

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

ROBERT K. BRANNON,

Defendant-Appellee.

UNPUBLISHED

March 23, 2010

No. 292617

Monroe Circuit Court

LC No. 2006-035769-FC

Before: Davis, P.J., and Fort Hood and Servitto, JJ.

PER CURIAM.

The prosecution appeals, by leave granted, the trial court's order granting defendant a new trial on the basis of ineffective assistance of counsel. Because defendant was, in fact, denied the effective assistance of counsel, we affirm.

In 2008, defendant was convicted by a jury of first-degree criminal sexual conduct, MCL 750.520b, stemming from a sexual assault he allegedly perpetrated in 1995 upon his six-year-old niece. After conviction, defendant moved for a new trial and for a *Ginther*¹ hearing, asserting, among other things, that his trial counsel was ineffective. The trial court granted defendant a new trial, finding that defense counsel failed to adequately investigate the benefit of expert witnesses. The trial court found that this failure deprived defendant of a substantial defense because the complaining witness's reliability or credibility was not challenged in a significant way. The trial court also faulted defense counsel's failure to contact an expert witness consulted by the prosecution, Dr. Kathleen Okla, a forensic psychologist. While Dr. Okla did not review any records concerning the case and did not testify at trial, the trial court noted that she or any other expert witness could have been of immense assistance to the trier of fact in sorting out the evidence. The trial court concluded that defendant was denied the effective assistance of counsel.

We review a trial court's decision concerning a motion for a new trial for an abuse of discretion. See *People v Miller*, 482 Mich 540, 544; 759 NW2d 850 (2008). A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes.

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

People v Unger, 278 Mich App 210, 217; 749 NW2d 272 (2008). Conversely, when the trial court selects one of these reasonable and principled outcomes, the trial court has not abused its discretion and it is proper for the reviewing court to defer to the trial court's judgment. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). Importantly, an abuse of discretion involves more than a difference in judicial opinion. *Williams v Hofley Mfg Co*, 430 Mich 603, 619; 424 NW2d 278 (1988).

In this matter, defendant based his request for a new trial upon allegations of ineffective assistance of counsel. In evaluating a claim for ineffective assistance of counsel, we review a trial court's findings of fact for clear error. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). However, we review de novo whether the defendant was deprived of the effective assistance of counsel as a question of constitutional law. *Id.*

Under the United States and Michigan Constitutions, US Const, Am VI; Const 1963, art 1, § 20, the guaranteed right to counsel encompasses the right to the effective assistance of counsel. *People v Cline*, 276 Mich App 634, 637; 741 NW2d 563 (2007). "Effective assistance of counsel is presumed, and defendant bears a heavy burden to prove otherwise." *People v Dixon*, 263 Mich App 393, 396; 688 NW2d 308 (2004). To establish the ineffective assistance of counsel, a defendant must show: "(1) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms; (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different; and (3) the resultant proceedings were fundamentally unfair or unreliable." *People v Mesik (On Reconsideration)*, 285 Mich App 535, 543; 775 NW2d 857 (2009).

Defense counsel has wide discretion regarding matters of trial strategy. *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). We will not substitute our judgment for that of counsel regarding matters of trial strategy, nor will we assess counsel's competence with the benefit of hindsight. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009). However, while deference is afforded to counsel's strategic judgments, strategic choices made after an incomplete investigation are reasonable only to the extent that reasonable professional judgments support the limitation on investigation. *Wiggins v Smith*, 539 US 510, 521-522, 528; 123 S Ct 2527; 156 L Ed 2d 471 (2003). Further, "[t]he failure to make an adequate investigation is ineffective assistance of counsel if it undermines confidence in the trial's outcome." *People v Grant*, 470 Mich 477, 493; 684 NW2d 686 (2004).

The failure to call witnesses or to present other evidence can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense, *Payne*, 285 Mich App at 190. A substantial defense is one that might have made a difference in the outcome of the trial. *In re Ayres*, 239 Mich App 8, 22; 608 NW2d 132 (1999). That a strategy does not work does not render its use ineffective assistance of counsel. *People v Petri*, 279 Mich App 407, 412; 760 NW2d 882 (2008).

On appeal, the prosecution argues that the trial court abused its discretion in granting defendant a new trial. It contends that defense counsel's decision not to call an expert regarding the reliability of the complaining witness's testimony constituted sound trial strategy that did not deny defendant a substantial defense, and that this decision was made after an adequate investigation. We disagree.

On defendant's motion, the trial court conducted a thorough *Ginther* hearing, at which significant evidence was presented concerning the necessity of expert testimony and what that testimony would have involved. Specifically, Dr. Campbell (listed on defendant's witness list) and Dr. Okla (listed on the prosecution's witness list) testified at the *Ginther* hearing that they would have testified at trial to the social influences on memory, which was important in this case because family members discussed with the complaining witness other sexual assault allegations against defendant prior to the complaining witness's disclosure. In addition, Dr. Campbell and Dr. Okla would have addressed the effects on memory caused by the ten-year delay between the date of the alleged incident and when the complaining witness reported it. Also, they would have addressed the problems with the forensic interview of the complaining witness conducted by Detective David Berg at the Kane County Child Advocacy Center in Illinois. Furthermore, they would have addressed the memory creation capacities of a six year old and how the complaining witness's failure to fully disclose all of the details on the first telling, and adding details on each telling of the incident, was contrary to how children generally provide all of the details once they tell someone about sexual abuse for the first time. Two out of four known potential expert witnesses essentially testified that they would have been able to provide testimony favorable to defendant on the issue of the complaining witness's credibility. Defense counsel failed to fully investigate these witnesses' potential testimony for his defense or for cross-examination purposes, and, in fact, failed to call any expert witnesses despite the fact that this case turned almost entirely on the credibility of the complaining witness.

While defense counsel testified at the hearing that he did not call Dr. Campbell as a witness because, after speaking with him several times, he believed Dr. Campbell's testimony might have been more helpful to the prosecution, counsel's reasoning only demonstrates his inadequate investigation. There was no indication that he was aware of the multitude of other ways described by Dr. Campbell and Dr. Okla in which expert testimony could have challenged the reliability of the complaining witness's testimony beyond merely the lengthy delay in reporting (which Dr. Okla acknowledged was common). Without acquiring this knowledge about how to challenge the complaining witness's reliability, through a more in-depth investigation into expert witnesses, defense counsel could not have made a sound strategic decision on this issue. As the trial court concluded, under the specific facts of this case, defense counsel failed to adequately investigate the benefit of expert witnesses, denying defendant the effective assistance of counsel.

In addition, we conclude that the trial court did not err in determining that there was a reasonable probability that, but for defense counsel's error, the result of the proceedings would have been different. Without expert testimony on the issues discussed above, there was nothing defense counsel did to challenge the reliability of the complaining witness's memory about the alleged incident. Merely pointing to inconsistent statements did not put forth a defense regarding how the facts surrounding the complaining witness's disclosure suggested that the reliability of her memory was questionable. Further, the complaining witness's testimony was crucial to the entire case because there was no corroborating evidence of a sexual assault. Rather, the prosecution relied on other incidents of sexual assault involving defendant to bolster the complaining witness's testimony. Therefore, if defense counsel had presented a reliability defense supported by expert testimony, there is a reasonable probability that the result of the proceedings would have been different.

Again, we would note that an abuse of discretion standard is relatively high and involves more than a mere difference in judicial opinion. *Williams v Hofley Mfg Co*, 430 Mich at 619. Whether we personally agree with the trial court's ultimate ruling is of no consequence. The trial court was in the best position to evaluate the testimony at each proceeding. The trial court fairly and accurately reviewed the evidence presented at the *Ginther* hearing to reach its decision, and its decision was within the reasonable and principled range of outcomes, based upon the evidence presented at the hearing and the issues presented at trial.

Affirmed.

/s/ Karen M. Fort Hood

/s/ Deborah A. Servitto