STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED August 21, 2012
v	No. 308361 Macomb Circuit Court
DANIEL ARMIJO, Defendant-Appellee.	LC No. 2007-001398-FH

Before: GLEICHER, P.J., and OWENS and BOONSTRA, JJ.

PER CURIAM.

The People of the State of Michigan appeal, by leave granted,[1] the trial court's order granting defendant's motion for relief from judgment. We affirm.

I. PROCEDURAL HISTORY

Following a jury trial, defendant was convicted of two counts of third-degree criminal sexual conduct, MCL 750.520(D)(1)(b). He was sentenced to concurrent sentences of 2 to 15 years' imprisonment for both convictions. Defendant appealed his convictions, and this Court affirmed. *People v Armijo*, unpublished opinion per curiam of the Court of Appeals, issued September 17, 2009 (Docket No. 282301). The Michigan Supreme Court denied defendant's request for leave to appeal. *People v Armijo*, 486 Mich 900; 780 NW2d 819 (2010). Defendant then filed a motion for relief from judgment in the trial court, which was heard by a different judge, based on the ineffective assistance of his counsel. Following a three-day *Ginther*[2] hearing concerning the effectiveness of both trial counsel and appellate counsel for defendant, the trial court granted defendant's motion.

The prosecution argues that, under MCR 6.508(D), the trial court abused its discretion in granting defendant's motion for relief from judgment, because defendant was not denied the effective assistance of trial and appellate counsel. We disagree.

[1] *People v Armijo*, unpublished order of the Court of Appeals, entered March 1, 2012 (Docket No. 308361).

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

II. STANDARD OF REVIEW

We review a trial court's decision on a motion for relief from judgment for an abuse of discretion, while we review its findings of facts supporting its decision for clear error. *People v Swain*, 288 Mich App 609, 628; 794 NW2d 92 (2010). "A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes or makes an error of law." *Id*. at 628-629 (citation omitted).

The underlying question of whether defendant received ineffective assistance of counsel presents a mixed question of fact and constitutional law. *People v Armstrong*, 490 Mich 281, 289; 806 NW2d 281 (2011). The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *People v Dendel*, 481 Mich 114, 124; 748 NW2d 859, amended 481 Mich 1201; 750 NW2d 165 (2008). Regard should be given to the trial court's opportunity to assess the credibility of the witnesses who appeared before it. MCR 2.613(C); *Dendel*, 481 Mich at 130. A finding is clearly erroneous when, although there is evidence to support it, this Court, on the whole record, is left with a definite and firm conviction that a mistake was made. *Dendel*, 481 Mich at 130.

III. DEFENDANT'S MOTION FOR RELIEF FROM JUDGMENT

"Subchapter 6.500 of the Michigan Court Rules establishes the procedures for pursuing postappeal relief from a criminal conviction." *People v Watroba*, 193 Mich App 124, 126; 483 NW2d 441 (1992). "The subchapter is the exclusive means to challenge a conviction in Michigan once a defendant has exhausted the normal appellate process." *Id*. Generally, a trial court's decision on a motion for relief from judgment is reviewed for an abuse of discretion. *Swain*, 288 Mich App at 628.

MCR 6.508(D) thus guides our analysis of the trial court's grant of post-appeal relief. MCR 6.508(D)(3) places limitations on a trial court's ability to grant post-appeal relief from a judgment of conviction. *People v Reed*, 198 Mich App 639, 645; 499 NW2d 441 (1993). Under MCR 6.508(D), a trial court may not grant a motion for relief from judgment if the motion:

> (1) seeks relief from a judgment of conviction and sentence that still is subject to challenge on appeal pursuant to subchapter 7.200 or subchapter 7.300;
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> (2) alleges grounds for relief which were decided against the defendant in a prior appeal or proceeding under this subchapter, unless the defendant establishes that a retroactive change in the law has undermined the prior decision;
>
> (3) alleges grounds for relief, other than jurisdictional defects, which could have been raised on appeal from the conviction and sentence or in a prior motion under this subchapter, unless the defendant demonstrates
>
> (a) good cause for failure to raise such grounds on appeal or in the prior motion, and
>
> (b) actual prejudice from the alleged irregularities that support the claim for relief. . . .

* * *

> The court may waive the "good cause" requirement of subrule (D)(3)(a) if it concludes that there is a significant possibility that the defendant is innocent of the crime. [MCR 6.508(D).]

Post-appeal relief from judgment therefore may not be granted unless the defendant demonstrates good cause for failing to raise the grounds for relief on appeal or in a prior motion, and demonstrates actual prejudice from the alleged irregularity. *Watroba***,** 193 Mich App at 126. Good cause warranting relief from judgment can be established by showing ineffective assistance of appellate counsel. *People v Reed*, 449 Mich 375, 379; 535 NW2d 496 (1995); *People v Brown*, 491 Mich 914, 914; 811 NW2d 500 (2012). Actual prejudice exists when, in a conviction following a trial, but for the alleged error, the defendant would have had a reasonably likely chance of acquittal. *Id.* at 624. "A defendant has the burden to establish entitlement to relief" from judgment. *Id*. at 630.

Defendant's motion for relief from judgment was based in part on a claim of ineffective assistance of his trial counsel, Murdoch Hertzog. Defendant further argued that there was good cause justifying defendant's motion because of ineffective assistance of his appellate counsel, James Czarnecki. Therefore, the performance of both defendant's trial counsel and his appellate counsel must be considered to determine if defendant's motion for relief from judgment was properly granted.

IV. INEFFECTIVENESS OF DEFENDANT'S TRIAL COUNSEL

We first analyze the effectiveness of Hertzog, defendant's trial counsel. The trial court made extensive findings regarding Hertzog's performance at trial, and ultimately concluded that his performance was constitutionally ineffective. We agree with the trial court that Hertzog's performance at trial was ineffective.

To establish ineffective assistance of counsel, a defendant must meet two requirements. *Armstrong*, 490 Mich at 289. "First, the defendant must show that counsel's performance fell below an objective standard of reasonableness." *Id*. at 290. "In doing so, the defendant must overcome the strong presumption that counsel's assistance constituted sound trial strategy." *Id*. "Second, the defendant must show that, but for counsel's deficient performance, a different result would have been reasonably probable." *Id.* The defendant must overcome the strong presumption that counsel employed sound trial strategy. *Id*.

The first prong of the ineffective assistance of counsel analysis requires a determination of whether Hertzog's performance fell below an objective standard of reasonableness. "Trial counsel is responsible for preparing, investigating, and presenting all substantial defenses." *People v Chapo***,** 283 Mich App 360, 371; 770 NW2d 68 (2009). "A substantial defense is one which might have made a difference in the outcome of the trial." *Id*. (citation omitted). We conclude that Hertzog failed to prepare, investigate, and present several substantial defenses.

The underlying incident in this case occurred in the early morning of February 3, 2007, in the complainant's home. The evening before the incident, the complainant had hosted a party at her home, and defendant was the disc jockey for the party. The complainant went to sleep

around midnight because she was sick. While she was sleeping, the complainant felt someone digitally penetrate her vagina and anus, and, at some later time, she felt someone grope her breast. She did not wake during either of these instances. At about 5:00 a.m., the complainant awoke to someone penetrating her vagina and anus with his fingers. Based on the complainant's identification of defendant as standing over her at the time of this third incident, defendant was charged with the final instance of sexual assault. At the *Ginther* hearing, Hertzog stated that a key part of his trial strategy was to establish that defendant could not have committed the first two sexual assaults that the complainant felt while she was asleep. He stated that he knew of witnesses who could testify that defendant did not leave his position as disc jockey during the party, and therefore, defendant "didn't have the opportunity to be in the bedroom two or three times and perform the acts similar in nature to the one in question." However, Hertzog did not present this defense at trial. If Hertzog had presented this defense, it may have created an inference that, because defendant did not commit the first two sexual assaults, defendant did not commit the third sexual assault. This evidence could have persuaded the jury that defendant did not commit the crime, and therefore, was a substantial defense.

Hertzog's actions cannot be considered trial strategy. At the *Ginther* hearing, Hertzog explained his reasoning for failing to present the defense that defendant could not have committed the first two sexual assaults. Hertzog explained that he believed that theory was necessarily connected to the fact that the complainant had been digitally penetrated by her boyfriend on prior occasions while she was sleeping. Hertzog referred to evidence of the complainant's prior sexual acts with her boyfriend as a "linchpin in the defense," and further admitted that he was aware that the prosecutor had objected to the admission of evidence of such acts pursuant to the rape shield statute. However, Hertzog failed to file the requisite notice of intent regarding the introduction of such evidence, and failed to document his research – or to file any appropriate motion – demonstrating the statute's inapplicability to the incidents giving rise to the instant case. At the preliminary examination, the complainant testified that, in the past, her boyfriend had digitally penetrated her vagina while she was sleeping. At trial, the judge ruled that the evidence of the complainant's prior sexual conduct with her boyfriend was inadmissible under the rape shield statute, MCL 750.520j. Hertzog stated that he abandoned his theory that defendant could not have committed all three sexual assaults after the trial court ruled that the evidence of the complainant's prior sexual acts with her boyfriend was inadmissible. Hertzog stated that because he could not show that it was the boyfriend who committed the first two sexual assaults, he abandoned the strategy of attempting to prove that defendant did not commit the first two assaults.

Hertzog's reason for abandoning the defense that defendant did not commit the first two sexual assaults is not convincing. At the hearing, it was clear that Hertzog did not understand the law, the evidence, or the logical inferences and conclusions that could be drawn from these two distinct pieces of evidence. Hertzog seemed to believe that the judge had ruled that the two prior instances of sexual assault were inadmissible. Hertzog stated:

> [O]nce Judge Schwartz ruled that we couldn't bring in the two prior incidents, what did it matter whether he [defendant] left the place or stayed there? After he made that ruling, bringing in witnesses to say he stayed at his post and only went to take to the bathroom one short incident [sic] didn't mean a thing because Judge

> Schwartz had emasculated the defense. It wouldn't matter if he was there or wasn't there.

Hertzog's statement is incorrect, however, because the complainant's testimony regarding the two prior sexual assaults that occurred that evening was admitted at trial. Therefore, Hertzog's reasoning for abandoning his trial strategy that defendant could not have committed the first two sexual assaults was not persuasive, because Hertzog could have presented evidence that the defendant was observed in his role as disc jockey for the party when the assaults were allegedly committed, had he not misapprehended the trial judge's ruling.

Furthermore, Hertzog's explanation does not account for his pretrial failure to investigate or prepare the defense. Hertzog stated that he knew of witnesses who could testify that defendant did not leave his post as disc jockey all night. However, he did not investigate or interview the witnesses, or file a witness list. There was no evidence that suggested that Hertzog planned to call any witnesses, despite his admission at the *Ginther* hearing that such witnesses were very important.

Hertzog stated that he did not interview witnesses because he was told by defendant and his family exactly what the witnesses would say. While failure to call a particular witness at trial is presumed to be a matter of strategy, *People v Seals*, 285 Mich App 1, 20; 776 NW2d 314 (2009), it will constitute ineffective assistance of counsel when it deprives the defendant of a substantial defense. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009). Further, "'strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. . . . [C]ounsel has a duty to make a reasonable decision that makes particular investigations unnecessary.'" *People v Grant*, 470 Mich 477, 485; 684 NW2d 686 (2004) (alterations in original), quoting *Strickland v Washington*, 466 US 668, 690-691; 104 S Ct 2052; 80 L Ed 2d 674 (1984). We conclude that Hertzog's decision not to investigate, interview, or call witnesses to establish defendant's whereabouts during the first two assaults was objectively unreasonable and deprived defendant of a substantial defense. See *People v Johnson*, 451 Mich 115, 122; 545 NW2d 637 (1996).

Hertzog's performance also fell below an objective standard of reasonableness because he failed to call witnesses who could have impeached the complainant's testimony that she was not intoxicated at the party. Specifically, the complainant testified at trial that she did not have a lot to drink, and that she was not drunk. Hertzog could have called, but failed to call, witnesses to contradict that testimony.

At the *Ginther* hearing, Tracey Zachmann testified that she was present at the party on the night of the incident. Zachmann stated that she observed that the complainant was intoxicated and that the complainant drank substantially more than that to which she had testified. Zachmann's testimony directly contradicted the trial testimony that the complainant was not drunk. Hertzog failed even to interview Zachmann, a witness who could have potentially impeached the complainant's trial testimony, despite the fact that Hertzog acknowledged the importance of showing the jury that the complainant's perception was impaired by alcohol. This was a "he said/she said" situation, and therefore, the complainant's credibility was very important. Furthermore, establishing that the complainant was drunk at the

party would have explained why the complainant testified that she was "fuzzy" when she woke up and saw defendant allegedly standing over her, which would have contributed to Hertzog's trial strategy of showing that the complainant's perception of the incident was skewed.

At the *Ginther* hearing, Hertzog denied knowing about any witnesses who could testify that the complainant was drunk at the party. However, defendant and his mother testified that they told Hertzog that Zachmann would testify that the complainant was heavily intoxicated; in fact Zachmann testified at the *Ginther* hearing that she had seen the complainant consume ten beers and take seven "jello shots" as well as drink from defendant's drink nine times. The trial court found that Hertzog knew that Zachmann was a potential witness, and that he knew what her testimony would be. There is no clear error in the trial court's factual finding. Despite knowing that Zachmann could be called as an impeachment witness, Hertzog failed to investigate or interview her, did not file a witness list, and did not call her at trial. This failure deprived defendant of a substantial defense because the complainant's credibility was a crucial issue in the case, and cannot be considered trial strategy. See *Grant*, 470 Mich at 492-494.

Finally, with regard to the complainant's intoxication, the prosecution called a toxicologist at trial who testified that the complainant's blood alcohol level would have been .03 at the time of the incident, premised on her uncontradicted testimony that she had ingested five or six beers prior to vomiting. Zachmann's testimony would have allowed Hertzog to cross-examine the prosecution's expert about what the complainant's blood alcohol level would have been if she had ingested the amount of alcohol Zachmann had observed, further supporting his trial strategy of showing that the complainant's perceptions were impaired. Even absent Zachmann's testimony, Hertzog failed to ask the expert any questions about the effect of alcohol on memory and perception. We conclude that the trial court correctly found Hertzog's handling of this expert witness to have fallen below an objective standard of reasonableness.

We do find that the trial court erred in finding that Hertzog was ineffective because of his failure to consult a medical expert regarding the complainant's lack of injury after the incident and Hertzog's failure to call character witnesses at trial. These failings do not justify a finding of ineffective assistance of counsel. At trial, a sexual assault nurse examiner testified that the complainant suffered no injuries during the assault. Hertzog's trial strategy was to show that the complainant suffered no injury. Therefore, an additional expert was not necessary to prove this point. Hertzog was also not deficient for failing to call character witnesses to testify on behalf of defendant. Defendant testified that he had no criminal record and served in the military. The prosecution did not contest these facts at trial, and additional character witnesses would not have provided defendant a substantial defense because the witnesses had no additional information that was not presented at trial already. However, Hertzog's performance was deficient in other ways, and his overall performance fell below an objective standard of reasonableness. His decisions were not reasonable trial strategy.

In addition, defendant has shown that, but for Hertzog's performance, a different result would have been reasonably probable. While there was no evidence presented at the *Ginther* hearing that could directly rebut the complainant's testimony that defendant sexually assaulted her, there was substantial credibility evidence that could have impacted the jury's decision.

The Michigan Supreme Court's decision in *Armstrong* is instructive. In *Armstrong*, the complainant reported that the defendant had raped her twice. *Armstrong*, 490 Mich at 284-285. During trial, the complainant testified that she had not had contact with the defendant since the second rape. *Id*. at 286. Defense counsel sought to introduce telephone records into evidence, but the prosecutor objected (for lack of foundation) and the evidence was excluded. Defense counsel made no further effort to have the records admitted. *Id*. at 286-287. The telephone records would have shown hundreds of calls from the complainant to the defendant. *Id*. On appeal, this Court affirmed defendant's conviction and sentences and denied appellate counsel's request for a *Ginther* hearing. *Id.* at 288. Our Supreme Court remanded for a *Ginther* hearing. *Id*. at 288.

At the *Ginther* hearing, defense counsel testified that he mistakenly believed that the cell phone records did not require foundational testimony for admission, and that the decision not to admit the records was unrelated to trial strategy. *Id*. Following the *Ginther* hearing, the trial court held that counsel's performance fell below an objective standard of reasonableness, but that a different result was not reasonably possible if the telephone records had been admitted, and this Court again affirmed the defendant's convictions. *Id*. at 288-289. Our Supreme Court reversed. *Id*. at 294. The Court held that the issue of the complainant's credibility was significant, and the telephone records were strong impeachment evidence, such that "any attorney acting reasonably would have moved for the records' admission given that they offered powerful evidence of the complainant's lying to the jury in a case that essentially boiled down to whether the complainant's allegations were true." *Id*. at 291-293. Under the circumstances, defense counsel's error affected the outcome of the proceedings, and the trial court improperly denied relief. *Id*. at 292.

This case is similar to *Armstrong*. There was evidence available to Hertzog that could have specifically rebutted the complainant's trial testimony. The complainant testified that she had five or six beers, and was not drunk. Zachmann could have testified that the complainant was extremely intoxicated and had drunk significantly more than she claimed. Zachmann could also have testified that defendant never left his position as disc jockey, so he could not have performed the first two assaults. This evidence could have significantly diminished the complainant's credibility to the jury, and could have rendered a different result. We conclude that defendant was prejudiced by his trial counsel's performance.

V. INEFFECTIVENESS OF DEFENDANT'S APPELLATE COUNSEL

Based on the discussion above, Hertzog's performance at trial was ineffective. However, defendant must prove good cause for not raising that issue in his first appeal. Defendant argues that there was good cause for not raising this issue in his first appeal because his appellate counsel, Czarnecki, was ineffective. We agree.

The same standards apply to a claim of ineffective assistance of appellate counsel as apply to a claim of ineffective assistance of trial counsel. *Reed*, 198 Mich App at 646. In a proceeding for post-conviction relief from judgment, appellate counsel's failure to raise every issue of arguable legal merit does not constitute ineffective assistance of counsel. *Id.* Appellate counsel may legitimately discard weaker arguments in order to focus on those arguments that are

more likely to prevail. *People v Uphaus (On Remand)*, 278 Mich App 174, 186-187; 748 NW2d 899 (2008).

As discussed previously, defendant had a valid claim that Hertzog was ineffective. Therefore, there is a reasonable probability that defendant's appeal would have rendered a different result had Czarnecki raised the ineffective assistance of trial counsel issue on appeal. We conclude that Czarnecki's performance, in failing to raise the ineffectiveness of Hertzog on direct appeal, was objectively unreasonable. Although appellate counsel's failure to raise every issue of arguable legal merit does not constitute ineffective assistance, the question is "whether a reasonable appellate attorney could conclude" that the issue of Hertzog's effectiveness was not "worthy of mention on appeal." *Reed*, 449 Mich at 391.

In its opinion and order, the trial court did not fully analyze the issue whether Czarnecki was ineffective. The Court only stated that "[g]iven the magnitude of trial counsel's ineffectiveness, ineffective assistance of trial counsel should have been raised on appeal." While a fuller analysis of this issue by the trial court would have been advisable, we agree with the conclusion reached by the trial court. See *People v Brown*, 491 Mich 914, 914; 811 NW2d 500 (2012) (defendant's appellate counsel was ineffective for failing to raise the issue of trial counsel's ineffectiveness on the defendant's direct appeal, and defendant was prejudiced by the error).

In defendant's appeal to this Court, Czarnecki raised three issues, but did not raise the issue of ineffective assistance of trial counsel. At the *Ginther* hearing, Czarnecki testified that he and defendant's family discussed the issue of Hertzog's ineffectiveness. However he also testified that he believed, based on the trial transcript, that defendant could not prove the second prong of ineffective assistance of counsel, *i.e.*, that but for counsel's deficient performance, a different result would have been reasonably probable. Czarnecki reasoned that there were no witnesses, besides defendant, that could directly rebut the complainant's testimony that defendant sexually assaulted the complainant. Czarnecki explained:

> [The complainant] testified that she was assaulted in the room. Mr. Armijo testified that he was in that same room to get his coat. . . . There were two people, and that was it. On that basis, Mr. Hertzog could not have prepared anyone; there were no other witnesses that could have shed light on that one key factor.
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> * * *
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> The jury was free to decide whether it was imagined or whatever, but they were free to decide whether the incident occurred. And they occurred, and there was [sic] only two people in that room. He [Hertzog] could have interviewed fifty different witnesses, but it would have not deprived Mr. Armijo of a substantial defense because nobody else was present in that room at that time.

Czarnecki thus admitted that he understood that the essential nature of the case was a credibility contest between complainant and defendant. We conclude that Czarnecki's decision not raise the issue of Hertzog's failure to investigate and call potential impeachment witnesses

and witnesses that could establish defendant's whereabouts during the other two assaults was objectively unreasonable.

In *Brown*, our Supreme Court reversed a decision of this Court finding that the defendant was not deprived of the effective assistance of trial counsel or appellate counsel and affirming the trial court's denial of a motion for relief from judgment. *Brown*, 491 Mich at 914; *People v Brown*, unpublished opinion per curiam of the Court of Appeals, decided October 27, 2011 (Docket No. 292470), unpub op at 1. There, the complainant had accused the defendant of sexually assaulting her during numerous individual counseling sessions. After his conviction, the defendant filed a motion for relief from judgment, which was denied by the trial court. *Id.* The denial was affirmed by this Court, but reversed by the Supreme Court and remanded for a *Ginther* hearing on trial counsel's ineffectiveness. *Id.* After the *Ginther* hearing, the trial court again found that the defendant had received effective assistance at trial. *Id.* This Court held that the defendant's trial counsel was not ineffective for failing to adequately cross-examine the complainant about inconsistencies in her testimony, and not ineffective for failing to request activity logs that would show that the defendant did not have as many individual counseling sessions with the complainant as she claimed. *Id.* at 3. This Court also held that the defendant's appellate counsel was not ineffective in his questioning of trial counsel at the *Ginther* hearing. *Id.* at 4. Significantly, however, our Supreme Court held, in reversing this Court, that appellate counsel was ineffective for failing to raise the issue of ineffective assistance of counsel "*on the defendant's direct appeal.*" *Brown*, 491 Mich at 914 (emphasis added).

We find *Brown* to be persuasive. Plaintiff has referred this Court to no case where this Court has found a defendant's trial counsel ineffective, yet nonetheless excused a defendant's appellate counsel for failing to raise such a meritorious argument. Although appellate counsel is allowed to "winnow out weaker arguments," he (or she) must "legitimately" do so in order to "focus on those more likely to prevail." *Reed*, 449 Mich at 391. We do not read *Reed* and its progeny to stand for the proposition that blanket approval must be given to every appellate counsel's selection of which arguments to pursue; indeed just as trial counsel's decisions concerning witnesses and cross-examination may at times dip below an objective standard of reasonableness, so too may an appellate attorney's decision on the presentation of issues on appeal. We conclude that appellate counsel did not "legitimately" discard the issue of trial counsel's ineffectiveness in this case, and that defendant was prejudiced thereby.

Our conclusion is bolstered by Czarnecki's failure to fully investigate the matter of Hertzog's ineffectiveness. Strategic decisions made after incomplete investigation are reasonable only if counsel made a reasonable decision not to investigate further. *Grant*, 470 Mich at 485. Here, Czarnecki admitted at his *Ginther* hearing that his usual practice as appellate counsel was to contact trial counsel regarding the case; however Hertzog testified that no one contacted him, and Czarnecki did not recall if he had contacted Hertzog. Czarnecki admitted that he never met with Hertzog in person and did not have evidence that he contacted Hertzog in any other form. Czarnecki admitted that defendant's family provided him with a detailed list of reasons why they believed Hertzog was ineffective. The list contained the allegations, among others, that Hertzog failed to investigate potential witnesses, failed to prepare to cross-examine the prosecution's expert witnesses, and failed to file the requisite notice under the rape shield statute. Yet Czarnecki never interviewed potential witnesses or investigated the matter further, because he was convinced that there were "no other witnesses that could shed light on any key

factor." As noted above, witnesses in fact could have shed light on two key factors in defendant's case: his whereabouts during the first two assaults, and the level of the complainant's intoxication. We therefore conclude that Czarnecki's decision not to investigate the claim of Hertzog's ineffectiveness fell below an objective standard of reasonableness, and constituted ineffective assistance of appellate counsel.

Brown indicates that a defendant meets his burden of establishing entitlement to relief under MCR 6.508(D) when he carries his burden of showing the ineffectiveness of both trial and appellate counsel. *Brown*, 491 Mich at 914. For the reasons noted, the trial court's decision to grant defendant's motion for relief from judgment did not fall outside the range of principled outcomes, and was not an abuse of discretion.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ Donald S. Owens
/s/ Mark T. Boonstra