STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 26, 2002
v	No. 230911 Kent Circuit Court
BILLY GLEN LEWIS, a/k/a BILLY GLENN LEWIS, Defendant-Appellant.	LC No. 99-010010-FH

Before: Murray, P.J., and Murphy and Kelly, JJ.

PER CURIAM.

Defendant was convicted following a jury trial of two counts of second-degree criminal sexual conduct, MCL 750.520c, and he was sentenced as a second habitual offender, MCL 769.10, to 3 to 22 ½ years' imprisonment. The convictions arose out of sexual contact between defendant and defendant's then eight-year-old daughter and the daughter's nine-year-old friend. Defendant appeals as of right solely on the issue of ineffective assistance of counsel. We affirm.

I. BASIC FACTS AND JURY VOIR DIRE

Facts Regarding Criminal Sexual Conduct

The charges against defendant arose out of actions that occurred between May and June 1999, in which, according to the prosecution, defendant touched the vaginal areas of his daughter and his daughter's nine-year-old female friend during two sleepovers at defendant's apartment. The testimony of defendant's daughter regarding defendant's actions was confused and conflicting; however, she was able to testify, through leading questions allowed by the court, that defendant "was doing it to me," that defendant touched her private area, and that defendant rubbed her under her clothes.

The testimony of defendant's daughter's friend was direct and clear. She testified that defendant "came and sat down next to me and he put his hand up my skirt and in my underpants and started feeling on me." The friend told defendant to stop and pushed his hand away. Defendant, however, persisted, and the friend pushed away his hand a second time. After a few more efforts by defendant to inappropriately touch his daughter's friend, he finally stopped, and the two young girls went to bed.

The friend further testified that the following night at defendant's apartment, she and defendant's daughter went to bed together, and defendant came and laid in the same bed with the both of them. The friend stated that defendant touched his daughter, and she could see him moving his hand up and down between the daughter's legs. According to the friend, defendant also touched and rubbed her in her private area under her clothes.

A detective testified that defendant denied touching either of the girls for any sexual purpose or in any sexual way, and that defendant stated that he had simply wrestled and innocently played with the girls on the bed. According to defendant, at most, any touching was merely horseplay. Defendant told the detective that he believed that his daughter's friend had a crush on him, and that she was probably not receiving enough attention at home. Defendant testified on his own behalf, and he denied any sexual touching.

Jury Voir Dire

During voir dire, the prosecutor asked prospective jurors if they knew of anyone who had been involved in a charge of molestation whether as a victim or as an accused. Juror G indicated affirmatively, and he stated that he found out, within the last two months, that his sons had been molested by their uncle. In response to the prosecutor's next question as to whether he could be fair and impartial, juror G stated "[t]hat's very questionable." There was no immediate follow-up by the prosecutor in response to juror G's statement.

Later during voir dire, the following colloquy occurred between defense counsel and juror G:

> *Q.* [I]n dealing with this case, there are allegedly two children in this instance, seven and nine, give or take, at the time. Is there anyone with relation to this case is that an issue? Anyone else?
>
> . . .
>
> *A.* (Indicating).
>
> . . .
>
> *Q.* But would that be an issue for you to try and be fair and impartial about this case?
>
> . . .
>
> *A.* I have a problem with it.
>
> *Q.* You have a problem with that?
>
> *A.* Yes.
>
> *Q.* Because of what you had learned earlier, and at this point, without rehashing it, because of that issue?

A. Because of all my children I just found out.

Q. I'm sorry?

A. I just found out my children had a problem with it.

Defense counsel did not challenge juror G and expressed satisfaction with the jury after exercising only one peremptory challenge and successfully challenging five other jurors for cause.

II. *GINTHER* HEARING

Following the trial, as part of defendant's motion for new trial, a *Ginther* hearing[1] was held in which defendant and defense counsel testified. Defendant could not remember discussing juror G at trial. Defense counsel, through reference to a jury selection sheet he used at trial and a transcript of voir dire, testified that he highlighted jurors on the selection sheet who he thought were potentially problematic, and that he placed a "P" or a "C" next to the juror's name indicating either a possible peremptory or "for cause" challenge. All jurors who were highlighted were removed from the panel except for juror G. Defense counsel testified that because juror G was highlighted with a "P" next to his name, it indicated counsel's concern about the juror. Although defense counsel could not recall the reason why he did not challenge juror G, he recalled discussing the juror with defendant, and that ultimately, defendant approved the jury and was satisfied with the individuals sitting on the jury. Defense counsel thought that possibly juror G was left on the jury so as to not ostracize the jury in light of the others who had been successfully challenged, and/or because juror G was a divorced male living in circumstances similar to defendant, who was also divorced, thereby possibly making juror G sympathetic to defendant's plight.

The trial court denied the motion for new trial, ruling that the record did not show that leaving juror G on the jury was an oversight, nor did it show that it was a mistake. Moreover, the trial court found that the record did not show, concerning a possible tactical decision between defendant and defense counsel, that leaving juror G on the jury was so palpably bad as to deprive defendant of his right to counsel. Additionally, the trial court ruled, assuming ineffective assistance of counsel, that it could not conclude that but for the error, a different result would have occurred. The trial court found no resulting prejudice based, in part, on its belief that the testimony of defendant's daughter's friend was the most powerful from a child witness that he had ever seen.

III. ANALYSIS AND CONCLUSION

Defendant argues that his trial counsel was ineffective for failing to challenge juror G in light of the juror's acknowledgment that it was questionable whether he could be fair and impartial, and that he had a problem with being fair because of the situation with his sons. Defendant further argues that it was highly likely that the failure to challenge juror G affected the outcome of the trial.

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

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).

We hold that defendant has failed to meet his burden showing that counsel made an error so serious that counsel was not performing as the counsel guaranteed by the Sixth Amendment, and defendant has failed to overcome the strong presumption that counsel's performance constituted sound trial strategy.

We first note that juror G never definitively stated that he could not be fair and impartial. See MCR 2.511(D). Next, there is no indication in the record, as noted by the trial court, that defense counsel failed to challenge juror G based on an oversight or a mistake. To the contrary, defense counsel testified that he highlighted juror G on his jury selection sheet as potentially problematic, conferred with defendant about juror G, and ultimately defendant indicated satisfaction with the make-up of the jury.

Considering that juror G did not expressly state that he could not be fair and impartial, that there was no evidence of oversight or mistake, that defendant approved of the jury, and that there could be strategic reasons for leaving juror G on the jury based on his life circumstances similar to that of defendant and the concern over ostracizing the jury, defendant has failed to establish ineffective assistance of counsel requiring reversal.

Affirmed.

/s/ Christopher M. Murray
/s/ William B. Murphy
/s/ Kirsten Frank Kelly