably believed Kahler to be 18 years of age based on what he saw on N.T.'s Facebook profile more credible and would have changed the outcome of the trial.

This argument fails because testimony that N.T.'s Facebook profile was viewable on defense counsel's page a year after the incident or even half a year, does very little to nothing to corroborate Kahler's testimony that he saw N.T.'s date of birth on her Facebook profile showing she was 18 years

of age because the Facebook security settings are changeable. Thus, the proffered testimony would have suffered from the same defects as Detective Arand and Ordona's testimony regarding what they saw on N.T.'s Facebook profile and which was highlighted on cross examination by defense counsel.

Det. Arand testified on rebuttal that he looked at his own phone the very morning before his trial testimony and could not see N.T.'s birthdate on her Facebook profile on his own Facebook page. A screenshot of Det. Arand's phone showing that N.T.'s profile was not visible was introduced in evidence as Exhibit 39.

On cross examination, defense counsel questioned Det. Arand about whether he had any idea what N.T.'s Facebook settings were and whether her date of birth was visible on her Facebook profile a year earlier. Det. Arand admitted that he didn't know what N.T.'s Facebook security settings were in the past and that he didn't know whether N.T.'s date of birth was visible on July 21, 2019. RP 544.

The point of this cross examination is that Facebook settings are changeable, as the *Kahler* Court also pointed out. *Kahler*, 2022 WL 683133, at *3.

Thus testimony as to what those settings were during the trial on defense counsel's Facebook page do not show what the settings were a year earlier or even whether Kahler actually saw N.T.'s birthdate on her Facebook profile.

Moreover, the proffered testimony does not explain how Det. Ordona took a screen shot from *N.T.'s phone* showing that her profile was not available to the public. Ordona did this well before Mr. Myers was appointed as counsel in Jan. 2020. Like Det. Arand, Ordona also admitted on cross examination that he did not know if N.T.'s personal information was public or private on July 21, 2019. RP 405.

Thus testimony about what defense counsel could see on his phone a year later or even half a year after the incident suffers from the same problems and also would not establish what Kahler saw in July 2019. Such evidence lacks probative

value and was rendered unnecessary by the cross examination of Arand and Ordona. *See Matter of Lui*, 188 Wn.2d at 548–49; *see also* citing *Strickland v. Washington*, 466 U.S. 668, 691, 104 S.Ct. 2052, 2066, 80 L.Ed.2d 674 (1984)) ("[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.").

Moreover, the proffered testimony would have risked a more harmful result by injecting defense counsel's credibility into the trial, pitting his credibility and knowledge of Facebook against that of Detectives Arand and Ordona to try to make a point that had low probative value.

A decision to not pursue evidence that has little to no probative value while risking more harmful than helpful results is a conceivable trial strategy and was not unreasonable. Therefore, counsel's decision was not deficient.

Furthermore, there was no prejudice to Kahler because counsel established through cross examination that what Det.

Arand saw on N.T.'s Facebook profile in Aug. 2021 does not establish what was on N.T.'s Facebook profile in July 2020 because the profiles are changeable. Therefore, Detective Arand's testimony was also of very little or no probative value.

The Court of Appeals decision was consistent with established principles regarding ineffective assistance claims. In particular, courts resists finding deficient performance "[w]hen counsel's conduct can be characterized as legitimate trial strategy or tactics . . . ." *Grier*, 171 Wn.2d at 33 (quoting *Kyllo*, 166 Wn.2d at 863; and citing *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994)).

Additionally, an attorney need not pursue evidence that is not likely to yield favorable results. *Matter of Lui*, 188 Wn.2d at 549 (citing *Harrington*, 562 U.S. at 108 (citing *Strickland*, 466 U.S. at 691)).

Therefore, the Court of Appeals decision does involve a question of law involving the state and federal constitutions. This Court should deny review.

VI. CONCLUSION

The Court of Appeals decision in this case is consistent with well-settled case law unwilling to find ineffective assistance of counsel where counsel's decision could be characterized as legitimate and reasonable trial strategy. Counsel's decision appeared to be a change of course immediately after a private discussion with his client. Further, it was not an unreasonable decision considering the minimal fruits to be gained and the risks of injecting defense counsel's own credibility into the trial.

Moreover, Kahler did not establish prejudice for the same reason that the decision to not introduce evidence of counsel's own Facebook page was not deficient. Kahler's counsel established on cross examination that what Det. Arand saw on Arand's phone regarding N.T.'s Facebook profile on the morning of trial had little or no probative value toward establishing what Kahler saw on his own phone a year earlier. Thus, evidence of what defense counsel saw on his own phone

to rebut Det. Arand's testimony was not likely to fare any better.

Therefore, review of the Court of Appeals decision is not warranted under RAP 13.4(b) because Kahler has not established that "a significant question of law under the Constitution of the State of Washington or of the United States is involved." For the foregoing reasons, the State respectfully requests that the Court deny Kahler's Petition for Review.

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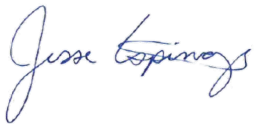
Respectfully submitted this 2nd day of June, 2022.

MARK B. NICHOLS
Prosecuting Attorney



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CERTIFICATE OF DELIVERY

Jesse Espinoza, under penalty of perjury under the laws of the State of Washington, does hereby swear or affirm that a copy of this document was forwarded electronically to Dana M. Nelson on June 2, 2022.

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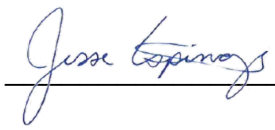

Jesse Espinoza

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