STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 1, 2008
v	No. 273937 Calhoun Circuit Court
LEONARD PAUL PATTERSON, Defendant-Appellant.	LC No. 06-001126-FH

Before: Saad, C.J., and Murphy and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction for possession of child sexually abusive material, MCL 750.145c(4). Because trial counsel was constitutionally ineffective, and because there was a reasonable probability that, but for counsel's unprofessional errors, the result would have been different, we reverse and remand for a new trial.

This case initially stems from a police investigation of a complaint waged against defendant that he had stalked an ex-girlfriend. Deputy Wes Cuatt was a part of a team that executed a warrant to search defendant's residence on August 31, 2006. Cuatt has expertise in computers, which was needed during the search so that property would not be damaged and evidence purportedly on a computer in the home would not be lost. Police located an old computer that operated with a dial-up modem in a small room and two hard drives. The computer was powered on even though no one was home and had no brand name or serial number. Police seized the computer and Deputy Cuatt eventually subjected both hard drives to certain forensic programs on December 21, 2006. One of the hard drives had a large amount of adult pornography on it. The same hard drive had four pictures of young girls who were obviously under the age of eighteen. The hard drives also contained photographs of defendant, family members, and friends, as well as e-mail to and from defendant.

Defendant was charged and the matter went to jury trial. The trial was relatively short and the prosecution only called two witnesses: Deputy Cuatt, and Dr. Steven R. Guertin, a physician. Deputy Cuatt testified regarding the investigation and the four illegal images among 31,739 images found on defendant's computer. Dr. Guertin's testimony concerned the apparent ages of the girls in the pictures, which he estimated to be between eight and twelve years old.

Specifically, in testimony about the illegal photographs, Deputy Cuatt said that two were found in the computer's temporary internet file. Both images would have to have been seen on

the monitor screen at some time. They might have come from any number of sources—the internet, a floppy disc, e-mail, or a peripheral drive. The other two pictures at issue came from an MPEG file icon on the monitor screen desktop. The same hard drive that had the four illegal images also had 31,735 other images on it. On cross-examination, defense counsel asked Deputy Cuatt about the MPEG icon and a file under that icon titled "teenpink." He testified:

> Q [by defense counsel]: Okay. So this is coming off the hard drive?
>
> A [by Deputy Cuatt]: Right.
>
> Q: Okay. So this is coming off the hard drive?
>
> A: Right.
>
> Q: All right. All right. That's where I wanted to get.
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> A: I'm sorry.
>
> Q: Okay. No. That's ok, trust me. Your knowledge is way as far advance [sic] than mine and everything. Now, as far as with the People's 2 and 3 that was taken off of the hard drive and everything, any indication how long it has been—it had been there?
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> A: That I've written down there, no. On the CD, for each one of the pictures out of all of them that I have tagged, there's a complete description, one where it's located, it's size, it'll have the creation date, it also has the last, what's called, access date. I don't have it printed off on the hard copy. That would be on that CD.
>
> Q: Okay. So there is a way of determining as far as when it was first placed on the hard drive and the last time it was accessed, is that correct?
>
> A: Right. Creation date would not necessarily [sic] the creation of the picture. I mean the creation of the picture on that hard drive.

On further cross-examination, Deputy Cuatt admitted not knowing who had put the illegal photos on the computer's hard drive. The room from which the computer was seized was not locked. Deputy Cuatt did not know if the computer was password-protected and stated that, if the computer was operated in a "standby" mode, someone could access it without a password. Deputy Cuatt insisted that someone had to have purposefully downloaded two of the photographs, but admitted there was no way to tell exactly how these unlawful images got onto the computer because he did not investigate whether anyone else might have had access to it. Deputy Cuatt also acknowledged that the two "thumbnail" photos might have come from "pop-ups" and might not have been seen by any person operating the computer.

During trial, the trial court allowed jurors to submit questions for Deputy Cuatt. The trial court posed the jury's questions as follows:

THE COURT: All right. Officer, several of the jurors have questions. I'll try and go through them so as not to be repetitive because some of them are duplicates. But, do you know whether the keyboard or the computer was checked for fingerprints?

WITNESS: No.

THE COURT: All right. Do you know whether anybody lives with the Defendant?

WITNESS: I do not know. I was not the one that interviewed him or anything. I never talked with him, so I couldn't answer that.

THE COURT: And so you don't know how many people reside in the home, if more than one?

WITNESS: I don't know for sure, no.

Deputy Cuatt further testified that it might have been possible, but difficult and "highly unlikely," for someone to "hack" into defendant's computer. In response to a question by the court whether someone else could have put the illegal images on the computer without the knowledge of the computer's owner, Deputy Cuatt responded, "It could be possible." But the deputy noted that the MPEG icon would appear on the computer desktop and opined that, if he or any reasonable person saw an icon on the desktop that he did not put there, he would check it out to see what it contained and why it was there.

Following the testimony, both the prosecutor and defense gave closing arguments. In his closing remarks to the jury, the prosecutor emphasized that the defense had made no offer of proof about who, beside defendant, had access to the computer. In part, the prosecutor states as follows:

You can consider things that are evidence in this case. And the only evidence has come from two witnesses and four photographs. It's come from Dr. Guertin, it's come from Deputy Cuatt. It came from the 4 photographs that were admitted as exhibits in this case. There isn't any other evidence in this case. That means that all of the ventures that we have taken down kind of side roads and little back trails with the defense saying, well, maybe it was somebody else, could have been somebody else, might have been somebody else, possibly somebody else, maybe the Defendant didn't know, possibly the Defendant know [sic], could it be that the Defendant didn't know really means absolutely nothing because there isn't any evidence here, at all, to tell any of you that anybody other than the Defendant had control of this computer, entered those images onto that computer. Because the Judge is going to tell you, as he gives you the instructions and you have sworn to follow those instructions, that this is not a guessing game, it's not a game of speculation. It's not where somewhere you [sic] can sit around and kind of theorize and say, yeah, but maybe someone else did this. Now, I know the defense is going to tell you, you know, look, we don't have to do anything. It's not our burden to do anything. This is the Prosecutor's job. It's the Prosecutor's

> burden to present you with the evidence. However, when the defense poses a theory to you, the defense truly has an obligation to give you something to support that theory. This is not just a, hey, look, there was [sic] gunmen on the grassy know [sic: knoll] that shot Kennedy, okay. Gee, now, there we have it, it's now solved. This is not a "guess what, someone else might have done it", we don't have to show you who did it, we don't have to give you any evidence as to who did it, we can just kind of throw out this blind theory and speculation and tell you someone could have done it. Now, you're supposed to believe what the defense is saying and you're supposed to then find that that's reasonable doubt. Well, it doesn't work that way. Again, this is evidence. It's based on evidence. You can only consider evidence and if there is no evidence that someone else entered or put these pictures on the hard drive of that computer, then no one else did.
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> Well, where else do you get this information then? If it's not the Defendant saying, hey, guess what, this other person, or these other people, had access to my computer, used my computer, did things on my computer, then where does the information come from? You already know from the instructions that the Defendant need not testify. Then where does the information come from? How did the police investigate to kind of, again, rebut these kind of blind theories, groundless theories, that the defense throws out about other people entering information and pictures and images and things onto the Defendant's computer, if we don't have that information to investigate? It's easy to take and, again, throw out kind of reckless speculation and say, ha, ha, the Prosecutor didn't prove to you that no one else did this. There. There's your reasonable doubt. What the defense doesn't want to tell you is that without the proper information, there is no way to answer that question.

In his summation to the jury, defense counsel emphasized that Deputy Cuatt admitted it was possible that someone else put the photos on defendant's computer and that the pictures might have been on the computer without defendant's knowledge. He also reminded the jurors that Deputy Cuatt had been asked about the origin of the illegal photographs and asserted that it could not be known whether defendant ever saw the illegal pictures.

After receiving instructions from the court, the jury deliberated about two hours before returning a guilty verdict. The trial court sentenced defendant to three months in jail, four years of probation, and ordered him to pay a fine and costs. Defendant was also required to register as a convicted sex offender. Defendant sought to appeal his conviction and sentence.

Appellate counsel moved in the trial court for a *Ginther*[1] hearing or new trial, alleging that defendant's trial counsel was ineffective and that there was insufficient evidence to prove that defendant was guilty beyond a reasonable doubt. A hearing was held on June 7, 2007 where defendant and his trial counsel were the only witnesses. Defendant testified that he had sent trial

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

counsel a list of witnesses he wanted called at trial. According to defendant, several witnesses would have testified that he did not live alone and that a number of people, who either lived with him or assisted him because of his physical limitations, had access to the computer. Defendant also testified that some of those people were no longer friends and they had a reason sabotage his computer. Defendant complained that he was "baffled" by his trial counsel's decision not to call any of the witnesses or, at a minimum, question them before trial.

Trial counsel acknowledged defendant sent him two letters listing prospective witnesses and the court admitted both letters into evidence. When defendant's appellate counsel questioned his trial counsel about the prosecutor's case, the following exchange occurred:

> Q [by defendant's appellate counsel] And wasn't part of it the fact that the Prosecutor's case—wasn't part of the Prosecutor's case the fact that [defendant] was the only person that really had access to that computer in his home, as he lived alone and that was his personal computer?
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> A [by trial counsel] At that time I believe [defendant] was living alone at that time.
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> Q Okay. And do you think that it would have been helpful to explain to the jury that there were many other people that lived in that place, and that had access to the computer and had actually used the computer?
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> A If I'm not mistaken, during the testimony it came out that he had a son who visited frequently, that there were individuals who helped [defendant] during the day. It came out during the testimony, if I'm correct, that the computer was not in [defendant's] room; it—the computer was not locked up. Anyone there at—visiting or staying overnight would have had access as far as to the computer.

Trial counsel said he was concerned about who else might have had access to the computer, but defendant never told him directly about who did have access. When asked why he decided not to call witnesses despite his concern about who else had access to the computer, trial counsel replied that he told defendant that the witnesses would have to be subpoenaed and would probably assert their 5th Amendment rights against self-incrimination. In response to questions from the court, trial counsel admitted receiving both witness lists weeks before the trial but that he did not contact anyone on the lists or investigate further. In his closing remarks at the *Ginther* hearing, the prosecutor stated:

> [Defendant's trial counsel] did exactly what he should have done. He acted effectively on behalf of his client. He did everything in this particular case that he could have done, and I will state this as the attorney of record for the prosecution; I think that there was certainly a degree of disbelief on everyone's part when the jury came back and said guilty.

The trial court entered an opinion and order denying relief. The court found that trial counsel employed a proper trial strategy in not calling witnesses, even though he never contacted any of the dozen or more witnesses offered by defendant.

On appeal, defendant argues that his trial attorney was constitutionally ineffective because counsel conducted no pretrial investigation and sought no assistance of an expert versed in computer science.[2] Assertions of ineffective counsel are mixed issues of fact and law. Fact issues are reviewed for clear error. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Constitutional claims based on provisions of the Sixth Amendment are reviewed de novo. *People v Grant*, 470 Mich 477, 485; 684 NW2d 686 (2004).

The benchmark in evaluating a claim that trial counsel was ineffective is whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. *Strickland v Washington*, 466 US 668, 686; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 337-338; 521 NW2d 797 (1994). To prevail on a claim that trial counsel was constitutionally ineffective, the defendant must meet two tests: First, the defendant must show that counsel's performance was deficient. This requires a showing that counsel made errors so serious that he was not functioning as the "counsel" guaranteed by the Sixth Amendment. Second, the defendant must show prejudice from the poor performance of counsel. This requires proof that counsel's errors were so serious as to deprive the defendant of a fair trial, i.e., a trial whose result is reliable. *Strickland, supra* at 687.

While counsel's conduct is presumed effective and reviewing courts are required to give heavy deference to the strategic decisions of trial counsel, counsel's clear duty to investigate remains "reasonableness under prevailing professional norms." *Strickland, supra* at 688-689. A decision by counsel not to investigate prior to trial must be directly assessed for reasonableness in all the circumstances. *Rompilla v Beard*, 545 US 374, 381; 125 S Ct 2456; 162 L Ed 2d 360 (2005); *Wiggins v Smith*, 539 US 510, 533; 123 S Ct 2527; 156 L Ed 2d 471 (2003); *Strickland, supra* at 691.

In *Rompilla, supra* at 387, and *Wiggins, supra* at 527-528, the United States Supreme Court emphasized that a lawyer has a duty to investigate thoroughly prior to making a strategic choice. Moreover, each decision made the point that *Strickland*'s cryptic reference to "prevailing professional norms" is now a constitutional imperative incorporating the American Bar Association Standards for Criminal Justice. *Rompilla, supra* at 375, and *Wiggins, supra* at 524. The standard relating to the duty of counsel to investigate provides in pertinent part:

> Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to defense counsel of facts constituting guilt

[2] No evidence was presented at the *Ginther* hearing to support appellate counsel's claim that trial counsel was ineffective for failing to present testimony from a computer expert. Without any record evidence regarding what an expert might have offered, we cannot conclude that trial counsel was ineffective on this ground. Thus, our analysis focuses only on counsel's failure to conduct a pretrial investigation of potential witnesses.

> or the accused's stated desire to plead guilty. [ABA Standards for Criminal Justice, Defense Function, Part IV, Investigation and Preparation, 4-4.1(a).]
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> The relevant portion of the Commentary to Standard 4-4.1 provides:
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> > Facts form the basis of effective representation. Effective representation consists of much more than the advocate's courtroom function per se. Indeed, adequate investigation may avert the need for courtroom confrontation. Considerable ingenuity may be required to locate persons who observed the criminal act or have information concerning it. After they are located, their cooperation must be secured. It may be necessary to approach a witness several times to raise new questions stemming from facts learned from others.
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> > The effectiveness of advocacy is not measured solely by what the lawyer does at trial; without careful preparation, the lawyer cannot fulfill the advocate's role. Failure to make adequate pretrial preparation and investigation may also be grounds for finding ineffective assistance of counsel.

Appellate review of trial counsel's conduct of pretrial investigation must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable lawyer to investigate further. *Rompilla, supra* at 391; *Wiggins, supra* at 527. *Strickland's* teaching is not that every cursory investigation justifies all subsequent tactical choices. Indeed, *Strickland* itself makes the point that "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland, supra* at 690-691.

Our review of the testimony at the *Ginther* hearing reveals that trial counsel knew weeks before the trial that many others had access to the computer containing the illegal pictures yet failed to investigate or produce these individuals as defense witnesses. On these facts alone, we conclude that counsel's conduct fell far below an objective standard of reasonableness. See *Grant, supra* at 486, 498 (the Court concluded that defense counsel's failure to investigate whether the minor victim's injuries were the result of the alleged sexual assault or an earlier bicycle accident was an abdication of counsel's duty to investigate, independent of any trial "strategy").

We also conclude that defendant was prejudiced because there was a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. A reasonable probability is a probability sufficient to undermine our confidence in the outcome. *Strickland, supra* at 694; *Grant, supra* at 496. Testimony that others were present in defendant's home and had access to the computer would have created a reasonable probability that the result would have been different, especially considering that even the trial prosecutor was somewhat surprised by the jury's finding of guilt. The trial prosecutor's comment at the conclusion of the *Ginther* hearing is especially telling in light of *Strickland*'s admonishment that a part of the effective assistance of counsel equation turns on the quantum and quality of proofs adduced at trial:

> In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. Some of the factual findings will have been unaffected by the errors, and factual findings that were affected will have been affected in different ways. Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support. [*Strickland*, *supra* at 695-696.]

Considering the totality of the circumstances, the evidence supporting defendant's conviction was weak. Counsel's failure to investigate telling circumstantial evidence that clearly would have countered the prosecutor's theory of the case undermines our confidence in the outcome. We disagree with the trial court's finding at the *Ginther* hearing that no evidence had been presented about what the witnesses on the witness lists might have testified. The record displays that defendant testified at length about the number of people who lived with him and took care of him. The witness lists even indicated who was a "roommate." Even a small amount of investigation would have shown who lived with defendant and the time periods involved. Given that the prosecutor's case rested entirely on the premise that defendant was the only person who could have put the illegal images on the computer, and where defendant's trial counsel thought defendant lived alone, counsel's failure to investigate the witness list was ineffective and extremely prejudicial. This is especially true considering the questions posed by the jury about defendant's living arrangements, and the prosecutor's emphasis during closing argument that defendant had failed to offer any evidence countering the prosecution's proofs.

Counsel's erroneous belief that he had to somehow prove others actually entered the illegal pictures onto the computer hard drive and that, if they were called as witnesses, they would invoke their constitutional protections against self-incrimination, directly contributed to his decision not to question them at all. "Constitutionally effective counsel must develop trial strategy in the true sense-not what bears a false label of "strategy"--based on what investigation reveals witnesses will actually testify to, not based on what counsel guesses they might say in the absence of a full investigation." *Ramonez* v *Berghuis*, 490 F3d 482, 489 (CA 6, 2007); see also *Towns v Smith*, 395 F3d 251, 258 (CA 6, 2005).

Defendant also claims that there was insufficient evidence to sustain a conviction for possession of child sexually abusive material, MCL 750.145c(4). We review sufficiency claims de novo, in a light most favorable to the prosecution, to determine whether any rational trier of fact could have found that the essential elements of the crime charged were proved beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992). It is for the trier of fact, and not this Court, to determine what inferences may fairly be drawn from the evidence and to determine the weight to be accorded to those inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002).

MCL 750.145c(4) requires that the prosecutor show that the defendant "knowingly possessed" child sexually abusive material on his computer. The prosecutor must show more than the presence of child sexually abusive material in a temporary internet file or in a computer recycle bin to prove that the defendant "knowingly possessed" child pornography. *People v Girard*, 269 Mich App 15, 20; 709 NW2d 229 (2005).

The proofs at defendant's trial showed that two photos were in a marked folder, entitled "teenpink." These two photos were thus part of the photo library contained on the computer. The testimony of Dr. Guertin, if accepted, proves the pictures to be of children. The existence of the pictures in a folder on a hard drive owned by defendant and maintained in defendant's home together with other images is evidence of defendant's possession. The circumstantial evidence created by defense counsel's failure to show other users of the computer--regardless of any denial that those users placed and kept the photos--infers defendant's placement and keeping of the photos. In sum, after reviewing the evidence adduced in this trial without a defense, we conclude that the evidence was sufficient to support defendant's conviction when viewed in the light most favorable to the prosecution.

Reversed and remanded for a new trial. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ Pat M. Donofrio