

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2009-0453, State of New Hampshire v. Kerry W. Kidd, the court on August 31, 2010, issued the following order:

The defendant, Kerry W. Kidd, appeals an order of the trial court denying his motion for new trial based upon ineffective assistance of counsel. He argues that his trial counsel was ineffective because he failed to: (1) adequately highlight discrepancies between out of court statements and testimony; and (2) object to the trial court's and State's use of the word "victim" during the course of the trial. We affirm.

The defendant cites both the State and Federal Constitutions in support of his claim of ineffective assistance of counsel. We examine the issue first under our State Constitution, using federal cases for guidance only. State v. Whittaker, 158 N.H. 762, 768 (2009). The standard for determining whether a defendant has received ineffective assistance of counsel is the same under both constitutions; we therefore reach the same result under both analyses. *Id.*

To prevail upon a claim for ineffective assistance of counsel, the defendant must first show that his counsel's representation was constitutionally deficient and, then, that the deficient performance actually prejudiced the outcome of the case. *Id.* To satisfy the first prong of this test, the defendant "must show that counsel's representation fell below an objective standard of reasonableness." *Id.* (quotation omitted). To satisfy the second prong, the defendant "must 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.* (quotation omitted).

The performance and prejudice components of our inquiry are mixed questions of law and fact; we will not disturb the trial court's factual findings unless they are unsupported by the evidence or erroneous as a matter of law and we review the ultimate determination *de novo*. *Id.*

We turn first to defense counsel's trial performance. The defendant argues that his counsel's failure to fully address several inconsistencies between out of court statements and trial testimony satisfies this prong of the ineffectiveness test. "Judicial scrutiny of counsel's performance must be highly deferential." *Id.* at 769 (quotation omitted). "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 at the time." *Id.* (quotation omitted).

Having reviewed the record in this case, we conclude that the defendant has failed to overcome the presumption that his trial counsel's actions constituted acceptable trial strategy. *See id.* Defense counsel developed testimony addressing the inconsistencies highlighted in his opening statement and closing argument. His decisions as to whether to further highlight inconsistencies necessarily included consideration of whether the additional testimony would allow the State to offer otherwise inadmissible evidence and whether the jury might perceive him as being overly technical and aggressive. *See State v. Flynn*, 151 N.H. 378, 389 (2004) (criminal defendants entitled to reasonably competent assistance of counsel, but neither perfection nor success).

The defendant also argues that his trial counsel's performance was deficient because he failed to object when the court and the prosecutor used the term "victim." He asserts that the trial court used the term eight times during jury selection and once in its instructions to the jury prior to deliberation; he also cites one instance where the prosecutor referred to the "victim" during trial. As the State notes, we have never held that use of the term "victim" by a trial court is error. In this case: (1) the text of the general voir dire questions read by the court during jury selection included the term "victim"; (2) the prosecutor used the term once during trial when eliciting testimony about the location of an interview; and (3) the trial court used the term when instructing the jury on the elements of the charged offense. Throughout the trial, the jury was instructed that the State had the burden to prove that an offense had occurred and that it was the jury's function to determine the facts of the case. Based upon the record before us, we conclude that even if it was error to fail to object, prejudice is not, for that reason alone, established. Failure to object does not meet the prejudice component of the ineffectiveness challenge. On this record, we cannot conclude that there is a reasonable probability that had counsel objected to use of the term "victim," and had the court sustained the objection, the result of the proceedings would have been different.

We take this opportunity, however, to strongly caution trial courts and counsel against using the term "victim" in cases where the fact that a crime has been committed is contested. Use of the term "victim" may convey to the jury that the trial court has formed a belief, however slight, that the crime has been committed against the complainant.

Affirmed.

BRODERICK, C.J., and HICKS and CONBOY, JJ., concurred.

**Eileen Fox,
Clerk**

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