

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

TIMOTHY WILLIAM RYAN,

Defendant-Appellee.

UNPUBLISHED

January 13, 2004

No. 247002

Macomb Circuit Court

LC No. 01-000636-FC

Before: Schuette, P.J., and Murphy and Bandstra, JJ.

PER CURIAM.

Defendant was charged with and convicted in a jury trial of six counts of first-degree criminal sexual conduct (CSC), MCL 750.520b(1)(b), one count of second-degree CSC, MCL 750.520c(1)(b), and one count of furnishing alcohol to a minor, MCL 436.1701(1). Defendant was sentenced to twenty-five to fifty years' imprisonment for each first-degree CSC conviction, ten to fifteen years' imprisonment for his second-degree CSC conviction, and forty-four days' imprisonment for his furnishing alcohol to a minor conviction. Defendant filed a motion for new trial on the grounds that his conviction was against the great weight of the evidence and ineffective assistance of counsel. The trial court denied this motion, but granted defendant's motion to reconsider as defendant required a *Ginther* hearing to preserve his claims for appellate review.¹ After an evidentiary hearing, the trial court granted defendant's motion for new trial. The trial court denied the prosecution's motion to reconsider this order. The prosecution now appeals by leave granted. We affirm.

The prosecution contends that the trial court abused its discretion in granting defendant's motion for new trial as defendant received effective assistance of counsel and the court's decision was based on bias against the prosecution's case and on its opinion of the victim's credibility, the prosecution's key witness. We disagree. This Court reviews a trial court's decision regarding a motion for new trial for an abuse of discretion. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003). "A mere difference in judicial opinion does not establish an abuse of discretion." *Id.* Effective assistance of counsel is a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). A trial

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

court's findings of fact are reviewed by this Court for clear error, and issues of constitutional law are reviewed de novo. *Id.*

In *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001), our Supreme Court, addressing the basic principles involving a claim of ineffective assistance of counsel, stated:

To justify reversal under either the federal or state constitutions, a convicted defendant must satisfy the two-part test articulated by the United States Supreme Court in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). See *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not performing as the 'counsel' guaranteed by the Sixth Amendment." *Strickland, supra* at 687. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *Id.* at 690. "Second, the defendant must show that the deficient performance prejudiced the defense." *Id.* at 687. To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

We find that the trial court did not abuse its discretion in granting defendant a new trial as defendant presented sufficient evidence and met his burden at the *Ginther* hearing by showing that his counsel's performance fell below an objective standard of reasonableness and that this performance prejudiced his case. For example, the opening statement lasted only one minute and twenty seconds, did not include the necessary fundamental principles of law and raised a possible inference that defendant would be presenting a defense that did not occur. Upon a motion for reconsideration of the grant of a new trial, the lower court determined that the failure to present a defense was not trial strategy as the trial court had been "informed" that the victim's testimony was fabricated, and yet defense counsel did not fully develop this point on cross examination and did not present a defense. Defendant also presented a compelling argument to the trial court that his counsel's performance during cross-examination of the victim, the prosecution's key witness upon whose testimony defendant's conviction was based, fell below an objective standard of reasonableness and prejudiced his case. We cannot conclude that the decision to grant a new trial was an abuse of discretion in light of these considerations.

We further find that the prosecution's contention that the trial court's decision to grant a new trial was based on bias against the prosecution's case or its opinion of the victim's credibility is without merit as we have found that defendant met his burden with regard to ineffective assistance of counsel. We note that the prosecution contends that the trial judge did not grant defendant's motion for a new trial for legally recognized reasons, as she admitted that she was prejudiced by her opinion of the prosecution's case when she disqualified herself. The prosecutor argues that the trial judge sat as "the thirteenth juror" by granting a new trial based on a disagreement with the jury's assessment of witness credibility. See *People v Lemmon*, 456 Mich 625, 627; 576 NW2d 129 (1998). These contentions are without merit as the trial court's

order granting a new trial on the ground of ineffective assistance of counsel was supported by the record, and the substituted judge who heard the prosecutor's motion to reconsider the new trial order equally found that defense counsel was ineffective.

Affirmed.

/s/ Bill Schuette

/s/ William B. Murphy

/s/ Richard A. Bandstra