

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MYRON JACKSON,

Defendant-Appellant.

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UNPUBLISHED

December 18, 2003

No. 241751

Genesee Circuit Court

LC No. 01-008286-FC

Before: Whitbeck, C.J., and Hoekstra and Donofrio, JJ.

PER CURIAM.

Defendant Myron Jackson appeals as of right his conviction, after a bench trial, of assault with intent to murder,<sup>1</sup> carrying a concealed weapon (CCW),<sup>2</sup> felon in possession of a firearm,<sup>3</sup> and felony-firearm.<sup>4</sup> The trial court sentenced Jackson as a second habitual offender<sup>5</sup> to 12 to 25 years' imprisonment for the assault charge and 2½ to 7½ years' imprisonment for the felon-in-possession charge, to be served concurrently with each other but consecutive to the CCW and felony-firearm charges, for which he was sentenced to 2½ to 7½ years' and two years' imprisonment, respectively. Because Jackson did not show that the outcome of his trial was reasonably likely to have been different but for the alleged errors of his counsel, we affirm.

I. Basic Facts And Procedural History

This case arose out of the June 5, 2001 shooting of Eric Leeper after a barbecue party outside the Georgia Manor apartment complex in Flint. Leeper, who had been invited to the party by his friend Shamise Marks, arrived at the party around noon. Jackson, who Leeper had never met before, was also at the party. At approximately 6:00 p.m., police arrived at the party in response to a noise complaint and arrested three people for drinking alcohol in public. Three

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<sup>1</sup> MCL 750.83.

<sup>2</sup> MCL 750.227.

<sup>3</sup> MCL 750.224f.

<sup>4</sup> MCL 750.227b.

<sup>5</sup> MCL 769.10.

others, including Jackson, were arrested on outstanding warrants and taken to the police station. Leeper, who had consumed a fifth of gin over the course of the day, was ticketed for drinking in public, but was not arrested.

According to Leeper, he was standing on a neighbor's porch later that evening when he saw Jackson return to the party driving a tan Blazer. Leeper told the neighbors that he planned to ask Jackson if he wanted to go get more alcohol. Leeper approached Jackson and proposed the idea of getting more drinks. Leeper testified that Jackson turned to the man next to him, who Leeper had seen before but did not know by name, and asked, "should I do it?" and the man turned his back and said he "doesn't have anything to do with it." As Leeper extended his hand to Jackson, Jackson pulled a gun from his left pants pocket and shot Leeper in the chest. Leeper ran back to the porch and told the people there to call the police; however, Leeper testified that they did not do so immediately, and when the police did come, the witnesses who had been on the porch "were acting like they didn't know nothing."

Officer Terrence Coon was dispatched to the scene at 10:21 p.m. Leeper told Officer Coon he had just met the shooter earlier that day, and knew him only as "Meesie."<sup>6</sup> Leeper described the shooter as a tall, thin black man wearing a blue-and-white shirt and blue jeans. Officer Coon testified that although he could tell Leeper had been drinking, Leeper's speech was normal and Officer Coon did not consider him intoxicated. Officer Coon spoke with three neighbors who all said that they heard the shot but saw nothing. Officer Coon then followed Leeper to the hospital, where Leeper further described the shooter as a clean-cut, six-foot-tall man with a beard, wearing a white polo-type shirt with blue stripes. Leeper also told Officer Coon that the shooter had been arrested earlier in the day.

After returning to the police department, Officer Coon retrieved the pictures of people who had been arrested earlier that day and concluded that Jackson's photograph, which depicted him with a well-trimmed beard and wearing a white shirt with blue stripes, matched Leeper's description of the shooter. Several days later, Leeper was shown the pictures of everyone at the party who had been arrested, and he identified Jackson as the man he called "Meesie."

At trial, Leeper testified that, although he had drunk a fifth of gin between the time he arrived at the party and the time the police arrived at around 6:00 p.m., he was completely certain that Jackson was the man who shot him. Leeper testified that he had never met Jackson before that day and did not know why Jackson shot him. Defense counsel had a copy of Leeper's hospital lab report, which indicated that his blood-alcohol level was .088; however, a doctor mistakenly testified at trial that Leeper's blood-alcohol level was only .02. Despite Jackson's urging, his defense counsel, Richard Ponsetto, Jr., did not challenge the doctor's testimony on this point.

The only witness for Jackson was Kareem Flanagan, the man for whom the party had been thrown. Flanagan testified that he saw Leeper not only drink a fifth of liquor but also

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<sup>6</sup> To avoid confusion, it should be noted that Leeper's friend Shamise Marks was also known as "Meesie," and she is occasionally referred to as such in the trial transcripts.

smoke marijuana between 5:00 and 6:00 that afternoon; Leeper had denied this at trial. Flanagan also testified that he drove a tan Blazer, and that the only two people he allowed to drive it were Sam Morgan and Andrew Bernard Shields. Flanagan stated that he left the party in the Blazer between 8:00 and 8:30 that night, and did not return to Georgia Manor apartments.

Jackson did not testify. During closing arguments, however, the trial court allowed Jackson to point out discrepancies between Leeper's preliminary examination testimony and his trial testimony, including how much he had to drink, how long he was hospitalized, and how he learned Jackson's name, as well as discrepancies between Leeper's trial testimony and Flanagan's trial testimony regarding whether Leeper had smoked marijuana and whether Jackson was driving the tan Blazer that night.

After the trial court found Jackson guilty of all counts, Jackson appealed, and this Court remanded for a *Ginther*<sup>7</sup> hearing.<sup>8</sup> At the hearing, Jackson testified that, after Leeper testified that the shooter was an inch or two taller than he was, he asked Ponsetto whether he could testify that he was shorter than Leeper. However, Ponsetto told him that

the only way that was gonna come out is if I took the stand and testified to somethin' that was untrue, which was returning to the scene of the crime—I mean to the barbeque after I got out of jail, and I told him I was not gonna do that.

According to Jackson, when he told Ponsetto that he would not testify that he had gone back to the barbecue, Ponsetto cursed at him and told him that he “would have to testify to returnin’ to the scene of the crime or he was gonna have to tell the courts—stand up and tell the courts that I was lyin’.” Jackson testified that he never told Ponsetto he had returned to the barbecue, never told him that he had shot Leeper, and never told him that he planned to testify to walking home from the jail rather than being driven home by his mother.

Jackson's mother, Shirley Jackson, also testified at the *Ginther* hearing. She stated that she drove Jackson home from the jail, then left him to babysit his two-year-old son after about fifteen minutes because she was too upset with Jackson to stay home. Shirley Jackson testified that she took a ten-minute drive to a store, shopped for about twenty-five minutes, then went to a friend's house for about forty minutes. Shirley Jackson could not remember exact times, but agreed that she likely picked Jackson up from jail between 8:20 and 8:30 p.m. based on the jail records, and therefore returned home between 9:45 and 10:00. When she returned, she saw Jackson leave the house, return briefly 20 to 25 minutes later, leave again, then return and leave again around midnight. She testified that Jackson never left his son alone.

Ponsetto told the trial court that when he initially met with Jackson he gave him the same explanation of lawyer-client confidentiality that he gives all his clients; specifically, that if Jackson testified to something on the stand that contradicted something he had told Ponsetto

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<sup>7</sup> *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

<sup>8</sup> *People v Jackson*, unpublished order of the Court of Appeals, entered April 11, 2003 (Docket No. 241751).

previously, Ponsetto would have to make a motion to withdraw from the case. Ponsetto testified that Jackson changed his mind several times about whether he wanted to testify. According to Ponsetto, Jackson told him that the trial would not go forward because Leeper would not be testifying.

Ponsetto further testified that although Jackson told him that he had an alibi, Jackson initially refused to tell him what it was. When Ponsetto explained that he would have to give the prosecution notice of the alibi, Jackson told Ponsetto he did not want to give notice. Ponsetto “kept asking him what his alibi was,” but “he wouldn’t tell me.” Eventually, Jackson told Ponsetto that he had spent the evening with his mother after she paid his bond and took him home from jail. However, when Ponsetto called Jackson’s mother shortly thereafter, she told him that she left the house after bringing Jackson home, and when she returned some time later no one was home. According to Ponsetto, when he told Jackson that his mother would not be able to provide an alibi, Jackson became angry and said, “You should’ve let me talk to her first.”

Ponsetto acknowledged reading Jackson’s initial statement in which Jackson told police that he was arrested at the barbecue between 5:00 and 6:00 p.m., was bonded out by his mother 2½ to 3 hours later, and did not return to the barbecue that night. Ponsetto further acknowledged that Jackson never told him he had shot Leeper or gone back to the party, and never announced an intention to lie on the stand. However, Ponsetto said Jackson had “crossed the cognitive dissonance threshold” when he announced his intention to testify that he would not have had enough time to walk from the jail to his house and then back to the party. When Ponsetto confronted him with his previous statement that he had not walked home but had been driven home by his mother, Jackson reportedly responded, “That’s between you and me . . . you can’t tell anybody I’m planning on lying.” At this point, Ponsetto stated, he “knew [Jackson] was planning on lying,” and reminded Jackson that he would withdraw from the case if Jackson testified falsely.

In addition, Jackson had written a letter detailing discrepancies in Leeper’s testimony, and Ponsetto was concerned that this letter included the phrase “when I fled in the Blazer,” which appeared to acknowledge that Jackson had been at the scene of the shooting. Jackson explained that he had written the letter from Leeper’s perspective, not his own, and was only paraphrasing Leeper’s statements.

With respect to the doctor’s testimony that Leeper’s blood-alcohol level was .02, Ponsetto testified that although this surprised him, he assumed that he himself must have read the lab report results incorrectly. Jackson confronted Ponsetto about his failure to correct the testimony, which Jackson believed was incorrect based on a conversation his mother had with a hospital employee; however, Ponsetto testified that Jackson refused to name that employee so that he or she could be called as a witness. Ponsetto explained that he did not challenge the testimony because he was not a doctor and thought he might have read the lab report incorrectly, and because Leeper had already testified that he was drunk.

After the hearing, the trial court issued a ruling. The trial court explained that it had based its original decision “not only on the identification of the victim,” but on the circumstantial evidence such as Jackson being taken into police custody, the booking photograph in which Jackson’s clothing matched that of the shooter, and the timing of Jackson’s release from custody in relation to the shooting. The trial court stated that there was nothing presented at the *Ginther*

hearing “that causes me to reconsider in any way the conclusions I reached at the end of the bench trial.”

In relation to the alleged infringement of Jackson’s right to testify, the trial court noted that Jackson appeared to have taken contrary positions, claiming at the hearing that his counsel kept him from testifying while, at the trial, complaining that his counsel tried to force him to testify. The trial court observed that Jackson was “not all that credible as a witness” and was “attempting to engage in some revisionist history to serve his needs on appeal.” Regarding counsel’s failure to challenge the testimony regarding Leeper’s blood-alcohol level, the trial court acknowledged that the testimony indicating the test showed a .02 “did not accurately reflect the victim’s state of intoxication”; however, the trial court explained that because “the victim himself testified to his state of intoxication and the amount that he drank[,] . . . the blood-alcohol level numbers . . . did not play any role in the determination of defendant’s guilt.” Accordingly, the trial court concluded that “if counsel was deficient in the manner he handled [the blood-alcohol level issue], and I don’t believe that he was, it did not impact the decision in this case.”

## II. Ineffective Assistance Of Counsel

### A. Standard Of Review

Whether a defendant was denied effective assistance of counsel presents a mixed question of fact and constitutional law.<sup>9</sup> This determination requires a judge first to find the facts, then determine “whether those facts constitute a violation of the defendant’s constitutional right to effective assistance of counsel.”<sup>10</sup> We review the trial court’s factual findings for clear error and review de novo its constitutional determination.<sup>11</sup>

### B. Legal Standards

To establish ineffective assistance of counsel, the defendant must show that counsel’s performance was below an objective standard of reasonableness under prevailing professional norms, and that, but for counsel’s error, it is reasonably probable that the outcome would have been different.<sup>12</sup> Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise.<sup>13</sup> To show an objectively unreasonable performance, the defendant must prove that counsel made “errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.”<sup>14</sup> In so doing, the defendant must overcome

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<sup>9</sup> *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002).

<sup>10</sup> *Id.* at 579.

<sup>11</sup> *Id.*

<sup>12</sup> *Strickland v Washington*, 466 US 668, 688, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 314, 318; 521 NW2d 797 (1994).

<sup>13</sup> *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

<sup>14</sup> *LeBlanc*, *supra* at 578, quoting *Strickland*, *supra* at 687.

a strong presumption that the challenged conduct might be considered sound trial strategy.<sup>15</sup> The defendant must also show that the proceedings were “fundamentally unfair or unreliable.”<sup>16</sup>

### C. Threat To Withdraw

Jackson argues that Ponsetto’s threat to communicate to the judge that Jackson was lying if he testified in a certain way violated Jackson’s right to testify and present witnesses as well as his right to a fair trial, and therefore constituted ineffective assistance of counsel. It is well established that a criminal defendant has the right to testify on his own behalf.<sup>17</sup> However, it is also well established that a defendant has no right to testify falsely.<sup>18</sup> In the context of an ineffective assistance claim, this means that, “[a]lthough counsel must take all reasonable lawful means to attain the objectives of the client, counsel is precluded from taking steps or in any way assisting the client in presenting false evidence or otherwise violating the law.”<sup>19</sup>

Jackson argues that the trial court’s finding that Ponsetto had reason to believe Jackson would have lied if he had testified was clearly erroneous. Jackson further argues that even if Ponsetto believed that Jackson was going to lie if he testified, Ponsetto should not have threatened to disclose to the judge that the testimony was perjured because the judge was also sitting as the factfinder. As Jackson points out, Michigan law is not clear what standard to apply when reviewing counsel’s determination that a client intends to testify falsely, or whether a threat to withdraw is an appropriate response when the finder of fact is a judge rather than a jury.

We need not address these issues to resolve the case. Even if the trial court’s finding was clearly erroneous and Ponsetto’s threat to withdraw was improper, Jackson has not shown that, but for these alleged errors, it is reasonably probable that the outcome of the trial would have been different.<sup>20</sup> The trial court indicated that it based its decision on Leeper’s identification of the shooter as well as circumstantial evidence such as Jackson being taken into police custody, the booking photograph in which Jackson’s clothing matched that of the shooter, and the timing of Jackson’s release from custody in relation to the shooting. Had Jackson testified that he did not return to the party or shoot Leeper, it would only have required the trial court to weigh Jackson’s credibility against the strength of the contradictory evidence. Given the trial court’s observation that Jackson was “not all that credible as a witness,” as well as its statement that nothing at the *Ginther* hearing caused him “to reconsider in any way the conclusions I reached at the end of the bench trial,” we are unconvinced that Jackson suffered actual prejudice by being dissuaded from testifying. Moreover, because Shirley Jackson’s testimony indicated only that

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<sup>15</sup> *People v Knapp*, 244 Mich App 361, 385-386; 624 NW2d 227 (2001).

<sup>16</sup> *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2002).

<sup>17</sup> See *Rock v Arkansas*, 483 US 44, 51-52; 107 S Ct 2704; 97 L Ed 2d 37 (1987); *People v Solomon (Amended)*, 220 Mich App 527, 534; 560 NW2d 651 (1996).

<sup>18</sup> *Nix v Whiteside*, 475 U.S. 157, 173; 106 S Ct 988; 89 L Ed 2d 123 (1986); *People v Adams*, 430 Mich 679, 694; 425 NW2d 437 (1988).

<sup>19</sup> *Nix*, *supra* at 166.

<sup>20</sup> *Strickland*, *supra* at 694; *Pickens*, *supra* at 314, 318.

Jackson was in and out of the house several times over the course of the evening in question, we are unconvinced that presenting this testimony at trial would have changed the outcome. Therefore, we conclude that reversal is not required.

D. Failure To Correct Testimony Regarding Leeper's Blood-Alcohol Level

Jackson argues that Ponsetto's failure to correct the testimony regarding Leeper's blood-alcohol level constituted ineffective assistance. The trial court acknowledged that the testimony regarding Leeper's blood-alcohol level was flawed. However, the trial court noted that Leeper himself testified that he had drunk a fifth of gin before the shooting, and that he was "drunk, real drunk" when he got to the hospital. Leeper testified unequivocally that he was completely certain that Jackson was the shooter despite his intoxication. Moreover, the trial court expressly ruled that the flawed blood-alcohol reading "did not play any role in the determination of defendant's guilt." Again, we conclude that Jackson has failed to show that, but for counsel's error, it is reasonably probable that the outcome would have been different.<sup>21</sup> Accordingly, reversal of his conviction is not warranted.

Affirmed.

/s/ William C. Whitbeck  
/s/ Joel P. Hoekstra  
/s/ Pat M. Donofrio

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<sup>21</sup> *Id.*