STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	FOR PUBLICATION September 4, 2012
v	No. 304159 Wayne Circuit Court
FRED ROBERT RUSSELL III, Defendant-Appellant.	LC No. 10-013518-FH

Before: K. F. KELLY, P.J., and SAWYER and RONAYNE KRAUSE, JJ.

RONAYNE KRAUSE, J. (*dissenting*).

I respectfully dissent from the majority's conclusion that the trial court abused its discretion by granting defendant's motion for a new trial.[1] I would therefore affirm the trial court's order and remand for further proceedings consistent with that order.

To demonstrate ineffective assistance of counsel, a defendant must show that his attorney's performance fell below an objective standard of reasonableness under prevailing professional norms and this performance prejudiced him. *People v Armstrong*, 490 Mich 281, 289-290; 806 NW2d 676 (2011). Effectiveness of counsel entails analysis of facts and of law; the trial "judge must first find the facts, then must decide whether those facts establish a violation of the defendant's constitutional right to the effective assistance of counsel." *Id*. at 289 (internal quotation omitted). We review the trial court's factual findings for clear error, meaning we must be definitely and firmly convinced that the trial court's factual findings were mistaken. *Id*. We review questions of law de novo. *Id*. We also review de novo whether a defendant was prejudiced. *People v Dendel*, 481 Mich 114, 132 n 18; 748 NW2d 859 (2008). "A trial court's decision to grant or deny a motion for a new trial is reviewed for an abuse of discretion. A trial court may be said to have abused its discretion only when its decision falls outside the principled

[1] I note that the majority and I unanimously agree that the trial court was fully authorized to grant the motion by this Court's remand order. I feel it is worth emphasizing what the majority already states, that it would be absurd for this Court to have explicitly directed that a motion be made without necessarily, if impliedly, permitting the trial court to either deny or grant that motion. The majority and I disagree as to whether the trial court's determination arrived at the proper conclusion, *not* as to whether the trial court was empowered to make that determination.

range of outcomes." *People v Blackston*, 481 Mich 451, 460; 751 NW2d 408 (2008) (internal citations omitted).

A defendant is entitled to a new trial on the basis of ineffective assistance of counsel if two requirements are satisfied: first, counsel's performance was objectively unreasonable; and second, the outcome of the proceedings reasonably likely would have been different but for counsel's deficient performance. *Armstrong*, 490 Mich at 289-290. Defendant's claim of ineffective assistance is premised on his trial counsel's failure to call an eyewitness to some of the events that immediately led up to the specific events upon which defendant's convictions were based. Decisions regarding whether to call and question witnesses are presumed to be matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). This Court does not generally second-guess counsel on matters of trial strategy, nor does it assess counsel's competence with the benefit of hindsight. *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008).

However, an attorney's "failure to call witnesses [] constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense," *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). "The failure to make an adequate investigation is ineffective assistance of counsel if it undermines confidence in the trial's outcome," *People v Grant*, 470 Mich 477, 493; 684 NW2d 686 (2004). Additionally, the failure to call a witness may constitute ineffective assistance of counsel where the witness' testimony is substantial, even when the testimony is cumulative. See *People v Johnson*, 451 Mich 115, 120-124; 545 NW2d 637 (1996). Importantly, therefore, whether counsel's failure to call a witness or investigate a potential witness was objectively deficient may depend significantly on a factual inquiry into the effect the witness would have had on the outcome of the proceedings.

During the trial, defendant's theory of the case was that the victim, Deshun Battle, and an associate of the victim, Dijon Deal, came to his hotel room seeking the return of a laptop computer. Deal held a crowbar, and at one point defendant indicated that he believed Battle had a shotgun. Deal began applying the crowbar against the window of defendant's truck, as if to break the window. Defendant exited the hotel room, got in the truck, and attempted to drive away while being pursued by Deal. Meanwhile, Battle, according to his own testimony, drove his own car around a corner, parked it, and got out to perform maintenance on his car's speakers. Defendant claimed to have been looking in his rear-view mirror at the man chasing him when he crashed into the back of the other vehicle, pinning Battle between the two vehicles. In other words, defendant's theory was that his driving was neither reckless under the circumstances nor was it the product of any sort of intent to cause harm.

At the *Ginther* hearing,[2] Kiesha Yates, defendant's girlfriend and the person defendant argues his trial counsel should have called as a witness at trial, testified that she had been with defendant at the hotel. She heard some loud noises outside their hotel room. She looked out of

[2] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973). This Court's remand order only referenced an "evidentiary hearing," but as the majority indicates, the trial court correctly interpreted this as a remand specifically for a *Ginther* hearing.

the window and saw two men banging on defendant's Tahoe, one with a crowbar, and one with a "shiny metal thing." Defendant then exited the room. From the window of the room, Yates saw defendant get into his Tahoe and drive off. The two men chased after defendant's vehicle with objects in their hands. Yates gave the police a written statement at the scene; however, she was not contacted by defense counsel. Defendant testified that during trial preparation, he told defense counsel that Yates was with him at the time of this incident and wished to have her called as a witness. However, defense counsel indicated that he did not feel comfortable calling "civilian" witnesses.

Defense counsel testified that he was aware of Yates and another woman being witnesses to this incident. Defense counsel never talked to Yates or the other woman personally. However, he did review Yates's police statement. Defense counsel believed that Yates's statement that two men chased defendant's vehicle was inconsistent or contradictory to his theory of the case that Battle was hit with the front of defendant's vehicle. Defense counsel assumed without knowing that the two men Yates referred to in her statement were Battle and Deal. However, he conceded that Yates's statement did not necessarily contradict the physical evidence.

The trial court ruled as follows:

> The witness that was not called is Kiesha Yates. She testified that Mr. Russell was her boyfriend. She was in the motel room and she heard loud banging noises outside. She looked out the window and saw two men banging on Mr. Russell's S.U.V. [] One had a crowbar and the other man had a bright, shiny object in his hand. Mr. Russell then went outside and got into the truck, started the engine and drove away. The two men ran after him both holding onto the objects that they had in their hand.
>
> This testimony is extremely important. It contradicts the testimony of both alleged victims Mr. Battle and Mr. Deal.
>
> The defendant's attorney, testified that Mr. Russell did tell him about the testimony of Miss Yates and another woman. He believed that Miss Yates' testimony as told to him by Mr. Russell contradicted his theories and the physical evidence. He did not, however, indicate a theory that was contradicted or the physical evidence that was contradicted.
>
> Mr. Russell did say that he only saw one man running after his S.U.V., but the statement is not contradicted by Miss Yates because she had a view entirely different than Mr. Russell. She was viewing the vehicle from the outside and Mr. Russell was viewing whoever was chasing him only through the windows of the car.
>
> It was ineffective assistance of counsel for defense counsel not to call Miss Yates, and even more so not to speak with her, the other female witness and any other witnesses. It is often a mistake to rely only on witnesses' statements and not speak with the witness in person or at least by telephone.

> Not only does Miss Yates' testimony contradict and impeach the testimony of Mr. Battle and Mr. Deal, it supports the testimony of Mr. Russell. Clearly a different result could have occurred with this testimony.

The only defense presented in support of defendant's case was made during closing argument. Again, defense counsel argued that defendant "was looking out of his rearview mirror at Deal when he struck Battle who was standing at the back of the Dodge Durango [Battle's vehicle]." Counsel also argued that there was no evidence that defendant knew where Battle was physically located at the time of the incident.

I note initially that counsel's subjective discomfort with "civilian witnesses," whatever those might be in this context, is simply not, at least to my mind, conceivably a sound strategic reason for failing to investigate or call any such witness who could cast doubt on the credibility of a complainant or other prosecution witness. More significantly, the applicable standard of review here is otherwise entirely that of reviewing the trial court's factual findings for clear error, there being no real legal dispute before this Court that I can discern. Consequently, our inquiry is not whether we would have arrived at the same conclusions, but whether the trial court's conclusions definitely appear wrong.[3]

I find no clear error in the trial court's conclusion that, contrary to defense counsel's view of Yates' testimony, she did not contradict either defendant's theory of the case or the physical evidence. It is common knowledge that the viewing perspective from inside a moving vehicle is not perfect; the fact that defendant apparently did not see Battle in his rear-view mirror does not constitute evidence that Battle was not giving chase. Furthermore, because defendant apparently never exceeded 20 MPH and went around a corner, there is no reason why Battle could not have initially pursued defendant from behind and ended up running in front of him. The majority finds this possibility "untenable," however as I interpret the evidence, this runner could have taken a "short cut" across the corner to get in front of the SUV. This scenario is certainly not impossible or contrary to the physical evidence, and I find it plausible enough that I can imagine no sound strategic reason not to seek to present it to a jury. It is also not the likeliest of scenarios, but our role on appeal is not to determine what conclusion we would have drawn had we been sitting as the trial court, but rather whether we can be definitely and firmly convinced that the trial court was mistaken.

At the same time Yates' testimony supports the possibility that Battle was armed with a shotgun, and it directly contradicts Battle's testimony that he departed from the dispute before defendant got into his truck. If the jury had chosen to find her testimony credible—which is not an assessment we may make—it could have found that Battle was not merely "minding his own business" elsewhere but was instead participating in armed pursuit of defendant with a weapon capable of killing defendant notwithstanding the fact that he was inside a moving vehicle.

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[3] This Court should not "simply defer to the trial court's judgment regarding prejudice." *Dendel*, 481 Mich at 132 n 18. However, I do not believe *Dendel* dictates that the trial court's conclusion is entitled to no deference. In any event, I believe the critical analysis to the outcome of this appeal is more factual, and the trial court's conclusions of fact are entitled to deference.

Therefore, the jury could have found that defendant was neither driving recklessly under the circumstances nor intending to harm Battle.

I am not definitely and firmly convinced that the trial court made a mistake, *People v Mullen*, 282 Mich App 14, 22; 762 NW2d 170 (2008), in concluding that Yates's proposed testimony would not contradict the physical evidence but would have contradicted and undermined Battle's testimony. The trial court is in the better position to evaluate the credibility of the witnesses who appeared before it, both at trial and at the *Ginther* hearing. Furthermore, the trial court will have to hear the matter again on retrial. Consequently, its findings are entitled to deference. Yates' testimony would have weakened the prosecution's case and supported defendant's defense. The trial court's conclusion that her testimony was sufficiently important and that counsel's failure to investigate and call her as a witness deprived defendant of a substantial defense and undermined confidence in the outcome of the trial should be affirmed. Because I can discern no sound strategic reason for defense counsel's failure to do so, I conclude that the trial court did not abuse its discretion when it granted defendant's motion for a new trial, and I would affirm that order and remand for further proceedings consistent therewith.

/s/ Amy Ronayne Krause