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PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 1, 2008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, P.J., and Murphy and Donofrio, JJ.

MURPHY, J. (*concurring in part and dissenting in part.*)

I agree with the majority that there was sufficient evidence to support the conviction; however, I respectfully disagree with the majority that defendant is entitled to a new trial on the basis of ineffective assistance of counsel.

I find that the trial court's thoughtful opinion following the *Ginther*[1] hearing was well-reasoned. The trial court ruled:

> While no witnesses on behalf of the Defendant were called to testify at trial, and while the record is clear that trial defense counsel advised his client that it would be inadvisable to call as witnesses any of the people who the Defendant wished to present, neither of these facts constitutes ineffective assistance of counsel in this case.
>
> It was appropriate trial strategy not to call defense witnesses in this case. The People, having the burden of proof, presented no witness whatsoever to testify that the Defendant put the child sexually abusive images on the computer found in []his home. The People called only two trial witnesses: the officer who seized and analyzed the computer and an expert who gave an opinion about the age of the children whose images on the computer form the basis for this case. The People's sole witness concerning seizure of and analysis of the computer freely acknowledged that there was no way for him to determine how the images became stored on the computer or who did so. That witness also freely

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

> acknowledged that he did not know who had access to the computer in the Defendant's home.
>
> While there was sufficient circumstantial evidence for the jury to reasonably conclude the requisite elements of the Defendant's possession of the images, there was certainly [a] very reasonable basis upon which the jury could conclude he did not possess the images, had the jury chosen to do so.
>
> Defense counsel testified at the evidentiary hearing that his reasoning in advising that Defendant's witnesses not be called was that either the witnesses would deny the images were theirs or would decline to testify on constitutional grounds. Obviously, the first alternative might tend to implicate the Defendant to a greater extent than the People's evidence. The second alternative has no evidentiary value and would never have reached the jury.
>
> The Defendant testified to this Court that his son was a potential witness who he identified to trial counsel, the only potential witness who he felt might admit the images were his. Defense counsel testified to this Court that the defendant forbade him to interview his son, effectively blocking defense counsel from exploring a potential defense.
>
> It was clearly appropriate trial strategy in this case for defense counsel to rely on the argument, which he forcefully made, that the People's evidence was insufficient to prove his client's guilt beyond a reasonable doubt.
>
> Finally, there is no evidence presented at the evidentiary hearing on this motion concerning what these proposed witnesses' testimony would have been at trial, nor is there any basis upon which this Court could therefore conclude that the result of the trial could have been different.

I agree with the trial court's assessment, and, picking up where the court left off on the issue of prejudice, I would likewise find that the evidence presented at the *Ginther* hearing was inadequate to establish the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different.

The issue of whether a defendant was denied the effective assistance of counsel is a mixed question of fact and constitutional law that we review, respectively, for clear error and de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). 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).

At trial, there was undisputed evidence, the computer forensic report, establishing the creation date and time of the offending photographs on the computer's hard drive, along with subsequent access dates. Accordingly, the only relevant witnesses would be those who were present in the home on the day and at the time the photographs first appeared on the computer's temporary internet files or were downloaded into particular computer folders, as well as days and times that the photographs were subsequently accessed. At the *Ginther* hearing, defendant testified regarding numerous persons who had resided in the home, who had access to or used the computer, who had performed repair work on the computer, and persons who had computer access and held grudges against him. He also testified that the computer was actually located in the bedroom of another person for four years. The problem with this testimony is that it is general in nature, presented without any context, nor correlated with particular days and times.[2] The evidence is entirely irrelevant absent evidence placing a particular witness in the home during the relevant timeframes, along with a showing that the individual had computer access and was computer literate.

Further, defendant testified to his belief that the photographs ended up on the computer by way of emails to his son from the son's friends. Indeed, at his sentencing, defendant stated, "I filed – I gave roughly 20 witnesses to my defense in order to call . . . to defend these charges against me, none of which were called, and they were called for the fact that I know for a fact that my son downloaded – that got – he got an email and that material was put on my computer." However, at the *Ginther* hearing, as touched on by the trial court in its opinion, defense counsel testified that he had planned to speak with defendant's son for purposes of developing a potential defense, but defendant specifically instructed counsel "not to interview his son." Defendant did not rebut this claim during further testimony and argument at the hearing.

Moreover, defendant's testimony lacked any corroboration, nor was corroboration attempted. There was no testimony from any of the proposed witnesses at the *Ginther* hearing, let alone defendant's son, there is no indication in the record that subpoenas were directed at anyof the witnesses, including defendant's son, and no affidavits from these witnesses were

[2] Witness lists that reflected names given to defense counsel before trial were admitted into evidence at the *Ginther* hearing. While those lists are not contained in the record sent to us, the prosecutor indicated at the *Ginther* hearing that some of the names had dates associated with them. Assuming that some of those dates tracked the dates that the photographs were downloaded or accessed, there is no testimony, nor affidavits, from those witnesses that confirm or verify the dates written by defendant.

presented, nor attempts at procuring affidavits shown. On this record, I cannot conclude that defendant has carried the burden of proof to establish that he was prejudiced; therefore, I would find that reversal is unwarranted and that defendant is not entitled to a new trial. Accordingly, I respectfully dissent from the majority's holding that defendant was denied the effective assistance of counsel requiring reversal.

I would affirm defendant's convictions.

/s/ William B. Murphy