SUPREME COURT NO. 100897-0
NO. 54942-5-II

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

TUCKER KAHLER,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR CLALLAM COUNTY

The Honorable Lauren Erickson, Judge

PETITION FOR REVIEW

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RULES, STATUTES AND OTHER AUTHORITIES

A. IDENTITY OF PETITIONER

Petitioner Tucker Kahler asks this Court to review the decision of the court of appeals referred to in section B.

B. COURT OF APPEALS DECISION

Petitioner seeks review of State v. Tucker Kahler, COA No. 54942-5-II, filed on March 8, 2022, and the Order Denying Motion for Reconsideration, filed on April 5, 2002, attached as appendices A and B.

C. ISSUES PRESENTED FOR REVIEW

1. Whether petitioner received ineffective assistance of counsel where his attorney failed to elicit material exculpatory evidence corroborative of petitioner's mistake of age defense to the state's charge of third degree rape of a child?

2. Whether this Court should accept review of this significant question of law under the state and federal constitutions? RAP 13.4(b)(3).

D. STATEMENT OF THE CASE

Kahler was convicted of third degree rape of a child for having sexual intercourse with N.T. CP 74-75, 107-108. Kahler's defense was mistake of age – that he reasonably believed N.T. was at least 16 years of age. CP 93.

Kahler testified that after meeting N.T. and before they had sex, he looked her up on Facebook. RP 488. Significantly, N.T.'s profile reported her date of birth as December 30, 2000, which would have made her 18 years old at the time of the alleged offense. RP 309, 492. Kahler testified he saw this date of birth when he looked up N.T.'s Facebook page. RP 492.

N.T. acknowledged she has a fictitious birthdate listed on her profile as December 30, 2000. 309-310. However, N.T. claimed that her security settings are set so that only "friends" and "friends of friends" can see this date of birth. RP 310.

After meeting Kahler and before they had sex, N.T. also searched for Kahler on Facebook but he did not have a profile. RP 281. The state surmised that Kahler therefore could not have seen N.T.'s fictitious birthdate because – without a profile – he could not be a "friend" or a "friend of a friend." RP 528-530.

In the state's rebuttal, detective Arand testified he looked up N.T.'s Facebook page. RP 528. He was not able to see her birthdate. RP 530. He is not a "friend" or "friend of a friend" of N.T. RP 530.

The same was not true of defense counsel Stanley Myers. RP 478-79, 531-32. Outside the presence of the jury and before cross-examination of Arand, Myers told the court that ever since he was assigned the case – including up until that day of trial – he was able to see N.T.'s fictitious birthdate when he looked her up from his own profile page on Facebook. RP 531-37. And he was

not a friend of N.T.; nor did they have any friends in common. RP 537-38, 542.

Outside the jury's presence, the court allowed Myers to make an offer of proof through Detective Arand. On his phone, Myers showed Arand a Facebook profile. Arand identified it as belonging to Stan Myers. RP 533. Myers had Arand scroll through his "friends" list. RP 534. N.T. was not listed. Myers then put N.T.'s name in his search bar. Arand verified Myers had done so. RP 535. Arand also verified that the same Facebook page of N.T. appeared that he had viewed earlier in the day. RP 535. But on this occasion, N.T.'s December 2000 birthdate was visible. RP 535. In the offer of proof, defense counsel did not expressly ask Arand to confirm that defense counsel did not have mutual friends with N.T. But defense counsel twice stated that he did not. Appendix A at 3.

The trial court opined defense counsel made a sufficient offer of proof that he could likely elicit the relevant evidence on cross of Arand. RP 539 (court responding to defense counsel's concern about state's authentication objection: "I think there's probably work-arounds"); RP 539 ("But I think he's entitled to rebut this testimony and if he can figure out how to do it through Detective Arand, I'm gonna allow him to do it").

Despite the court's reassurances, Myers seemed dumbfounded as to how to get the evidence in through Arand. RP 540. Defense counsel surmised it would be better to call his investigator to elicit the evidence although she would not be back in town for a week. RP 540. The court declined that proposition. RP 540.

Myers insisted he did not know how to get around the state's objection and did not understand how the two searches (his and Arand's) could yield different results.

RP 541. The court responded counsel's concern went to weight not admissibility. RP 541.

Myers resolved: "this is a pretty big piece of evidence against him, you know. You know, perhaps I could just ask Detective Arand, have you looked at any other Facebook accounts and were you able to see the date of birth and just leave it at that." RP 542. The court and prosecutor agreed that would be fine. RP 542.

Defense counsel Myers reiterated his astonishment his search could have a different result than Arand's: "and I just checked again to make sure that we didn't have any friends in common, I don't know why we would, but we have no friends in common that I could see. So, anyway, I just don't know how that's possible." RP 542.

At this point, Kahler asked to speak to Myers privately. 543. After briefly conferring, Myers reiterated: "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 543-44.

Defense counsel never introduced the above-discussed Facebook evidence and Kahler was convicted. RP 554; CP 74-75.

On appeal, Kahler argued he received ineffective assistance of counsel when Myers failed to elicit through Arand that N.T.'s fictitious date of birth could be seen when searched from Myers' account despite the fact they are not friends and have no friends in common. Brief of Appellant (BOA) 9-14.

Kahler explained that despite Myers' concerns, the evidence would have been admissible through Arand despite the state's authentication objection. BOA at 11-12. Kahler was prejudiced by his counsel's inaction because the viewability of N.T.'s fictitious age by a non-friend or non-friend of a friend obviously would have

bolstered Kahler's testimony and mistake of age defense. BOA at 13-14.

The appellate court disagreed, reasoning counsel's decision was tactical:

> It appears from the record that defense counsel's decision not to present the evidence or ask Detective Arand about it on cross-examination can be characterized as a legitimate trial strategy. Initially, defense counsel appeared to be uncertain about whether, and how, to bring in the evidence. Then, as he was openly considering using the evidence to cross-examine Detective Arand, Kahler interrupted the conversation and asked if he could speak with defense counsel privately. After this private attorney-client conversation, defense counsel immediately informed the trial court he was *not* going to attempt to introduce his own Facebook page. It is logical to infer that defense counsel's decision not to bring in this evidence immediately following his private consultation with Kahler was "determined or substantially influenced by this discussion – supporting the inference that this was a jointly-discussed strategy, not deficient performance. See Strickland, 466 U.S. at 691.[1] Because defense counsel's decision appears to be a legitimate trial strategy resulting from a

[1] Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

> conversation with Kahler, he was not deficient for failing to present the evidence related to his Facebook page.

Appendix A at 6 (emphasis in original).

Alternatively, this Court held that even if defense counsel was ineffective, Kahler failed to show prejudice because: "the probative value of the evidence was low because it would have only shown that N.T.'s birthdate was publicly viewable at the time of the trial." Appendix A at 6.

E. REASONS WHY REVIEW SHOULD BE ACCEPTED AND ARGUMENT

1. THIS COURT SHOULD ACCEPT REVIEW OF KAHLER'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM BECAUSE IT PRESENTS A SIGNIFICANT QUESTION OF LAW UNDER THE STATE AND FEDERAL CONSTITUTIONS.

Every criminal defendant is guaranteed the right to the effective assistance of counsel under the Sixth Amendment and article I, section 22 of the Washington Constitution. Strickland v. Washington, 466 U.S. 668,

685-86, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P. 2d 816 (1987). "A claim of ineffective assistance of counsel is an issue of constitutional magnitude that may be considered for the first time on appeal." State v. Kyllo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009); see State v. Davis, 119 Wn.2d 657, 664, 835 P.2d 1039 (1992) (court reviewed defense counsel's failure to object to aggressor instruction under ineffective assistance theory).

Defense counsel is ineffective where (1) the attorney's performance was deficient and (2) the deficiency prejudiced the defendant. Strickland, 466 U.S. at 687; Thomas, 109 Wn.2d at 225-26.

Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008 (1998). Only legitimate trial strategy or tactics constitute

reasonable performance. Kyllo, 166 Wn.2d at 869. The strong presumption that defense counsel's conduct is reasonable is overcome where there is no conceivable legitimate tactic explaining the conduct. State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004).

Prejudice exists where, but for the deficient performance, there is a reasonable probability the verdict would have been different. State v. B.J.S., 140 Wn. App. 91, 100, 169 P.3d 34 (2007). A reasonable probability is a probability sufficient to undermine confidence in the outcome. Strickland, 466 U.S. at 694.

The court of appeals decision was wrong for three reasons. First, in his offer of proof, Myers informed the court he had done the same Facebook search with the same result ever since he was assigned the case. RP 537. Myers was assigned the case on January 24, 2020. Jury trial did not start until August 2020. Thus, the evidence would have shown – not just that N.T.'s fictitious birthdate

was viewable at the time of trial – but much closer to the date in question, within six months after-the-fact. Furthermore, whether Kahler could see N.T.'s fictious birthdate was a critical fact in his defense. That fact that Myers could also see it would have corroborated Kahler's testimony. Counsel's failure to elicit this tie-breaking evidence undermines confidence in the outcome. The appellate court's prejudice analysis does not withstand reasoned scrutiny.

Second, the court of appeals incorrectly concluded defense counsel's choice to forego the exculpatory Facebook evidence was tactical. Contrary to the appellate court, the record shows Myers had already made up his mind not to elicit the evidence by the time Kahler interrupted and asked to speak to him privately. If anything, the record shows Kahler interrupted because he could see the prison doors closing behind him and urgently wanted to change his attorney's mind to forego the

Facebook evidence.

Also, it is inconceivable why a defendant whose defense is mistake of age would agree as a tactical matter not to introduce available evidence that buttressed that defense. It doesn't make sense.

Regardless, even if for some inconceivable reason Kahler did not want this evidence introduced, it inevitably was defense counsel's decision. State v. Grier, 171 Wn.2d 17, 31, 246 P.3d 1260 (2011) (noting non-exhaustive list of decisions to be made by defense counsel after consultation with the defendant, such as conducting cross-examination).

In holding otherwise, the appellate court cites to Strickland, 466 U.S. at 691. There, the Court stated:

> In short, inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions, just as it may be critical to a proper assessment of counsel's other litigation decisions. See United States v.

> Decoster, supra, at 372–373, 624 F.2d, at 209–210.[2]

Strickland, 466 U.S. at 691.

But the Strickland Court's primary example related to the reasonableness of defense counsel's investigation:

> In particular, what investigation decisions are reasonable depends critically on such information. For example, when the facts that support a certain potential line of defense are generally known to counsel because of what the defendant has said, the need for further investigation may be considerably diminished or eliminated altogether. And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable.

Id.

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[2] United States v. Decoster, 199 U.S.App.D.C. 359, 371, 374–375, 624 F.2d 196, 208, 211–212 (en banc), cert. denied, 444 U.S. 944, 100 S.Ct. 302, 62 L.Ed.2d 311 (1979),

Strickland did not address the type of situation at issue here where defense counsel had exculpatory evidence in hand and chose not to elicit it. There is no legitimate tactical reason for that. And indeed, counsel had none. Myers' only concerns – as clearly evidenced by the record – were offending the detective and getting over the state's authentication objection. Both of which do not qualify as reasonable tactics.

Whether counsel's failure to present material exculpatory evidence can be consider tactical presents a significant question of law under the state and federal constitutions that should be reviewed by this Court. RAP 13.4(b)(3).

F. CONCLUSION

For the reasons stated above, this Court should accept review. RAP 13.4(b)(3).

This document contains 2,514 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Dated this May 2nd, 2022.

Respectfully submitted,

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APPENDIX A

Filed
Washington State
Court of Appeals
Division Two

March 8, 2022

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. TUCKER S. KAHLER, Appellant.	No. 54942-5-II UNPUBLISHED OPINION

PRICE, J. — Tucker Kahler appeals from his conviction of rape of a child in the third degree. He argues that defense counsel was ineffective at trial for failing to provide evidence related to the visibility of the victim's birthday on Facebook. He also argues, and the State concedes, that the trial court erred by imposing a sentence in excess of the statutory maximum and by imposing a supervision fee. We disagree with Kahler's argument as to ineffective assistance of counsel. However, we agree that the supervision fee should be stricken and that Kahler's judgment and sentence should be remanded to the trial court to correct the sentencing error.

FACTS

I. BACKGROUND

Kahler and N.T. met at a Walmart while N.T. was shopping with her grandmother. Later that day, N.T., who was 14 years old at the time, snuck out of her grandparents' house in the middle of the night to Kahler's car that was parked across the street. Kahler was 26 years old at the time.

When N.T. got into Kahler's car, he handed her a White Claw. Kahler drove N.T. to a secluded place and sexual intercourse occurred.

Kahler was subsequently charged with rape in the second degree and rape of a child in the third degree.

II. TRIAL

At trial, N.T. testified that Kahler had forced her to have sexual intercourse with him. She said that when she first met Kahler, she told him she was 14 years old. She admitted that according to the birthdate listed on her Facebook profile, she was 18, but she said that her privacy settings on Facebook were set so that only her friends and those with mutual friends with her could see this false birthdate.

Kahler testified and admitted to having sex with N.T. However, he maintained that it was consensual and that he had reasonably believed N.T. was at least age 16. These were defenses to the crimes of rape in the second degree and rape of a child in the third degree respectively. Kahler testified that N.T. had told him she was 18 when they first met. He also testified that although he did not have a Facebook account, he had looked up N.T.'s Facebook page prior to the alleged rape and the birthdate provided on her page was publicly viewable and indicated that she was 18.

In rebuttal, the State presented the testimony of Detective Dave Arand of the Port Angeles Police Department who showed a screenshot of N.T.'s Facebook profile taken that morning indicating that her birthdate was not visible to users who did not have mutual friends with N.T.

During cross-examination of Detective Arand, defense counsel asked that the jury be excused from the courtroom for an offer of proof. With the jury absent, defense counsel explained that he had viewed N.T.'s profile on Facebook using his own account and N.T.'s birthdate was

visible even though he was neither friends with N.T. nor had mutual friends with her. Defense counsel wanted to explore whether he could somehow bring in the evidence from his own Facebook page.

Continuing with his offer of proof, defense counsel then handed his phone to Detective Arand, who confirmed that defense counsel was not friends with N.T. Detective Arand looked up N.T.'s profile and confirmed that he could see her birthdate on defense counsel's phone. 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.

The parties and the trial court then engaged in a discussion regarding whether and how defense counsel could bring in evidence from his own Facebook account. Defense counsel appeared to have decided that, instead of actually presenting his own Facebook account, he was going to ask Detective Arand whether he had been able to see N.T.'s birthdate on her profile from any other accounts. At this point in the discussion, Kahler interrupted and asked to speak with defense counsel privately.

After this private discussion with Kahler, defense counsel came back and informed the trial court that he felt like there were several potential issues with bringing in evidence from his own Facebook page. Defense counsel also expressed doubts about the evidence, saying:

> 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.

2 Verbatim Report of Proceedings (VRP) at 543. After this conversation, the jury returned to the courtroom, and defense counsel continued cross-examining Detective Arand. Detective Arand confirmed that the screenshot he had presented was downloaded that morning and did not show

what might be viewable when Kahler claimed to have seen the page. Notably, defense counsel asked no questions about defense counsel's own Facebook page that had been previously discussed during the offer of proof.

The jury found Kahler not guilty of rape in the second degree with forcible compulsion but guilty of rape of a child in the third degree.[1]

III. SENTENCING

The statutory maximum penalty for Kahler was 60 months and the standard range was 36-48 months. The trial court sentenced Kahler to 48 months in prison followed by 36 months of community custody.

The trial court also found Kahler to be indigent and stated that it would not be imposing any financial obligations apart from the victim assessment penalty. However, the judgment and sentence included a provision requiring Kahler to pay supervision fees.

Kahler appeals his conviction and sentence.

ANALYSIS

I. INEFFECTIVE ASSISTANCE OF COUNSEL

A. LEGAL PRINCIPLES

The Sixth Amendment to the U.S. Constitution and article I, section 22 of the Washington Constitution guarantee a defendant the right to effective assistance of counsel. *State v. Grier*, 171 Wn.2d 17, 32, 246 P.3d 1260 (2011). Prevailing on an ineffective assistance of counsel claim

[1] The trial court's instructions to the jury included the defense's proposed instruction on the affirmative defense of mistake of age.

requires the defendant to show: (1) deficient performance and (2) 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. We engage in 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 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 reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." *Strickland v. Washington*, 466 U.S. 668, 691, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). In making a determination regarding an ineffective assistance of counsel claim, we may also consider actions and statements of the defendant which may have "given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful." *See Id.*

The prejudice prong requires the defendant to 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 *Strickland*, 466 U.S. at 694).

B. APPLICATION

Kahler maintains that defense counsel was ineffective for failing 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. We disagree.

It appears from the record that defense counsel's decision not to present the evidence or ask Detective Arand about it on cross-examination can be characterized as a legitimate trial strategy. Initially, defense counsel appeared to be uncertain about whether, and how, to bring in the evidence. Then, as he was openly considering using the evidence to cross-examine Detective Arand, Kahler interrupted the conversation and asked if he could speak with defense counsel privately. After this private attorney-client conversation, defense counsel immediately informed the trial court he was *not* going to attempt to introduce his own Facebook page. It is logical to infer that defense counsel's decision not to bring in this evidence immediately following his private consultation with Kahler was "determined or substantially influenced" by this discussion–supporting the inference that this was a jointly-discussed strategy, not deficient performance. *See Strickland*, 466 U.S. at 691. Because defense counsel's decision appears to be a legitimate trial strategy resulting from a conversation with Kahler, he was not deficient for failing to present the evidence related to his Facebook page.

Even if defense counsel was deficient for not introducing his own Facebook page into evidence, Kahler has failed to show prejudice. First, the probative value of the evidence was low because it would have only shown that N.T.'s birthdate was publicly viewable at the time of the trial. Because Facebook privacy settings are changeable, the evidence would not have established what was viewable when Kahler claimed to have looked at the profile about a year prior. 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 since N.T. testified in the courtroom where the jury was able to directly observe her. Third, defense counsel appropriately minimized the importance of the State's Facebook exhibit by soliciting and emphasizing testimony that it did not establish what was publicly viewable at the time of the incident. For these reasons, Kahler has failed to establish that he was prejudiced by defense counsel's failure to present the evidence.

II. SENTENCE

Kahler argues that the trial court erred in imposing a sentence beyond the statutory maximum. The State concedes the error. We agree.

Where a defendant's sentence includes community custody along with time in prison, the combined time of both may not exceed the statutory maximum sentence. RCW 9.94A.505(5). Where the trial court erroneously imposes a sentence in excess of the statutory maximum, we remand for the trial court to amend the community custody term. *State v. Boyd*, 174 Wn.2d 470, 473, 275 P.3d 321 (2012).

The trial court sentenced Kahler to 48 months in prison and 36 months of community custody for a total of 84 months. The statutory maximum was 60 months. Because Kahler's sentence was in excess of the statutory maximum, we remand for the trial court to reduce the community custody term consistent with the statutory maximum.

III. SUPERVISION FEES

Kahler argues that the trial court inadvertently imposed supervision fees as part of the judgment and sentence. The record shows that the State did not orally request the supervision fees and the trial court did not intend to impose them at sentencing. The trial court found Kahler

indigent and said that the only financial obligation that would be imposed was the victim assessment fee. The State concedes that the judgment and sentence should be corrected to remove the supervision fees.

Because it is evident from the record that the trial court did not intend to impose the supervision fees, we find that the inadvertent imposition of the supervision fees was a procedural error and order it stricken from the judgment and sentence. *See State v. Bowman*, 198 Wn.2d 609, 627-30, 498 P.3d 478 (2021).

CONCLUSION

In conclusion, we affirm Kahler's conviction, and remand for the trial to reduce the community custody term and order the supervision fees be stricken from the judgment and sentence.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Price, J.
PRICE, J.

We concur:

Glasgow, ACJ
GLASGOW, A.C.J.

Worswick J
WORSWICK, J.

APPENDIX B

Filed
Washington State
Court of Appeals
Division Two

April 5, 2022

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

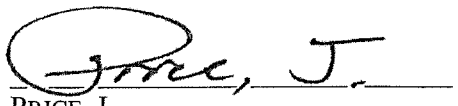
STATE OF WASHINGTON, Respondent, v. TUCKER S. KAHLER, Appellant.	No. 54942-5-II ORDER DENYING MOTION FOR RECONSIDERATION

Appellant moves for reconsideration of the unpublished opinion filed March 8, 2022, in the above entitled matter. Upon consideration, the court denies the motion. Accordingly, it is

SO ORDERED.

PANEL: Jj: GLASGOW, WORSWICK, PRICE

FOR THE COURT:



PRICE, J.

NIELSEN KOCH & GRANNIS P.L.L.C.

May 02, 2022 - 1:51 PM

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