Order

Michigan Supreme Court
Lansing, Michigan

March 8, 2022

Bridget M. McCormack,
Chief Justice

163380

Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh
Elizabeth M. Welch,
Justices

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 163380
COA: 353296
Macomb CC: 2005-003245-FC

ANTHONY JEROME DeLEON,
Defendant-Appellant.

_____/

On order of the Court, the application for leave to appeal the June 10, 2021 judgment of the Court of Appeals is considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we VACATE the judgment of the Court of Appeals and we REMAND this case to that court for reconsideration. The Court of Appeals shall specifically address whether or how the procedural bars of MCR 6.508(D)(2) and (3)(a) affect the outcome of this case.

We do not retain jurisdiction.

t0228

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

March 8, 2022

Clerk

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

ANTHONY JEROME DELEON,

Defendant-Appellee.

UNPUBLISHED
June 10, 2021

No. 353296
Macomb Circuit Court
LC No. 2005-003245-FC

Before: FORT HOOD, P.J., and CAVANAGH and TUKEL, JJ.

PER CURIAM.

The prosecution appeals by leave granted[1] the trial court's order granting defendant a new trial under MCR 6.500 *et seq*., following a *Ginther*[2] hearing. We reverse.

I. FACTUAL BACKGROUND

This Court described the facts of this case in a prior appeal:

> Defendant's convictions arise from the April 1998 shooting death of his wife, Karen DeLeon, who died from a single gunshot wound to the head. Police found several bags packed with the woman's clothing. Defendant claimed to be present at the time of the shooting and further claimed to hold his wife closely right after the shooting, but police found him clean and emotionless when they arrived at the scene. Shortly after the shooting, the medical examiner certified the manner of death as "undeterminable." A toxicology report indicated that the decedent had consumed a large, possibly fatal, amount of Butalbital. The police file was closed in June 1998, because the police determined that there was no direct evidence that the decedent's death was anything other than a suicide. Much of the physical

[1] *People v DeLeon*, unpublished order of the Court of Appeals, entered July 31, 2020 (Docket No. 353296).

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

> evidence was destroyed, including the decedent's numerous prescription medications and the clothing she was wearing at the time of her death. The case was later reopened in 2002, after defendant assaulted his live-in fiancée by wrestling her to the floor and telling her he was going to kill her. The assault was precipitated in large part by the fiancée's communication of her desire to end the relationship. In June 2005, defendant was charged with first-degree murder in connection with the decedent's death.
>
> Testimony indicates that, at least in retrospect, some witnesses believed that defendant acted suspiciously on the night his wife died. There was also evidence that the decedent had a history of prescription drug abuse and a previous suicide attempt. Although testimony at trial portrayed defendant as controlling and insensitive toward the decedent, no one ever saw him physically assault the decedent, and she never complained to anyone of physical abuse. Evidence of defendant's 2002 assault of his fiancée was presented at defendant's trial. [*People v DeLeon*, unpublished per curiam opinion of the Court of Appeals, issued September 18, 2007 (Docket No. 269574), pp 1-2.]

Defendant was convicted of first-degree murder and possession of a firearm during the commission of a felony. Defendant appealed his convictions and this Court affirmed. *Id*. at 4.

In 2018, defendant sought relief from judgment on the basis of the ineffective assistance of his trial counsel, Salvatore Palombo, for failing to call Dr. Herbert MacDonell as an expert witness. The trial court granted defendant a *Ginther* hearing to permit him the opportunity to establish a factual predicate for his claim. Following the *Ginther* hearing, the trial court agreed with defendant's contention that Palombo was ineffective and granted defendant a new trial. The prosecution now appeals.

II. THE LAW-OF-THE-CASE DOCTRINE

The prosecution first argues the trial court erred by considering defendant's request for relief from judgment because the law-of-the-case doctrine precluded such relief. We disagree.

We review de novo whether the law-of-the-case doctrine applies. *Kasben v Hoffman*, 278 Mich App 466, 470; 751 NW2d 520 (2008). Under the law-of-the-case doctrine, "an appellate court's decision regarding a particular issue is binding on courts of equal or subordinate jurisdiction during subsequent proceedings in the same case." *People v Herrera*, 204 Mich App 333, 340; 514 NW2d 543 (1994). "The law[-]of[-]the[-]case doctrine is a general rule that applies only if the facts remain substantially or materially the same." *People v Phillips (On Second Remand)*, 227 Mich App 28, 31-32; 575 NW2d 784 (1997).

During defendant's direct appeal, the only facts available to the Court were that Palombo did not call Dr. MacDonell and that Palombo told the trial court Dr. MacDonell left town suddenly and could not be reached. *DeLeon*, unpub op at 3-4. On October 10, 2016, however, Dr. MacDonell signed an affidavit asserting that he left town because Palombo told him his testimony would not be needed. Because this Court relied on Palombo's uncontested assertion at trial that Dr. MacDonell had to leave town suddenly in resolving defendant's ineffective assistance of

counsel claim on direct appeal, *id*. at 4, Dr. MacDonell's affidavit constitutes a material change in facts. Therefore, the law-of-the-case doctrine did not preclude the trial court from considering defendant's claim. *Phillips*, 227 Mich App at 31-32.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

The prosecution also argues the trial court erred by finding Palombo was ineffective. The prosecution's argument is essentially that the trial court erred by concluding Palombo's testimony at the *Ginther* hearing suggested his failure to call Dr. MacDonell was not a matter of sound trial strategy. We agree.

We review a trial court's findings of fact regarding a motion for relief from judgment for clear error and the trial court's ultimate decision on the motion for an abuse of discretion. *People v Swain*, 288 Mich App 609, 628; 794 NW2d 92 (2010). "A finding is clearly erroneous when, although there is evidence to support it, the reviewing court, on the whole record, is left with the definite and firm conviction that a mistake has been made." *People v Dendel*, 481 Mich 114, 130; 748 NW2d 859 (2008), amended 481 Mich 1201 (2008) (quotation marks and citation omitted). "A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes or makes an error of law." *Swain*, 288 Mich App at 628-629 (citations omitted).

"Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law. A judge first must find the facts, and then must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel." *Dendel*, 481 Mich at 124 (quotation marks and citation omitted). The trial court's factual findings on a claim of ineffective assistance of counsel are reviewed for clear error, but we review de novo whether a particular act or omission fell below an objective standard of reasonableness under prevailing professional norms and whether defendant was prejudiced as a result. *People v Gioglio (On Remand)*, 296 Mich App 12, 19-20; 815 NW2d 589 (2012), vacated in part on other grounds 493 Mich 864 (2012); see also *Dendel*, 481 Mich at 124.

A criminal defendant may move for relief from a judgment of conviction and sentence under the provisions of MCR 6.500 *et seq*. *Swain*, 288 Mich App at 629. The defendant bears the burden of establishing he or she is entitled to relief. MCR 6.508(D). Further, a court may not grant relief from judgment if the defendant:

> (2) alleges grounds for relief which were decided against the defendant in a prior appeal or proceeding under this subchapter . . .
>
> (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. [MCR 6.508(D).]

"The requirement of 'good cause' can be established by proving ineffective assistance of counsel." *Swain*, 288 Mich App at 631.

"Both the Michigan and the United States Constitutions require that a criminal defendant enjoy the assistance of counsel for his or her defense." *People v Trakhtenberg*, 493 Mich 38, 51; 826 NW2d 136 (2012), citing Const 1963, art 1, § 20; US Const, Am VI. "Effective assistance of counsel is presumed, and a defendant bears a heavy burden to prove otherwise." *Swain*, 288 Mich App at 643. To obtain relief on the basis of ineffective assistance of counsel, "a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness and (2) but for counsel's deficient performance, there is a reasonable probability that the outcome would have been different." *Trakhtenberg*, 493 Mich at 51. "[A] defendant must overcome the strong presumption that counsel's performance was born from a sound trial strategy." *Id*. at 52. Further, "the failure to call a particular witness at trial is presumed to be a matter of trial strategy, and an appellate court does not substitute its judgment for that of counsel in matters of trial strategy." *People v Seals*, 285 Mich App 1, 21; 776 NW2d 314 (2009).

Near the end of the seventh day of defendant's trial on January 19, 2006, Palombo informed the trial court he still had several witnesses to call, including Dr. MacDonell. Shortly thereafter, Palombo told the court: "Apparently Dr. [MacDonell] had an emergency and his wife is now in the hospital and he—I haven't talked to him directly, but he tells me that he's got to get on a plane and leave." The court suggested the issue could be dealt with the next day, perhaps by permitting Dr. MacDonell to testify by phone. The next day, after calling another witness, the following conversation took place:

> [*Palombo*]: We have not been able to get in contact with Dr. [MacDonell] who was going to be our next witness. His wife had an emergency. He flew out abruptly last night.
>
> *The Court*: Well, that's fine, Mr. Palombo. Call your next witness.
>
> [*Palombo*]: At this point the defense rests after we address the issue of the medical records, your Honor.
>
> *The Court*: Oh, I'm sorry. I interrupted you. I presumed you had other witnesses. Mr.—so you won't be calling Dr. [MacDonell]?
>
> [*Palombo*]: I will not be calling any further witnesses . . . .

Subsequently, at the *Ginther* hearing on November 8, 2019, Palombo asserted that he decided not to call Dr. MacDonell because he believed he had created reasonable doubt with the expert witnesses he had already called, and he knew the prosecution had its own expert witness standing by to testify in contrast to Dr. MacDonell regarding certain blood evidence. According to Palombo, he was not only worried about the prosecution's witness degrading the defense that had already been made, but he did not want the prosecution's expert witness to be the last one heard by the jury before it began deliberating. Palombo testified that he discussed this decision with defendant and defendant agreed. However, Palombo asserted that he never told Dr. MacDonell he would not be called to testify. Defendant testified that the first he heard Dr. MacDonell would not be called to testify was when Palombo rested for the defense.

The trial court found that Palombo's testimony at the *Ginther* hearing was "somewhat inconsistent" and contradictory to the representations he made to the trial court during defendant's trial. The court further found Palombo dismissed Dr. MacDonell on January 19, 2006, without consulting with defendant, and that Palombo "may have been mistaken" when he told the court and defendant on January 20, 2006, that Dr. MacDonell would not be called because of a family emergency. After making the above findings, the trial court stated:

> Considering the record as a whole, the [trial c]ourt finds that the failure to call Dr. MacDonell as a witness may not have been a strategic decision, and that Palombo's representations to the [trial c]ourt and to [defendant], as well as his failure to keep [defendant] informed of the status of a key expert witness, leads to the conclusion that Palombo's performance fell below an objective standard of reasonableness.

The court noted that the consequence of Palombo's deficient performance was the inability to present Dr. MacDonell's testimony. In light of the circumstantial nature of the prosecution's case, the trial court concluded defendant was prejudiced by Palombo's deficient performance. Dr. MacDonell was prepared to explain how gunshot residue and blood evidence strongly supported the conclusion that Karen committed suicide, and there was a reasonable probability that such testimony would have affected the outcome of the proceedings.

We disagree, and conclude that Palombo's decision not to call Dr. MacDonell was a matter of trial strategy.

When this Court heard defendant's claim of ineffective assistance on direct appeal, the record suggested Palombo's failure to call Dr. MacDonell was a matter of time management and the ordering of witnesses. *DeLeon*, unpub op at 4. It appeared that Palombo intended to call Dr. MacDonell, but because of Dr. MacDonell's family emergency *and* the fact that Palombo called other experts before him, Palombo lost the opportunity to call Dr. MacDonell. *Id*. Following the Ginther hearing, however, the trial court concluded that Palombo intentionally dismissed Dr. MacDonell on January 19, 2006, without consulting with defendant. Be that as it may, the trial court has failed to further explain the conclusion that this decision was not a matter of trial strategy. It appears the trial court's finding that Palombo misled it and defendant at trial clouded the trial court's analysis of defendant's ineffective assistance claim.

Undoubtedly, Palombo's misstatement about Dr. MacDonell during trial was improper. MRPC 1.4(a) (obligation to keep a client reasonably informed about the status of a matter); MRPC 3.3(a) (candor toward the tribunal); MRPC 8.4(b) (conduct involving dishonesty, fraud, deceit, or misrepresentation). And, while we do not diminish how inappropriate it was for Palombo to mislead the trial court and defendant about his reasons for not calling Dr. MacDonell to testify, that act does not permit us to substitute our judgment *on the decision of whether to call Dr. MacDonell*, the only decision that is alleged to have affected defendant's trial. *Seals*, 285 Mich App at 21. To put it simply, Palombo offered numerous reasons that he did not call Dr. MacDonell, in addition to the fact that Dr. MacDonell had a family emergency. Palombo believed the trial had gone well without Dr. MacDonell's testimony, and he knew the prosecution had a rebuttal expert that was prepared to testify if Dr. MacDonell did. Palombo was not only concerned about what damage the prosecution's rebuttal expert would do to defendant's defense, he was also concerned

about the prosecution's expert being the last the jury heard before it began deliberating. We believe this was sound trial strategy. See *Trakhtenberg*, 493 Mich at 52.

For these reasons, defendant did not carry his burden of establishing deficient performance on the part of Palombo. Because defendant did not demonstrate deficient performance, he cannot establish he was denied the effective assistance of counsel. *Trakhtenberg*, 493 Mich at 51. Since defendant cannot establish he was denied the effective assistance of counsel, defendant cannot establish good cause for relief under MCR 6.508(D)(3)(a), and the trial court's decision to grant him a new trial was therefore an abuse of discretion. *Swain*, 288 Mich App at 628-629.

Reversed.

/s/ Karen M. Fort Hood
/s/ Mark J. Cavanagh

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

ANTHONY JEROME DELEON,

Defendant-Appellee.

UNPUBLISHED
June 10, 2021

No. 353296
Macomb Circuit Court
LC No. 2005-003245-FC

Before: Fort Hood, P.J., and Cavanagh and Tukel, JJ.

TUKEL, J. (*dissenting*).

I. INTRODUCTION

I find myself in an unusual position in this case. I agree with much of what the majority says but ultimately cannot agree with it; I find fault with the trial court's factfinding, but I deem it understandable. These facts arise from the unusual nature of this case.

First the backdrop. Although at the time of defendant's wife's death, the medical examiner ruled the cause of death "undeterminable;" and closed the case, leading to the destruction of almost all of the physical evidence, years later, without any change in medical science or newly discovered physical evidence, the prosecution charged and ultimately convicted defendant. There had been undisputed evidence of defendant's wife's suicidal thoughts and drug addiction at the time her cause of death had been labeled "undeterminable." It is of course black-letter law that every crime generally requires an actus reus (criminal act) and mens rea (criminal intent). See, e.g., *People v Likine*, 492 Mich 367, 393; 823 NW2d 50, 65 (2012). It is worth pausing to note here that the only thing which had transpired in the period between when the medical examiner had ruled the cause of death "undeterminable" until defendant was charged with homicide, is that that defendant had allegedly assaulted his fiancée and threatened to kill her. While not improper, this evidence is generally inadmissible, see MRE 404; and if admissible here seems to go almost exclusively to mens rea, and thus apparently was bootstrapped into evidence of cause of death or actus reus. It is a bit unusual for a defendant's bad motive (in an unrelated case) to be used as evidence that a criminal act was committed, rather than that scientific evidence established that a homicide rather than a suicide occurred, with the prosecution then setting out to prove defendant's mens rea. Everything which I have described placed defendant at a disadvantage, as the physical evidence

had been destroyed at the police's instance. These unusual disadvantages are part of the context in which the effectiveness of defendant's trial counsel must be evaluated. For reasons I state below, I cannot agree that defendant received effective assistance of counsel. Rather, I would vacate the order of the trial court and remand for additional factfinding, and I therefore respectfully dissent from the majority's opinion.

II. DISCUSSION

Given the factual history, at trial the only issue was whether defendant's wife had committed suicide or was murdered; in other words, whether a crime had been committed at all. Thus, any evidence at trial which would have borne on the suicide question was highly relevant, in fact the only relevant subject matter. Such was Dr. Herbert MacDonnell's potential testimony. He was prepared to offer a number of conclusions as to why suicide was the overwhelmingly likely cause of Mrs. DeLeon's death. That leads to the final complication in the case. Dr. MacDonnell was not available to testify at the *Ginther* hearing regarding why he did not testify at trial, as he is now deceased, although he submitted a fairly detailed affidavit before his death, which was admitted at the hearing.

A. DR. MACDONNELL AT TRIAL

As the majority recounts, Dr. MacDonnell was not called to testify at trial. Defendant's trial attorney told the trial court at that time that "Apparently Dr. [MacDonell] had an emergency and his wife is now in the hospital and he—I haven't talked to him directly, but he tells me that he's got to get on a plane and leave." The next day, counsel added that, "We have not been able to get in contact with Dr. [MacDonell] who was going to be our next witness. His wife had an emergency. He flew out abruptly last night."

At the *Ginther* hearing held in 2019, however, the trial court noted that "When initially asked why he did not call Dr. MacDonnell to testify at trial, [defendant's trial counsel Salvatore] Palombo testified that things were going very well, and DeLeon agreed, so 'we were satisfied that we had created a reasonable doubt.' " Palombo expressly testified that he discussed the decision not to call Dr. MacDonnell with DeLeon, asked DeLeon's permission, and DeLeon "agreed that we could close the defense of the case and rest . . . [w]ithout calling Dr. MacDonnell." Palombo further testified that he did not want to erode the defense he already had established, and that if he called Dr. MacDonnell to testify, the prosecuting attorney would call as a rebuttal witness a "very respected Michigan State Police Lieutenant who was qualified to testify as to blood spatter as well."

The trial court found that Palombo's testimony at the *Ginther* hearing was "somewhat inconsistent and his representations to the Court during both the trial and the *Ginther* hearing are contradictory." The trial court discussed Dr. MacDonnell's affidavit, which stated that "prior to his death Dr. MacDonnell advised defense counsel that his wife was scheduled for a medical procedure around the time of the trial but that Dr. MacDonnell was available to stay and testify if needed." After the hearing, the trial court reached "the conclusion that Palombo's representation to the Court and DeLeon on January 20, 2006, the day after Dr. MacDonnell was dismissed may have been mistaken." Thus, "[T]he Court finds that the failure to call Dr. MacDonnell as a witness may not have been a strategic decision."

For the reasons I already have recounted, resolving the factual disputes in this case presented significant difficulties and barriers. Nevertheless, and without intending to be overly critical, I find the trial court's comments unenlightening. The trial court was tasked with finding the facts, and with determining whether the reason that Dr. MacDonnell did not testify was because counsel decided not to call him because the trial was going well and he did not want to risk a setback through a prosecution rebuttal witness, a strategic decision; or whether it was because counsel thought that Dr. MacDonnell had been called away for personal reasons, as counsel had twice represented to the court at trial. Stating that "the failure to call Dr. MacDonnell as a witness *may not* have been a strategic decision" (emphasis added), does not answer the critical factual questions. We are an error correcting court, not a factfinding one. See, e.g., *People v Woolfolk*, 304 Mich App 450, 475; 848 NW2d 169 (2014), aff'd 497 Mich 23; 857 NW2d 524 (2014) ("[W]e are mindful that we are an error-correcting court. As such, we must confine our role to that function."). Consequently, "[i]t is not the function of an appellate court to decide disputed questions of fact in the first instance." *In re Martin*, 200 Mich App 703, 717; 504 NW2d 917 (1993) (citation omitted). Thus, it was incumbent on the trial court to find the facts. See MCR 2.613(C) ("Findings of fact by the trial court may not be set aside unless clearly erroneous. In the application of this principle, regard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it."). The trial court simply failed to discharge that duty.[1]

One could infer that the trial court disbelieved Palombo, based on the trial court's statement in its order granting a new trial that "Palombo's testimony is somewhat inconsistent and his representations to the Court during both the trial and the *Ginther* hearing are contradictory." The court further stated that contrary to Palombo's testimony, "The evidence presented at the *Ginther* hearing reveals that DeLeon may not have been consulted on this important decision." Thus, the trial court stated that Palombo "may have been mistaken" when he told the court and defendant on January 20, 2006, that Dr. MacDonell would not be called due to of a family emergency.

We defer to findings regarding credibility. MCR 2.613(C). But the trial court's "may haves" and "may not haves" simply do not constitute factfinding or credibility determinations.

The trial court concluded: "Considering the record as a whole, the [trial c]ourt finds that the failure to call Dr. MacDonell as a witness may not have been a strategic decision, and that Palombo's representations to the [trial c]ourt and to [defendant], as well as his failure to keep [defendant] informed of the status of a key expert witness, leads to the conclusion that Palombo's performance fell below an objective standard of reasonableness."

In this part of its ruling, the trial court committed an error of law. The burden of proving ineffective assistance is on the defendant. See *Strickland v Washington*, 466 US 668, 688, 104 S

[1] If the trial court found it impossible to make the necessary determinations given the circumstances, then the burden of proof and burden of persuasion should have dictated the outcome of this case. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999) (explaining that defendant "has the burden of establishing the factual predicate for his claim of ineffective assistance of counsel").

Ct 2052, 80 L Ed 2d 674 (1984). Moreover, there is a presumption, which I discuss further, that the failure to call a witness was a strategic decision and thus generally given deference regarding claims of ineffective assistance. The trial court, however, by granting a new trial because Palombo's failure to call Dr. MacDonnell "may not have been a strategic reason," reversed both the burden of persuasion and the presumption of effective assistance. While I believe that the trial court's opinion cannot stand in light of its failure to find facts, if the case were to be remanded to it the trial court also would have to apply the proper burden.

B. THE MAJORITY OPINION

The majority elides the difficulties with the trial court's factual findings by simply, in the first instance, making its own.[2] The majority states that it disagrees with the trial court regarding ineffective assistance, "and conclude[s] that Palombo's decision not to call Dr. MacDonell was a matter of trial strategy." The majority then speculates regarding the trial court's reasoning and fills in the gaps through its own factfinding: "the trial court has failed to further explain the conclusion that this decision was not a matter of trial strategy. It appears the trial court's finding that Palombo misled it and defendant at trial clouded the trial court's analysis of defendant's ineffective assistance claim." I certainly agree that the trial court did not explain, or in fact even reach a conclusion, as to these critical factual questions. But the remedy for that shortcoming is proper factfinding by the trial court, not for the majority to substitute its own version of the facts.[3]

The majority also states that "the failure to call a particular witness at trial is presumed to be a matter of trial strategy," majority opinion citing *People v Seals*, 285 Mich App 1, 21; 776 NW2d 314 (2009). While it is impossible to apply the law to the facts until the facts are determined, that assertion, although correct as far as it goes, cannot resolve the case. Simply because a decision was strategic does not insulate it from all review. Rather, the reasonableness of that decision would be the key, with significant deference given to counsel's informed decisions:

> strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that

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[2] The majority dutifully states " 'A judge first must find the facts, and then must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel.' The trial court's factual findings on a claim of ineffective assistance of counsel are reviewed for clear error, but we review de novo whether a particular act or omission fell below an objective standard of reasonableness under prevailing professional norms and whether defendant was prejudiced as a result." (Citation omitted). The majority simply fails to apply that standard of review, or apparently any standard of review, however, because the trial court did not first find the essential facts, and the majority does not then review anything but rather conducts its own factfinding.

[3] Although the majority "finds" that Palombo's decision not to call Dr. MacDonnell was a matter of trial strategy, it never "explains" why during trial Palombo twice told the trial court something completely different. Needless to say, the majority runs roughshod over MCR 2.613(C), as it affords no deference to the trial court's obligation to judge the credibility of Palombo, who testified before it.

> reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments. [*Strickland*, 466 US at 690-691.]

Moreover, the presumption is just that —a presumption, which can be rebutted. If, for example, the trial court's speculation that Palombo "may have been mistaken" when he said Dr. MacDonnell would not be called due to a family emergency was in fact correct—i.e., that Palombo *was* mistaken in thinking that there was a family emergency which made Dr. MacDonnell unavailable—then the presumption would be rebutted because what ensued was not a strategic choice. But we cannot know any of that without full factfinding by the trial court as to what happened and why.[4]

Therefore, I would vacate the order of the trial court, and remand for additional factfinding. I respectfully dissent.

/s/ Jonathan Tukel

[4] The prosecution and the majority also rely on this Court's previous decision in this case, and the law of the case doctrine, to argue that defendant cannot raise the failure to call Dr. Leon. In the previous appeal, this Court found that the failure to call the doctor was not prejudicial, based on the facts as then developed. "Under the law of the case doctrine, if an appellate court has passed on a legal question and remanded the case for further proceedings, the legal questions thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case where the facts remain materially the same." *Grievance Administrator v Lopatin*, 462 Mich 235, 259; 612 NW2d 120 (2000). The law of the case doctrine may bar the relief sought here, but until there is proper factfinding of the questions involved, so that we can determine if the facts are unchanged from what was known at the time of this Court's first decision, we cannot make that determination.