STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 1, 2010
v	No. 285438 Kent Circuit Court
DENNIS JAY CLARK, Defendant-Appellant.	LC No. 07-005360-FH

Before: STEPHENS, P.J., and GLEICHER and M. J. KELLY, JJ.

M. J. KELLY, J. (*dissenting*).

Respectfully, I dissent. Even if defendant's trial counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and thus met the first prong of the ineffective assistance of counsel test under *Strickland v Washington*, 466 US 668, 687-688, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984), it still must be demonstrated that the second prong of the test (that there is a reasonable probability that, but for the deficient performance, the outcome would have been different) was met. Because I do not believe the second prong was satisfied, I would affirm.

The majority cites what it maintains are the many errors and deficiencies committed by defense counsel, some of which were not raised by defendant on appeal. The chief deficiency challenged was the failure to investigate the need for corroboration as to the non-existence of the special "rules" the victim testified the defendant imposed upon her. Witnesses Shawnda Helmbrecht (defendant's ex-wife and the mother of BH—the stepdaughter whose breast the defendant was previously convicted of touching), Helmbrecht's mother Annette Coby and Helmrecht's sister, Anna Coby were not called to testify at trial. They did, however, testify at the subsequent *Ginther*[1] hearing.

Following the *Ginther* hearing, the trial court, without making a specific factual finding as to whether Mr. Grace was actually informed of the Coby's presence in the home (a fact which Grace denied) found with regard to Anna Coby: "The best that this witness could say was that she lived at the Underhill address in 1998 to 1999 and, of course, that has a significance because

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

the offense was alleged to have occurred sometime on or about January 1, 1996, to January 1, 1997." The trial court summed up the testimony of the Cobys thus:

> Anna Coby, who was a witness claimed to have been necessary in this case, really when she testified here wasn't even able to give the appropriate time frame, as I noted, missing it by a substantial period of time. She was the one who was the self-described guardian at the gate, but I don't believe that her testimony had much credibility because of the softness of its recall and, quite frankly, wouldn't have made a difference.
>
> So too, Annette Coby, who understandably has an interest in having been here, or at least the defendant having had an interest would want her, was a woman who by her own admission, was worked to the bone, and I don't believe would have anything measurably important to offer even if you took all the testimony she gave in a light most favorable to the defendant in this case.

As to Helmbrecht, the trial court concluded that calling her at trial would have been a "double-edged sword" due to her denial of the admitted abuse of the other child. The court commented:

> I don't believe in my twenty years on the bench, and a stipulation was presented based on facts deduced from a person who didn't even testify—I don't believe the prosecution can hardly object to this because it was a stipulation, but we had a person who was not subject to any cross-examination whose testimony was taken at face value and sanitized without the crucible of cross-examination. In this case it seems to me that the defendant received a substantial bargain to that—would have been something which basically was by its nature hearsay, but at least presented to the jury for their consideration.

As noted, even assuming that both defendant and Helmbrecht disclosed the identity of the Cobys to defense counsel, the inquiry does not end there. Defendant must still demonstrate that the deficient performance prejudiced his defense. Given the clear error standard under which we are to review the factual findings of the trial judge, *People v Lanzo Constr Co*, 272 Mich App 470, 473; 726 NW2d 746 (2006) ("A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made."), and recognizing that deference is to be given "the trial court's superior ability to judge the credibility of the witnesses who appear before it", *Ambs v Kalamazoo County Road Com'n*, 255 Mich App 637, 652; 662 NW2d 424 (2003), I cannot conclude that the lower court erred when it determined that the outcome would not have been different had the Cobys and Helmbrecht testified at trial.

The majority solidly contends that credibility played a major role in this trial and that these witnesses could rebut the so-called "rules" including DT being forbidden to wear underwear to bed.[2] Whether these rules "always" applied was convincingly addressed by the

[2] The same passage of time that could dim the memory of the victim, who was recalling events (continued…)

prosecutor during closing argument when he responded to the credibility attack of defense counsel that the abuse happened "every time" DT was at the defendant's home. The defense argued in closing that simple arithmetic demonstrated that DT must have been molested without detection an implausible 104 times: "And during those 104 times, he said something just once, just one time. He said something once. 103 times he didn't say anything, but once he did. Think other children were in the room. Of those 104 times, not once do they awaken. Not once did she awaken them. Not once did she awaken them."

The prosecutor rejoined:

> Defense counsel argued over and over again 104 times. Well, you know what I bet? To Dani it seemed like every time she was there it occurred. This nightmare occurred over and over again, and I'll bet she thought it occurred every time she was there. This is the girl—she told you she couldn't go back to sleep after he left the room. But I don't have to prove it happened 104 times. One time. One time. Out of the number of times this happened, one time. You're going to hear one count one time. I don't have to prove again and again. We're getting away from what my burden is. One time.

The same reasoning applies to the "no underwear" rule: the jury did not have to believe that the rule was always in effect and, in the mind of a five-year-old, it may have seemed like it was imposed every time she slept at the home. After reading the entire trial transcript, I simply do not view the no-underwear rule as a verdict-overturning credibility destroyer.[3]

My reading of the trial transcript reveals that the most convincing and compelling credibility testimony came from DT's adoptive parents, Donna and James Tefft. The suggestion was made by the defense that DT conjured the sexual abuse allegations some ten years after they occurred to deflect punishment for her getting in trouble for signing her adoptive father's name to a school paper. The parent's testimony bolstered the credibility of DT's meltdown following the revelation of the abuse and, together with the prosecutors argument that the jury need only believe one instance of abuse occurred to convict the defendant, was more than sufficient in countering the would-be testimony of the Cobys and Helmbrecht.

Finally, I disagree with the majority's assertion, citing *Ramonez v Berguis*, 490 F3d 482, 490 (CA 6, 2007) and *Matthews v Abramajtys*, 319 F3d 780, 790 (CA 6, 2003), that the review of a Strickland ineffective assistance claim in the context of a *Ginther* hearing requires that a jury—not the trial court—assess the credibility of witnesses.[4] Under this logic, each time a

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from age 5 or 6, could equally fade the memories of the Cobys. Although not addressed by the trial court or parties, I frankly found the testimony of Annette Coby, that she specifically recalled fishing clean underwear out of the laundry for DT to wear before going to bed—a mundane event if ever there was one—more than ten years after the fact, incredible.

[3] It is worth repeating that the Helmbrecht affidavit confirms that there was at least some time when DT was told not to wear underwear, albeit for a genital rash.

[4] It is worth noting that the federal appellate court made these statements in the context of "the bounds of Section 2554(e)(1)" and determined that the court had not actually made credibility

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defendant presents a witness at a *Ginther* hearing that was not called at trial—no matter how incredible they might be—a new trial would be necessary, because a jury would need to assess the credibility of that witness. This would vitiate the courts function in determining the prejudice prong of the Strickland test.

Under these facts I cannot find, even assuming defense trial counsel's performance was deficient, that there is a reasonable probability that the outcome would have been different and, therefore, would affirm.

/s/ Michael J. Kelly

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determinations.