STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED October 6, 2009
v	No. 290178 Oakland Circuit Court
LABEED SAMI NOURI, Defendant-Appellee.	LC No. 2007-218065-FC

Before: Stephens, P.J., and Jansen and Wilder, JJ.

PER CURIAM.

Defendant was charged with the sexual assault of one of his employees at his Oakland County medical office. Following a jury trial, he was convicted of one count of first-degree criminal sexual conduct, MCL 750.520b(1)(f), and two counts of fourth-degree criminal sexual conduct, MCL 750.520e(1)(b). Defendant then moved for a *Ginther*[1] hearing and a new trial, arguing that his trial counsel had rendered ineffective assistance by interfering with his constitutional right to testify. The trial court agreed, ruling that counsel had been ineffective for failing to inform defendant of his absolute right to testify and for preventing defendant from testifying in his own defense. The court therefore issued an order granting defendant's motion for a new trial. The prosecution now appeals that order as on leave granted.[2] We reverse and remand for reinstatement of defendant's convictions.

We review for clear error the trial court's findings of fact at a *Ginther* hearing, *People v Grant*, 470 Mich 477, 484-485; 684 NW2d 686 (2004), but review de novo the underlying legal question whether a defendant was denied the effective assistance of counsel, *People v Kevorkian*, 248 Mich App 373, 410-411; 639 NW2d 291 (2001). The trial court's ultimate decision whether to grant or deny a motion for a new trial is reviewed for an abuse of discretion. *People v Miller*, 482 Mich 540, 544; 759 NW2d 850 (2008).

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

[2] This Court initially denied the prosecution's application for leave to appeal. *People v Nouri*, unpublished order of the Court of Appeals, entered March 13, 2009 (Docket No. 290178). In lieu of granting leave to appeal, our Supreme Court remanded this case for consideration as on leave granted. *People v Nouri*, 483 Mich 947 (2009).

On the defendant's motion, a trial court "may order a new trial on any ground that would support appellate reversal of the conviction . . . ." MCR 6.431(B). The trial court must state its reasons for granting a new trial orally on the record or in a written order. MCR 6.431(B). Here, the trial court stated, among other things, that defendant "was denied his right to the effective assistance of counsel because counsel deprived [d]efendant of his right to testify." After thoroughly reviewing the *Ginther* hearing transcripts, we conclude that the trial court erred in its determination that defendant received the ineffective assistance of counsel.

We fully acknowledge that a criminal defense attorney may be ineffective in the constitutional sense when he prevents his client from testifying against his client's wishes. See, e.g., *Nichols v Butler*, 953 F2d 1550, 1552-1553 (CA 11, 1992). A defendant's right to testify in his or her own defense is personal and fundamental, see *People v Solomon*, 220 Mich App 527, 533-534; 560 NW2d 651 (1996), and a criminal defense attorney must "abide by the client's decision, after consultation with the lawyer, with respect to . . . whether the client will testify," MRPC 1.2(a). As this Court has held, "[i]f the accused expresses a wish to testify at trial, the trial court must grant the request, even over counsel's objection." *People v Simmons*, 140 Mich App 681, 685; 364 NW2d 783 (1985). However, this Court has also held that if a criminal defendant "acquiesces in his attorney's decision that he not testify, 'the right will be deemed waived.'" *Id*. (citation omitted).

"[A]n accused's decision to testify or not to testify is a strategic decision best left to an accused and his counsel." *People v Martin*, 150 Mich App 630, 640; 389 NW2d 713 (1986). Defense counsel's advice to his client with respect to whether the client should testify is generally a matter of trial strategy, *People v Pace*, 102 Mich App 522, 531; 302 NW2d 216 (1980), and a criminal defense attorney is presumed to follow the rules of professional conduct when advising his client concerning the decision whether to testify at trial, *United States v Webber*, 208 F3d 545, 551 (CA 6, 2000). A defendant's mere allegations that he wanted to testify and was prevented from doing so are not sufficient to overcome the presumption that the defendant acquiesced in counsel's tactical decision that he not testify. See *Hodge v Haeberlin*, ___ F3d ___, ___ (CA 6, 2009).

It is beyond dispute in this case that defendant informed one of his attorneys, David Griem, that he wanted to testify in his own defense. It is also beyond dispute that Griem urged defendant not to testify in the strongest possible language. Griem testified at the *Ginther* hearing that he "made it crystal clear that [defendant] should not take the stand," that he informed defendant that it would be "a horrible mistake in judgment to take the witness stand," that he told defendant that "it would be a huge mistake for you to testify," and that he told defendant either "[y]ou can't [testify]" or "you shouldn't [testify]." But Griem explained that "if I used the word can't, it would have been in a figurative sense . . . ." Griem could not specifically recall whether he had informed defendant that he had an absolute right to testify, but acknowledged that it is his general practice to tell all his clients that the matter of testifying at trial "is the client's decision." Griem testified that after discussing the matter with defendant, and twice advising defendant not to testify, "we looked at each other, we looked each other in the eye and I don't believe that [defendant] said anything more after the second time that we discussed it." Defendant's other attorney, Deanna Kelley, confirmed that Griem had strongly discouraged defendant from testifying, but did not specifically know what Griem had told defendant during several one-on-one conversations dealing with the issue of defendant's possible testimony.

Defendant testified at the *Ginther* hearing that he had not been aware of his absolute right to testify, and that he had believed at the time of trial that the question whether he would testify was solely for defense counsel to decide.

Following the *Ginther* hearing, the trial court found that defendant had been unaware of his absolute right to testify and that counsel had failed to sufficiently explain to him that it was ultimately his own choice whether to testify. These findings of fact were clearly erroneous. *Grant*, 470 Mich at 484-485. As an initial matter, we conclude that defendant acquiesced in Griem's strategic determination that he should not testify. See *Simmons*, 140 Mich App at 685. Moreover, our review of the record reveals that Griem never expressly informed defendant that he did not have the right to testify or that it was not his choice whether to testify.

It is true that Griem strongly urged defendant not to testify. Griem was concerned that defendant might be a less-than-ideal witness, and also believed that the prosecution had failed to prove the charged offenses beyond a reasonable doubt. But the record establishes that Griem never actively prevented defendant from testifying. Indeed, Griem spent numerous hours preparing defendant to testify, discussed the issue of testifying with defendant several times, and ultimately told defendant that testifying would be "a horrible mistake in judgment."

Griem did not tell defendant that he was *not permitted* to testify. Instead, Griem merely stated that defendant "should not," "could not," or "can't" testify. Defendant therefore apparently believed that it was not his choice whether to testify. But defendant's faulty impression in this regard arose from a simple misunderstanding of Griem's words. Indeed, as noted previously, Griem explained that "if I used the word can't, it would have been in a figurative sense . . . ." Furthermore, Griem's warning to defendant that testifying would be "a horrible mistake in *judgment*" surely conveyed that the decision to testify was a matter within defendant's *judgment*, and therefore, defendant's *discretion*. The word "judgment" means the capacity to make a decision or form an opinion. See *Random House Webster's College Dictionary* (1997). Despite the fact that English is defendant's second language, there is simply no evidence that defendant did not understand the meaning of the common English word "judgment." It was implicit in Griem's very words that the decision whether to testify was ultimately defendant's own.

The trial court clearly erred by finding that defendant was unaware that it was his right to testify and by finding that defense counsel prevented defendant from taking the stand. *Grant*, 470 Mich at 484-485. While defense counsel strongly discouraged defendant from testifying, it is clear that Griem never actively prevented defendant's testimony. Instead, the record establishes that defendant acquiesced in Griem's strategic recommendation that he not testify at trial. On de novo review, *Kevorkian*, 248 Mich App at 410-411, we conclude that defendant was not denied the effective assistance of counsel. Because the reasons cited by the trial court would not support appellate reversal of defendant's convictions, MCR 6.431(B), we must also conclude that the court abused its discretion by granting defendant's motion for a new trial, *Miller*, 482 Mich at 544; see also *People v Leonard*, 224 Mich App 569, 580; 569 NW2d 663 (1997). We reverse the trial court's order granting defendant's motion for a new trial and remand for reinstatement of defendant's convictions.

Reversed and remanded for reinstatement of defendant's convictions. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Kurtis T. Wilder