

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LEANDREW LIDDELL,

Defendant-Appellant.

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UNPUBLISHED

October 2, 2008

No. 272777

Wayne Circuit Court

LC No. 06-006206-01

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

LEANDREW LIDDELL,

Defendant-Appellee.

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No. 282551

Wayne Circuit Court

LC No. 06-006206-01

Before: Borrello, P.J., and Murray and Fort Hood, JJ.

PER CURIAM.

I. Introduction

In Docket No. 272777, defendant appeals as of right his jury trial convictions of two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a) (sexual penetration of a person under 13 years of age) (CSC I), and three counts of second-degree criminal sexual conduct, MCL 750.520c(1)(a) (person under 13 years of age) (CSC II). Defendant was sentenced, as a second habitual offender, MCL 769.10, to 20 to 60 years in prison for each count of CSC I and 15 to 30 years in prison for each count of CSC II. This Court granted defendant's motion for remand to the trial court for an evidentiary hearing on whether defendant's trial counsel was ineffective. *People v Liddell*, unpublished order of the Court of Appeals, entered April 6, 2007 (Docket No. 272777). Subsequent to the evidentiary hearing, the trial court granted defendant a new trial.

In Docket No. 282551, the prosecutor appeals by delayed leave granted from the trial court's order granting defendant a new trial. This Court consolidated the two appeals and stayed

further proceedings in Docket No. 272777. *People v Liddell*, unpublished order of the Court of Appeals, entered February 29, 2008 (Docket No. 282551). We affirm the trial court's order granting a new trial and, thus, decline to consider defendant's issues on appeal.

## II. Facts and Proceedings

As just mentioned, this Court remanded this matter to the trial court to hold a *Ginther*<sup>1</sup> hearing about the medical report and Jordan's representation of defendant. At that hearing, Jordan testified that Lindsay<sup>2</sup> and defendant told Jordan that there was a medical report for Tory; Jordan asked the prosecutor if she had a copy of a report, and she responded that she did not. Jordan explained to defendant that in order to obtain the report, they would likely need the trial court to inspect the report and make a determination of whether it was relevant to defendant's case. He explained to defendant that this would put the prosecutor on notice that they intended to use the medical report and that, in his opinion, the prosecutor would then preemptively introduce the report in her case-in-chief in the light most favorable to her case. He further explained that in the absence of the report, he could argue to the jury that the prosecutor had not "present[ed] to the jurors everything that they would need to feel confident in a verdict of guilty."

Lindsay told Jordan that the medical report might show that Tory's hymen was intact. Nevertheless, Jordan opined to defendant that "a doctor is not going to come forward and say a victim of a CSC . . . is a virgin. He will just say whether or not his findings are consistent with . . . penetration." Jordan further explained that because defendant was accused of conduct other than penile penetration, the medical report might not eliminate the charges related to fellatio and digital penetration of the vagina. Further, Jordan was aware of allegations of other criminal sexual conduct in other jurisdictions and was concerned that the testimony resulting from introduction of the report would bring out this information, to defendant's detriment. Again, Jordan felt that the lack of a medical report would be far more valuable to defendant's case overall than casting some doubt upon one count of CSC I. Jordan testified that he did not have any indication at that time that the medical report contained evidence that Tory denied vaginal penetration.<sup>3</sup>

The doctor's summary in the medical report includes:

[Tory] states that there has never been any intercourse to her vagina or to her anus. She states that she has seen his penis, touched his penis[,] and has given him oral sex on demand.

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

<sup>2</sup> Maria Lindsay was defendant's fiancée, who frequently dealt with Jordan regarding defendant's trial.

<sup>3</sup> Defendant testified at the hearing that there was a conversation between he and Jordan, but he testified that he did not agree to not obtaining the medical record. Jordan testified that defendant agreed with the tactical decision not to obtain the report.

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[Tory] denies acute [sic] putting his penis in her vagina or rectum but she performs oral sex and she touches his penis. . . . The genital examination, vaginal examination, no discharge, no bleeding, hymen ring is pink and is complete.

The trial court granted defendant's motion for a new trial, stating:

I've got to tell you – I was convinced that counsel for the defense made an error. But for that error, this man might have been acquitted. . . . [I]n this case, I think that if [the] medical report had been introduced, and people had understood that this little girl had an intact hymen – and if I remember correctly, her testimony was that this man placed his penis in her vagina something like 50 times, and I know what they say – “penetration, however slight” – but look how huge this guy is.

And so . . . I believe that if the jury heard that, they would have had a reasonable doubt. And especially – I hate to say this . . . I have to grant a new trial.

### III. Analysis

The prosecutor argues that the trial court abused its discretion in granting a new trial because it erred in its conclusion that defendant's trial counsel was ineffective. We disagree.

The decision of whether to grant a new trial is in the trial court's discretion and is, therefore, reviewed for an abuse of discretion. *People v Brown*, 279 Mich App 116, 149; \_\_\_ NW2d \_\_\_ (2008); *People v Lester*, 232 Mich App 262, 271; 591 NW2d 267 (1998). Whether a defendant has been denied the effective assistance of counsel is a mixed question of fact and law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). A trial court's findings of fact are reviewed for clear error, while questions of constitutional law are reviewed de novo. *Id.*

Generally, trial counsel is presumed effective and the defendant must show that: (1) counsel's performance fell below an objectively reasonable standard, and (2) that defendant was so prejudiced by counsel's deficiency that there is a reasonable probability that, without the error, the outcome would have been different. *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005). Further, the defendant must demonstrate that “the attendant proceedings were fundamentally unfair or unreliable.” *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

Defendant's claim of ineffective assistance of counsel was predicated on the fact that defense counsel declined to subpoena, and thus introduce at trial, the victim's medical report. The report contained evidence that the victim's hymen was intact and that the victim denied vaginal penetration. Defendant was charged with both digital and penile penetration of the

victim's vagina, and penile penetration of the victim's mouth.<sup>4</sup> Defense counsel argued that this was a question of trial strategy and that his only knowledge of the report was that it indicated that the victim's hymen was intact; he had no knowledge that the victim had denied penetration.<sup>5</sup>

Decisions regarding what evidence to present are presumed to be matters of trial strategy. *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008). Defendant does not deny that defense counsel's decision was a strategic one. Defendant argues, however, that the strategy decision was not a sound one. However, even if an attorney's trial strategy is ultimately unsuccessful, there is a strong presumption that the strategy was sound. *Rodgers, supra* at 715. An appellate court will not substitute its judgment for that of defense counsel, or use the benefit of hindsight on questions of trial strategy. *People v Odom*, 276 Mich App 407, 411; 740 NW2d 557 (2007). However, the failure to fully investigate potentially exculpatory evidence may fall beneath an objective reasonable standard of performance. *People v McGhee*, 268 Mich App 600, 626; 709 NW2d 595 (2005); *Mack, supra* at 129.

We hold that the trial court did not abuse its discretion in granting a new trial based on the ineffective assistance of counsel. In making this conclusion, we are quite cognizant of the standards used to review trial counsel's difficult job of making strategic decisions both before and during trial. Our decision is not contrary to that standard. Instead, and as explained below, our decision is consistent with the abuse of discretion standard of review, and recognizes that a principled decision on this close issue could have gone either way. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

In *People v Grant*, 470 Mich 477; 684 NW2d 686 (2004), our Supreme Court addressed a similar situation. In that case the Court held that trial counsel's failure to conduct a complete investigation that would have revealed eyewitness testimony to corroborate its defense and impeach the oldest victim's testimony, "was not a strategic decision, erroneous only in hindsight," but rather was "a fundamental abdication of duty that prejudiced defendant, depriving him of a fair trial." *Id.* at 497-498.

*Grant* involved multiple counts of CSC, with the prosecution asserting that defendant injured the victim through sexual misconduct, while defendant alleged that the injuries were caused by a bicycle accident. In its case the prosecution relied heavily on (1) the victim's vaginal injury and (2) corresponding testimony from the victim that her injury was a result of the defendant's sexual penetration. *Id.* at 479-481. Despite the fact that (1) the victim had knowingly made prior inconsistent statements (telling her first doctor that her vaginal injury was the result of a bike accident, and her second doctor that she made up the story of the bike accident out of fear of defendant and that her injury was a result of sexual penetration), (2) the victim testified at trial consistent with what she told the second doctor, and (3) defendant gave defense counsel a list of approximately a dozen witnesses that could help substantiate defendant's alleged innocence because they were "present on the day of the incident," defense

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<sup>4</sup> Defendant was acquitted of the digital penetration charge.

<sup>5</sup> The details of the report were elucidated in the trial court at the evidentiary hearing on remand from this Court.

counsel failed “to adequately interview” the witnesses. *Id.* at 481-482. Finding that had defense counsel interviewed the witnesses, he could have presented their testimony that would have significantly undercut the victim’s credibility, *id.* at 495, the Court reversed the defendant’s convictions and remanded the case for a new trial because defense counsel’s objectively unreasonable failure to adequately investigate the material facts undermined “confidence in the trial’s outcome” *Id.* at 480, 493, 497-498.

Like the *Grant* Court, and as already recognized, we are very cognizant of the deference given to strategic decisions of trial counsel. We are also cognizant of the fact that defense counsel discussed the options with defendant. Nonetheless, counter balancing that is the simple fact that trial counsel failed to even review an important document, thus precluding the making of an informed decision and preventing the jury from hearing potentially exculpatory evidence. Defense counsel was aware that the records contained evidence that the victim’s hymen was intact. At trial, the victim, a nine-year-old girl, testified that she was penetrated vaginally as many as 20 times. Clearly this evidence could have been beneficial to defendant’s case, whether for impeachment purposes or to make further trial decisions, such as calling the doctor as a witness. And, knowing what was actually contained in the document would have allowed for a more informed decision as to whether to introduce the document.

There is no doubt that defense counsel demonstrated at the *Ginther* hearing that his decision was thought out, was based upon several considerations surrounding this evidence, and that defense counsel’s decision was strategic. *Rodgers, supra* at 715. However, defense counsel’s decision not to ascertain the full details of the medical report prevented him from discovering the victim’s denial of vaginal penetration in the report, and as noted above, precluded him from making further decisions regarding evidence to support defendant’s position.

It was within the trial court’s discretion to resolve such close questions. *Brown, supra* at 15. The trial court had the ability to view the evidence and testimony first-hand and judged that trial counsel erred in not pursuing this evidence *and* that the introduction of this evidence would have likely raised a reasonable doubt with the jury. The victim’s veracity concerns all the charges, and could have impacted the jury.<sup>6</sup> Obviously the trial court felt that other witnesses for the prosecution were not too objective. Because a principled decision below could have gone either way, we find that the trial court did not abuse its discretion. *Babcock, supra* at 269.

Affirmed.

/s/ Stephen L. Borrello  
/s/ Christopher M. Murray  
/s/ Karen M. Fort Hood

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<sup>6</sup> We recognize that the medical report also contains damaging evidence as to the allegation of oral penetration. However, medical record contains significant evidence as to vaginal penetration, which was one of the counts defendant was convicted of, and raises serious credibility issues.