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PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED October 6, 2009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.

STEPHENS, P.J. (*dissenting*)

I respectfully disagree with my colleagues. I do not find clear error in the trial court's factual determinations nor do I find that the trial court's decision regarding a motion for a new trial was an abuse of discretion.

The basis of defendant's motion for an evidentiary hearing and a new trial was that he was denied his separate constitutional right to the effective assistance of counsel. Effective assistance is strongly presumed and the reviewing court should not evaluate an attorney's decision with the benefit of hindsight. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). To demonstrate ineffective assistance according to the test established in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984), a defendant must show: (1) that his attorney's performance fell below an objective standard of reasonableness, and (2) that this performance so prejudiced him that he was deprived of a fair trial. *People v Grant*, 470 Mich 477, 485-486; 684 NW2d 686 (2004). Prejudice exists if a defendant shows a reasonable probability that the outcome would have been different but for the attorney's errors. *Id.* at 486.

The pivotal question in this case is not whether defendant assented to a reasonable trial strategy not to testify, but whether defendant knew he had a right to do anything but assent to that strategy. At the *Ginther* hearing, defendant testified that Griem never told him that it was his decision to testify and that he could do so against Griem's advice. Likewise, Kelley also testified that she never discussed defendant's absolute right to testify with him. Griem could not recall if he told defendant that he had the absolute right to decide to testify. Griem prepared defendant to testify, but repeatedly told him that "we" would make the decision to testify at trial. Similarly, in her opening statement, Kelley said, "we haven't made a decision" whether defendant would testify. Reviewing this evidence, the trial court concluded that the use of the word "we" minimally conveyed that the attorneys' concurrence was necessary for defendant to testify. The evidence showed that defendant was not familiar with the American legal system,

lending to the inference that he did not have independent knowledge that such concurrence by his attorney was unnecessary. In its analysis, the trial court questioned defendant's self-serving testimony, discussed the attorneys' motives and credibility and made it's finding based on the totality of the evidence presented at the *Ginther* hearing. The trial court was in the best position to evaluate the credibility of the testimony at the hearing. *People v Martin*, 199 Mich App 124-125; 501 NW2d 198 (1993). It found Griem's testimony regarding his advice about the ultimate decision to testify credible and relied on the attorneys' testimony when making its findings. I am not left with a definite and firm conviction that a mistake was made regarding the trial court's credibility determination. *People v Kurylczyk*, 443 Mich 289, 303; 505 NW2d 528 (1993).

Because an attorney's failure to inform a defendant of the absolute right to decide whether to testify neglects the "vital professional responsibility of ensuring that the defendant's right to testify is protected and that any waiver of that right is knowing and voluntary," defendant's attorney's failure fell below an objective standard of reasonableness. *United States v Teague*, 953 F2d 1525, 1532 (CA 11, 1992) ("*Teague II*"). The record supports the trial court's finding that defense counsel's performance prejudiced defendant such that he was deprived of a fair trial. *Grant*, *supra* at 484-485. If defendant had testified according to his proposed testimony, denying the incident and likewise denying that he apologized to the complainant's father, the jury may have questioned the complainant's father's credibility and altered its verdict. Defendant offered additional alibi evidence that was not presented at trial. Even though the complainant claimed that she left at 7:23 p.m., the jury may have inferred that the incident actually took place between defendant's last dictation at 7:26 p.m. and the complainant's phone call to her boyfriend on her way home from the office at 7:33 p.m. The jury may have found that defendant's proposed testimony that he made a one-minute phone call from his cellular phone to his office phone, beginning at 7:28 p.m., narrowed this opportunity and altered its verdict. Given the trial court's finding that this was a very close case, I conclude that the trial court did not err when it concluded that there was a reasonable probability that the outcome would have been different but for defendant's attorneys' errors. Therefore, I would conclude that the trial court did not abuse its discretion when it granted defendant's motion for a new trial.

/s/ Cynthia Diane Stephens