STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 10, 2004
v	No. 247354 Oakland Circuit Court
BILLY JOE ENGLISH, Defendant-Appellant.	LC No. 02-184901-FH

Before: Saad, P.J., and Talbot and Borrello, JJ.

PER CURIAM.

A jury convicted defendant Billy Joe English of assault with intent to murder (AWIM), MCL 750.83, and carrying a concealed weapon, MCL 750.227. The trial court sentenced defendant to 140 months to 30 years in prison for the AWIM conviction to be served concurrently with a sentence of two to five years' imprisonment for the carrying a concealed weapon conviction. Defendant appeals his convictions and sentences, and we affirm.

Defendant's convictions arise from the April 28, 2002, stabbing of Ron Higdon in the apartment of defendant's girlfriend, Lydia Ceruti. Higdon lived with Ceruti and her three children[1], and one of his friends, Daniel Lamont. Ceruti had recently ended her long-term dating relationship with Higdon because she had begun a relationship with defendant. Higdon planned on moving out of the apartment around May 3, 2002. On April 28, 2002, at approximately 9:30 p.m., Higdon saw defendant, Ceruti, and one of the children in a car in front of the apartment. Higdon spoke with Ceruti, and then left. Some time later, he returned to the apartment, and saw defendant sitting on the couch. Ceruti, Lamont, and the three children were also present. Defendant and Higdon had a conversation about the children for a while, and ended with the two men shaking hands. Ceruti began arguing with Higdon and ordered him to leave the apartment. Higdon then asked Ceruti to speak with him in private, and turned to leave, but before he could, he felt a hard impact in the small of his back and felt and extreme pain, burning, and stinging. Higdon turned and saw defendant with a knife in his hand. Higdon grabbed defendant's wrist and slammed him into the wall, and defendant pulled a second knife with his free hand, and

[1] Higdon is the father of Ceruti's two elder children and defendant is the father of the youngest, although Higdon had, for a time, believed he was the father of all three children.

began to attack Higdon with it. Defendant told Higdon that he was "going to kill" Higdon. Higdon managed to escape and hide in a bedroom, and call for a ambulance with his mobile phone. Higdon was taken to Pontiac Osteopathic Hospital, and his treating physician testified that his injuries, eleven knife wounds that resulted in over one hundred stitches and a substantial loss of blood, would likely have resulted in Higdon's death had he not received treatment.

Defendant's theory of the case is that Higdon had already been evicted from the apartment, and that he broke into it on April 28, 2002, pulled a knife, and began threatening Ceruti. Defendant then pulled a knife and the stab wounds he inflicted were in self-defense.

Defendant argues that his trial counsel's failure to call Ceruti to the stand constituted ineffective assistance of counsel, and that the trial court erred in refusing to hold a *Ginther*[2] hearing regarding the matter. Defendant properly preserved this issue by timely filing a post-judgment motion in the trial court seeking either a new trial or an evidentiary hearing pursuant to *Ginther*. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658; 620 NW2d 19 (2000); See also MCR 6.431(A)(2) and 7.208(B)(1). The trial court denied defendant's motion. A trial court's decision whether a defendant was denied the effective assistance of counsel is a mixed question of fact and law; we review the trial court's findings of fact for clear error, and its constitutional determinations. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Defendant must show that his counsel's performance "was below an objective standard of reasonableness under prevailing professional norms" and that a reasonable probability exists that the outcome of the proceedings would have been different but for counsel's errors. *Sabin (On Second Remand)*, *supra* at 659. Defendant must also "overcome a strong presumption that the assistance of his counsel was sound trial strategy." *Id.*

Defendant says that his trial counsel's performance was deficient because he did not call Ceruti despite the fact that during his opening statement, he stated that he would call Ceruti, who would testify that Higdon broke into the apartment, pulled a knife and threatened her, that defendant pulled a knife in response, and that defendant stabbed Higdon in self defense. Trial counsel's "failure to call witnesses is presumed to be trial strategy." *People v Mitchell*, 454 Mich 145, 163; 560 NW2d 600 (1997), citing *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *Ginther*, *supra*. We agree with the trial court that this testimony is cumulative to defendant's own testimony. Here, the victim, Higdon, testified that defendant attacked him and Lamont's testimony corroborated Higdon's. Furthermore, Lamont testified that after Higdon escaped from defendant, Ceruti placed a knife on the floor near the bedroom in which Higdon hid. Lamont also testified that prior to defendant's preliminary examination, Ceruti asked Lamont to change his story. He further testified that defendant and Ceruti approached him, and accused him of letting Higdon into the apartment. Higdon's brother-in-law, Kevin Whitehouse, testified that defendant told him that he "wished he had killed the son of a bitch [referring to Higdon]," and that Ceruti asked Whitehouse to lie, and threatened him and his family. Defendant himself admitted, while testifying in his own defense, that he was carrying the concealed knives, that Higdon had not hit defendant or Ceruti, and that defendant could easily have walked away from Higdon after he and defendant finished their conversation and

[2] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

Higdon turned to walk away. Defendant also admitted to stabbing Higdon several times. Because of the testimony given by Lamont and Whitehouse, we conclude that trial counsel likely made the decision not to call Ceruti as a witness for strategic reasons. Defendant argues that he was forced to testify because of counsel's failure to call Ceruti. Defendant claims that Ceruti's testimony was not cumulative to his but rather, was testimony of a "neutral" witness, which would have relieved him of the necessity of testifying. However, we reject defendant's argument that Ceruti was an unbiased, neutral witness. We find this argument less than persuasive given Ceruti's failed relationship with Higdon precipitated by her romantic relationship with defendant, together with Lamont's and Whitehouse's testimony of Ceruti's conduct toward them. Accordingly, we hold that defendant has failed to rebut the presumption that trial counsel's decision not to call Ceruti as a witness was sound trial strategy, that defendant has overcome "strong presumption" that the performance of his trial counsel was sufficient, and that the trial court did not err when it denied defendant's motion for new trial and/or a *Ginther* hearing. *Sabin (On Second Remand), supra*.[3]

Affirmed.

/s/ Henry William Saad
/s/ Michael J. Talbot
/s/ Stephen L. Borrello

[3] Defendant filed a supplemental brief in propria persona raising several issues, two of which, in fact, reiterate his argument that trial counsel erred in not calling Ceruti as a witness. Defendant also maintains that trial counsel should have called another witness, the landlord of the apartment in which Ceruti lived, and that trial counsel should have done a better job of impeaching Lamont. However, defendant has failed to make the strong showing required to rebut the presumption that his counsel's performance was effective, and he has failed to convince us that any error trial counsel may have committed was prejudicial in light of the substantial evidence of his guilt. We therefore consider the arguments in defendant's supplemental brief to be without merit.