STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant/Cross-Appellee,	UNPUBLISHED March 10, 2009
v	No. 287203 Ionia Circuit Court
FLOYD PHILLIP ALLEN, Defendant-Appellee/Cross-Appellant.	LC No. 06-013487-FH

Before: Sawyer, P.J., and Zahra and Shapiro, JJ.

PER CURIAM.

Plaintiff appeals by leave granted and defendant cross-appeals an order of the circuit court granting defendant a new trial. Defendant was convicted following a jury trial of fourth-degree criminal sexual conduct (CSC IV), MCL 750.520e(1)(d) (victim related to defendant by blood). Defendant was thereafter sentenced to 36 months' probation, with the first 11 months to be served in jail. We reverse the trial court's order granting a new trial and reinstate defendant's conviction and sentence.

The victim testified that on a Monday sometime between September and October 2006, defendant, her father, put his hands down her pants while she was watching wrestling on television with him in his bedroom. Specifically, she testified that during a commercial break he asked her to come up on his bed to give her "daddy some lovin." Her father usually said he wanted "some lovin" when he wanted to "cuddle for a little bit," so she got up on her father's bed. They were "cuddling for a little while," and then her father "slipped his hand down [her] pants" for "like two, three minutes" before she finally told him to stop. She testified that her father's hand was in her pants and under her underwear on her vagina and that defendant moved his hand around at first and then "he just kind of stopped and just left it there." After telling defendant to stop, she got off the bed and went to her own bedroom and locked her door. Her father had touched her "[a]t least 10" other times in the past when they were watching wrestling, including other incidents of placing his hands inside her pants. The last time defendant touched her, he said, "you're getting harry [sic] I'm going to have to shave you like I did your mother." The victim spoke with her older brother and her uncle about what occurred to get their opinion

on what she should do. She told them before telling her mother because she was concerned she might have to go back to foster care[1] if her mother told the authorities.

The victim's mother, defendant's wife, testified that she was not present when the alleged touching occurred. She also testified that her husband in the five years prior to the incident had begun telling her that her pubic hair was long and that "he thought he should shave it." She allowed defendant to shave her pubic hair about "four or five" times. She further testified that she never discussed or mentioned that defendant had shaved her pubic hair and that she had never heard defendant discuss it with anyone.

Defendant did not call any witnesses and chose not to testify. The jury returned a verdict of guilty, and defendant was sentenced on November 6, 2007. On May 13, 2008, defendant filed a motion for a new trial or evidentiary hearing in the trial court, arguing in part that he received ineffective assistance of counsel when counsel advised him not to testify. At the subsequent *Ginther*[2] hearing, defendant testified that he should have been permitted to testify in order to explain how his daughter found out about the shaving incident. Defendant said that he had a conversation with his son, the victim's older brother, about women's grooming habits, and indicated that he told his son that he shaved his wife "for certain things."

During trial counsel's testimony, the trial court asked whether she remembered having any discussions with defendant about his conversation with his son regarding his mother's grooming habits. She testified that she recalled discussing the possibility that his son might testify and "the pros and cons of whether that would be successful. Whether or not he would—he would come in and testify or even tell the truth about it and whether or not that could potentially backfire." After additional questioning by the parties, the trial court again questioned defendant's trial counsel and asked whether she had discussed with the son whether he would testify or corroborate the conversation defendant had relayed. She indicated that she did not think she could locate or contact him, and that she never asked the victim to see if her brother had relayed the alleged conversation to her.

At the close of the hearing, the trial court sua sponte raised the issue of whether trial counsel should have interviewed defendant's son about whether he and defendant had ever discussed his father's alleged habit of shaving his mother's vaginal pubic hair, or should have interviewed the victim to see if her brother ever relayed the conversation to her. The hearing was continued and defendant's son was located and called to testify.

The son testified that he did have a conversation with his father about why women shave their pubic hair, but that he did not recall his father revealing any details about his father shaving his mother's her pubic hair. Further, he testified that he never had any discussions with the victim involving whether she shaved her pubic hair or revealing any information from the conversations with their father about their father shaving their mother's pubic hair. The trial

[1] The victim and her younger brother were in foster care prior to this incident for unrelated issues to this matter that dealt with the condition of the housing they were living in.

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

court concluded that defense counsel was ineffective for failing to interview defendant's son and granted defendant's request for a new trial.

Plaintiff argues on appeal that the trial court erred in granting defendant a new trial. We agree. We review a trial court's decision to grant or deny a motion for new trial for an abuse of discretion. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003). Here, the trial court's decision to grant a new trial was based on its determination that defendant received ineffective assistance of counsel. See MCR 2.611(A)(1)(a). "The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law." *People v Cline*, 276 Mich App 634, 637; 741 NW2d 563 (2007). We review de novo a trial court's constitutional determinations, while factual findings are reviewed for clear error. *Id.*

Ineffective assistance of counsel is proven if a defendant can show that "(1) counsel's performance was below an objective standard of reasonableness under professional norms and (2) there is a reasonable probability that, if not for counsel's errors, the result would have been different and the result that did occur was fundamentally unfair or unreliable." *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). The trial court concluded that trial counsel's failure to interview defendant's son or have him testify constituted ineffective assistance of counsel. While it does appear that trial counsel's decision not to even interview a witness whose testimony might explain a key piece of otherwise inculpatory evidence was unreasonable, we do not believe the son's testimony could have created reasonable doubt.

As previously noted, defendant's son testified at the *Ginther* hearing that he did not recall any conversation with his father about his mother's grooming habits. Although he admitted that such a conversation may have occurred, he specifically testified that he never had any conversations with the victim about such grooming habits or whether their mother shaved her pubic hair or permitted their father to do so. Therefore, assuming trial counsel had investigated defendant's son's possible testimony, that testimony would not have helped defendant establish an alternative explanation for the victim's knowledge of her mother personal grooming habits.

If the jury believed defendant's son, then the evidence supported the prosecution because there was no evidence that the victim could have found out about defendant's shaving of her mother's pubic hair other than by defendant telling her. If the jury disbelieved defendant's son's testimony, they still could not reasonably infer that the facts were exactly the opposite of what he testified. An inference is a factual conclusion that can be fairly and rationally drawn or deduced from other facts. 29 Am Jur 2d, Evidence, § 199, p 213. "[I]t is not a legitimate interference to draw from testimony denying the existence of a fact sought to be proved, that such denial is evidence that the fact exists." *Quinn v Blanck*, 55 Mich 269, 272; 21 NW 307 (1884).

The court's reasoning to the contrary was speculation, i.e., speculation that the jury would have "add[ed] one and two and getting three" even in the face of defendant's son's denials, and does not add up to a "reasonable probability that . . . the result would have been different [or that] the result that did occur was fundamentally unfair or unreliable." *Odom*, *supra*. Additionally, we note that the trial court's justification for his conclusion included evidence that was not supported by the testimony. Specifically, the trial court indicated that defendant's son "indicated a number of different ways but he did also indicate that he may have

said something about shaving to his mother." In fact, there was no testimony that defendant's son ever spoke with his mother about the shaving. Thus, these findings were clear error. *Cline*, *supra*.

Because defendant has not shown that interviewing defendant's son and getting him to testify could have created reasonable doubt, defendant did not meet his burden to show ineffective assistance of counsel, *Odom*, *supra*, and the trial court erred when it concluded otherwise. Having erred in determining that defendant received ineffective assistance of counsel, the trial court's decision to grant defendant a new trial based on that erroneous determination constituted an abuse of discretion. See *People v Giovannini*, 271 Mich App 409, 417; 722 NW2d 237 (2006), quoting *Koon v United States*, 518 US 81, 100; 116 S Ct 2035; 135 L Ed 2d 392 (1996) (Holding that "a court 'by definition abuses its discretion when it makes an error of law.'").

On cross-appeal, defendant argues he received ineffective assistance of counsel because his trial counsel did not call him the stand to testify at his trial. At trial, defense counsel requested a recess to discuss with her client whether he should testify. After the recess, the trial court asked defense counsel whether defendant would be testifying and trial counsel stated the following:

> You're Honor, it's my understanding and after discussing with my client that he is electing his right to remain silent and that he will not be testifying. Therefore we would be requesting the jury instruction. I believe that would be the normal procedure when the defendant doesn't testify.

Further, at the hearing on the motion for a new trial, in response to the trial court's question about whether she advised defendant to testify or not defendant's trial counsel stated the following:

> We did ask for, at the second trial, ask for time so we could discuss it and I can clearly state that I did not advise him not to testify. I advised him and discussed with him, as I do with every client, the pros and cons of testifying. That obviously if someone elects to testify there's strengths and weaknesses involved with that testimony for each individual, obviously that would be different.
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> I have a pretty much set routine that I would discuss with a client that I do on every case regarding whether or not they're going to elect to testify. They have the right to remain silent, they don't have to testify but if they should chose to testify then I go through the questions that I would ask them. I basically go through what I anticipate would be a cross-examination of them and that's what's discussed and ultimately it has to be their decision. I don't believe that I can tell them they can't testify. Just similarly I can't tell them that they have to testify. It has to absolutely be their decision.

The trial court then asked if defense counsel remembered ultimately who made the decision whether defendant would testify or not and defense counsel stated, "It was his decision to testify or not testify and it was his decision that he was not going to testify." Accordingly, the record supports the judge's finding that defendant made the decision not to testify and did not object when his trial counsel told the trial court his decision. It is axiomatic that defendants can neither be compelled nor prohibited from testifying, and that the ultimate decision rests solely with the defendant. Because the decision to testify belonged to defendant, and defendant alone, that decision cannot constitute ineffective assistance of counsel, as it is not a decision made by counsel.

Next, defendant argues the prosecutor committed prosecutorial misconduct in his closing statement by stating the following:

> When somebody is rubbing your vagina under your pants, inside your underwear and it's your father, is there another purpose other than sexual conduct? [The victim] didn't think so and [she] was there. And in this case absolutely this was her father and you need to remember this is uncontroverted testimony. There is no testimony here today but for [the victim] and [her mother]. It's uncontroverted.

Defendant asserts it was improper for the prosecutor to tell the jury the victim's testimony was uncontroverted because it impinged on his Fifth Amendment[3] right not to testify given that only defendant could have provided an alternative explanation. Acknowledging that no evidence has been offered contrary to a point does not imply that someone had a responsibility to do so. Further, this Court has held that a statement that the evidence is uncontroverted does not constitute an impermissible comment on a defendant's failure to take the stand. See *People v Fields*, 450 Mich 94, 115-116; 538 NW2d 356 (1995) (citations omitted) (stating that a prosecutor may comment on whether evidence was uncontroverted.).

Moreover, the trial court instructed the jury that defendant was presumed innocent until proven guilty and that defendant had the absolute right not to testify and that defendant's choosing to not testify "must not affect [the jury's] verdict in any way." Jurors are presumed to follow a judge's instructions. *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003), citing *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

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

/s/ David H. Sawyer
/s/ Brian K. Zahra
/s/ Douglas B. Shapiro

[3] US Const, Am V.