STATE OF MINNESOTA
IN COURT OF APPEALS
A10-894

State of Minnesota,
Respondent,

vs.

Dexter Tate Hanson,
Appellant.

Filed June 13, 2011
Reversed and remanded
Klaphake, Judge

Crow Wing County District Court
File No. 18-CR-09-2233

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Donald F. Ryan, Crow Wing County Attorney, Rockwell J. Wells, Assistant County Attorney, Brainerd, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Peter L. Gregory, Special Assistant State Public Defender, Minneapolis, Minnesota (for appellant)

Considered and decided by Shumaker, Presiding Judge; Klaphake, Judge; and Worke, Judge.

U N P U B L I S H E D O P I N I O N

KLAPHAKE, Judge

On appeal from his conviction of third-degree criminal sexual conduct, Minn. Stat. § 609.344, subd. 1(b) (2008), for having sexual intercourse with a 15-year-old girl when

he was 19 years old, appellant Dexter Tate Hanson argues that his trial counsel was ineffective for failing to ask him during direct examination about his reasonable belief about the complainant's age, based on her misrepresentation that she was 16 years old on her MySpace account. Because we agree that appellant met his burden to establish by a preponderance of evidence that this key evidence of his affirmative defense likely would have changed the trial outcome, we reverse and remand.

D E C I S I O N

To make a successful claim of ineffective assistance of counsel, "[t]he defendant must affirmatively prove that his counsel's representation 'fell below an objective standard of reasonableness' and 'that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Gates v. State*, 398 N.W.2d 558, 561 (Minn. 1987) (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 694, 104 S. Ct. 2052, 2064, 2068 (1984)); *see also Sanchez-Diaz v. State*, 758 N.W.2d 843, 847-48 (Minn. 2008). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Gates*, 398 N.W.2d at 561. (quotation omitted). When considering a claim of ineffective assistance of counsel, there is a strong presumption that counsel's performance was reasonable. *State v. Rhodes*, 657 N.W.2d 823, 844 (Minn. 2003). This court "generally will not review attacks on counsel's trial strategy." *Opsahl v. State*, 677 N.W.2d 414, 421 (Minn. 2004). "What evidence to present to the jury, including which defenses to raise at trial and what witnesses to call, represent an attorney's decision regarding trial tactics which lie within

the proper discretion of trial counsel and will not be reviewed later for competence." *Reed v. State*, 793 N.W.2d 725, 733 (Minn. 2010) (quotation omitted).

Here, appellant and the complainant began their relationship as "friends" on MySpace, a computer social network, although they never met in person before the night of the offense. On that night, the complainant secretly left her parent's Brainerd home with a girlfriend to meet appellant and his male friend at an apartment, where they spent the next few hours drinking, listening to music, and, in the case of appellant and the complainant, eventually having sexual intercourse. Appellant did not contest that sexual intercourse occurred; rather, he claimed as an affirmative defense that he reasonably believed that the complainant was 16 years old.

During trial, appellant's attorney offered some evidence to support this affirmative defense, including the complainant's admission that shortly before her birthday she altered her MySpace account to reflect her birth year as 1993 rather than 1994, so that when she turned 15, her MySpace account erroneously listed her age as 16. Appellant also offered evidence to show that although the complainant claimed that she corrected this inaccuracy a few days after her birthday and shortly before the date of the offense, the complainant did not actually correct the error until long after the offense. Trial evidence also included that the complainant stated she wished she was 16, that she was looking forward to her birthday, and that she discussed birthday plans with appellant.

However, appellant's attorney never asked appellant what he believed her age to be on the night of the offense. In regard to this omission, appellant's attorney stated during his closing argument:

> [Appellant] has presented evidence that his state of mind at the time he had sexual intercourse with her on April 20th was that she was 16. The county is going to argue strenuously that. And that evidence includes the fact that he brought these things back to Investigator Katzenberger and said here, look what is – what I was relying on. *The county says he didn't testify to it. Now maybe that's our fault – or my fault. I'm going to point out nobody asked him.*

(Emphasis added.) In a posttrial letter to the district court prior to sentencing, appellant also apparently recognized his counsel's deficient performance, stating: "'I did not know how old she was' [was] the only thing I had to say where the verdict could have been turned around. Not one person asked me in court." Although respondent argues that appellant acquiesced in defense counsel's trial strategy, this comment shows that he did not. During rebuttal of the defense's closing argument, the prosecutor stated:

> But as far as making the best of his opportunity [to support his claim of an affirmative defense], that's all he chose to talk about, were those text messages. And to somehow extend that to because he brought these documents to Investigator Katzenberger, that somehow that established his state of mind or belief as to her age, he didn't even testify as to any of those exhibits, any of those documents that he brought to Investigator Katzenberger, even though this was his opportunity. It was his burden with respect to that defense, and he failed.

Appellant's attorney's remarks indicate that his failure to ask appellant about his belief about the complainant's age was an oversight—the attorney stated that it was his "fault" that appellant did not offer testimony on this point. It is also clear that appellant's attorney was competent overall—he was well-prepared for trial, made proper motions, elicited relevant testimony during direct and cross-examination of witnesses, made proper and timely objections, and advanced a theory of the case that was plausible based on the

relevant facts. For this reason, the attorney's failure to elicit testimony from appellant to support an affirmative defense amounted to a glaring omission. As noted by appellant, "failing to question [appellant] regarding his belief as to [the complainant's] age left the jury to speculate as to the single key fact in [his] sole defense." Under these circumstances, the error, although arguably one of trial strategy, implicated appellant's fundamental right to present a defense, which is not merely a tactical decision. *See Williams v. State*, 764 N.W.2d 21, 31 (Minn. 2009) (stating that reviewing court "will examine trial strategy when it implicates fundamental rights"); *State v. Rosillo*, 281 N.W.2d 877, 878 (Minn. 1979) (stating that a defendant has the right to testify in his own defense); *see also Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064 (stating that ineffective assistance of counsel claim requires showing of serious error and that "the deficient performance prejudiced the defense"). And we conclude that appellant would have met the preponderance-of-evidence standard for proving his defense had he been asked how old he thought the complainant was. *See* Minn. Stat. § 609.344, subd. 1(b) (stating that an affirmative defense "must be proved by a preponderance of the evidence").

An attorney's failure to raise a defense is generally considered to be one of trial strategy. *See, e.g.*, *Opsahl*, 677 N.W.2d at 421 (stating "[w]e are in no position to second-guess counsel's decision to focus his strategy on other defenses"); *State v. Voorhees*, 596 N.W.2d 241, 255 (Minn. 1999) (stating "which defenses to raise at trial . . . represent[s] an attorney's decision regarding trial tactics which lie within the proper discretion of trial counsel and will not be reviewed later for competence"); *State v. Doppler*, 590 N.W.2d 627, 635 (Minn. 1999) (stating that attorney's decision to focus on

defendant's claim of self-defense, rather than defense of intoxication, provided no basis for relief in ineffective assistance of counsel claim). This case does not involve a tactical choice between several defense options, however—it was the sole defense available to appellant when the prosecution had clearly met its burden of proving the elements of the offense. The reason for judicial reluctance to "scrutinize trial tactics is grounded in the public policy of allowing counsel to have the flexibility to represent a client to the fullest extent possible." *Opsahl*, 677 N.W.2d at 421 (quotation omitted). That public policy concern is not implicated here.

Reversed and remanded.