STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 20, 2007
v	No. 269409 Oakland Circuit Court
THUY THITHU NGUYEN, Defendant-Appellant.	LC No. 2005-204358-FH

Before: Saad, P.J., and Owens and Kelly, JJ.

PER CURIAM.

A jury convicted defendant of two counts of larceny over $20,000, MCL 750.356(2)(a). The trial court sentenced defendant to three years' probation, with one year to be served in jail. For the reasons set forth below, we affirm.

I. Facts

The jury found that defendant stole two distinctive rings from a client while giving her a manicure at US Nails in Royal Oak. The victim, Marjorie Christopher, testified that she regularly wore a ten-carat diamond wedding band and a yellow diamond ring by designer Charles Krypell. Christopher generally put the rings on the table in front of her while defendant, whom she knew as Kim, gave her a manicure. Christopher fell asleep while defendant gave her a manicure during an afternoon appointment on March 30, 2005. Other people in the salon at that time included the owner, his wife, and an employee who sat near defendant and acted as her "trainer." After Christopher woke up, she could not find her rings. When Christopher asked defendant about the rings, defendant said she did remember or notice her wearing the rings. After she retraced her steps that day, Christopher concluded that defendant took the rings.

Police linked defendant to the theft through evidence that she tried to sell the rings. In April 2005, a woman entered Lavdas Jewelers in Warren at around closing time with rings that matched the description of Christopher's rings. The woman negotiated for a cash sale of the wedding band, but the deal fell through when the woman failed to provide a driver's license. Before she left, the woman identified herself as "Kim" and provided a cellular phone number that matched defendant's. The woman drove off in a white Oldsmobile Alero that was the same kind of vehicle registered to defendant. Two Lavdas Jewelers employees, Carmen Pohorily and Jennifer Rocheleau, identified defendant as the person who came into the store.

In May 2005, a woman tried to sell a yellow diamond ring that fit the description of Christopher's ring at Mync Jewelers in Utica. Richard Buss, a sales representative for a diamond company who was visiting the store, planned to buy the ring, but before he could complete the purchase, the woman left the store. Buss and store owner Michael Mync identified defendant as the woman who came to the store.

II. *Ginther*[1] Hearing

Defendant claims that her attorney was ineffective and that the trial court erred when, following a *Ginther* hearing, it denied defendant's motion for a new trial.[2]

Specifically, defendant maintains that defense counsel was ineffective because he failed to adequately investigate or present testimony to refute evidence that she tried to sell the rings after the theft occurred. With regard to the attempted sale at Lavdas Jewelers in April 2005, the testimony of the store owner and two employees differed about the time of the attempted sale. At the *Ginther* hearing, defense counsel testified that he learned through discovery that defendant was trying to sell the ring shortly after 8:00 p.m. on April 14, 2005. He investigated defendant's whereabouts at that time by reviewing the nail salon's appointment book, speaking with Dan Hgo, the owner of the nail salon, and confirming with defendant that her last appointment on that date was at 6:30 p.m.[3] Defense counsel also obtained information that defendant typically

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

[2] We review a trial court's factual findings at a *Ginther* hearing for clear error. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Constitutional questions of law are reviewed de novo. *Id.* at 579. A defendant claiming ineffective assistance of counsel has a heavy burden to show deficient performance and prejudice. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). With regard to deficient performance, defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). "[D]efendant must overcome a strong presumption that counsel's performance constituted sound strategy." *Carbin, supra* at 600. The strategic choices made by counsel are considered in the context of the investigation conducted. As observed in *People v Grant*, 470 Mich 477, 485; 684 NW2d 686 (2004), quoting *Strickland v Washington*, 466 US 668, 690-691; 104 S Ct 2052; 80 L Ed 2d 674 (1984):

> [S]trategic choices made after less than complete investigations are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. . . . Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.

With regard to prejudice, defendant must show a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Carbin, supra* at 600; *Rodgers, supra* at 714. The attendant proceedings must be fundamentally unfair or unreliable. *Id.*

[3] At the *Ginther* hearing, defendant denied that defense counsel had asked her about the April 14 schedule. However, the trial court ultimately found that defense counsel's testimony was

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helped clean the salon at closing time and that the cleanup work generally takes 10 to 15 minutes.

Based on the information he received from Hgo and defendant, defense counsel estimated that defendant could have left the nail salon by approximately 7:30 p.m. Because it would take 20 to 30 minutes to drive from the nail salon to Warren, defense counsel decided that there was sufficient time for defendant to go to the jewelry store and that presenting evidence regarding the last appointment of the day would have provided a weak alibi. Considered in light of other evidence linking defendant to the attempted sale, including the identification of her car, defense counsel decided not to present this evidence to the jury.

Giving appropriate deference to the trial court's findings at the *Ginther* hearing, we reject defendant's claim that her counsel was ineffective for failing to present an alibi defense for the attempted sale on April 14, 2005. Defense counsel conducted a reasonable investigation and the failure to call defendant's last client of the day as a witness did not deprive defendant of a substantial defense. Although the store owner's testimony provided some basis for an argument that the store might have closed even earlier, we will not assess counsel's trial strategy with the benefit of hindsight. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004).

Regarding the attempted sale at Mync Jewelers on May 17, 2005, testimony also differed about the exact time of the incident. Mync testified that the woman came into the store at about noon, but Buss testified at trial and at the preliminary examination testimony that she entered the store at about 10:30 a.m. Both Mync and Buss identified defendant at trial as the woman who attempted to sell the ring.

At the *Ginther* hearing, defense counsel testified that he did not have the benefit of the nail salon's appointment book to evaluate whether there was a viable alibi defense because the appointment book page for May 17 was missing. He spoke with Ngo and defendant about the clients that day, but was unable to discover any names of defendant's clients, and he was unable to obtain credit card slips from the salon to conduct further investigation. Defense counsel also testified that he had information that defendant admitted that she went to a jewelry store in Utica on May 17. Under the circumstances, defense counsel decided not to pursue an alibi defense or to advertise for potential alibi witnesses at the nail salon.

Defendant produced two alibi witnesses at the *Ginther* hearing whose testimony could have conflicted with testimony about when defendant attempted to sell the ring on May 17, 2005. However, we note that a defendant has an obligation to assist in her own defense, *People v Tommolino*, 187 Mich App 14, 17-18; 466 NW2d 315 (1991), and the reasonableness of trial counsel's actions "may be determined or substantially influenced by the defendant's own statements or actions." *Strickland*, *supra* at 691. In light of evidence that defense counsel made inquiries to defendant and her employer in an effort to identify potential alibi witnesses or documentation that could lead him to such witnesses and had reasonable concerns arising from defendant's admission that she went to a jewelry store in Utica on May 17, we cannot say that

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credible. We give deference to the trial court's assessment of credibility issues. *People v Farrow*, 461 Mich 202, 209; 600 NW2d 634 (1999).

defendant met her burden of showing that defense counsel made an unreasonable decision not to investigate further. Under these circumstances, we are also not persuaded that prevailing professional norms required defense counsel to post signs at the nail salon to try to find other potential witnesses.

We also note that the witnesses defendant presented at the *Ginther* hearing could do nothing to refute the strong evidence that defendant attempted to sell one of the rings on April 14, 2005. In addition to the two store employees who identified defendant as the woman who came to the store, there was evidence that the woman used defendant's nickname, provided defendant's phone number, and had a vehicle that matched defendant's vehicle. Thus, were we to find that defense counsel erred, there is no reasonable probability that, but for the alleged error, the result of the proceeding would have been different. *Carbin, supra* at 600.

Defendant claims that defense counsel was ineffective by not interviewing or calling Kim Ha Le, an employee at the nail salon, or Lan Tran, Ngo's wife, regarding whether the victim wore her rings on March 30, 2005. However defendant gives only cursory treatment to her claim. Therefore, we need not consider this issue. See *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998).[4]

[4] Were we to analyze defendant's claim, we would nonetheless conclude that defense counsel's decision not to call these two witnesses did not constitute deficient performance. The decision whether to call a witness is presumed to be a matter of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). A defendant claiming ineffective assistance of counsel must show that he or she was deprived of a substantial defense. *Kelly, supra* at 526. Kim Ha Le testified that she remembered that the victim did not have a ring on her right hand during her March 30 appointment with defendant, but previously indicated in a statement to the police that she did not remember if the victim was wearing her ring. She denied that defense counsel interviewed her.

Lan Tran did not claim to have observed whether the victim was wearing the rings during the March 30 manicure, but testified that defendant told her in Vietnamese that the victim was not wearing her rings, that she told defendant in Vietnamese to tell the victim that she was not wearing her rings, that defendant told this to the victim, and that the victim then said that she must have left her rings at home. After reviewing her statement to the police, Lan Tran agreed that the victim said that she must have left her rings in the shower, as indicated in her statement.

Contrary to defendant's argument on appeal, there was evidence at the *Ginther* hearing that defense counsel interviewed Lan Tran before trial. At most, the record indicates that defense counsel conceded that he did not interview Kim Ha Le after being confronted with Kim Ha Le's testimony that he did not interview her. Defense counsel testified that he considered Kim Ha Le's statement to the police in deciding not to call her as a witness. He did not call Lan Tran because she was hesitant to testify and provided information to him that was inconsistent with statements to the police. Further, based on his questioning of the victim at the preliminary examination, defense counsel thought that he could raise uncertainty regarding whether the victim wore her rings to the nail salon through cross-examination of the victim at trial.

Considering the record as a whole, and giving appropriate deference to the trial court's findings, we conclude that defendant has not established either deficient performance or

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Defendant maintains that defense counsel was ineffective for failing to call her as a witness at trial. She asserts that, if defense counsel had attempted to have her prior convictions "expunged," she could have testified without being impeached. Defendant has not shown that prevailing professional norms required defense counsel to investigate whether defendant's prior convictions could be "expunged." Nonetheless, we agree with the trial court that defense counsel might have been mistaken about the admissibility of the prior convictions for impeachment purposes. Under MRE 609(a)(2), the credibility of a witness cannot be attacked by evidence of a conviction for a crime containing an element of theft unless it is punishable by imprisonment in excess of one year and the "court determines that the evidence has significant probative value on the issue of credibility and, if the witness is the defendant in a criminal trial, the court further determines that the probative value of the evidence outweighs its prejudicial effect."

Whether defense counsel was ineffective by not calling defendant as a witness was a late issue raised by defendant only after defense counsel's testimony concluded at the *Ginther* hearing. There was no factual development regarding defense counsel's reasons for not calling defendant as a witness beyond his brief testimony explaining why he only planned to have Ngo testify. As the trial court found, allowing defendant to testify would have been problematic in light of its self-serving nature and evidence that defendant had told defense counsel and others that she went to a jewelry store in Utica on May 17, 2005. Indeed, while we will not assess counsel's trial strategy with the benefit of hindsight, *Matuszak, supra* at 58, it is clear from the record that evidence regarding defendant's statement became problematic at trial when the prosecutor attempted to introduce evidence of the statement through rebuttal witnesses.[5] Based on the limited factual record developed at the *Ginther* hearing on this issue, defendant has not established either deficient performance or prejudice arising from defense counsel's failure to call defendant as a witness.[6]

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prejudice arising from defense counsel's failure to call Kim Ha Le or Lan Tran as witnesses at trial. Moreover, we are not persuaded that defense counsel's failure to call other witnesses regarding defendant's or the victim's demeanor amounted to ineffective assistance of counsel. Defendant has not shown that she was deprived of a substantial defense. *Kelly, supra* at 526.

[5] We note that defense counsel ultimately chose not to call Ngo as a witness at trial, and that the prosecutor was permitted to call Ngo as a rebuttal witness to ask him whether defendant told her that she went to a jewelry store in Utica on May 17. The trial court allowed the rebuttal testimony based on its assessment of the defense theory as an attempt to show that "every piece of evidence offered by the prosecution is flawed in some respect." Although Ngo denied that defendant made the statement, the prosecutor presented another witness who testified that Ngo told him that defendant had said that she went to a jewelry store in Utica to have a ring fixed. While Ngo was on the witness stand, defense counsel questioned him about what occurred in the nail salon on March 30 and information in the appointment book for April 14.

[6] We reject defendant's claim that defense counsel's errors cumulatively undermined confidence in the outcome of the trial. Only actual errors are aggregated to determine the cumulative effect. *LeBlanc, supra* at 591 n 12. For the reasons set forth above, we find no actual errors. Further, the strong evidence linking defendant to the April 14 incident belies any claim that the verdict was unreliable. *Id.* at 591. Therefore, the trial court correctly denied defendant's motion for a new trial.

II. Motion for Mistrial

Defendant asserts that the trial court erred when it denied her motion for a mistrial based on Christopher's volunteered testimony regarding a civil lawsuit she filed against Ngo and the nail salon. Specifically, defendant cites Christopher's statement that her husband talked about suing Ngo "because he had someone stole [sic] a ring from her before – oh I'm sorry, we are not supposed to say that . . . ." Defendant argues that she was denied a fair trial because Christopher gave the impression that defendant committed a prior theft and jury instructions could not cure the resulting prejudice.[7]

Here, Christopher volunteered the improper remark during cross-examination by defense counsel. Not only does the record reflect that Christopher's testimony was garbled, the record does not support defendant's claim that Christopher implied that defendant committed a prior theft. Her comments were directed at Ngo and why she was suing Ngo and his salon. The trial court correctly concluded that the jury would not necessarily conclude from Christopher's remark that defendant stole a ring in the past. The court did not abuse its discretion by denying a mistrial, and the trial court correctly offered defense counsel an opportunity for a curative jury instruction. Though the trial court did not adopt defense counsel's request that the jury be instructed that Christopher lied, the court prepared its own instruction with counsel's approval. The court instructed the jury to disregard the testimony if they determined that Christopher said, in effect, that defendant stole a ring from someone else in the past. The court admonished the jury that "[a] statement to that effect would have no relevance to the issues in this case and it would not be part of the evidence in this case that you should consider so if you understand her testimony to have been to that effect, then you should totally disregard that part of her testimony." The trial court's instructions were sufficient to dispel any prejudice arising from the victim's volunteered comments. *Abraham, supra* at 279. Therefore, defendant is not entitled to a new trial on this ground.

III. Newly Discovered Evidence

Defendant further claims that she is entitled to a new trial on the basis of newly discovered evidence that one of her clients was in the nail salon on May 17 at the same time that she was supposed to be at Mync Jewelers in Utica. We have already considered this proposed alibi testimony in the context of the trial court's denial of defendant's motion for new trial based on ineffective assistance of counsel. A motion for a new trial based on newly discovery evidence requires the defendant show that "(1) 'the evidence itself, not merely its materiality,

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[7] We review a trial court's denial of a motion for a mistrial for an abuse of discretion. *People v Bauder*, 269 Mich App 174, 194; 712 NW2d 506 (2005). The motion should be granted only if an irregularity prejudices a defendant's rights and impairs her ability to get a fair trial. *Id.* at 195. "[A]n unresponsive, volunteered answer to a proper question is not grounds for the granting of a mistral." *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995). "When a motion for a mistrial is premised on the unsolicited outburst of a witness, it should be granted only where the comment is so egregious that the prejudicial effect cannot be cured." *Bauder, supra* at 195. "Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors." *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003).

was newly discovered'; (2) 'the newly discovered evidence was not cumulative'; (3) 'the party could not, using reasonable diligence, have discovered and produced the evidence at trial'; and (4) the new evidence makes a different result probable on retrial." *People v Cress*, 468 Mich 678, 692; 664 NW2d 174 (2003), quoting *People v Johnson*, 451 Mich 115, 118 n 6; 545 NW2d 637 (1996). It constitutes a claim that, in the first instance, should properly be decided by the trial court. *People v Givhan*, 472 Mich 907; 696 NW2d 710 (2005).

Because defendant has not shown, nor does the record indicate, that she moved for a new trial on the basis of her alternative theory that the proposed testimony constitutes newly discovered evidence, we deem this issue unpreserved. Further, having previously concluded that defendant was not prejudiced by the absence of the client's testimony, we find no basis for relief under the plain error doctrine applicable to unpreserved issues. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Affirmed.

/s/ Henry William Saad
/s/ Donald S. Owens
/s/ Kirsten Frank Kelly