

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant/Cross-Appellee,

v

GARY PRESTON HOPKINS,

Defendant-Appellee/Cross-  
Appellant.

---

UNPUBLISHED

December 14, 2004

No. 253282

Washtenaw Circuit Court

LC No. 00-000910-FC

Before: O’Connell, P.J., and Bandstra and Donofrio, JJ.

PER CURIAM.

Plaintiff appeals by leave granted the trial court’s decision to grant defendant a new trial based upon ineffective assistance of counsel. We affirm the trial court. This case arose in the midst of custody and child-support disputes between defendant and his ex-girlfriend, and involves allegations of sexual abuse by the ex-girlfriend’s daughter. Before they separated, the couple had a long-term relationship that produced two boys. During a custody dispute in 1992, the ex-girlfriend claimed that defendant molested the boys. The older boy outright denied the claim, and the younger one only provided a vague, unsubstantiated, and generally incredible account of sexual abuse. Defendant, on the other hand, credibly asserted his innocence, passing a polygraph, and prosecutors did not pursue the matter. Seven years later, the ex-girlfriend was having problems with her new boyfriend and asked defendant to take the two boys along with another, younger, son and a six-year-old daughter from more recent relationships.

The ex-girlfriend claimed that six or seven months after the visit, her daughter pulled her aside at a rest stop on their way back to Indiana and told her that defendant touched her in her private areas during the visit. Two weeks later, when the ex-girlfriend and her daughter were back in Michigan, the daughter told police that defendant told her to sleep in his bed and then penetrated her vagina with his finger. She also claimed that the next night he penetrated her vagina with his penis. Medical examinations of the daughter failed to uncover any physical evidence of sexual abuse. At trial, defendant’s counsel failed to introduce any evidence of the earlier, presumably false, accusations, and failed to present any evidence supporting the defense theory that the ex-girlfriend fabricated the story because of custody and support issues. During her testimony, the daughter forgot to mention the incident when defendant penetrated her vagina with his penis. Nevertheless, defendant was convicted of first-degree criminal sexual conduct, MCL 750.520b(1)(a).

Plaintiff contends that the trial court abused its discretion when it granted defendant a new trial based upon the ineffective assistance of his trial counsel. We disagree.

“On the defendant’s motion, a trial court may order a new trial on any ground that would support appellate reversal of the conviction or because it believes that the verdict has resulted in a miscarriage of justice.” MCR 6.431(B). We review for abuse of discretion the decision to grant a new trial. *People v Jones*, 236 Mich App 396, 404; 600 NW2d 652 (1999). To determine if the trial court abused its discretion, we must examine the reasons given by the court and will find an abuse if those reasons “do not provide a legally recognized basis for relief.” *Id.* “A mere difference in judicial opinion does not establish an abuse of discretion,” and we review for clear error a trial court’s underlying factual determinations. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003).

A criminal defendant has the right to the effective assistance of counsel. *Strickland v Washington*, 466 US 668, 686; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pubrat*, 451 Mich 589, 596; 548 NW2d 595 (1996). “Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise.” *People v Solomonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). To meet this burden, a defendant must show how his counsel’s performance fell below an objective standard of reasonableness and demonstrate a reasonable probability that absent counsel’s errors, the outcome at trial would have been different. *Id.* at 663-664.

At the *Ginther*<sup>1</sup> hearing, the trial court learned that defendant’s trial counsel adopted and argued a defense theory, suggested by defendant, without taking the basic step of examining court documents that established the very presence of a custody dispute and the timeline within which it occurred. The trial court concluded that this failure to investigate the most rudimentary documents relevant to the proposed defense fell below an objectively reasonable standard of performance and that this prejudiced the defendant to the point of depriving him of a fair trial.

“A defendant is entitled to have his counsel prepare, investigate, and present all substantial defenses.” *In re Ayres*, 239 Mich App 8, 22; 608 NW2d 132 (1999). “Where there is a claim that counsel was ineffective for failing to present a particular defense, the defendant must show that he made a good-faith effort to avail himself of the right to present a particular defense and that the defense of which he was deprived was substantial.” *Id.* A substantial defense is one that reasonably could have changed the outcome of the trial. *Id.*

Defense counsel’s testimony at the *Ginther* hearing clearly established that defendant attempted to get his counsel to present the argument that the victim’s mother manipulated the victim into making a false accusation based upon a custody dispute which had begun just prior to the accusation. This defense goes to the core of the prosecution’s case, because the case turned upon the victim’s testimony regarding the events in question and her mother’s corroboration of her statement. This is especially true given that there was no physical evidence confirming the allegations. This defense was the most substantial defense available to defendant and, if pursued

---

<sup>1</sup> *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

competently and aggressively, could reasonably have made a difference in the minds of the jurors. But defendant's trial attorney not only failed to properly prepare the defense, he abandoned it after only a cursory cross-examination of the prosecution witnesses. Had defendant's trial counsel examined the circuit court and Friend of the Court records, he could have easily established a timeline that would have corroborated defendant's theory of the case. Counsel could have pursued a more aggressive cross-examination of the victim's mother and seriously damaged her credibility. Furthermore, the establishment of a concrete timeline may have excluded as hearsay the ex-girlfriend's testimony concerning the daughter's statements at the rest stop. MRE 801(d)(1)(B).

Plaintiff's argument that the trial court failed to apply the prejudice prong of the *Strickland* test, and therefore abused its discretion, is simply inaccurate. The trial court's opinion clearly indicates that it considered both the objective standard and the prejudice prong. In its opinion and order, the trial court stated that it questioned "how Defense counsel can argue his entire case around the ongoing visitation dispute, but never review any of the records . . ." and then competently choose to abandon that theory " . . . during trial when he has failed to review information to effectively promote his theory." The trial court then went on to state that there "is no way that a defense can be prepared when you know absolutely nothing about the facts of that defense." Prejudice is self-evident, in a case such as this, where the prosecution's entire case rests upon the credibility of two witnesses, and a reasonable investigation and application of the results would have seriously damaged the witnesses' credibility. In a credibility contest, the failure to present the plausible alternative explanation for the accusations, especially when there is substantial evidence supporting the explanation, more than establishes a "probability sufficient to undermine confidence in the outcome" and that "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland, supra* at 694.

Similarly, plaintiff's contention that the documents would not have substantially bolstered defendant's theory is without merit. The documents clearly would have established an ongoing bitter custody dispute, along with a timeline for the dispute that belied the ex-girlfriend's testimony and cast doubt on the witnesses' credibility. The documents may have enabled defendant's trial counsel to prevent the admission of the victim's statement at the rest stop and would have utterly undermined the ex-girlfriend's credibility. We are persuaded that this lack of supporting evidence intolerably prejudiced the trial defense. Therefore, we cannot say that the trial court failed to exercise its discretion or that its decision lacked any legal basis. *Jones, supra*. In light of the quality of the evidence against defendant, the trial court did not abuse its discretion in granting defendant's motion for a new trial. *Strickland, supra* at 696.

Because we affirm the trial court's decision to grant a new trial on the above stated grounds, we need not address the issues defendant raises in his cross-appeal.

Affirmed.

/s/ Peter D. O'Connell  
/s/ Richard A. Bandstra  
/s/ Pat M. Donofrio