

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RANDY DEAN COURON,

Defendant-Appellant.

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UNPUBLISHED

January 22, 2009

No. 278082

Berrien Circuit Court

LC No. 2003-411956-FC

Before: Beckering, P.J., and Whitbeck and M. J. Kelly, JJ.

PER CURIAM.

Defendant Randy Couron appeals by right his jury conviction for two counts of first-degree criminal sexual conduct.<sup>1</sup> The trial court sentenced Couron to 20 to 80 years' imprisonment. Thereafter, Couron appealed his convictions on the ground that the trial court erroneously denied his motion for a new trial without first conducting an evidentiary hearing pursuant to *People v Ginther*.<sup>2</sup> This Court agreed and remanded to the trial court for a *Ginther* hearing to address Couron's claim of ineffective assistance of counsel.<sup>3</sup> On remand, the trial court held the *Ginther* hearing and thereafter denied the motion for new trial. This case arose out of allegations that during the years of 1989 and 1990, Couron repeatedly sexually molested the complainant herein, his then seven-year-old niece, while she was visiting his home. We affirm.

I. Ineffective Assistance Of Counsel

A. Standard Of Review

We review a trial court's decision to grant or deny a motion for a new trial for an abuse of discretion. A trial court abuses its discretion only when its decision falls outside the range of

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<sup>1</sup> MCL 750.520b(1)(a).

<sup>2</sup> *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

<sup>3</sup> *People v Couron*, unpublished opinion per curiam of the Court of Appeals, issued September 21, 2006 (Docket No. 256952).

principled outcomes.<sup>4</sup> With regard to a claim of ineffective assistance, we review for clear error a trial court’s factual findings, while we review de novo its constitutional determinations.<sup>5</sup>

## B. Legal Standards

To prevail on a claim of ineffective assistance of counsel, a defendant must prove constitutionally deficient performance and prejudice.<sup>6</sup> To satisfy the first component, a defendant must show that “counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.”<sup>7</sup> The second component requires the defendant to show “the existence of a reasonable probability that, but for the counsel’s error, the result of the proceeding would have been different.”<sup>8</sup> A defendant must satisfy both components to prevail.<sup>9</sup> A defendant also “must overcome a strong presumption that counsel’s performance constituted sound trial strategy.”<sup>10</sup> “[T]his Court neither substitutes its judgment for that of counsel regarding matters of trial strategy, nor makes an assessment of counsel’s competence with the benefit of hindsight.”<sup>11</sup> A defendant bears the burden of establishing the factual predicates for his claims.<sup>12</sup>

## C. Applying The Standards

### 1. Failure To Prevent Spontaneous Statement

Couron argues that trial counsel provided ineffective assistance when he created circumstances during a pretrial hearing that resulted in Couron making a statement that the prosecutor overheard and subsequently used at trial to undermine Couron’s credibility. Couron made a voluntary and spontaneous statement during a public hearing in a courtroom that was loud enough to be overheard. Consequently, it was Couron’s failure to take reasonable precautions to keep his remark confidential, not any act or omission on the part of trial counsel, that created the opportunity for later use of his statement for impeachment purposes at trial. We

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<sup>4</sup> *People v Blackston*, 481 Mich 451, 460; 751 NW2d 408 (2008).

<sup>5</sup> *People v Dendel*, 481 Mich 114, 124; 748 NW2d 859 (2008), amended 481 Mich 1201 (2008).

<sup>6</sup> *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *Dendel*, *supra* at 125.

<sup>7</sup> *Strickland*, *supra* at 687.

<sup>8</sup> *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

<sup>9</sup> *Id.* at 599-600.

<sup>10</sup> *Id.* at 600.

<sup>11</sup> *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004).

<sup>12</sup> *Carbin*, *supra* at 600.

do not fault trial counsel for failing to anticipate and prevent Couron from making a spontaneous statement.<sup>13</sup>

## 2. Failure To Object To Impeachment

Couron argues that defense counsel was ineffective for failing to object to the prosecutor's use of the spontaneous statement to impeach him. However, in its ruling after the *Ginther* hearing, the trial court explained that it allowed the prosecutor to use the statement, despite defense counsel's objection raised during a bench conference. Thus, Couron has failed to establish the factual predicate for his claim that defense counsel was ineffective for failing to object.<sup>14</sup>

## 3. Failure To Accept Offer of Adjournment

Couron argues that defense counsel was ineffective because he did not accept the trial court's offer of an adjournment when the prosecution made a late disclosure of evidence and submitted a revised witness list. According to Couron, because of this decision defense counsel did not have time to interview the witnesses or review the complainant's journal. The record shows that the newly presented witnesses were not a surprise to defense counsel and that their testimony merely corroborated the complainant's testimony that she had been at Couron's home at the time of the sexual abuse. The record also shows that defense counsel reviewed the journal before the beginning of the trial. In addition, at the evidentiary hearing, defense counsel testified that he was capable of being prepared for trial even without the adjournment and that he would have accepted the adjournment if he felt he would be unprepared for trial. Because defense counsel testified that he was prepared for trial and because the contents of the journal and witnesses' testimony did not contain any unexpected evidence, Couron is unable to overcome the strong presumption that defense counsel's actions constituted trial strategy.<sup>15</sup>

## 4. Failure To Obtain Evidence and Expert

Couron maintains that defense counsel was ineffective for failing to request the complainant's medical records and for failing to secure the assistance of an expert. Couron claims that if defense counsel requested these records and if defense counsel consulted an expert, then defense counsel would have been able to argue the complainant's allegations were a result of improper therapy techniques. But Couron presented no evidence at the *Ginther* hearing to show that such an investigation would have revealed any beneficial information.<sup>16</sup> Couron failed

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<sup>13</sup> See, e.g., *People v Compeau*, 244 Mich App 595, 597; 625 NW2d 120 (2001) (holding that because the defendant "chose to communicate with counsel by speaking to the attorney in a manner that could be overheard by a third party rather than covering his mouth and quietly whispering or communicating in writing," the statement was not protected by the attorney-client privilege).

<sup>14</sup> *Carbin*, *supra* at 600.

<sup>15</sup> *Id.*

<sup>16</sup> See *People v Caballero*, 184 Mich App 636, 640; 459 NW2d 80 (1990).

to seek an in camera review of the complainant's psychiatric records. Although Couron consulted an expert on appeal, he still failed to establish that a valid defense existed on the basis of the complainant being subjected to suggestive therapy techniques. Accordingly, Couron has failed to establish the factual predicate for his claim.<sup>17</sup>

#### 5. Failure To Investigate

Couron contends that defense counsel failed to investigate certain family animosity that could have been used as a defense and failed to lay a proper foundation to introduce evidence of family animosity. Contrary to Couron's representation, the record indicates that during the trial defense counsel repeatedly raised the animosity in Couron's family as a reason for why the complainant may have fabricated her claims. Thus, Couron has failed to establish a factual predicate for his claim that defense counsel provided deficient representation.<sup>18</sup>

#### 6. Failure To Lay Proper Evidentiary Foundation

Couron alleges that defense counsel failed to lay a proper foundation to admit the contents of a friendly telephone conversation between the complainant and Couron that transpired shortly before the complainant accused Couron of sexual assault. The record indicates that defense counsel questioned the complainant and Couron about the telephone call. Through this testimony, the jury heard that the telephone occurred because the complainant returned Couron's initial telephone call, that the telephone call was long and friendly, and that the complainant made no accusations about the sexual abuse at that time. Thus, Couron is unable to establish the factual predicate for his claim that the defense counsel was deficient for failing to present this information.<sup>19</sup>

#### 7. Failure To Call Witness

Couron maintains that defense counsel was deficient for failing to call Couron's son as a witness. "The decision whether to call witnesses is a matter of trial strategy which can constitute ineffective assistance only when the failure to do so deprives the defendant of a substantial defense."<sup>20</sup> Couron has not demonstrated what substantial defense he was deprived of when defense counsel decided to not have Couron's son testify. At the most, the son's testimony would have established that animosity existed between various family members and that the complainant had sent him an e-mail detailing her mental health problems before she made the allegations. Because the evidence of family animosity and the e-mail were presented at trial through other witnesses, the son's testimony would only have been cumulative. Thus, the

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<sup>17</sup> *Carbin, supra* at 600.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *People v Hoyt*, 185 Mich App 531, 537-538; 462 NW2d 793 (1990).

defense counsel's decision was trial strategy and did not deprive Couron of a substantial defense.<sup>21</sup>

In sum, we conclude that the trial court did not abuse its discretion when it denied Couron's motion for a new trial.

Affirmed.

/s/ Jane M. Beckering  
/s/ William C. Whitbeck  
/s/ Michael J. Kelly

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<sup>21</sup> *Id.* at 537-538.