SUPREME COURT NO. 94215-3

NO. 73703-1-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DERRICK KOLANOWSKI,

Petitioner.

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

The Honorable Roger Rogoff, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER/COURT OF APPEALS DECISION

Petitioner Derrick Kolanowski asks this Court to grant review of the court of appeals' unpublished decision in State v. Kolanowski, No. 73703-1-1, filed January 30, 2017 (appendix).

B. ISSUE PRESENTED FOR REVIEW

Was Kolanowski denied effective assistance of counsel when his trial attorney failed to authenticate extrinsic impeachment evidence, warranting this Court's review under RAP 13.4(b)(3) as a significant question of constitutional law?

C. STATEMENT OF THE CASE

On February 13, 2014, the State charged Kolanowski with one count of second degree rape. CP 1. The State alleged that on February 8, 2014, Kolanowski engaged in sexual intercourse with S.W.-H. by forcible compulsion. CP 1. On May 4, 2015, the State amended the information to add the charge of unlawful imprisonment, alleging Kolanowski knowingly restricted S.W.-H.'s movements without her consent. CP 19.

1. State's Case

S.W.-H. testified that late in the evening on February 7, 2014, her roommate's friend came over to buy marijuana. RP 764-65. The man did not identify himself and S.W.-H. had never met him before, but she "believe[d] he said his name was Dale." RP 766, 772. After she gave the

man the marijuana, he refused to leave. RP 765. S.W.-H. testified the man eventually barricaded her in the trailer, pushed her to the floor, and repeatedly tried to have sexual intercourse with her. RP 779-84.

S.W.-H. claimed the man held her down the entire time, so she did not have access to her phone and could not get to the door. RP 807-09. Phone records showed S.W.-H. did not initiate any text messages after 1:24 a.m. and all the calls she received between 1:33 a.m. and 11:43 a.m. went to voicemail. RP 1005-06.

S.W.-H.'s roommate later told her the man's name was Derrick, even though he never saw the man. RP 223. Police showed S.W.-H. a photomontage of six different people. RP 436-37. S.W.-H. thought three of the people, one of whom was Kolanowski, "kind of look[ed]" like the suspect. RP 443-48. A DNA profile recovered from the interior neckline of S.W.-H.'s sweatshirt matched Kolanowski, and was not expected to occur more frequently than one in 8600 male individuals in the U.S. population. RP 1140-42. Kolanowski was later found to have a note in his wallet that said, "Shorty for my stuff," which is S.W.-H.'s nickname. RP 195, 1031-33.

2. Defense Case

The defense was identity/alibi. Kolanowski lives with mother, Lorena Calvery, and stepfather, Michael Calvery. RP 1212, 1232-33. Michael testified Kolanowski came home late on February 7 "very

intoxicated." RP 1239. Lorena testified she got up to use the restroom in the early morning hours on February 8 and noticed Kolanowski's bedroom door was open. RP 1217-18. She went to close his door and saw him in bed asleep. RP 1218. Lorena took Kolanowski's glasses off and covered him up with a blanket. RP 1218. Lorena explained Kolanowski has worn glasses for a couple of years and does not have contacts. RP 1218. She noticed Kolanowski "smelled strongly of alcohol and cinnamon." RP 1219. He opened his eyes slightly and "they were very, very bloodshot." RP 1219.

The defense also emphasized the numerous inconsistencies in S.W.-H.'s description of the suspect. For instance, S.W.-H. testified the man was not wearing glasses, but the witnesses who knew Kolanowski testified he always wore glasses. RP 195-99, 814, 1217-18. Kolanowski is circumcised, but S.W.-H. said in a defense interview the man was uncircumcised. RP 821-23, 1213. Kolanowski also has several prominent tattoos, including a "D" above his left nipple, a large 8 ball on his left shoulder, and large stars on both sides of his abdomen. RP 1085-87; Exs. 205-12. S.W.-H. did not recall seeing any tattoos on the man, even though the lights were on and his shirt was off. RP 821-23, 869, 1053-54.

S.W.-H. also told police and testified the man did not have any facial hair. RP 277, 320, 801-02, 1053-54. When Kolanowski was arrested on February 10, he had a mustache and beard. Exs. 4-5. S.W.-H.'s description

of the man's hair color varied wildly, from black to brown to "really light." RP 320, 823-27, 1053-54. S.W.-H. also said she did not smell any alcohol on the man, though several witnesses testified Kolanowski was drinking pungent cinnamon whiskey that night. RP 199-200, 846, 1219-20.

Another key aspect of the defense case was a Facebook post S.W.-H. made at 2:49 a.m. on February 8, a time when she claimed she did not have access to her phone. RP 107-13. Pursuant to the State's motion, the trial court excluded the Facebook post because defense counsel presented no evidence authenticating or laying foundation for the timestamp. RP 114-18. The court asked, "does [the timestamp] correspond to when it gets downloaded to the server? Does it correspond to when it hits the Facebook server in California? Does it correspond to exactly when you type it in?" RP 114-15. The court explained the defense needed a witness to establish "this timestamp has some meaning and here is what the meaning is." RP 117. Without such information, the court concluded, the jury would be left to speculate. RP 114-15. The court emphasized, however, "Let's work on getting you the witness that you need from Facebook." RP 119.

The parties continued to discuss the admissibility of the Facebook post throughout trial. Defense counsel thought he needed a Facebook custodian of records to authenticate the post. RP 109-14. But on the first day of trial, May 6, 2015, the trial court ruled the Facebook post itself was

authenticated because the Facebook account belonged to S.W.-H. and the defense investigator could testify to taking the screenshot. RP 159. As for authenticating the timestamp, the court told defense counsel, "Really all that I am looking for in order to address the issue of authentication or relevance . . . is a witness who says, 'This is how the posting date time works, generally.'" RP 298.

On May 12, the court reiterated the authenticating witness only needed to have "some expertise in using Facebook and posting things to Facebook, and seeing how that post relates to the timing of it." RP 621. The court thought one of the detectives might be able to testify to that. RP 622. The court also noted there was a Facebook office in Seattle, but defense counsel admitted he had not subpoenaed anyone. RP 623.

During cross-examination, defense counsel asked S.W.-H. if she accessed her Facebook account at all during the incident. RP 857. She said no. RP 857. Cross-examination ended there. RP 857. The court excused S.W.-H. at the end of her testimony. RP 869. Defense counsel did not ask for her to remain in attendance. RP 869. The State rested its case on May 20. RP 1163. The defense rested on May 26. RP 1370. The defense did not put on a witness to authenticate the Facebook timestamp, so the post was never admitted.

The jury found Kolanowski guilty as charged. CP 34-35. Kolanowski appealed and challenged his attorney's failure to authenticate the Facebook timestamp. Br. of Appellant, at 16-26. The court of appeals rejected Kolanowski's argument, holding it could not "determine from this record what evidence the timestamp would have provided." Opinion, at 12. The court further held "this record does not show any unreasonable failure to gain admission of the evidence" by defense counsel. Opinion, at 12. The court accordingly concluded defense counsel's performance was not deficient. Opinion, at 12-13. The court did not reach the prejudice prong of the Strickland[1] test. Opinion, at 13.

D. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

KOLANOWSKI WAS DENIED EFFECTIVE OF ASSISTANCE OF COUNSEL BECAUSE HIS ATTORNEY FAILED TO AUTHENTICATE EXTRINSIC IMPEACHMENT EVIDENCE.

Defense counsel wanted to impeach S.W.-H.'s credibility with a Facebook post that directly contradicted her testimony. However, he inexplicably failed to obtain a witness who could authenticate the Facebook timestamp, even though the trial court gave him multiple opportunities to do so. This amounted to ineffective assistance of counsel because it was entirely to Kolanowski's detriment.

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

Every accused person enjoys the right to effective assistance of counsel. U.S. CONST. amend. VI; CONST. art. 1, § 22; Strickland, 466 U.S. at 685-86; State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). That right is violated when (1) the attorney's performance was deficient and (2) the deficiency prejudiced the accused. Strickland, 466 U.S. at 687; Thomas, 109 Wn.2d at 225-26.

Counsel's performance is deficient when it falls below an objective standard of reasonableness. Thomas, 109 Wn.2d at 226. If counsel's conduct demonstrates a legitimate trial strategy or tactic, it cannot serve as a basis for an ineffective assistance claim. Strickland, 466 U.S. at 689; State v. Yarbrough, 151 Wn. App. 66, 90, 210 P.3d 1029 (2009).

Prejudice occurs when there is a reasonable probability that but for counsel's deficiency, the result would have been different. Thomas, 109 Wn.2d at 226. The accused "need not show that counsel's deficient conduct more likely than not altered the outcome of the case." Strickland, 466 U.S. at 693. A reasonable probability is one sufficient to undermine confidence in the outcome. Thomas, 109 Wn.2d at 226.

1. Defense counsel's failure to secure an authenticating witness constituted deficient performance.

Any party may attack a witness's credibility. ER 607. Evidence offered to impeach a witness is relevant if "(1) it tends to cast doubt on the

credibility of the person being impeached, and (2) the credibility of the person being impeached is a fact of consequence to the action." State v. Allen S., 98 Wn. App. 452, 459-60, 989 P.2d 1222 (1999).

ER 613(b) allows witnesses to be impeached with extrinsic evidence of a prior inconsistent statement. The proper procedure is to first ask the witness whether she made the prior statement. State v. Babich, 68 Wn. App. 438, 443, 842 P.2d 1053 (1993). If the witness denies the prior statement, extrinsic evidence of the statement is admissible unless it concerns a collateral matter. Id. "[I]t is sufficient for the examiner to give the declarant an opportunity to explain or deny the statement, either on cross-examination or after the introduction of extrinsic evidence." State v. Horton, 116 Wn. App. 909, 916, 68 P.3d 1145 (2003) (quoting State v. Johnson, 90 Wn. App. 54, 70, 950 P.2d 981 (1998)).

Horton provides a useful analogy. There, Horton was accused of raping and molesting 13-year-old S.S. Horton, 116 Wn. App. at 911. A medical examination of S.S. revealed penetrating trauma to her hymen. Id. Before trial, S.S. told a child protective services (CPS) investigator she had been having sex with a boy. Id. at 913. Defense counsel also interviewed S.S.'s friend, who said S.S. bragged in detail about being sexually active with a boyfriend two years earlier. Id.

During cross-examination, S.S. denied having sex with anyone but Horton. Id. Defense counsel did not ask S.S. to explain or deny her inconsistent pretrial statements. Id. Nor did she ask for S.S. to remain in attendance after testifying. Id. Later, defense counsel attempted to call the CPS investigator and S.S.'s friend to relate S.S.'s prior inconsistent statements about her sexual activity. Id. at 914. The court excluded this testimony because defense counsel failed to comply with ER 613(b). Id.

The appellate court held defense counsel's failure to comply with ER 613(b) amounted to ineffective assistance. Id. at 924. Counsel wanted to impeach S.S.'s trial testimony with extrinsic witnesses. Id. at 916. Before she could do that, though, ER 613(b) required her to give S.S. an opportunity to explain or deny her prior statements by calling them to S.S.'s attention on the stand, or by arranging for S.S. to remain in attendance after testifying. Id. Nothing in the record showed why counsel failed to do so. Id. Further:

> The record shows that non-compliance with ER 613(b) was entirely to Horton's detriment; that compliance with ER 613(b) would have been only to his benefit; and thus that counsel's non-compliance could not have been a strategy or tactic designed to further his interests.

Id. at 916-17 (emphasis in original). The court held defense counsel's performance fell below an objective standard of reasonableness. Id. at 917.

Counsel's deficient performance prejudiced Horton. Id. at 922. When S.S. testified she had never had sex with anyone but Horton, she

necessarily implied Horton was the cause of the penetrating trauma to her hymen. Id. Defense counsel could have defused the implication, at least in part, by presenting evidence that S.S. made prior inconsistent statements to two different people about her sexual history. Id. "[T]he resulting void was extremely detrimental to Horton's position at trial." Id.

In reaching this conclusion, the Horton court discussed two Indiana cases where the courts reached the same result on similar facts. Id. at 922-23 (citing Ellyson v. State, 603 N.E.2d 1369 (Ind. Ct. App. 1992); Wright v. State, 581 N.E.2d 978 (Ind. Ct. App. 1991)).

For instance, Ellyson was charged with raping his estranged wife and burglarizing her home. Ellyson, 603 N.E.2d at 1371-72. Defense counsel tried, but failed, to introduce the wife's prior inconsistent statements at trial, as well as a rape kit tending to show she did not have intercourse on the night of the alleged rape. Id. at 1372-74. The appellate court held counsel was ineffective because he failed to produce the witnesses necessary to authenticate the rape kit and failed to lay the proper foundation for the wife's prior inconsistent statements. Id. at 1373-74.

Likewise, in Wright, defense counsel "blundered" by failing to lay the proper foundation for testimony that would impeach the complaining witness. 581 N.E.2d at 980. The appellate court held this constituted ineffective assistance because it "resulted in relevant and probative evidence

not being admitted." Id. This, in turn, "undermine[d] the confidence in the verdict." Id.

These cases demonstrate that defense counsel's performance falls below an objective standard of reasonableness when he or she seeks to admit relevant impeachment evidence but fails to take the necessary procedural steps for admission. This is precisely what happened here.

S.W.-H. testified she was not able to contact anyone or call for help "after he started doing what he was doing," because "I didn't have my phone. I wasn't close to my phone." RP 807. S.W.-H. further explained she could not escape the trailer because "[h]e had me held down and I couldn't." RP 809. The State introduced phone records corroborating S.W.-H.'s testimony: she did not initiate any text messages after 1:24 a.m. on February 8 and all the calls she received between 1:33 a.m. and 11:43 a.m. went to voicemail. RP 1005-06.

Contrary to all this evidence, though, defense counsel was in possession of a screenshot of a Facebook post S.W.-H. made at 2:49 a.m. on February 8, when she supposedly did not have access to her phone and could not escape the man's grasp. RP 107-13. Defense counsel wanted to impeach S.W.-H.'s testimony with this evidence because it directly contradicted several of her statements, casting doubt on her credibility. On cross, defense counsel asked S.W.-H.:

> And during this period when Dale, or the person that assaulted you came to your trailer, and when they left the following morning around 8 or 8:30 in the morning on Saturday, February 8, 2014, did you access your Facebook account at all?

RP 857. She responded, "No." RP 857. The Facebook post demonstrated this statement was false, making it admissible under ER 613(b).

However, defense counsel never produced a witness to authenticate the Facebook timestamp, so S.W.-H.'s false statement was never contradicted. The bar for authentication is very low: "evidence sufficient to support a finding that the matter in question is what its proponent claims." ER 901(a). Indeed, the court made it exceptionally clear to defense counsel that the authenticating witness only needed to have "some expertise in using Facebook and posting things to Facebook, and seeing how that post relates to the timing of it." RP 621. This simply required explanation of "how the posting date time works, generally." RP 298. Virtually anyone who uses Facebook somewhat regularly could testify to this. The court noted one of the detectives might even be able to authenticate the timestamp. RP 622. Further, there is a Facebook office located in Seattle, but defense counsel never attempted to subpoena anyone from that office. RP 623.

Defense counsel had plenty of time to secure a witness. The court initially excluded the Facebook post on May 4, 2015, for lack of authentication. RP 118. The court noted its willingness to help defense

counsel get the necessary authenticating witness. RP 119. The defense did not rest its case until May 26, over three weeks later. RP 1370.

Nothing in the record shows defense counsel's failure to call an authenticating witness was a strategic decision. "Generally, the decision to call a witness will not support a claim of ineffective assistance of counsel." Thomas, 109 Wn.2d at 230. But the presumption of competence does not apply when defense counsel clearly wanted to introduce certain evidence but blundered in doing so. See Horton, 116 Wn. App. at 916-17. For instance, in Thomas, counsel failed to conduct any investigation into a defense expert's complete lack of qualifications. 109 Wn.2d at 230. The trial court refused to allow the "expert" to testify and no other expert was called. Id. at 229. Given that an expert's testimony was important for establishing a voluntary intoxication defense, counsel's failure to investigate or call another witness constituted ineffective assistance. Id. at 230-32.

Similar to Thomas, defense counsel clearly wanted to introduce the Facebook post, discussing it time and again with the court. See, e.g., RP 151-60, 294-301, 379, 620-24, 853-54, 1098-1105, 1266-67. But he failed to take the necessary steps to ensure its admission. Towards the end of trial, the court noted if "somebody knew that they were going to try and present evidence from Facebook, perhaps there should have been a witness ready to go." RP 1267. Defense counsel did not seem to grasp that he should have

called an authenticating witness, asking, "And you say that witness should have been here, somebody from Facebook or --[?]" RP 1267. This demonstrates defense counsel did not make a strategic decision in failing to authenticate the Facebook post.

Defense counsel's failure to produce an authenticating witness was entirely to Kolanowski's detriment. The Facebook post directly contradicted S.W.-H.'s testimony and would have only benefited Kolanowski. Like in Horton, defense counsel's inexplicable failure to take the necessary procedural steps for admission "could not have been a strategy or tactic designed to further his interests." Horton, 116 Wn. App. at 916. Because defense counsel could have impeached S.W.-H.'s testimony had he produced an appropriate witness, his failure to do so constitutes deficient performance. See id. at 920.

2. Defense counsel's failure to introduce key impeachment evidence prejudiced Kolanowski.

Counsel's deficient performance prejudiced Kolanowski. The opportunity to challenge the credibility of an accuser "is of great importance," particularly when the charged crime is a sex offense. State v. Roberts, 25 Wn. App. 830, 834, 611 P.2d 1297 (1980). "In the prosecution of sex crimes, the right of cross-examination often determines the outcome." Id. This is so because, "owing to natural instincts and laudable sentiments

on the part of the jury, the usual circumstances of isolation of the parties involved at the commission of the offense and the understandable lack of objective corroborative evidence, the defendant is often disproportionately at the mercy of the complaining witness'[s] testimony." State v. Peterson, 2 Wn. App. 464, 467, 469 P.2d 980 (1970).

S.W.-H. did not know Kolanowski. RP 760. She thought the man's name was Dale. RP 766, 772. Powell informed her it was Kolanowski, but Powell never saw the man at the trailer that night. RP 223. S.W.-H.'s own identification of the man was extremely inconsistent. She could not remember his hair color. RP 320, 823-27, 1053-54. She said the man who attacked her did not have any tattoos, facial hair, or glasses, but Kolanowski had all three. RP 277, 320, 801-02, 814, 1053-54, 1217-18. S.W.-H. said the man was uncircumcised, but Kolanowski is circumcised. RP 821-23, 1213. She could not pick Kolanowski out of the photomontage. RP 443-48. She was also not sure she recognized Kolanowski in the courtroom, admitting she did not remember what the man who allegedly attacked her looked like. RP 801, 826.

These facts demonstrated S.W.-H.'s inability to recall many details of the event. They also suggested S.W.-H. was mistaken about identity. The Facebook post, however, demonstrated S.W.-H. was lying. She claimed she did not have access to her phone during the attack, yet she posted on

Facebook at 2:49 a.m. This called into question S.W.-H.'s entire story. If S.W.-H. was lying about having access to her phone, what else was she lying about? The Facebook post further undermined the State's phone records, which provided seemingly infallible direct evidence.

This is not a case of overwhelming evidence. The circumstantial evidence was conflicting. Even the DNA evidence was weak. The DNA profile from S.W.-H.'s sweatshirt that supposedly matched Kolanowski was obtained from only 25 cells and could be found in one in 8600 people in the U.S. population. RP 1141-42. In 2014, the population of King County alone was 2,079,967 people. RP 1346; CP 28. The defense needed the opportunity to undermine S.W.-H.'s credibility by demonstrating she made a false statement on the stand about having access to her phone during the alleged attack. But this opportunity was lost because defense counsel failed to produce a witness to authenticate the Facebook timestamp. There is a significant probability the outcome of the trial would have been different had that evidence been admitted.

Kolanowski's did not receive effective assistance of counsel. Because this case involves a significant question of constitutional law, this Court should grant review under RAP 13.4(b)(3), reverse, and remand for a new trial. Thomas, 109 Wn.2d at 232; Horton, 116 Wn. App. at 924.

E. CONCLUSION

For the aforementioned reasons, Kolanowski respectfully asks this Court to grant review under RAP 13.4(b)(3).

DATED this 1st day of March, 2017.

Respectfully submitted,

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Appendix

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. DERRICK ALLEN KOLANOWSKI, Appellant.	)	No. 73703-1-I DIVISION ONE UNPUBLISHED FILED: January 30, 2017

Cox, J. — Derrick Kolanowski appeals his conviction for rape and unlawful imprisonment. Because he fails in his burden to overcome the presumption that his trial counsel was effective, we reject his ineffective assistance of counsel claim. We affirm.

On the night of February 7, 2014, Kolanowski arranged through his acquaintance Tim Powell to buy marijuana from a woman named S.W.-H. Powell and S.W.-H were roommates at the time. Powell told Kolanowski to stop by the trailer where S.W.-H. and Powell lived for the sale.

Later that night, a man arrived at the trailer around 10:30 or 11:00 p.m. S.W.-H. was alone at the time. She let him in and sold him the marijuana. The man did not leave despite her repeated requests for him to do so. Instead, he sat down at a table and smoked the marijuana. He also offered to pay S.W.-H. for sex. S.W.-H. repeatedly refused.

When the man finally arose to leave, he claimed to have trouble opening the door. When S.W.-H. went to assist him, the man placed her in a chokehold and punched her when she resisted. S.W.-H. continued to struggle with the assailant. Nevertheless, he sexually assaulted her and repeated his sexual assaults overnight until sometime the next morning. He left the scene around 8:00 or 8:30 a.m. the next morning.

S.W.-H. went to the hospital that morning, where police responded to her report of the sexual assaults. Police investigated the matter, interviewing S.W.-H and others. Police also gathered evidence from the crime scene.

Based on this investigation, police arrested Kolanowski at his workplace. At the time of his arrest, he was wearing a black sweatshirt. Police seized this sweatshirt as evidence, and a crime lab tested it for DNA.

The State charged Kolanowski with rape in the second degree and unlawful imprisonment of S.W.-H., allegedly occurring on or about February 8, 2014. His primary defense at trial was identity, claiming he was elsewhere at the time of the crimes. He also maintained that the blood on his sweatshirt at the time of his arrest was due to injury at work. A jury convicted him as charged.

Kolanowski appeals.

INEFFECTIVE ASSISTANCE OF COUNSEL

Kolanowski argues that he was denied effective assistance of trial counsel on two grounds. First, he argues his counsel failed to authenticate extrinsic impeachment evidence. Second, he argues his counsel failed to object to

inadmissible DNA "match" testimony. We hold that he fails to meet his burden to show counsel was ineffective in either respect.

The Sixth Amendment to the United States Constitution guarantees a criminal defendant's right to not only counsel, but to counsel whose assistance is effective.[1] The Washington Constitution provides an analogous right in article 1, section 33.[2] The United States Supreme Court explained in Strickland v. Washington that the benchmark of this right is "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."[3]

The defendant demonstrates the ineffectiveness of his counsel by meeting a two-part burden. He must first show that counsel's performance was unreasonably ineffective and, second, that such ineffectiveness prejudiced the results of his case.[4] Because he must meet both elements, the court need not address both if either is found wanting.[5]

The defendant shows that his counsel's representation "fell below an objective standard of reasonableness" based on the relevant circumstances and the "prevailing professional norms."[6] So long as the representation was

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[1] Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

[2] State v. Benn, 120 Wn.2d 631, 663, 845 P.2d 289 (1993).

[3] 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

[4] Id. at 687.

[5] Id. at 697.

[6] Id. at 688.

reasonable, this court should neither "interfere with the constitutionally protected independence of counsel [nor] restrict the wide latitude counsel must have in making tactical decisions."[7] Thus, this court conducts this inquiry "from counsel's perspective at the time" of trial and must strongly presume that counsel's conduct was reasonably effective.[8] The defendant can overcome that presumption by showing "there is no conceivable legitimate tactic explaining counsel's performance."[9] But the defendant must show this or any other deficiency based on the record established in the proceedings below.[10]

The defendant seeking to overturn his conviction must also show a "reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt."[11] The defendant need not show that he would more likely have been acquitted than not absent the relevant error.[12] He must also show that that probability was "substantial, not just conceivable."[13] Again, he must do so based on the record below.[14]

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[7] Id. at 689.

[8] Id.; see also State v. McFarland, 127 Wn.2d 322, 337, 899 P.2d 1251 (1995).

[9] State v. Carson, 184 Wn.2d 207, 218, 357 P.3d 1064 (2015).

[10] McFarland, 127 Wn.2d at 337.

[11] Strickland, 466 U.S. at 695.

[12] Id. at 693.

[13] Harrington v. Richter, 562 U.S. 86, 112, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011).

[14] McFarland, 127 Wn.2d at 337.

Determining whether counsel provided ineffective assistance is a mixed question of law and fact.[15] We review de novo whether a defendant received ineffective assistance of counsel.[16]

Authenticating Extrinsic Impeachment Evidence

Kolanowski first argues that his trial counsel's failure to secure a witness to authenticate a screenshot of a Facebook post allegedly made at the time of the rape was deficient performance. Specifically, he claims this evidence would have impeached S.W.-H.'s credibility by showing she had access to her phone and was not within her attacker's grasp at the time of the sexual assaults. We hold that this record fails to support the claim that counsel's performance was deficient.

The issue is whether counsel's failure to secure a witness to authenticate the time stamp on a March 2015 screenshot of a Facebook page was objectively unreasonable. In deciding this question, we are confined to the record on appeal in ascertaining the relevant facts.

This record shows that S.W.-H testified at trial that she was unable to contact anyone outside her trailer during the sexual assaults of February 8, 2014. That was because she was not close to her phone. She also testified that she could not escape from the assailant because he held her down.

During pretrial motions, the State sought to exclude Facebook records that lacked foundation. Counsel for Kolanowski sought to admit a March 2015

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[15] State v. Jones, 183 Wn.2d 327, 338, 352 P.3d 776 (2015).

[16] Id.; State v. Cross, 156 Wn.2d 580, 605, 132 P.3d 80 (2006).

screenshot of what purported to be a 2:49 a.m., February 8, 2014 record. The record was purported to be a "liking [by S.W.-H of] a photograph of—posted by [her]—[a] friend of a football player in a tutu." The relevance of this post was to undercut the credibility of S.W.-H's testimony that she did not have access to her phone at 2:49 a.m. on February 8, 2014.

The focus of the arguments centered on the foundation required to prove that the 2:49 a.m. time shown on the March 2015 screenshot was the same time S.W.-H's device liked the posting by her friend on February 8, 2014.

The parties appeared to acknowledge that Facebook has a privacy policy disallowing access to its records other than by duly authorized law enforcement officers. A Facebook website sets forth the protocols for this option. Thus, it appears that counsel, as opposed to law enforcement officers, could not pursue this option.

The discussion moved to another option, a judicial subpoena issued by the trial court. But it appears that Facebook, headquartered in California, could ignore or delay responding to a subpoena issued by a Washington trial court.

Counsel established that he timely sought the cooperation of the State in pursuing information from Facebook before trial. But this was without success because the law enforcement officer tasked with serving the subpoena never did so. The trial court then ordered the State to put counsel in contact with someone who knew what needed to be done to obtain information from Facebook. Nothing in this record shows what took place in response to this directive. We decline to speculate about what took place after the court's directive to the State.

We also decline to speculate what a successful inquiry of Facebook would have shown on the authentication issue of timing.

Near the end of the presentation of witnesses, counsel indicated he would explore the possibility of having his investigator testify about her experience with Facebook posts. However, no such testimony followed. We must presume counsel decided that such testimony would not be helpful.

During closing argument, neither side addressed this Facebook issue. Rather, counsel for Kolanowski focused on other challenges to the victim's credibility.

It is clear from our review of this record on appeal that counsel sought admission of the March 2015 screenshot to undermine S.W.-H's testimony about her inability to obtain access to her phone because her assailant held her down during the sexual assaults of February 8, 2014. If she "liked" a post at 2:49 a.m. on that date, the time stamp on the screenshot could have been relevant to her credibility.

But there is neither evidence of what authentication evidence of timing would prove or what more counsel could have done to obtain this authentication evidence under the circumstances. In sum, on this record, Kolanowski fails in his burden to overcome the presumption that counsel provided effective assistance. He has failed to show counsel's performance was not objectively reasonable.

The cases Kolanowski cites confirm this conclusion. State v. Thomas[17] is instructive. In that case, defense counsel had called a witness to offer expert

[17] 109 Wn.2d 222, 229-30, 743 P.2d 816 (1987).

testimony showing that Kerry Thomas could not have formed the intent necessary to sustain her conviction.[18] The trial court declined to qualify the proffered expert because she was only a trainee in her profession.[19] The verbatim transcript from the trial, quoted at length in the opinion, "demonstrate[d] that defense counsel was unaware of his 'expert's' lack of qualifications."[20] The supreme court characterized this as a "fail[ure] to conduct appropriate investigations" rather than a strategic choice.[21]

Division Two of this court considered the related question whether a defense attorney acts unreasonably when she fails to satisfy the procedural requirements to admit crucial evidence in State v. Horton.[22] Thomas Horton had been convicted of raping and molesting a child.[23] A mandated reporter had informed Child Protective Services (CPS) that the child, S.S., might be a victim of abuse.[24] A doctor with CPS found penetrating trauma to S.S.'s hymen.[25] But S.S. gave conflicting accounts to the doctor and a forensic investigator on the cause of that trauma.[26] S.S. told the investigator she had been having sexual

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[18] Id.

[19] Id. at 229.

[20] Id. at 231.

[21] Id. at 230.

[22] 116 Wn. App. 909, 68 P.3d 1145 (2003).

[23] Id. at 910.

[24] Id. at 911.

[25] Id.

[26] Id.

intercourse with a boy other than the defendant.[27] She also told the doctor that Horton had sexually abused her and that she had not been sexually active with anyone else.[28] The record in the case evidenced the precise content of these inconsistent statements.[29]

Confronted with these conflicting accounts, CPS concluded that the allegations were unfounded.[30] But the State charged Horton with rape and child molestation. During cross-examination at trial, Horton's attorney asked S.S. if she had engaged in sexual activity with anyone beside Horton.[31] S.S. answered no, and defense counsel did not challenge her response.[32]

Later, defense counsel attempted to call the forensic investigator and S.S.'s childhood friend so that they might relate S.S.'s statements about sexual activity with her boyfriend.[33] But counsel did not comply with ER 613(b) because he failed to give S.S. "an opportunity to explain or deny her pretrial statements by calling them to [her] attention while [she] was on the stand, or by arranging for

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[27] Id. at 913.

[28] Id. at 911.

[29] Id. at 913

[30] Id. at 911.

[31] Id. at 913.

[32] Id.

[33] Id. at 914.

[her] to remain in attendance after testifying."[34] On this basis, the trial court excluded the testimony.[35] The jury found Horton guilty.[36]

Horton appealed, arguing that his counsel had rendered deficient assistance by failing to provide a proper foundation for the admission of S.S.'s prior inconsistent statements.[37] Division Two of this court agreed, concluding that the record provided no suggestion that counsel's non-compliance with ER 613(b) supported some "strategy or tactic designed to further [Horton's] interests."[38] Instead, the court observed that counsel had sought to impeach S.S.'s testimony with extrinsic evidence but had failed to lay the proper foundation.[39] The court concluded that procedural non-compliance "was entirely to Horton's detriment; that compliance with ER 613(b) would have been ***only*** to his benefit."[40]

The Horton court discussed two cases in the Indiana Court of Appeals, Ellyson v. State[41] and Wright v. State.[42] In the first, the trial court had convicted

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[34] Id. at 916.

[35] Id. at 914.

[36] Id. at 912.

[37] Id.

[38] Id. at 917.

[39] Id. at 916-17.

[40] Id.

[41] Id. at 923; Ellyson v. State, 603 N.E.2d 1369, 1371 (1992).

[42] 581 N.E.2d 978 (1991).

Matthew Ellyson of raping his wife and burglarizing her home.[43] The case record indicated that when authorities conducted rape exams soon after the alleged incident, they found the results "negative as to sexual intercourse that evening."[44] Defense counsel attempted to introduce the exam results during the state investigator's testimony at trial but failed to do so.[45]

On appeal, Ellyson argued that his attorney had acted incompetently by failing to "produce the witnesses necessary to authenticate and show the relevancy of" the rape exams.[46] The reviewing court rejected the notion that such failure was "merely the result of poor strategy or bad tactics."[47] Rather, the decision to introduce the rape exam results was itself a "valid strategic decision" but one executed ineffectively.[48] That "gaffe" in execution rendered the assistance of counsel objectively unreasonable.[49]

In Wright, the second Indiana case, the state charged Russell Wright with child molestation.[50] At trial, defense attempted to call a witness to testify to statements given by the victim, inconsistent with her allegations of molestation.[51]

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[43] Ellyson, 603 N.E.2d 1369.

[44] Id. at 1372.

[45] Id.

[46] Id. at 1373.

[47] Id. at 1374.

[48] Id.

[49] Id. at 1374-75.

[50] 581 N.E.2d at 978.

[51] Id. at 979.

But, as in Horton, the trial court excluded this testimony because defense counsel had failed to first cross-examine the witness as to these statements.[52] Defense counsel made an offer to prove at which time the witness testified that the victim had admitted to fabricating her accusation.[53] Reversing the conviction, the appellate court characterized defense counsel's failure to comply with procedure as a "blunder[]."[54]

In all these cases, the reviewing court had a record clearly establishing what the relevant evidence would show, such as the results of the rape exam in Ellyson or the contents of the offered testimony in the other cases. In all, the defense counsel actually acted to introduce the relevant evidence at trial, rather than merely discussing its possible admission with the court. In each, defense counsel failed to act in an objectively reasonable way that led to exclusion of the evidence.

This case is different. Authentication of the Facebook timestamp was at issue. Without proper authentication the post was not relevant to the victim's credibility. But we simply cannot determine from this record what evidence the timestamp would have provided.

Moreover, this record does not show any unreasonable failure to gain admission of the evidence. Rather, this record shows that counsel took reasonable steps to gain admission of the evidence. In observing the

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[52] Id.

[53] Id. at 979-80.

[54] Id. at 980.

presumption of effective assistance of counsel, we cannot discount that counsel may have ultimately decided that authentication of the Facebook record would not have advanced the defense case. In short, Kolanowski has failed in his burden to show deficient performance of counsel. Accordingly, we need not reach the other prong of the test: prejudice.

DNA "Match" Testimony

Kolanowski next argues that his trial counsel was ineffective for failing to object when a forensic scientist for the State testified that the blood on Kolanowski's sweatshirt cuff "matched" Kolanowski's blood sample. Specifically, he contends this evidence was inadmissible without the scientist also providing a probability estimate. We hold that he has failed to overcome the presumption that counsel was effective.

"[W]here the defendant claims ineffective assistance based on counsel's failure to challenge the admission of evidence," we apply a modified three-part version of the Strickland test.[55] Under this test:

> the defendant must show (1) an absence of legitimate strategic or tactical reasons supporting the challenged conduct, (2) that an objection to the evidence would likely have been sustained, and (3) that the result of the trial would have been different had the evidence not been admitted.[56]

The first element is at issue here. Megan Inslee, a forensic scientist from the State's crime lab, testified to DNA testing done on various items of evidence

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[55] State v. Saunders, 91 Wn. App. 575, 578, 958 P.2d 364 (1998) (internal citations omitted); see State v. Hendrickson, 129 Wn.2d 61, 80, 917 P.2d 563 (1996); McFarland, 127 Wn.2d at 336-37.

[56] Id.

collected by police during their investigation of the crimes. For certain tests, she testified both to whether there was a "match" between items tested and known blood samples and the probability estimates whether the same genetic profile would appear in the population. But neither her testimony nor her lab report included a probability estimate for the DNA test on the blood sample found on Kolanowski's sweatshirt that he was wearing at the time of arrest. Kolanowski argues that counsel either should have objected to this incomplete testimony or moved to exclude it once this witness testified. He argues the failure to do so was objectively unreasonable. We disagree.

Whether and when to object are classic examples of trial strategy.[57] Thus, the issue is whether counsel had any "legitimate strategic or tactical reason[]" for failing to seek exclusion of the "match" testimony.[58]

The State correctly argues that counsel may have determined it strategic to let the DNA evidence of a match to Kolanowski to go unchallenged so the jury would believe that the blood on the sweatshirt was Kolanowski's. This is consistent with the defense's theory that Kolanowski injured himself at work. This also fits within the defense of identity, attempting to place Kolanowski elsewhere at the time of the crimes.

Had counsel objected based on the incomplete evidence, it is likely the court would have sustained the objection based on the controlling law that Kolanowski cites in this appeal. Because the forensic scientist had already

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[57] See State v. Madison, 53 Wn. App. 754, 763, 770 P.2d 662 (1989).

[58] McFarland, 127 Wn.2d at 336.

testified to probability estimates for the other DNA tests, there is no reason to believe that she could not have also provided the missing evidence for the DNA test on Kolanowski's sweatshirt. Thus, an objection was unlikely to have advanced the defense case.

Alternatively, in the unlikely event that the court would have admitted the evidence without the probability estimate after a proper objection, the jury could have concluded that the blood was S.W.-H.'s. That would have been highly prejudicial to the defense, as there was no other DNA evidence definitively linking Kolanowski to the victim.

Kolanowski counters that the trial court might have excluded all of Inslee's testimony regarding the blood. For the reasons we already discussed, that was highly unlikely, on this record.

In sum, Kolanowski fails to meet his burden under the first prong of the controlling test to show the absence of legitimate strategic or tactical reason for counsel's choice not to exclude the incomplete evidence in this case.

Having failed to meet the first prong of the three part test, we need not consider the remaining prongs of Kolanowski's claim. He has failed to overcome the presumption of effective assistance of counsel.

COSTS

Kolanowski argues that the court should decline to award the State appellate costs should he not prevail. We agree.

RCW 10.73.160(1) gives appellate courts discretion to decline to impose appellate costs on appeal.[59] Under State v. Sinclair, there is a presumption that indigency continues unless the record shows otherwise.[60]

Here, the trial court found Kolanowski "unable by reason of poverty to pay for any of the expenses of appellate review." Kolanowski's conviction, incarceration, and resultant loss of meaningful income make him further unable to pay such costs and expenses. Nothing in this record overcomes the presumption of Kolanowski's indigence. Thus, an award to the State for appellate costs is inappropriate under these circumstances.

The State cites numerous cases in rebuttal but none are persuasive. In all three cases, the defendants challenged the constitutionality of cost statutes.[61] Two of these cases concerned the imposition of mandatory and not discretionary fees in cases where the defendant had failed to show his indigence.[62]

Here, Kolanowski proved his indigency as the trial court found in its order of indigency. He does not challenge the constitutionality of a cost statute but merely argues that this court should use its statutory discretion to decline an award of costs. We do so.

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[59] State v. Nolan, 141 Wn.2d 620, 629, 8 P.3d 300 (2000).

[60] 192 Wn. App. 380, 393, 367 P.3d 612 (2016).

[61] State v. Blank, 131 Wn.2d 230, 233, 930 P.2d 1213 (1997); State v. Shelton, 194 Wn. App. 660, 666, 378 P.3d 230 (2016); State v. Stoddard, 192 Wn. App. 222, 226, 366 P.3d 474 (2016).

[62] Shelton, 131 Wn. App. at 669; Stoddard, 192 Wn. App. at 225.

We affirm the judgment and sentence. We also deny costs of appeal to the State.

COX, J.

WE CONCUR:

Schindler, J.

Becker, J.

NIELSEN, BROMAN & KOCH, PLLC

March 01, 2017 - 10:38 AM

Transmittal Letter

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