

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHRISTINA ALDORA JOHNSON,

Defendant-Appellant.

UNPUBLISHED

January 27, 2009

No. 282282

Wayne Circuit Court

LC No. 07-007430-FH

Before: Hoekstra, P.J., and Fitzgerald and Zahra, JJ.

PER CURIAM.

Defendant appeals as of right her jury convictions of felonious assault, MCL 750.82, and second-degree child abuse, MCL 750.136b(3). We affirm.

Defendant argues that she received ineffective assistance of counsel. Following an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973), the trial court denied defendant's motion for a new trial. We review the trial court's factual findings for clear error, and the ineffective assistance question de novo. *People v Dendel*, 481 Mich 114, 124; 748 NW2d 859 (2008), amended on other grounds 481 Mich 1201 (2008). Clear error is established when, although there is evidence to support a finding, the reviewing court is left with the definite and firm conviction that a mistake has been made. *Id.* at 130.

It is undisputed that defendant became upset when she discovered her fiancé, Myron Knight, in a car with another woman, Sandy Gongora. Defendant followed as Knight and Gongora left a restaurant parking lot, and allegedly bumped Gongora's SUV in the parking lot. Gongora alleged that defendant pursued her and twice struck her vehicle. Defendant denied bumping the SUV in the parking lot, and maintained that it was Gongora who slammed into her vehicle after both vehicles proceeded from the intersection at Ford Road and Auto Club Drive onto Auto Club Drive. A detective testified that Knight originally supported Gongora's version. However, in a subsequent written statement and at trial, Knight's version of events was consistent with that of defendant.

Defendant argues that because the defense was, in essence, Gongora's credibility, trial counsel should have had the tools to rebut Gongora's mistaken testimony, supported on rebuttal by the officer in charge, relative to the Ford Road/Auto Club Drive intersection. Those witnesses asserted, contrary to defendant and Knight, that as the vehicles were side-by-side at the

intersection, defendant was required to turn left and could not legally go straight. Defendant argues that counsel should have investigated the geography and markings of the intersection, provided photographs and questioned witnesses to clearly establish its layout, and rebutted the officer in charge's erroneous testimony. In *Dendel, supra* at 124-125, quoting *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001), our Supreme Court stated:

A defendant seeking a new trial on the ground that trial counsel was ineffective bears a heavy burden. 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).

There is no indication that counsel was on notice to study the intersection in advance of trial. It appears that, until Gongora gave misinformation, the issue was unanticipated; counsel reasonably presumed that the layout of the intersection was undisputed. The court did not err in concluding that the benefit of learning about the layout of the intersection could only have been appreciated in hindsight. Thus, defendant has not established a deficiency in representation.

Defendant also argues that counsel should have presented additional information about the curves and speed limit on Auto Club Drive. She asserts that this would have refuted Gongora's testimony that she and defendant were traveling at speeds of 60 to 65 miles per hour. However, the trial court properly concluded that little would have been gained by providing more evidence. First, Gongora referenced a map of Auto Club Drive in establishing where the impacts occurred. Moreover, defendant testified that the road was curvy and that the speed limit was 20 to 25 miles per hour. It does not appear that this was disputed. In addition, counsel used Gongora's alleged speed limit to challenge her credibility, suggesting that multiple impacts at 60 to 65 miles per hour would have caused more serious damage. Thus, the information regarding the curves and speed limit was before the jury. Moreover, rather than challenging the reasonableness of Gongora's assertion regarding the speed limit, trial counsel made the tactical decision to use the testimony to challenge the number of impacts, which also bore on her credibility. Defendant has failed to overcome the strong presumption that this tactic constituted sound trial strategy. See *Dendel, supra*.

Finally, defendant takes issue with counsel calling Knight as a witness because Knight was subject to impeachment based on an alleged inconsistent oral statement to the officer in charge. Counsel made a strategic decision, however, that Knight's testimony would be more beneficial than a jury instruction. If Knight had not testified, defendant's version of events would have been uncorroborated. Moreover, the only information that the jury would have had regarding Knight was an officer's testimony that Knight appeared scared on the night in question. Counsel had to balance the absence of Knight's testimony against possible impeachment with an unrecorded statement that he denied making. This strategic decision was not unsound, and does not point to deficient performance.

Defendant also asserts that Knight incorrectly asserted that he still lived with defendant, a point that was refuted by defendant's mother at the *Ginther* hearing. Defendant maintains that the suggestion of a continued relationship implied bias, and should have been refuted. However, it was undisputed that at the time of this altercation, defendant was five months pregnant with Knight's child. Thus, there was already evidence of a continued relationship, albeit because of a child, but this was indicative of Knight's interest in defendant not being incarcerated. That Knight was living elsewhere would not have established disinterest that would have made his testimony more credible. Thus, failing to refute this point did not compromise counsel's representation and, regardless, it did not result in prejudice.

Affirmed.

/s/ Joel P. Hoekstra
/s/ E. Thomas Fitzgerald
/s/ Brian K. Zahra