State of New Hampshire
Supreme Court

NO. 2009-0453

2010 TERM

JANUARY SESSION

State of New Hampshire

v.

Kerry Kidd

RULE 7 APPEAL OF FINAL DECISION OF
GRAFTON COUNTY SUPERIOR COURT

BRIEF OF DEFENDANT/APPELLANT KERRY KIDD

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MEMORANDUM IN SUPPORT OF MOTION FOR NEW TRIAL (Jan. 20, 2009)

II. Did Mr. Kidd's trial attorney provide ineffective assistance of counsel of failing to object to the court's and the State's use of the word "victim" during trial to refer to the complainant?

MEMORANDUM IN SUPPORT OF MOTION FOR NEW TRIAL (Jan. 20, 2009)

STATEMENT OF FACTS AND STATEMENT OF THE CASE

The State alleges that in 2001 Amanda Haddock, of Meredith, New Hampshire, went on a weekend camping trip with her friend, Brittany Boeckler, and Ms. Boeckler's family, who owned a small private campsite in Bethlehem, New Hampshire. Mr. Kidd was married to Tammy Kidd, Ms. Boeckler's mother, who was also along on the trip. *1 TrialTrn*. at 12-14.[1]

Among the several small tents in close proximity, Mss. Haddock and Boeckler shared one, sleeping next to each other in sleeping bags. The State alleged that Mr. Kidd unzipped the tent, entered Ms. Haddock's partially open sleeping bag, talked with her, fondled her, pulled her clothes down, had sexual intercourse, pulled up his jeans and zipped them, and left the tent by unzipping and zipping it. Ms. Boeckler is alleged to have slept through this, as are all others in tents a few feet away. *1 TrialTrn*. at 14-15.

In the morning, Ms. Haddock wrote Ms. Boeckler a letter, which was not produced, telling her friend what happened. The State maintains that morning Ms. Haddock told Regina Thurber, an adult member of the family who was there, what happened, that Ms. Haddock instructed Ms. Thurber to not tell anyone, and that Ms. Thurber kept the secret. Several months later, the State alleges that Ms. Haddock told another adult, Linda Rogers, who is Ms. Boeckler's grandmother and who was also on the camping trip, and that Ms. Rogers also kept the secret. *1 TrialTrn*. at 15-16.

The State alleges that four years later, after Ms. Boeckler's family had moved to Florida,

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[1] "*JurySelect.Trn*." refers to the day the jury was selected, September 5, 2006.
"*1 TrialTrn*." refers to the first day of the underlying trial, September 18, 2006.
"*2 Trial.Trn.*" refers to the second day of the underlying trial, September 19, 2006.
"*Depo.Trn*." refers to the deposition of Attorney Lee Topham.
"Disco." refers to the State's discovery package, which comprises the appendix to this brief.

Ms. Haddock was a contented high school student with good grades and a job. In 2005 Ms. Rogers and Ms. Kidd were talking, compared stories, and reported them to the Meredith police. *1 TrialTrn*. at 17-18. Ms. Haddock was then approached by the police and interviewed by several officials, including Officer Denise Miller of the Belknap County Sheriff's Department, TAPED INTERVIEW, *Disco*. at 17-40,[2] and Officer Bart Merrill of the Town of Meredith, POLICE REPORT, *Disco*. at 5-11, who then made a statutory report to DCYF. INTAKE REPORT, *Disco*. at 1-3. As part of the investigation in 2006, both Mss. Boeckler and Rogers wrote detailed letters to the Bethlehem police. LETTER FROM MS. BOECKLER TO BETHLEHEM POLICE (June 15, 2006), *Disco*. at 87-90; LETTER FROM MS. ROGERS TO BETHLEHEM POLICE (June 15, 2006), *Disco*. at 91-92. At the time of trial Ms. Haddock was 16 years old.

Mr. Kidd was indicted on one count of aggravated felonious sexual assault, and tried by jury in the Grafton County Superior Court (*William J. Groff*, J.). He was represented at trial by Attorney Lee Topham of the Littleton office of the New Hampshire Public Defender.

Attorney Topham's short opening statement suggested the State had an "implausible scenario about what happened out there." *1 TrialTrn*. at 20. He noted that the campsite "was a relatively small area that was occupied … by a dozen or so people" who were in tents that "[we]re next to each other." *Id.* He argued to the jury that "despite the fact there were numerous people there, despite the fact there is another person in the tent with Amanda Haddock, no one hears it." *1 TrialTrn*. at 21. He suggested that the State "has really no evidence … than the testimony you're going to hear … from Amanda Haddock." *Id.* He promised to demonstrate

[2]The transcript of the taped interview uses initials to indicate who is speaking. For consistency, those designations have been altered here to the standard "Q" and "A."

discrepancies in her story:

> What the state does have is a number of conflicting statements that they received from Amanda Haddock or that other people actually received from Amanda Haddock. At one point Amanda tells Linda Rogers one version, he rubbed my back. She tells her friend, her best friend, Brittany, he rubbed my chest. Another time she says well, he was drunk and I think he stumbled in.

Id. In his closing argument Attorney Topham asked the jury to rely on discrepancies in Ms. Haddock's stories. *2 TrialTrn*. at 74-75. Attorney Topham, however, neglected to bring many significant discrepancies to the jury's attention. The trial record shows that several of the State's witnesses went unquestioned by Attorney Topham, *see 2 TrialTrn*. at 46, 54, 61, and of those he did question, remarkably short and unincisive examinations. *See 1 TrialTrn*. at 37-42, 60-63, 76-79, *TrialTrn*. at 38-46, 47.

After a guilty verdict this court affirmed. *State v. Kidd*, N.H. Sup.Ct. No. 2007-0151 (decided by order, Dec. 21, 2007).

Mr. Kidd then filed a motion for a new trial based on ineffective assistance of counsel. The Grafton County Superior Court (*Timothy J. Vaughan*, J.) appointed an attorney to conduct that proceeding, during which Attorney Topham was deposed, *Depo.Trn*., passim. Following a hearing, during which the court heard testimony from Mr. Kidd, his expert, and Attorney Topham, the court denied relief. Mr. Kidd appealed that order, and this Court appointed appellate counsel.

SUMMARY OF ARGUMENT

Mr. Kidd first sets forth 18 discrepancies that Mr. Kidd's trial attorney left unaddressed at trial, some of which cast doubt on the State's theory, and some of which merely undermined the complainant's credibility. After setting forth the legal standards for ineffective assistance of counsel, Mr. Kidd acknowledges that his trial attorney chose implausibility as a defense. He argues that his trial attorney did not follow through, however, by exposing the discrepancies that are necessary to the defense, and that this failure undermines confidence in the outcome of the trial. Mr. Kidd further argues that his trial attorney compounded the error by asking the jury, both in opening and closing, to rely on the unexposed discrepancies.

Finally, Mr. Kidd argues that his trial lawyer's failure to object to the court's and the State's use of the word "victim" throughout trial was also ineffective assistance, as the word carries the presumption that a crime occurred, which was the ultimate issue for the jury.

ARGUMENT

I. Discrepancies Unaddressed, Unexplored, Unexposed by Attorney Topham

A. How Many Camping Trips?

Various witnesses differed on the number of camping trips the extended family groups went on that summer.

Tammy Kidd testified that the family tried to camp every weekend and that Ms. Haddock joined the family almost every time they went. *1 TrialTrn*. at 52, 53. Ms. Haddock testified that she went camping four times. *1 TrialTrn*. at 88. Ms. Rogers testified she went camping with Ms. Haddock just twice. *1 TrialTrn*. at 35.

Attorney Topham did not raise the discrepancy at trial.

B. Who was Present on the Camping Trip?

At trial Ms. Haddock testified that Mark and Regina Thurber, who were friends of the family, came on the trip in question, and sat around the campfire on Saturday evening. *1 TrialTrn.* at 87, 91. Ms. Haddock even told the jury that Mark Thurber took her and Ms. Boeckler to a store to buy glow sticks and hair spray. *1 TrialTrn.* at 94. It was to Regina Thurber on the morning after the alleged rape she allegedly confessed the events of the night before. *2 TrialTrn.* at 58; *1 TrialTrn.* at 15-16.

In her interview with Officer Miller, however, Ms. Haddock could not recall whether Mark and Regina Thurber were even present. After naming several people who were at the campsite, Officer Miller asked:

> Q: And anybody else there?
> A: Um, I don't really know, I'm not sure.
> Q: OK.
> A: But we were friends with um, Regina and Mark Thurber, they might have gone, I just don't remember if they did.

Disco. at 21-22 (capitalization altered). Even though the Thurbers, especially Regina, played a central role in Ms. Haddock's story, Attorney Topham never brought this discrepancy in Ms. Haddock's memory to the attention of the jury.

Similarly, Ms. Haddock told Officer Miller that Chuck and Linda Rodgers were present at the campground. TAPED INTERVIEW, *Disco*. at 22. Her testimony at trial was unequivocal that they were there. *1 TrialTrn*. at 94. But Linda Rodgers testified she was not present that weekend. *1 TrialTrn*. at 30, 35.

Attorney Topham did not raise this discrepancy.

C. How Many People Were in the Tent?

Ms. Haddock told Meredith Police Officer Merrill that she "was sleeping in her own tent by herself." POLICE REPORT, *Disco*. at 8. Tammy Kidd also stated that Ms. Haddock slept in a tent by herself. *Id.*

In her letter to the Bethlehem police, however, Ms. Boeckler made clear she and Ms. Haddock "were in a two man tent, in separate sleeping bags." LETTER FROM MS. BOECKLER TO BETHLEHEM POLICE (June 15, 2006), *Disco*. at 88. Likewise Ms. Haddock told Officer Miller she shared a tent with Ms. Boeckler. TAPED INTERVIEW, *Disco*. at 22.

At trial Ms. Haddock was unequivocal that the girls shared a tent, *1 TrialTrn*. at 68, 89, 92, even describing the location of the two sleeping bags in relation to each other and to the zippered tent door. *1 TrialTrn*. at 97.

Attorney Topham did not mention this discrepancy at trial.

D. "Pass it Off" as Drunk and Entering Mistaken Tent?

In her letter to the Bethlehem police, Ms. Boeckler wrote:

> I woke up and remember Amanda [Haddock] telling me Kerry [Kidd] had came into the tent during the night. I really didn't think anything of it at the time because she didn't go into detail on it. We passed it off as him being drunk and finding the wrong tent.

LETTER FROM MS. BOECKLER TO BETHLEHEM POLICE (June 15, 2006), *Disco*. at 89. On cross-examination, Attorney Topham questioned Ms. Haddock about them passing off the incident, but she denied it:

> Q: And the two of you basically pass it off as Kerry being drunk and getting into the wrong tent, isn't that correct?
> A: That's not what we said.

2 TrialTrn. at 41-42.

Attorney Topham did not confront Ms. Haddock with Ms. Boeckler's statement, but rather moved on to another line of inquiry, and never returned. The passing reference in Attorney Topham's closing, *2 TrialTrn*. at 74, does not address counsel's lack of effort to adequately confront Ms. Haddock on the matter.

E. What was Amanda Haddock Wearing?

Ms. Haddock made differing statements about what clothing she was wearing and what Mr. Kidd was wearing. She was equivocal in her her interview with Officer Miller:

Q: What were you wearing, do you remember?
A: No.

TAPED INTERVIEW, *Disco*. at 25. At one point in the interview Ms. Haddock gave no response when asked directly if she had any clothes on. TAPED INTERVIEW, *Disco*. at 26. Also in that interview she told Officer Miller, "I think I was wearing pants or shorts, I'm not really sure." TAPED INTERVIEW, *Disco*. at 26. And a few pages later in the same interview, Ms. Haddock hedged, referring to her clothing as "my shorts or pants." TAPED INTERVIEW, *Disco*. at 30.

At trial on direct examination, Ms. Haddock was far more definite.

Q: And what are you wearing at this point in time?
A: I'm wearing p.j.'s. I'm wearing – I have a t-shirt and pants on, like p.j. pants.
Q: And long or short, what kind of p.j. pants?
A: They were long.

1 TrialTrn. at 101.

Attorney Topham made no attempt to confront Ms. Haddock on whether she wore shorts, long pants, or anything at all, nor to compare her definitive testimony with her earlier inability to recall.

F. What was Kerry Kidd Wearing?

Similarly, Ms. Haddock gave differing versions of Mr. Kidd's clothing. In her interview with Officer Miller, she claimed no memory:

> Q: Do you remember what he was wearing?
> A: Um, not really.

TAPED INTERVIEW, *Disco*. at 25. In the same interview, however, she provided clear details about what he was and was not wearing:

> A: Yeah, he wasn't wearing jeans, that's what I know, so it's like stretchy pants.

TAPED INTERVIEW, *Disco*. at 30.

At trial on direct examination, however, Ms. Haddock was clear Mr. Kidd was wearing jeans:

> Q: Do you remember what he was wearing?
> A: Jeans and like a fat tank top, like a fat striped tank top thing."

1 TrialTrn. at 101-02.

> Q: And what is he wearing?
> A: Like a cut off t-shirt and jeans.

2 TrialTrn. at 11. Ms. Haddock even claimed she recalled Mr. Kidd unzipping the jeans. *Id.*

On cross-examination, Attorney Topham asked Ms. Haddock if she told Officer Miller that Mr. Kidd was not wearing jeans. *2 TrialTrn*. at 39. When Ms. Haddock indicated she was unsure, Attorney Topham did not confront her with her initial statement that she could not remember what he wore, nor her intermediate statement that he was wearing stretchy pants.

G. Did he Rub her Stomach or also her Chest?

In her letter to the Bethlehem police, Ms. Boeckler wrote that Ms. Haddock "told me that the night of our camping trip, he had climbed into her sleeping bag and was rubbing her chest." LETTER FROM MS. BOECKLER TO BETHLEHEM POLICE (June 15, 2006), *Disco*. at 89. She told the Thurbers that it was her stomach, but did not mention her chest. POLICE REPORT, *Disco*. at 8.

On direct examination, Ms. Haddock testified that Mr. Kidd rubbed her stomach, and then moved his hand lower. She did not testify that Mr. Kidd rubbed her chest. *2 TrialTrn*. at 6.

On cross examination Attorney Topham asked Ms. Haddock: "[Y]ou told Brittany [Boeckler] that Kerry [Kidd] had climbed into the tent and rubbed your chest, is that correct? Ms. Haddock denied it and reiterated the rubbing was to her stomach and not her chest. *2 TrialTrn*. at 42.

Attorney Topham did not confront Ms. Haddock with Ms. Boeckler's letter, nor even with her own inconsistent statements. He made no attempt to resolve the discrepancy about whether her chest was touched. The passing reference in Attorney Topham's closing, *2 TrialTrn*. at 75, does not address counsel's failure to confront Ms. Haddock on the matter.

H. Did he Rub her Back?

Similarly, Ms. Haddock told both Meredith Police Officer Merrill and Linda Rogers that Mr. Kidd rubbed her back as part of the rape. POLICE REPORT, *Disco*. at 8; LETTER FROM MS. ROGERS TO BETHLEHEM POLICE (June 15, 2006), *Disco*. at 92.; *1 TrialTrn*. at 34. She told Officer Miller, however, that the only places Mr. Kidd touched with his hand were her stomach and vagina. TAPED INTERVIEW, *Disco*. at 20, 25-26, 28-29.

On direct examination, she testified she was laying on her back, *1 TrialTrn*. at 103; *2 TrialTrn*. at 15, presumably making it unavailable for rubbing. And on cross examination she testified she did not remember if her back was rubbed. *2 TrialTrn*. at 43.

Although Attorney Topham mentioned the rubbing of her back in his opening, he made no attempt to resolve the discrepancies about whether her back was touched or even could have been.

J. Where was the Underwear?

In her police interview, Ms. Haddock was tentative whether she had any underwear on at all:

> Q: …[W]ere you wearing underpants that you can remember?
> A: I think so.

TAPED INTERVIEW, *Disco*. at 30. In the same interview, she told Officer Miller not only that she had underwear on, but that Mr. Kidd slid it over to the side, and did not push it down:

> Q: OK, were they [your underwear] on or off or?
> A: They were on I think he like slid 'em over, you know the side over the -
> Q: OK. So he slid the side of the panties over?
> A: Yeah.
> Q: Not down, but just sideways?

TAPED INTERVIEW, *Disco*. at 30.

On direct examination, however, Ms. Haddock testified quite differently as to the position of her clothing:

> Q: Okay. And what happens next?
> A: He starts pulling down my pants like to my – a little on my calves, like a little higher from my ankles.
> Q: And do you have underwear on?
> A: Well, he pulled them down with my pants, my p.j. bottoms.
> Q: Okay. And where are your underwear?
> A: They're in my p.j. bottoms below my calves.

1 TrialTrn. at 103-04; *2 TrialTrn*. at 10-11, 15 (clothes pulled down to ankles and calves). Ms. Haddock testified that after the alleged assault she pulled her clothes up. *2 TrialTrn*. at 15

Attorney Topham never mentioned the discrepancy regarding whether Ms. Haddock was wearing underwear at all, nor whether they were pushed to the side or pulled down. The issue is significant because depending upon the answer penetration could be hampered or restricted.

K. Was There Physical Resistance?

Ms. Haddock told Linda Rogers that when Mr. Kidd started rubbing her back, she physically resisted his advances and "kept pushing him away." LETTER FROM MS. ROGERS TO BETHLEHEM POLICE (June 15, 2006), *Disco*. at 92. In her testimony, Ms. Rogers was emphatic:

> She told me that she was sleeping in a tent and that Kerry came in and got into her sleeping bag and started rubbing her back. And she kept pushing him away. And he wouldn't leave. And she kept pushing him away. And eventually he did leave.

1 TrialTrn. at 34.

Ms. Haddock's testimony was quite different, however. She testified at trial that she did not say anything, *1 TrialTrn*. at 102, nor do anything: "I was just laying there. I didn't know what to do." *2 TrialTrn*. at 13.

This discrepancy is significant because Attorney Topham's defense was implausibility, and the incredulity that a dozen people in a small campsite, including one in the same tent, slept through a rape. If there was physical jostling, it makes the defense more credible. Attorney Topham, however, did not mention the discrepancy regarding whether Ms. Haddock made an effort to push Mr. Kidd away.

L. When were Contemporaneous Oral Reports Made?

To the extent that Ms. Haddock orally and contemporaneously told Ms. Boeckler about the incident, she gave inconsistent accounts about when that occurred.

Ms. Haddock told Officer Miller that the tale was told inside the tent when Ms. Boeckler woke up: "And in the morning I told Brittany about it, when she woke up." TAPED INTERVIEW, *Disco*. at 33.

Ms. Haddock testified at trial, however, that she told Ms. Boeckler after breakfast when Ms. Boeckler and Ms. Haddock were in the tent packing. *2 TrialTrn*. at 19, 22.

> A: Well, after she ate breakfast and stuff, that was the day we were going home, so it was kind of a busy day. We started packing up and everything. And me and Brittany were in the tent. And I – so since I didn't know she got the letter, I just told her what happened. And she was listening to me.

2 TrialTrn. at 22.

There are thus two versions of when Ms. Haddock discussed the issue with Ms. Boeckler. Attorney Topham did not raise this discrepancy at trial.

M. Where and When was the Apology Made?

Connected to where and when Ms. Haddock told Ms. Boeckler about the incident, is where and when Mr. Kidd apologized to her for it. Ms. Haddock was consistent that Ms. Kidd apologized to her the next morning, but inconsistent regarding where it occurred and the circumstances surrounding it. Ms. Haddock told Officer Miller that Mr. Kidd

> "heard me telling Brittany [Boeckler] about it, and he came in and gave me a hug and he told me I'm sorry for scaring you, cause I told Brittany I was scared, I didn't know what to do. And he said I'm sorry for scaring you."

TAPED INTERVIEW, *Disco*. at 33. According to this version, the apology was inside the tent after Mr. Kidd overheard Ms. Haddock telling her friend.

At trial, Ms. Haddock testified that she was out of the tent next to the campfire "eating breakfast with everyone else that was up." *2 TrialTrn*. at 17. Mr. Kidd "goes in the tent to wake up Brittany" "because it was getting later in the day."

Q: Okay. And who comes out of the tent at first?
A: Kerry.
Q: And what happens when Kerry comes out of the tent, where does he go?
A: He comes and gives me a hug and he says I didn't mean to hurt you, I'm sorry .
Q: And where are you when he gives you a hug?
A: By the fire because I was still eating breakfast.

2 TrialTrn. at 18. In this version not only did the apology occur outside the tent by the fire over breakfast, but it was also not prompted by any overheard conversation with Ms. Boeckler, as she was still sleeping.

Attorney Topham did not bring the differing versions to the attention of the jury.

N. Were Disclosures About a Rape Made Contemporaneously?

There are three differing accounts regarding when Ms. Haddock disclosed that she had been raped – contemporaneously, later the same summer, or years later after the police approached her.

Ms. Haddock testified that she had a conversation with Ms. Boeckler after breakfast when they were in the tent packing.

> "[S]ince I didn't know she got the letter, I just told her what happened. And she was listening to me. And she goes Amanda, if you're my true friend, you won't tell anybody."

2 TrialTrn. at 19, 22. Ms. Haddock confirmed that conversation with others. In her interview with Officer Miller, Ms. Haddock said that "in the morning I told Brittany about it, when she woke up." She also told Officer Miller that Mr. Kidd had overheard the conversation, prompting his apology. TAPED INTERVIEW, *Disco*. at 33. Regina Thurber likewise reported that Ms. Haddock told her that Ms. Haddock had told Ms. Boeckler inside the tent "about what happened." POLICE REPORT, *Disco*. at 110.

In her letter to the police, Ms. Boeckler wrote that the issue came up in a conversation between her and Ms. Haddock at some point probably later in the summer, when Ms. Haddock told Ms. Boeckler that Mr. Kidd had rubbed her chest. LETTER FROM MS. BOECKLER TO BETHLEHEM POLICE (June 15, 2006), *Disco*. at 89.

According to the DCYF intake, Ms. Haddock reported telling no one contemporaneously that she was raped – "Amanda did not disclose this to anyone." INTAKE REPORT, *Disco*. at 3. Officer Merrill had the same understanding, writing that Ms. Haddock "has not told anyone about the rape until today's date, when she told her mother." POLICE REPORT, *Disco*. at 8.

Attorney Topham did not raise this issue during trial. He never focused attention on the various stories regarding when Ms. Haddock told people, or whether she told anyone at all until the police approached her.

O. Were Disclosures About Conduct Short of Rape Made Contemporaneously?

There are also discrepancies regarding when Ms. Haddock made disclosures regarding Mr. Kidd's behavior that was short of sexual intercourse.

Regina Thurber testified that Ms. Haddock disclosed to her the morning after the incident. *2 TrialTrn*. at 58-59. In her interview with Officer Miller, Ms. Haddock agreed, saying that "I told Mark and Gina, but I didn't tell em' he raped me. I told them about the stomach." TAPED INTERVIEW, *Disco*. at 33. In her testimony, however, Ms. Haddock told the jury that she did not tell Ms. Thurber until after the Kidds had moved to Florida sometime later. *2 TrialTrn*. at 24-25.

Similarly, Ms. Haddock told Officer Miller a disclosure regarding touching short of sexual intercourse was made to Linda Rodgers the morning after it occurred. TAPED INTERVIEW, *Disco*. at 33-34. Ms. Rodgers testified at trial however, that she did not attend the trip and that Ms. Haddock did not tell her until sometime afterwards. *1 TrialTrn.* at 34.

Ms. Haddock also testified that she did not talk about the incident to anyone except Ms. Boeckler on the morning after the assault. *2 TrialTrn*. at 23.

In her interview with Officer Miller, Ms. Haddock said "I told my Mom." Ms. Haddock said that her mother asked whether she should report the incident, but that Ms. Haddock declined at the time: "And I told her I really don't want to cause I didn't wanna get in all this stuff cause I was so young." TAPED INTERVIEW, *Disco*. at 34. At trial, however, Ms. Haddock testified that she did not tell her mother. *2 TrialTrn*. at 28.

Attorney Topham did not make any attempt to explore these discrepancies or highlight them with the jury.

P. Why Ms. Haddock did not Report a Rape?

Ms. Haddock offered several versions of why she did not report to a responsible adult or some authority that a rape had occurred .

In her letter to the Bethlehem Police, Ms. Boeckler wrote that "I really didn't think anything of it at the time.… We passed it off as him being drunk and finding the wrong tent." LETTER FROM MS. BOECKLER TO BETHLEHEM POLICE (June 15, 2006), *Disco*. at 89. This implies that little happened and the entry was simply a mistake unworthy of being reported.

In her conversations with the police, Ms. Haddock gave a different explanation. Ms. Haddock told Officer Miller that she did not report it because Ms. Boeckler "told me not to tell anybody because it's her mom's … husband." TAPED INTERVIEW, *Disco*. at 33. Similarly, Ms. Haddock told Officer Merrill that she did not report the rape at the time because "she was scared and did not want to hurt her mother." POLICE REPORT, *Disco*. at 8. This implies she understood the importance of the incident but made a decision to not report in order to spare the feelings of others.

Ms. Haddock gave a third explanation at trial. She said she kept the incident to herself because Ms. Boeckler asked her to. Ms. Haddock testified that Ms. Boeckler made a poignant statement: "And she goes Amanda, if you're my true friend, you won't tell anybody." *2 TrialTrn*. at 22. This implies not only that the importance of the incident was manifest, but that a decision was made to not report in order to preserve the girls' own relationship.

Although Attorney Topham alluded to Ms. Boeckler's statement in his closing, he never referenced it specifically. He did not challenge Ms. Haddock's testimony, nor the three differing explanations.

Q. Was there a Morning Note and What did it Say?

Ms. Haddock testified that she wrote a comprehensive letter to Ms. Boeckler immediately after the rape in the light of the glow-stick, placed it next to Ms. Boeckler's pillow, and that it remained there the next morning.

Q: After he leaves the tent, what do you do?
A: Oh. I write Brittany a letter.
Q: And what kind of letter did you write her?
A: I wrote her a letter about everything that happened that night .
Q: And why did you do that?
A: I thought it'd be easier to write a letter than to say it in person.
Q: And why did you think you'd find it hard to say it in person?
A: Because I didn't want to lose my best friend. And I didn't want anybody else to hear, because there was no way that I could tell her without anybody else hearing it.
…

Q: After you write the letter to Brittany, what do you do?
A: I stick it next to her pillow 'cause – so it was the first thing she saw when she woke up.
Q: And what did you do after you stuck the letter by her pillow?
A: I went to bed.
Q: And the next morning when you woke up, who was in the tent?
A: Brittany and me.
Q: And what was Brittany doing when you first woke up?
A: Sleeping.
Q: And where do you go, what do you do?
A: I go and eat breakfast with everyone else that was up.
Q: And before leaving the tent, was the letter still there?
A: Yeah.

2 TrialTrn. at 16-17.

Ms. Haddock believes Ms. Boeckler saw the letter, but was equivocal.

Q: So did you ask Brittany if she read the letter?
A: I'm pretty sure I did.
Q: And what did Brittany say?
A: I don't remember what she said.
Q: Okay . And what do you and Brittany talk about next? Do you even know if she got the letter?
A: No.

2 TrialTrn. at 22. Ms. Boeckler denied ever seeing a letter. *1 TrialTrn*. at 78-79.

There are several unknowns about which Attorney Topham could have attempted to resolve – whether the letter was actually written, the details of its contents, and what became of it.

Although in his closing Attorney Topham questioned the existence of the letter, beyond confirming that Ms. Boeckler did not see it, he did not explore any of the issues with any of the possible actors.

R. Later Family Relationships?

Linda Rodgers, Tammy Kidd, and Brittney Boeckler all testified that the relationship between Ms. Haddock and Ms. Boeckler's family cooled due to the assault. *1 TrialTrn*. at 38, 53-54, 72.

Ms. Haddock testified on direct examination, however, that she maintained a close loving relationship and continued to do activities with Linda and Chuck Rogers, who are Ms. Boeckler's grandparents, even after Ms. Boeckler moved to Florida. *1 TrialTrn*. at 93.

Although Attorney Topham discussed the fickleness of relationships among 11 year girls, he did not raise the discrepancies in testimony regarding Ms. Haddock's continuing affinity with Ms. Boeckler's family.

S. How Much did Ms. Haddock Remember?

After a conversation with Ms. Haddock, Meredith Officer Bart Merrill wrote in his report: "Amanda told me that she remembers everything that happened." POLICE REPORT, *Disco*. at 8. Two months later, in her interview with Officer Miller, Ms. Haddock could not remember details:

Q: What were you wearing, do you remember?
A: No.
Q: Do you remember what he was wearing?
A: Um, not really.

TAPED INTERVIEW, *Disco*. at 25. Similarly, at trial Ms. Haddock could not remember what Mr. Kidd smelled like when he was in the tent, even though all witnesses present agreed he had been drinking all day, *2 TrialTrn*. at 4, and likely would have been pungent. Also at trial Ms. Haddock could not remember whether Mr. Kidd was saying anything to her during the incident. *Id.* She could not remember how wide Mr. Kidd's body was in relation to hers. *2 TrialTrn*. at 6. She could not remember the position of his legs. *2 TrialTrn*. at 11-12. She could not remember what Ms. Boeckler said about the letter Ms. Haddock wrote her. *2 TrialTrn*. at 22. She could not remember if she talked with other people about Mr. Kidd the morning after the alleged incident. *2 TrialTrn*. at 23. She could not remember whether she ruminated regarding whether she should talk to an adult about what happened. *2 TrialTrn*. at 25.

Q: Okay. Do you remember a lot about that morning?
A: Yeah.
Q: Okay. What do you remember about that morning?
A: What happened that morning?
Q: About what happened after you told Brittany and packing up?
A: Oh. I don't remember that.
Q: Okay.
A: I don't remember that.

2 TrialTrn. at 25. Although she claims to have contemporaneously told several adults part of what happened, she testified she could not remember why she told them, *2 TrialTrn*. at 28, what she told them, *2 TrialTrn*. at 39, nor what their reaction was. *2 TrialTrn*. at 28.

What Ms. Haddock could not remember came out pre-trial and at trial both in direct and cross examination. But Attorney Topham did not raise the discrepancy between Ms. Haddock's claim that she remembered everything and the significant details which she claimed at trial that she could not remember.

II. Failure to Expose Discrepancies in Evidence was Ineffective Assistance of Counsel

A. Prejudice is a Reasonable Probability that Confidence in the Outcome is Undermined

Our constitutions guarantee a defendant meaningful representation by counsel. U.S. CONST. amds. 6, 14; N.H. CONST. pt. I, art. 15.

> There are two components to a successful claim of ineffective assistance. First, the defendant must show that counsel's performance was deficient, which requires proof that counsel made such egregious errors that counsel was not functioning as the "counsel" guaranteed by both constitutions. Second, the defendant must prove that counsel's conduct actually prejudiced the defendant such that there is a reasonable probability that the result of the proceeding would have been different had counsel been competent.

State v. Fennell, 133 N.H. 402, 405 (1990) (citations omitted).

Prejudice does not require a showing that "counsel's deficient conduct more likely than not altered the outcome in the case." *Strickland v. Washington*, 466 U.S. 668, 693 (1984). Such a standard would be too severe because "[t]he result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." *Id.*

Rather, the defendant must only show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694; accord *State v. Faragi*, 127 N.H. 1, 5 (1985); *State v. Seymour*, 140 N.H. 736, 748 (1996).

To determine prejudice, the reviewing court must consider the totality of the evidence before the jury. *State v. Wisowaty*, 137 N.H. 298, 308 (1993). Ineffective assistance may be proven when the prejudice is a result of the cumulative effect of multiple errors. *Id.* at 302;

Seymour, 140 N.H. at 748; *People v. Clarke*, 886 N.Y.S.2d 753, 755 (App.Div. 2009) (various errors, "the cumulative effect of which was to deprive the defendant of the effective assistance of counsel and his right to a fair trial").

Then strategic decisions of trial counsel are afforded a high degree of deference, *Wisowaty*, 137 N.H. at 303, "bearing in mind the limitless variety of strategic and tactical decisions that counsel must make." *State v. Chase*, 135 N.H. 209, 212 (1991) (quotations omitted). A lawyer who elects a strategy, however, must execute it effectively. *Eze v. Senkowski*, 321 F.3d 110, 112 (2nd Cir. 2003) ("[I]f certain omissions cannot be explained convincingly as resulting from a sound trial strategy, but instead arose from oversight, carelessness, ineptitude, or laziness, we would find the quality of representation sufficiently deficient."); *Wilson v. Mazzuca*, 570 F.3d 490, 502 (2nd Cir 2009) (Attorney errors that fall below an objective standard of reasonableness "include omissions that cannot be explained convincingly as resulting from a sound trial strategy, but instead arose from oversight, carelessness, ineptitude, or laziness.").

B. Implausibility Defense

The issue here is not Attorney Topham's strategic choice of implausibility as a defense. Rather, the issue is that he did not follow through on it.

Implausibility was a reasonable defense theory. Critical to the theory, however, would be to expose discrepancies in documents and witness statements and testimony, to show that the various stories disagreed, to cast doubt on the credibility of the complainant, and to hold up her version as unlikely to be true beyond a reasonable doubt. Attorney Topham agreed that exposing

the discrepancies between Ms. Haddock's statements and the statements of others was a central part of the theory. *Depo.Trn*. at 84, 91.

Here however, the lawyer failed to introduce evidence of a myriad of discrepancies available to him. On the few occasions when he did raise one, or Ms. Haddock denied making a prior inconsistent statement, Attorney Topham did not confront her with the documentary proof available.

Although a lawyer might reasonably withhold confrontation when there is a risk of backfire, *see e.g.*, *Breest v. Perrin*, 125 N.H. 703 (1984) (not calling witness held not ineffective when decision dictated by desire to avoid harmful facts), that is not what happened here. Attorney Topham failed to raise the various discrepancies even though there were none he would not want the jury to be aware of, *Depo.Trn*. at 96-97, and even though he recognized that showing documents to witnesses who denied the existence of an inconsistency could be helpful to Mr. Kidd's defense. *Depo.Trn*. at 92-93.

C. Confidence in Outcome of Trial Undermined by Failure to Present Jury with Evidence of Changes in Ms. Haddock's Stories, Faulty Memory, and Lack of Credibility

There are two prongs of prejudice resulting from Attorney Topham's failure to adequately confront. First, Attorney Topham did not make an adequate effort to undermine the state's case – to expose discrepancies, to show that the various stories disagreed, to cast doubt on the credibility of the complainant, and to hold up her version as unlikely to be true beyond a reasonable doubt. Here there is a reasonable probability he may have been able to undermine the state's case had he fully confronted the complaining witness. *See State v. Fleury*, 111 N.H. 294

(1971) (counsel not ineffective when additional cross examination would have strengthened state's case).

Courts have found prejudice amounting to ineffective assistance when the lawyer failed to introduce inconsistent statements of prosecution witnesses and when such evidence would have bolstered the defense theory. For example, in *United States ex rel. Williams v. Washington*, 863 F. Supp. 697, 704 (N.D. Ill. 1994), *affd*, 59 F.3d 673 (7th Cir. 1995), the court identified the defense lawyer's failure to cross examine with regard to a letter written by the alleged sexual assault victim which contained inconsistencies that "an adequately prepared defense counsel could exploit." The court found that "[f]ailure to introduce prior inconsistent statements of state's witnesses, particularly when such evidence is consistent with defense's theory, is deficient performance."

Similarly, in *Johnson v. Norris*, 999 F. Supp. 1256 (E.D. Ark., 1998) *reversed on other grounds*, 170 F.3d 816 (8th Cir. 1999), defense counsel provided ineffective assistance by conducting inadequate cross examination of the state's key witness. In *Sparman v. Edwards*, 26 F. Supp.2d 450 (E.D.N.Y.,1997), the court determined that counsel rendered ineffective assistance in failing to discover exculpatory medical evidence and in failing to cross-examine victims about inconsistencies in their statements to police and their trial testimony which would have supported the defense theory that someone else was the perpetrator.

In *Moffell v. Kolb*, 930 F.2d 1156 (7th Cir. 1991), the defense theory was the defendant was not the shooter. The state's witness who could come closest to putting the gun in defendant's hand at the time of the shooting had made statements to police at odds with his trial testimony. The defendant's attorney, however, did not confront the witness with the documents.

The court held that counsel's assistance was ineffective. Similarly, in *People v. Clarke*, 886 N.Y.S.2d 753, 755 (App.Div. 2009), the court found that "[t]he trial record underscores defense counsel's meager efforts and unsuccessful attempts to cross-examine witnesses with respect to identification discrepancies of the perpetrator as well as events leading up to the shooting." The court held:

> [W]here a witness has offered prior testimony which is significantly at odds with his or her trial testimony, the discrepancy can be used on cross-examination to cast doubt on the credibility of the witness. Instead of highlighting the discrepancies contained in the complainant's report to the police with his testimony … and at trial, defense counsel improperly failed to fully pursue these lines of questioning.

Clark, 886 N.Y.S.2d at 756 (citations omitted).

In *State v. Chase*, 135 N.H. 209, 213-14 (1991), the defendant was accused of rape, and then moved for a new trial based on ineffective assistance. In contrast to the situation here, however, this court found that trial counsel "examined [the complainant] about changes in her successive police statements … and not telling the police initially about several of the alleged assaults." Trial counsel "brought out her history of lying," and her conversations with her boyfriend that provided motive for fabrication. There was thus no ineffective assistance.

Of the 18 separate inadequately-addressed discrepancies raised by Mr. Kidd before this Court, some are intrinsically important as they in and of themselves cast doubt on the State case – whether Mr. Haddock was alone in her tent or there were other people who could have been awakened by a closely proximate assault, whether Mr. Kidd merely stumbled drunk into her tent, whether Mr. Kidd was wearing jeans that would make noise when removed, whether she was laying on her back making it unavailable for rubbing as Ms. Haddock sometimes claimed,

whether Ms. Haddock was wearing underwear and if so whether they were pushed aside or pulled down as the resolution to these discrepancies may imply that penetration was not possible, whether Ms. Haddock offered any physical resistence calling into question that her tent-mate and others close by did not hear a rape allegedly in progress, and whether she made contemporaneous reports. Even if some of the other discrepancies are not particularly significant in an of themselves, however, they show changes in Ms. Haddock's stories, her faulty memory, and lack of credibility, and therefore generally cast doubt on her version of events. Because trial counsel did not bring them up, however, the jury never got a chance to weigh them, thus undermining confidence in the outcome of the trial.

D. Confidence in Outcome of Trial Undermined by Failure to Follow Through with Promises Made to Jury

The second prejudice prong here is that Attorney Topham did not deliver on promises he made in his opening, thus leaving the jury with the impression that Mr. Kidd had no defense.

It is an elementary principle of trial practice that a lawyer should not make promises in his opening statement that cannot be delivered during trial.

> The most fundamental human barometer of credibility is past performance: If you told me the truth yesterday, I will trust you today. If you lied to me yesterday, I will trust you neither today nor tomorrow. Consequently, in order to plant and nurture the seeds of trust in the opening statement, it is imperative that the attorney be honest with the jury and be accurate in her narrative. Yet one of the most common mistakes in openings is exaggeration or overstatements by the attorney. This absolutely must be avoided. Never exaggerate or overstate your case. Never state or promise anything that you cannot, or even might not, be able to prove. Never attempt to mislead the jurors or distort what the evidence will actually show.

> Promises made explicitly or implicitly to the jurors during opening statement are fine only if the promised evidence is delivered. If you do not keep a promise, expect your credibility to suffer, much like the general credibility of a witness whose testimony on a particular point has been exposed as erroneous. Undelivered promises in the opening statement may very well cause the jurors to lose faith in your entire case, not just in its representative. … Studies with mock jurors indicate that this sequence of events affects the verdict more negatively than a conservative and accurate opening statement.

Kenneth J. Melilli, *Trial Technique: Succeeding in the Opening Statement*, 29 AM. J. TRIAL ADVOC. 525 (Spring 2006) (citations omitted). *See also*, Daniel I. Small, ABA Solo & Small Firm Section, *Going to Trial: A Step-by-Step guide to Trial Practice and Procedure* 185, 187 (2d ed. 1999) (Juries "certainly understand and care when someone lies to them about what the evidence will be. You can lose your credibility – and your case – by venturing too far into overstatement.") ("An opening statement should not contain statements of fact that cannot be proven at trial."); James W. McElhaney, ABA Section of Litigation, *McElhaney's Litigation* 351 (1995) ("If what you say about the evidence is different from what the jurors remember, they are likely to think you are trying to make your case look better than it is."); David Berg, ABA Section of Litigation, *The Trial Lawyer: What it Takes to Win* 146 (2003) ("[T]he only way to avoid letting [juries] down is to back up your promises with hard evidence, at the earliest possible moment.").

In his opening Attorney Topham told the jury:

> What the state does have is a number of conflicting statements that they received from Amanda Haddock or that other people actually received from Amanda Haddock. At one point Amanda tells Linda Rogers one version, he rubbed my back. She tells her friend, her best friend, Brittany, he rubbed my chest. Another time she says well, he was drunk and I think he stumbled in.

1 TrialTrn. at 21.

In his opening Attorney Topham thus promised the jury he would show discrepancies. By not following through during trial, however, the jury was left with the impression that the State had an open-and-shut case, and that Mr. Kidd had no defense.

Making things worse, in his closing argument Attorney Topham asked the jury to rely on the inconsistencies that he had already failed to deliver.

> You also need to look at the inconsistencies in the testimony of the state's witnesses, but particularly the inconsistencies in the testimony of Amanda Haddock, whose story has changed significantly over time. Early on it was well, he was drunk and crawled in. Then it became well, he rubbed my chest. Then it became eventually the aggravated felonious sexual assault that was charged here.

2 TrialTrn. at 74-75.

By not presenting the jury with all the discrepancies in Ms. Haddock's story, bolstered by statements made by her and others, Attorney Topham undermined his own theory. Overall, the record discloses a lackadaisical defense, with no real effort to expose the holes in the State's case. Mr. Kidd thus did not have the benefit of functioning counsel to which he is entitled, and this Court should order a new trial.

III. Failure to Object to Use of Word "Victim" was Ineffective Assistance of Counsel

During jury selection, the court referred to Ms. Haddock as "the victim" eight times. *JurySelect.Trn*. at 9-10. In its instructions to the jury immediately before deliberation, the court once again referred to Ms. Haddock as "the victim." *2 TrialTrn*. at 98. The prosecutor also referred to Ms. Haddock as "the victim" during the course of the trial in the presence of the jury. *2 TrialTrn* at 53. At no time did Attorney Topham object to the use of this term.

In the ineffective assistance proceeding, Attorney Topham testified that he believes that the use of the term "victim" could be prejudicial. *Depo.Trn*. at 102. Attorney Topham conducted no research to bolster a claim regarding the impermissibility of use of the term. *Depo.Trn*. at 103-04. He testified it was simply not his practice to object to the use of the term during jury selection and jury instructions. *Depo.Trn*. at 102.

The word "victim" means:

> a. A person who is put to death or subject to torture by another; one who suffers severely in body or property through cruel or oppressive treatment.
> b. One who is reduced or destined to suffer under some oppressive or destructive agency.
> …
> d. In weaker sense: one who suffers some injury, hardship, or loss, is badly treated or taken advantage of, etc.

OXFORD ENGLISH DICTIONARY (1987). Similarly:

> 1. a person who suffers from a destructive or injurious action or agency ….
> 2. a person who is deceived or cheated, as by his or her own emotions or ignorance, by the dishonesty of others, or by some impersonal agency.…

DICTIONARY.COM, http://dictionary.reference.com/ (visited Dec. 30, 2009). The conventional

legal definition of "victim" is: "The person who is the object of a crime or tort, as the victim of a robbery is the person robbed." BLACK'S LAW DICTIONARY (5th ed.).

The word presupposes a bad thing occurring. In this context that bad thing is the crime charged. The word thus essentially instructs the jury on the ultimate issue.

In a case where it was clear that a crime had been committed, but at issue was the identity of the perpetrator or the method of commission, for example, there would be no prejudice. But here, the question for the jury was whether a crime had been committed. Mr. Kidd was prejudiced by the presumption implied in the word that one had. This contradicts his right to the opposite – the presumption of innocence guaranteed by our constitutions. U.S. CONST. amd 14; N.H. CONST. pt. I, art. 15.

The prejudice associated with the word has been recognized by the law for at least 150 years. *People v. Williams*, 17 Cal. 142 (Cal. 1860) ("[T]he Court had no right to use the word 'victim' …, because it seems to assume that the deceased was wrongfully killed, which was the point in issue, and was calculated to prejudice the accused.").

In *State v. Cortes*, 851 A.2d 1230 (Conn.App. 2004), the defendant claimed that the prosecutor's and the court's use of the word "victim"

> infringed on his right to a fair trial in that they impaired his defense, deprived him of the presumption of innocence, invaded the fact-finding function of the jury and reflected that the trial judge was not impartial. As the defendant correctly points out, the jury was called on to determine if the complainant was a "victim" of any crime. The jury's function was to determine if, in fact, any crime had been committed.

Cortes, 851 A.2d at 1240. Thus the *Cortes* court held:

> In cases in which the fact that a crime has been committed against the complaining witness is not contested, but only the identity of the perpetrator is in

> dispute, a court's use of the term "victim" is not inappropriate. In cases in which the fact that a crime has been committed is contested, and where the court's use of the term "victim" has been the subject of an objection and has not been the subject of a subsequent curative instruction, a court's use of the term may constitute reversible error. The danger in the latter type of case is that the court, having used the term without specifically instructing the jury as to its intention in using the term, might convey to the jury, to whatever slight degree, its belief that a crime has been committed against the complainant.

Cortes, 851 A.2d at 12, *aff'd on other grounds*, 885 A.2d 153, 158 n. 4 (Conn. 2005) (issue not reached but deemed likely meritorious). Similarly, in *People v. Davis*, 423 N.Y.S.2d 229 (N.Y. A.D. 1979), the court wrote:

> By referring in its charge to the complainant as the "victim" …, the court impermissibly insinuated to the jury that the complainant was the victim of injuries resulting from acts committed by the defendant. The defendant's culpability and criminal liability were issues solely to be resolved by the jury without any indication of the court's evaluation of the evidence, and the use of such descriptive, conclusory terms constituted an invasion of the jury's province.

Davis, 423 N.Y.S.2d at 230; *Talkington v. State*, 682 S.W.2d 674, 674-75 (Tex. App.1984) ("We hold that to refer in the court's charge to the complainant as the 'victim' when the issue is whether or not she consented to the sexual intercourse, constitutes reversible error."); *Jackson v. State*, 600 A.2d 21, 24 (Del. 1991) ("The term 'victim' is used appropriately during trial when there is no doubt that a crime was committed and simply the identity of the perpetrator is in issue. We agree with defendant that the word 'victim' should not be used in a case where the commission of a crime is in dispute.").

In *Veteto v. State*, 8 S.W.3d 805, 816 (Tex. App. 2000), the defendant was charged with sexual assault of a child. The "sole issue" at trial "was whether he committed the various assaults." The court held that "[r]eferring to [the child] as the victim instead of the alleged victim lends credence to her testimony that the assaults occurred and that she was, indeed, a

victim." This case is especially informative, as the trial court's jury instruction there was effectively identical to that here, and trial counsel there failed to object, same as Attorney Topham here. *See also*, *State v. Devey*, 138 P.3d 90 (Utah App. 2006) ("[I]n cases such as this – where a defendant claims that the charged crime did not actually occur, and the allegations against that defendant are based almost exclusively on the complaining witness's testimony – the trial court, the State, and all witnesses should be prohibited from referring to the complaining witness as 'the victim.'"); *State v. R.B.*, 873 A.2d 511, 533-34 (N.J. 2005) (*Albin*, J., dissenting) ("court's identification of C.R. as the victim in the jury charge had the obvious potential to diminish the presumption of innocence accorded to defendant").

Because the implications of the word "victim" are so prejudicial, and have been recognized as such for so long, Attorney Topham should have objected. Failing to do so cannot be overlooked as a strategic choice, as there is no conceivable upside to condoning its use. By the court having used the term during trial, the evidence was prejudged, thereby undermining confidence in the outcome. This Court should thus hold Attorney Topham's failures constituted ineffective assistance of counsel.

CONCLUSION

In accordance with the foregoing, this Court should find that Attorney Topham was not functioning as counsel as guaranteed by our constitutions, and thus grant Kerry Kidd a new trial.

Respectfully submitted,

Kerry Kidd
By his Attorney,

Law Office of Joshua L. Gordon

Dated: January 7, 2010

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REQUEST FOR ORAL ARGUMENT AND CERTIFICATION

Counsel for Kerry Kidd requests that Attorney Joshua L. Gordon be allowed 15 minutes for oral argument.

I hereby certify that on January 7, 2010, copies of the foregoing will be forwarded to the office of the Attorney General.

Dated: January 7, 2010

Joshua L. Gordon, Esq.

THE STATE OF NEW HAMPSHIRE

GRAFTON, SS. **SUPERIOR COURT**

State of New Hampshire

vs.

Kerry W. Kidd

No. 2006-S-308

ORDER

The defendant was indicted pursuant to RSA 632-A:2 with Aggravated Felonious Sexual Assault. The defendant was found guilty, following a jury trial, on September 19, 2006. The defendant was sentenced to the New Hampshire State Prison for not more than 20 years and not less than 10 years. The defendant's conviction was affirmed by the New Hampshire Supreme Court on December 21, 2007. On January 17, 2008, the defendant filed a *pro se* motion for new trial (index #45) to which the State objected (index #46). The defendant moved for the appointment of counsel, which motion was granted by the Court by order dated April 9, 2008 (index #52). After the appointment of counsel the defendant filed a supplemental motion for new trial (index #59). The defendant's motions for new trial allege ineffective assistance of his trial counsel. For the reasons set forth below, the defendant's motion for a new trial is DENIED.

Legal Standard:

"[T]he standard for determining whether a defendant has received ineffective assistance of counsel is the same under both the State and Federal Constitutions . . ." State v. Kepple, 155 N.H. 267, 269 (2007). The defendant has the burden of proof with

respect to this issue of ineffective assistance of counsel. State v. Fennell, 133 N.H. 402, 405 (1990). "To successfully assert a claim for ineffective assistance of counsel, a defendant must first show that counsel's representation was constitutionally deficient and, second, that counsel's deficient performance actually prejudiced the outcome of the case." Kepple, 155 N.H. at 269-70. Where the defendant has failed to meet either prong of this test, the court need not consider the other one. Id. at 270.

Under the first prong of the test, the defendant is required to show "that counsel made such egregious errors that he or she failed to function as the counsel that the State Constitution guarantees." State v. Dewitt, 143 N.H. 24, 29 (1998) (brackets and quotation omitted). The State Supreme Court has recognized "that broad discretion is permitted trial counsel in determining trial strategy, and the defendant must overcome the presumption that counsel's trial strategy was reasonably adopted." State v. Flynn, 151 N.H. 378, 389 (2004). Courts afford such deference due to the fact that counsel must make a "limitless variety of strategic and tactical decisions" in any trial. Id.; see also State v. Wisowaty, 137 N.H. 298, 303 (1993) ("Trial counsel's strategic decisions are afforded a high degree of deference; it is not the trial court's function to seize on the facts of the defendant's conviction to speculate as to the propriety of a defense tactic."). "Criminal defendants are entitled to reasonably competent assistance of counsel, but not perfection in trial tactics, or success." Flynn, 151 N.H. at 389.

Under the second prong of the test for ineffective assistance of counsel, "a defendant must demonstrate that there is a reasonable probability that the result of the proceeding would have been different had competent legal representation been

provided." Kepple, 155 N.H. at 270. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the case." Id. "The prejudice analysis considers the totality of the evidence presented at trial." Id.

"'[T]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" Wiggins v. Smith, 539 U.S. 510, 521 (2003) (quoting Strickland v. Washington, 466 U.S. 668, 687 (1984)). "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland, 466 U.S. at 689. "Because of the difficulties inherent in an making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." Id.; see also State v. Whittaker, __ N.H. __, __ (June 3, 2009) (slip op. at 5-6); State v. Sharkey, 155 N.H. 638, 641 (2007).

Discussion:

The defendant raises four issues under his claim of ineffective assistance of counsel. First, he argues that counsel failed to cross-examine the complaining witness regarding inconsistent statements. Second, he argues that defense counsel was ineffective by failing to object to use of the word "victim" during the trial. Third, the defendant argues that counsel failed to investigate or to present the defense of erectile dysfunction. Fourth, the defendant argues that his right to testify was interfered with by

actions of his attorney.

I. Failure To Cross-Examine The Complaining Witness Regarding Inconsistent Statements

Attorney Topham testified at the hearing on the motion for new trial. Attorney Topham testified that his theory of the case was implausibility. The defendant argues that once the line of defense was chosen, trial counsel had the obligation to thoroughly review all of the pretrial material and to point out to the jury numerous inconsistencies between the complainant's statements and statements of other witnesses central to the State's case. The defendant argues that trial counsel promised the jury in his opening (T-I-21) that he would demonstrate inconsistencies in these statements and he asked the jury to rely upon those in his closing argument (T-II-74). The defendant claims that trial counsel failed, however, to introduce evidence of a myriad of inconsistencies available to him. The defendant believes that these inconsistencies would have buttressed the theory of implausibility and supported Attorney Topham's argument that the event could not have happened in the location where it was alleged to have occurred.

The defendant argues that the failure to introduce inconsistent statements of prosecution witnesses was prejudicial. This is particularly true when such evidence is consistent with the theory of defense. The defendant cites United States ex rel. Williams v. Washington, 863 F.Supp. 697, 704 (N.D. Ill. 1994), aff'd, 59 F.3d 674 (7th Cir. 1995), where the court identified, among other deficiencies, the defense lawyer's failure to exploit inconsistencies in a letter written by the alleged sexual assault victim.

The defendant also cites Johnson v. Norris, 999 F.Supp. 1256 (E.D. Ark. 1998), in which defense counsel was found to have provided ineffective assistance by failing to adequately investigate the circumstances surrounding the case and by conducting inadequate cross-examination of the case agent and key witness for the state, and Sparman v. Edwards, 26 F.Supp.2d 450 (E.D.N.Y. 1997), in which the court determined that counsel rendered ineffective assistance in failing to discover exculpatory medical evidence and in failing to cross-examine victims about inconsistencies between their statements to police and their trial testimony.

The defendant presented testimony from Attorney George Ostler. Attorney Ostler is a former public defender and has been in private practice representing criminal defendants for several years. Attorney Ostler reviewed the transcripts, focusing, in particular, on the testimony and cross-examination of the State's witnesses. Attorney Ostler pointed out several places where, in his opinion, defense counsel failed to alert the jury to clear inconsistencies between the recorded statements, written statements, and trial testimony. Attorney Ostler conceded on cross-examination that some of the inconsistencies contained in the discovery material were brought to the jury's attention, but he testified that the inconsistencies could have been more effectively used. The defendant has identified numerous inconsistencies by contrasting exhibits from discovery contrasted to the trial testimony. At the hearing on this matter, counsel for the defendant questioned both Attorney Ostler and Attorney Topham on each of the inconsistencies.

The defendant has identified two general categories of inconsistencies. The first

category involves the victim's own statements, which were available to defense counsel. The defendant has outlined thirteen areas of inconsistencies between the victim's statements and trial counsel's examination of her. The second category of inconsistencies involves statements by the victim as contrasted with other witnesses. This category includes nine specific areas of inconsistencies between the victim's statements and statements of police officers and lay witnesses. In each of these categories, the defendant argues that Attorney Topham's decisions during the course of the trial, in either choosing not to raise the inconsistencies or in failing to fully raise them, support his claim of ineffective assistance of counsel.

The State argues that trial counsel's representation was not deficient. There is no evidence of ineptness, inexperience, lack of preparation or unfamiliarity with basic legal principals. See Government of the Virgin Islands v. Weatherwax, 20 F.3d 572, 579 (3rd Cir. 1994). The State argues that trial counsel's choice of questioning and use of evidence must be considered as a whole and in connection with the overall presentation of the case. The State notes that Attorney Topham is an experienced criminal trial defense lawyer, having tried numerous aggravated felonious sexual assault and other serious felony matters.

The State concedes that there are various inconsistencies between the statements of the victim and other witnesses in this case. However, the State argues that the use of inconsistent statements is part of a trial lawyer's tactics. The court agrees.

Having reviewed the trial transcripts, the memoranda, and other written material

submitted and having listened carefully to the testimony of trial counsel and the defendant's expert, the Court finds that the defendant has not met his burden of proof. He has not shown that Attorney Topham's cross-examination of witnesses demonstrates ineffective assistance of counsel. Attorney Topham made trial decisions that were strategic in nature. Attorney Ostler, in his testimony, agreed that in many instances the choices and tactical decisions of trial counsel are judgment calls. Even assuming that Attorney Topham could have highlighted inconsistencies more clearly or more fully to the jury, the Court does not find the failure to do so to represents "such egregious errors that he . . . failed to function as the counsel that the State Constitution guarantees." Dewitt, 143 N.H. at 29 (1998) (brackets and quotation omitted).

II. Trial Counsel's Failure To Object To The Use Of The Term "Victim" Before The Jury

The defendant argues that trial counsel's failure to object to the use of the word "victim" in relation to the complaining witness represents ineffective assistance of counsel. Attorney Topham testified that it has not been his practice over the many years that he has been trying sexual assault cases to object to the use of the term "victim" during jury selection, jury trial, or jury instructions. In his pleadings, the defendant highlights cases from various other states dealing with this issue. However, there is no New Hampshire case law on point. Accordingly, the Court finds and rules that the defendant has failed to meet his burden of proof on the second issue. Trial counsel's decision not to object to use of the word "victim" does not fall outside the range of reasonable professional assistance. See Strickland, 466 U.S. at 689.

III. Failure To Investigate Or Present Defense Of Erectile Dysfunction

The defendant argues that the State's discovery package and testimony of the State's witnesses at trial indicated that the defendant was highly intoxicated the weekend of the alleged assault. The defendant argues that he advised his attorney that he suffers from erectile dysfunction when intoxicated and could not have committed the alleged act of penile penetration. The defendant states that Attorney Topham failed to investigate the defense of impossibility, failed to seek an independent medical examination, and failed to properly interview the defendant's girlfriend. The defendant argues that had Attorney Topham interviewed his girlfriend on this issue and then called her as a witness, the outcome of the case would have been different.

The State alleges that Attorney Topham did investigate this issue and made a tactical decision not to raise this issue in front of the jury. The issue presented for Attorney Topham's analysis was whether the defense of erectile dysfunction was appropriate. Attorney Topham found, based on his investigation, that while the defendant may have had occasions of inability to perform when intoxicated there had never been a diagnosis of erectile dysfunction and no medical records supported this claim. The State informs the Court that Attorney Topham's investigator established that the defendant could perform sexually and, in fact, that he had impregnated his girlfriend after the events which gave rise to the sexual assault charge in this case. Attorney Topham concluded that the testimony of the defendant's girlfriend would have potentially created more risks for the defendant, rather than lessening his potential for conviction. The State's evidence and argument show that Attorney Topham did

investigate this issue, but ultimately made a tactical decision that erectile dysfunction was not an appropriate defense. For this reason, he did not raise it to the jury.

Having reviewed the trial transcript, testimony of the witnesses in the course of this hearing, and additional material submitted by counsel, the Court finds and rules that the defendant has failed to meet its burden of proof with respect to ineffective assistance of counsel as to the issue of erectile dysfunction. The Court finds that the defendant has failed to overcome the presumption that trial counsel's strategy was reasonably adopted after review of all relevant considerations. See Flynn, 151 N.H. at 389.

IV. Defendant's Right To Testify At Trial

At the hearing on the motion for a new trial, the defendant testified that he informed Attorney Topham of his desire to testify in his own behalf at his trial, but that Attorney Topham told him "no." Attorney Topham testified at his deposition and at the hearing on the motion for a new trial that prior to and at trial the defendant was afforded an opportunity to testify. Attorney Topham testified that the defendant declined to testify.

A defendant in a criminal case has a right to take the witness stand and testify in his own behalf. Having reviewed the testimony of the defendant and Attorney Topham, as well as the written materials submitted in this case, however, the Court finds that the defendant's testimony on this issue is not credible. Accordingly, the defendant has failed to meet his burden of proof with respect to ineffective assistance of counsel on this fourth issue.

Conclusion:

As outlined above, the defendant is required to show "that counsel made such egregious errors that he or she failed to function as the counsel that the State Constitution guarantees." Dewitt, 143 N.H. at 29. If the defendant can meet this first prong of the test, he must also show that "there is a reasonable probability that the result of the proceeding would have been different had competent legal representation been provided." Kepple, 155 N.H. at 270. The defendant did not carry this burden in this case.

As a final matter, the Court notes that several months after the conclusion of the defendant's trial, his trial counsel developed certain medical conditions which required him to take a leave of absence and ultimately resign from the New Hampshire Public Defender. The Court, in an abundance of caution, issued an order requiring Attorney Topham's counsel, Attorney David Garfunkel, to supply the Court with certain medical information detailing Attorney Topham's medical conditions. The Court reviewed this material *in camera* and placed it under seal. Counsel for the defendant sought access to this information, arguing that failure to provide the information to him deprived his client of his due process rights.

In analyzing a defendant's motion for a new trial, the Court must examine the events at trial. As the Court has explained in detail above, the test for whether counsel was effective focuses on counsel's representation and performance. See Kepple, 155 N.H. at 269-70. It is counsel's conduct at the time of trial, and not subsequent events, that the Court must scrutinize to determine whether the representation was

constitutionally adequate. See Whittaker, __ N.H. at __ (slip op. at 6) (court must "'evaluate the conduct from counsel's perspective at the time'" (quoting Strickland, 466 U.S. at 689)). The trial of this case was contained within the four volume trial transcript provided to the Court. The Court reviewed counsel's performance as reflected in that transcript. The fact that trial counsel's current medical conditions prevented him from accurately recalling answers to certain questions he was asked on direct or cross-examination during the hearing on this matter is not, in the Court's view, determinative of whether his actions were or were not effective at trial. Based on an examination of all of the information contained in the transcript, as well as the written memoranda and materials submitted by both the State and the defendant, the Court has found that the defendant has failed to meet his burden of proof with respect to his ineffective assistance of counsel claim. Attorney Topham's medical conditions, which developed subsequent to his representation of the defendant, do not alter the Court's findings or require a different outcome.

Accordingly, for the reasons set out above, the defendant's motion for a new trial is DENIED.

SO ORDERED.

June 8, 2009

Timothy J. Vaughan
Presiding Justice