IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

MICHAEL JOSEPH KELLYWOOD,
Petitioner.

No. 2 CA-CR 2020-0067-PR
Filed August 10, 2020

Petition for Review from the Superior Court in Pima County
No. CR20153211001
The Honorable Michael Butler, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Harriette P. Levitt, Tucson
Counsel for Petitioner

MEMORANDUM DECISION

Judge Espinosa authored the decision of the Court, in which Judge Brearcliffe concurred and Judge Eckerstrom dissented.

E S P I N O S A, Judge:

¶1 Michael Kellywood seeks review of the trial court's order dismissing his petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P.[1] We will not disturb that order unless the court clearly abused its discretion. *See State v. Roseberry*, 237 Ariz. 507, ¶ 7 (2015). Kellywood has not established such abuse here.

¶2 After a jury trial, Kellywood was convicted of three counts of sexual conduct with a minor under the age of fifteen, and one count each of molestation of a child, continuous sexual abuse of a child, and sexual abuse of a minor under the age of fifteen. The victim was Kellywood's adopted daughter A.K., and the offenses were committed when she was between eleven and fourteen years old. The trial court sentenced Kellywood to life imprisonment, in addition to a combination of consecutive and concurrent prison terms totaling sixty years, and suspended the imposition of sentence for the sexual abuse count, placing him on lifetime probation.

¶3 On appeal, a majority of this court rejected Kellywood's argument that the trial court had erred in denying his motions to compel disclosure of A.K.'s medical and counseling records for *in camera* review. *State v. Kellywood*, 246 Ariz. 45, ¶¶ 1-3, 15 (App. 2018). Kellywood argued he had presented sufficient information that the records might contain impeachment evidence that would support his claim that A.K. had fabricated the allegations against him because she had been angry at him,

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[1] Our supreme court amended the post-conviction relief rules, effective January 1, 2020. Ariz. Sup. Ct. Order R-19-0012 (Aug. 29, 2019). "Because it is neither infeasible nor works an injustice here, we cite to and apply the current version of the rules." *State v. Mendoza*, No. 2 CA-CR 2019-0281-PR, n.1, 2020 WL 3055826 (Ariz. Ct. App. June 9, 2020) ("amendments apply to all cases pending on the effective date unless a court determines that 'applying the rule or amendment would be infeasible or work an injustice'" (quoting Ariz. Sup. Ct. Order R-19-0012)).

and speculated the records might show she had been asked if anyone had engaged in sexually inappropriate conduct with her and she had denied it. *Id.* ¶ 5. We affirmed Kellywood's convictions, concluding "the mere possibility [that the victim] could have said something exculpatory is not, as a matter of law, sufficient by itself to require her to produce the medical and counseling records." *Id.* ¶¶ 6, 18.

¶4 Kellywood sought post-conviction relief, arguing trial counsel had been ineffective in failing to adequately investigate, prepare, and argue a motion to compel the production of the counseling and medical records of A.K. He asserted that her records would have been relevant to establish whether the allegations against him were "genuine" or just "a reiteration" of her past abuse, and whether she had denied engaging in sexual activity during the relevant time period.[2] He maintained that the release of the family's Department of Child Safety (DCS) records, either to trial counsel or for an *in camera* inspection by the trial court, would have been "minimally intrusive to A.K.'s privacy" and would have helped determine what additional counseling records were necessary. Kellywood also argued that any requests for A.K.'s counseling records before she was adopted should have been directed to the Arizona Attorney General's office rather than the Pima County Attorney's office. The trial court summarily dismissed Kellywood's Rule 32 petition, finding he had not established a claim of ineffective assistance of counsel and noting his assertion that the requested records might contain exculpatory evidence was based on "mere speculation." This petition for review followed.

¶5 To prevail on a claim of ineffective assistance of counsel, a defendant must establish both "that counsel's performance fell below reasonable standards and that the deficient performance prejudiced him."

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[2]Kellywood attached as an exhibit to his petition below a February 21, 2016, addendum report prepared by the Department of Child Safety (DCS), asserting it showed that A.K. and her siblings were currently in counseling addressing, "[a]mong other things, . . . trauma they endured from their previous removal [from their biological parents]." While the DCS report reflected current counseling, notably, it said nothing about the purpose of A.K.'s counseling sessions, and only referred to "past trauma" as to one of her siblings. Kellywood also attached as an exhibit the affidavit of his mother, who relied primarily on second-hand information to assert that the children's biological parents had sexually abused them and that A.K. had previous sexual relations with her cousin that were similar to the described acts with Kellywood.

Roseberry, 237 Ariz. 507, ¶ 10 (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). "Failure to satisfy either prong of the *Strickland* test is fatal to an ineffective assistance of counsel claim." *State v. Bennett*, 213 Ariz. 562, ¶ 21 (2006). Under the first prong of the *Strickland* test, "we must presume 'counsel's conduct falls within the wide range of reasonable professional assistance' that 'might be considered sound trial strategy.'" *State v. Denz*, 232 Ariz. 441, ¶ 7 (App. 2013) (quoting *Strickland*, 466 U.S. at 689). "Therefore, 'disagreements about trial strategy will not support an ineffective assistance claim if the challenged conduct has some reasoned basis, even if the tactics counsel adopts are unsuccessful.'" *State v. Varela*, 245 Ariz. 91, ¶ 8 (App. 2018) (quoting *Denz*, 232 Ariz. 441, ¶ 7). To show prejudice under the second prong, a defendant must establish there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* A defendant is entitled to an evidentiary hearing if he presents a colorable claim for relief, that is, "he has alleged facts which, if true, would probably have changed the verdict or sentence." *State v. Amaral*, 239 Ariz. 217, ¶¶ 10-11 (2016) (emphasis omitted).

¶6 In his petition for review, Kellywood asserts the trial court abused its discretion by summarily dismissing his claim that trial counsel was ineffective in failing to successfully compel production of the victim's medical and counseling records for an *in camera* review. He contends the requested records would have shown that A.K. and her siblings "were sexualized and manipulative" before they lived with Kellywood, and maintains that such information would have permitted him to convince the jury A.K. knew how to describe sexual acts and that she had, therefore, falsely accused him. He maintains trial counsel failed to obtain the information that "was there," and thus failed to provide the court with an adequate record upon which to grant his motion to compel production. He also argues the motion to compel was "extremely vague and broad," thus permitting the state to successfully argue he was "on a fishing expedition" and thereby "compel[ing]" the court to deny the motion. He asserts he is entitled to an evidentiary hearing so that trial counsel can explain what he "did and didn't do and why he failed to obtain information which would have supported his motion to compel."

¶7 In its ruling dismissing the petition, the trial court clearly identified, addressed, and correctly resolved Kellywood's claims of ineffective assistance of trial counsel. We therefore adopt that ruling. *See State v. Whipple*, 177 Ariz. 272, 274 (App. 1993) (when trial court has

correctly ruled on issues raised "in a fashion that will allow any court in the future to understand the resolution[, n]o useful purpose would be served by this court rehashing the trial court's correct ruling in a written decision").[3]

¶8 In addition, although Kellywood referred in his Rule 32 petition to trial counsel's failure to properly request the DCS records, he failed to acknowledge either in his petition or on review that trial counsel withdrew his motion to compel those records, a fact the trial court specifically noted in its ruling below.[4] Moreover, Kellywood did not argue in his petition, and certainly does not argue on review, that trial counsel's withdrawal of the motion to compel the DCS records constituted ineffective assistance of counsel, which the court also noted.

¶9 And, to the extent Kellywood challenges the trial court's comment in its ruling below that A.K. was a credible witness, suggesting the court's observation applied only to the single count for which physical evidence of his DNA existed, we disagree. The same judge who ruled on Kellywood's petition for post-conviction relief had presided over the trial. He characterized A.K. as "a very believable" witness, which appeared to be a general comment about A.K.'s overall credibility and attention to "many small and seemingly unimportant details," rather than one limited to only the single count involving the DNA evidence. In fact, the court also noted that Kellywood had "admitted to being alone with A.K. at all of the times, and all of the places, she stated he had sexual intercourse with her," noting that Kellywood had admitted everything A.K. testified to except for having sexual intercourse with her.

¶10 Finally, a few observations about the dissent are in order. Our colleague reiterates and amplifies several of the points raised in his previous dissent to this court's opinion in Kellywood's appeal, and argues

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[3]And, as the state correctly pointed out in its response to the petition below, "[e]ven with the advantageous ability of hindsight and a critical eye," Kellywood has essentially failed to provide information "supporting a reasonable possibility that the records contain the supposed exculpatory information."

[4] On appeal, Kellywood's challenge to the motion to compel that was withdrawn was relegated to a review for fundamental, prejudicial error. *Kellywood*, 246 Ariz. 45, ¶ 16. A majority of this court found no such error. *Id.* ¶ 17.

now that Kellywood's trial counsel was colorably ineffective for failing to present the trial court with more specific information to support his requests for the victim's medical and counseling records. *See infra* ¶¶ 14-17. That conclusion, however, relies on many "could haves" and "ifs," underscoring the trial court's express conclusion in denying Kellywood's petition that it was "supported by speculative facts layered upon more speculative facts." The dissent further asserts that the victim's possible failure to report her abuse to those health care providers would have been "clearly exculpatory." But that is highly debatable—merely positing a circumstance she would have had the opportunity to explain to the jury. And it is notable that Kellywood's petition made little reference to *Strickland*'s prejudice prong, another factor underlying the trial court's correct ruling, which contrary to our colleague's suggestion, did not depart from our reasoning in the appellate opinion, the issue of ineffective assistance having been neither addressed nor broached in that decision.

¶11 Most significantly, although a better discovery strategy might have been employed by trial counsel, the standard for evaluating a claim of ineffective assistance is not the *best* defense, which our dissenting colleague has arguably articulated with the benefit of hindsight, but only a reasonably competent one. *See Hinton v. Alabama*, 571 U.S. 263, 273 (2014) (proper measure of attorney performance is whether counsel's assistance "was reasonable considering all the circumstances" (quoting *Strickland*, 466 U.S. at 688)); *State v. Valdez*, 160 Ariz. 9, 15 (1989) ("Defendants are not guaranteed perfect counsel, only competent counsel."). The trial court appropriately so concluded here.

¶12 Although we grant review, relief is denied.

E C K E R S T R O M, Judge, dissenting:

¶13 According to the victim, A.K., the offenses for which Kellywood has been convicted occurred in the presence of only two witnesses: herself and Kellywood. Although the state produced physical evidence corroborating A.K.'s testimony as to one of the six counts, the state's case on the other five counts turned substantially on A.K.'s credibility. Put another way, Kellywood would be entitled to an acquittal on these counts if the jury harbored a reasonable doubt about the credibility of A.K.'s testimony as to them. For this reason, competent representation of Kellywood required defense counsel to discover and present any evidence of prior statements by A.K. that contradicted her trial testimony. Kellywood maintains his trial counsel failed to diligently do so.

¶14 We must assess this question in the context of this court's opinion affirming the denial of trial counsel's request for disclosure. We must do so because the trial court was duty-bound to assess Kellywood's ineffectiveness claim with reference to the reasoning set forth in this court's majority opinion. Before trial, counsel had requested "A.K.'s medical and counseling records for the period of time that she lived in [Kellywood's] home." *Kellywood*, 246 Ariz. 45, ¶ 3. A majority of this court found that request too speculative to trigger an *in camera* inspection. It so concluded because the motion failed to identify: (1) either the medical treatment provider or counselor who saw A.K.; (2) the conditions for which A.K. was receiving medical treatment and counseling; or (3) "the standard of care applicable to when and under what circumstances physicians and counselors should inquire about whether someone has suffered sexual abuse, or whether and how such inquiries are routinely made." *Id.* ¶ 10.

¶15 The record before us suggests that each of these pieces of information was available to defense counsel—and would have amply supported disclosure—had he sought and provided them to the court. Given that Kellywood or his wife would have been responsible for transporting A.K. to her medical and counseling appointments, we can presume counsel could have secured the names of his adoptive daughter's physician and counselors with diligent inquiry.

¶16 Reasonably diligent counsel could also have provided the trial court with information explaining why those providers would almost certainly have asked A.K. questions pertinent to the case. During trial, Kellywood testified that DCS had provided A.K. with counseling services, in the context of severance proceedings, both before and after she had come to live with her adoptive family, the timing of which necessarily would have prompted inquiries and discussions about the nature of A.K.'s relationship with Kellywood, her new adoptive father. In that context, A.K.'s failure to mention to the counselor that she was being sexually abused between sessions[5] would be clearly exculpatory.[6] That trial counsel

[5]As trial counsel did point out, we can presume A.K. did not accuse Kellywood of improprieties during either the counseling sessions or her medical checkups because those providers would have been required to report any such accusation. Neither had done so. *See Kellywood*, 246 Ariz. 45, ¶ 25 (Eckerstrom, C.J., dissenting).

[6] In this post-conviction proceeding, Kellywood attached to his petition for post-conviction relief an affidavit by his mother stating she had

failed to provide that specific context for the counseling within his motion for disclosure seems negligent at best. By providing that context, counsel would have been able to establish there was a "reasonable possibility" the records requested contained potentially exculpatory evidence, information Kellywood was entitled to "as a matter of due process," *Kellywood*, 246 Ariz. 45, ¶ 8 (quoting *State v. Sarullo*, 219 Ariz. 431, ¶ 20 (App. 2008)), thereby distinguishing the request from a speculative fishing expedition. This would have justified, at the very least, an *in camera* review of the records by the trial court.

¶17 Defense counsel also had information readily available that could have demonstrated a physician's standard of care for A.K.'s yearly checkups: a standard of care that would have included asking A.K. whether she was being sexually abused and whether she had been sexually active. On appeal, this court's dissenting opinion found and cited authoritative medical sources indicating precisely that. *See Kellywood*, 246 Ariz. 45, n.7 (Eckerstrom, C.J., dissenting) (citing an AMA Code of Medical Ethics opinion and an AMA Journal of Ethics article reviewing best practices for screening adolescent patients for sexual risks). These materials were equally available to counsel had he conducted appropriate research on the topic. Those materials would have provided the trial court with

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received information that A.K. had been sexually abused by her biological parents before arriving at her adoptive placement. That affidavit further alleged that A.K. had described sexual relations with her cousin that "were remarkably similar" to the allegations A.K. later provided against Kellywood. Although these statements in the affidavit are anchored on two levels of hearsay, they do beg the question whether trial counsel had made any inquiry to explore the cause of A.K.'s severance from her original parents. If sexual abuse had indeed been the cause of the severance, this fact would have further assured that A.K.'s counseling sessions would have logically explored—and implicitly invited disclosure of—any similar behavior by Kellywood. Any prior abuse might also have placed A.K.'s allegations of similar abuse against Kellywood in a different context and made Kellywood's theory of A.K.'s motivations somewhat more plausible. It might have better explained why A.K. might plausibly choose such a damning allegation against Kellywood as retaliation for merely confiscating her cell phone. At minimum, such information of prior abuse would have been clearly exculpatory if it is indeed evident in the counseling records trial counsel originally sought; it would be remarkable for A.K. to have repeatedly failed to disclose that Kellywood was similarly abusing her between sessions.

good reason to believe A.K. had been asked about sexual abuse during the time frame of the alleged offenses and had denied that it was occurring. Instead, counsel merely asserted generally: "Oftentimes, these professionals directly ask [patients] questions concerning whether or not someone has been sexually inappropriate with them."

¶18 In short, trial counsel could have, with reasonable diligence, provided all of the information this court found pivotally absent when evaluating whether the trial court should have granted Kellywood's motion for *in camera* disclosure. That counsel failed to do so raises the specter that he provided prejudicially ineffective representation.

¶19 Both the trial court's order and the majority decision here suggest that any defects in trial counsel's request for the disclosure would be irrelevant because the possibility of discovering exculpatory information is anchored in "speculative facts layered upon more speculative facts." But, it requires no speculation at all to deduce that A.K. failed to mention any sexual abuse to counselors and physicians: those providers had a statutory duty to report any such allegation. And, that repeated failure to report Kellywood's alleged sexual abuse allows for only two inferences: A.K. either failed to mention any abuse because it wasn't happening or she was persistently dishonest with her providers. Either conclusion would damage her credibility as a witness. In short, the records documenting her repeated failure to mention ongoing abuse would almost certainly contain materials exculpatory to Kellywood.

¶20 The only speculation surrounds *how* exculpatory those records would be. Did A.K. fail to allege sexual abuse in the face of direct probing questions? Or did she merely fail to do so when asked more general questions about abuse or her relationship with Kellywood? Did she present during these sessions as open and trusting of the counselors and physicians? Or was she guarded? Does she speak of other similar abuse in her prior household which echoes the allegations she later made against Kellywood? I also agree with my colleagues that the trial impact of the exculpatory materials would surely be affected by A.K.'s explanation for any statements inconsistent with abuse and her demeanor while providing that explanation. But as to the several criminal counts which turned on A.K.'s credibility, it is far from "speculative" to surmise that the records contained some species of exculpatory material for Kellywood. As my colleagues appear to overlook, evidence may be exculpatory in nature without wholly exonerating a defendant.

¶21 For these reasons, I would conclude that Kellywood has established a colorable claim that his trial counsel's "performance fell below reasonable standards," *Roseberry*, 237 Ariz. 507, ¶ 10, warranting an evidentiary hearing. Had counsel diligently marshalled all of the context for A.K.'s yearly checkups and monthly counseling sessions, Kellywood would have been entitled to have the trial court conduct an *in camera* inspection of the records pertaining to those appointments. Because "the result of the proceeding" in question—Kellywood's request for disclosure—may have turned out differently had his counsel not acted deficiently, *see Strickland*, 466 U.S. at 694, Kellywood has also established at the very least a colorable claim that he was prejudiced by counsel's performance, *see Roseberry*, 237 Ariz. 507, ¶ 10. Whether any exculpatory information found within the materials sought by Kellywood would ultimately justify a new trial is not ripe for our decision. The trial court could only assess that question after conducting an *in camera* inspection of those materials. I dissent because the majority opinion holds that, while Kellywood spends the remainder of his life in prison, the contents of those records will forever remain a mystery.