STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 19, 2013
v DENZEL LAMAR HARDY, Defendant-Appellant.	No. 304809 Macomb Circuit Court LC No. 2010-005056-FC

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	
v DENZEL LAMAR HARDY, Defendant-Appellee.	No. 310555 Macomb Circuit Court LC No. 2010-005056-FC

Before: CAVANAGH, P.J., and SAAD and SHAPIRO, JJ.

PER CURIAM.

In Docket No. 304809, defendant appeals his jury trial conviction for first-degree home invasion, MCL 750.110a(2). The trial court sentenced defendant to 78 months to 20 years in prison for the conviction. In Docket No. 310555, this Court granted the prosecutor's application for leave to appeal the trial court's order granting defendant a new trial on the ground of ineffective assistance of counsel. This Court consolidated the cases on appeal, and, for the reasons set forth below, we affirm.

I. FACTS AND PROCEEDINGS

Defendant's conviction stems from the home invasion and armed robbery of a husband, Art, and wife, Tennille, at their apartment in Mount Clemens. Defendant does not dispute that, at the time of the robbery, he was at the victims' apartment to buy marijuana. At trial, the prosecutor advanced the theory that defendant conspired with an unidentified man to commit the

robbery. According to the prosecutor, defendant entered the apartment under the guise of purchasing marijuana from Art in order to give the accomplice an opportunity to enter and help defendant rob Art and Tennille. Defendant took the position at trial that, as he was leaving after his transaction with Art, two unidentified men rushed past him and into the apartment. According to defendant, he was scared and fled the scene when he heard a gunshot.

The prosecutor charged defendant with first-degree home invasion, MCL 750.110a(2), and armed robbery, MCL 750.529, and the jury found defendant guilty of first-degree home invasion, but not guilty of armed robbery. After his conviction, defendant filed a claim of appeal and motion to remand, arguing that he received ineffective assistance of counsel at trial. Specifically, defendant asserted that defense counsel failed to investigate and introduce at trial a recording of the 911 call made by Tennille. This Court granted defendant's motion and remanded the case to allow defendant to move for a new trial and directed the trial court to conduct an evidentiary hearing.[1] Following the *Ginther*[2] hearing, the trial court granted defendant a new trial on the ground that defense counsel's performance fell below an objective standard of reasonableness and defendant demonstrated prejudice. This Court then granted the prosecutor's application for interlocutory appeal to address the trial court's ruling.[3]

II. EFFECTIVE ASSISTANCE OF COUNSEL

The prosecutor claims that the trial court erred in granting defendant a new trial on the ground that he did not receive the effective assistance of counsel.

We review for an abuse of discretion a trial court's decision to grant a defendant's motion for new trial. *People v Grissom*, 492 Mich 296, 312; 821 NW2d 50 (2012). Whether a defendant received effective assistance of counsel is a mixed question of fact and law. *People v Armstrong*, 490 Mich 281, 289; 806 NW2d 676 (2011). We review the trial court's findings of fact for clear error. *Id*. "Clear error exists if the reviewing court is left with a definite and firm conviction that the trial court made a mistake." *Id*. Questions of constitutional law are reviewed de novo. *Id*.

To warrant a new trial based on the ineffective assistance of counsel, a defendant must satisfy the two-part *Strickland*[4] test: (1) "the defendant must show that counsel's performance fell below an objective standard of reasonableness," and (2) "the defendant must show that, but for counsel's deficient performance, a different result would have been reasonably probable." *Armstrong*, 490 Mich at 289-290. Decisions regarding what evidence to present are presumed to

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[1] *People v Hardy*, unpublished order of the Court of Appeals, issued February 9, 2012 (Docket No. 304809).

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

[3] *People v Hardy*, unpublished order of the Court of Appeals, issued July 10, 2012 (Docket No. 310555).

[4] *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

be matters of trial strategy, and this Court will not substitute its judgment for that of counsel regarding matters of trial strategy. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). Nevertheless, defense counsel must make reasonable investigations or make a reasonable decision that makes a particular investigation unnecessary. *People v Grant*, 470 Mich 477, 485; 684 NW2d 686 (2004). "[T]he court must ensure that counsel's actions provided the defendant with the modicum of representation that is his constitutional right in a criminal prosecution." *Id.*

We hold that the trial court correctly ruled that defense counsel's performance fell below an objective standard of reasonableness. Failing to pursue the admission of the 911 call of a key trial witness was not a matter of sound trial strategy. At trial, Tennille testified that she knew defendant from the apartment complex where she and her husband lived. She further testified that, during the robbery, she saw defendant standing over her husband during a struggle in the living room and she later saw him walking by the doorway of the bedroom. Following defendant's conviction, it was discovered that Tennille's 911 call to police differed from her trial testimony. The 911 recording indicates that Tennille did not know who the other assailant was until her husband gave her defendant's name.

Defense counsel testified at the *Ginther* hearing that he obtained discovery and learned that Tennille called 911, but he did not seek a recording of the 911 call. Defense counsel also did not interview Tennille before trial. He testified that he would have typically requested the 911 recording from the prosecution if he discovered its existence and he had no strategic reason for not doing so here. Defense counsel agreed that the 911 recording supports the defense theory that Tennille did not actually see defendant at the apartment and such evidence would have "greatly" affected her credibility at trial. Because the 911 recording directly contradicted Tennille's trial testimony in which she identified defendant as one of the perpetrators, the trial court correctly held that defense counsel's failure to obtain the recording constituted deficient performance.

While defendant established the first prong set forth in *Strickland*, he also had to show that trial counsel's deficient performance rose to the level of prejudice. In other words, defendant had to establish that there was a reasonable probability that the outcome of the trial would have been different had counsel's performance been adequate. *Armstrong*, 490 Mich at 289-290.

At the conclusion of the *Ginther* hearing, the trial court ruled that defense counsel's failure to admit the 911 recording affected the outcome of the trial. The trial court found that Art's identification of defendant as the second intruder was "compromised" because he had been wrestled to the floor and pistol whipped and because he identified defendant by his coat, not his face or other unique feature. Tennille's trial testimony was contrary to the defense theory and corroborated Art's identification of defendant. However, the 911 recording supported the inference that, in contrast to her trial testimony, Tennille did not know that defendant was one of the perpetrators. The trial court found that, if the jury had heard Tennille's 911 call, it might have determined that she could not corroborate Art's "blurred recollection" because she did not actually see defendant. The trial court concluded that the recording could have created reasonable doubt in the minds of the jurors.

Evidence attacking a witness's credibility is important. See *Grissom*, 492 Mich at 319. It is particularly crucial where, as here, the primary defense theory of the case is misidentification. Tennille's testimony placed defendant at the crime scene and corroborated Art's identification of defendant. However, had the jury heard the 911 recording, it could have concluded that Tennille did not see defendant. Given that the 911 recording would have impeached Tennille's trial testimony, the matter of prejudice hinges on whether there was sufficient evidence apart from her testimony to support defendant's conviction.

Here, defendant admitted that he was present at the apartment, but he claimed that he fled when two unidentified men rushed past him and inside. There was no forensic evidence placing defendant at the scene during the robbery, and the only other eyewitness was Art, the victim of the assault and robbery. While the identification testimony of a robbery victim would ordinarily be sufficient to identify the perpetrator and warrant a guilty verdict, the evidence in this case shows that the credibility of the victim was tenuous. Art had been wrestled to the ground, beaten with a gun, and shot in the foot. He became "woozy" at some point because of his injuries. Further, as noted, Art did not identify defendant by his face or another distinctive feature. Rather, Art testified that he thought that the second intruder was defendant because that person was wearing a three-quarter length, black coat similar to what defendant had on when he first entered the apartment. Art also testified that he did not see defendant leave the apartment during the robbery. Moreover, Art admitted that he initially told the police that defendant and the other perpetrator pushed their way into the apartment when defendant first arrived at the apartment door. He further admitted that he lied about selling marijuana so that he would not get into trouble with his parole officer. In light of this evidence, it was not clearly erroneous for the trial court to find that Art's testimony was compromised by his injuries and location on the floor during much of the robbery. Without corroborating evidence of defendant's presence, the jury reasonably could have disbelieved Art's identification of defendant as one of the perpetrators. Accordingly, there is a reasonable probability that defendant would not have been convicted of the crime had the 911 recording been presented at trial.

In sum, trial counsel failed to investigate and procure evidence that would have impeached a key witness at trial, and this failure was not a strategic decision. There is a reasonable probability that the trial outcome would have been different had the evidence been presented to the jury. Therefore, the court did not err in holding that defendant is entitled to a new trial.

III. ADMISSION OF EXPERT WITNESS TESTIMONY

Defendant argues that the trial court abused its discretion during trial by admitting the testimony of a firearms expert because the evidence was irrelevant and highly prejudicial. Though we need not decide this issue because we hold in Issue II that defendant is entitled to a new trial, we address this claim of error in the interest of judicial economy because it is likely to arise on remand.

"The decision whether to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent a clear abuse of discretion." *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). "An abuse of discretion occurs when a trial court chooses an outcome falling outside the range of reasonable and principled outcomes." *People v Babcock*,

469 Mich 247, 265; 666 NW2d 231 (2003). In other words, "[a]n abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say that there was no excuse for the ruling made." *Aldrich*, 246 Mich App at 113, citing *People v Snider*, 239 Mich App 393, 419; 608 NW2d 502 (2000). Reversal is not warranted unless, after examination of the entire case, it appears that it is more probable than not that the error was outcome determinative. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

First, evidence is relevant if it has any tendency to make the existence of a fact that is of consequence to the action more probable or less probable than it would be without the evidence. MRE 401; *People v Yost*, 278 Mich App 341, 355; 749 NW2d 753 (2008). In general, if evidence is helpful in shedding light on any material point at issue, then it is deemed admissible under this definition. *People v Murphy (On Remand)*, 282 Mich App 571, 580; 766 NW2d 303 (2009).

Here, there were two shell casings found at the scene of the crime, one from a nine-millimeter round and one from a .380-caliber round. The prosecution's theory was that the unidentified accomplice shot two different caliber rounds from the same gun. In support of that theory, Macomb County Sergeant Philip Abdoo testified as a specialist in firearms. He tested a Glock 17, semi-automatic pistol that was chambered for a nine-millimeter round and was able to fire both nine-millimeter and .380-caliber ammunition from the gun. The sergeant attempted to shoot six rounds of .380-caliber ammunition from the gun, but two rounds misfired, three rounds failed to automatically eject and the casings from all six rounds showed signs of bulging. Although he experimented with two different types of .380-caliber rounds and used a Glock 17 to test-fire the ammunition, there was no evidence that the sergeant used the same brand of ammunition or the same type of gun used at the crime scene. In fact, the gun or guns used in the crime were never recovered. The sergeant also testified that he did not attempt to shoot a nine-millimeter round from a .380-caliber firearm because it was unsafe and would probably blow apart the gun.

The testimony was relevant to support the prosecution's theory that it was possible for both rounds to have been fired from the same gun that belonging to defendant's alleged accomplice. It was also relevant to rebut the defense theory that there were two unknown assailants, each with a gun, who entered the victims' apartment on the night of the robbery. While there is no evidence that the expert used the exact brands of ammunition and type of gun in testing, the expert confirmed the plausibility of the prosecution's theory that one gun could discharge those two types of casings. Certainly, the expert testimony that it was possible, though difficult, to shoot both types of rounds from a nine-millimeter gun tended to make the fact that there was only one shooter more probable, and therefore, the testimony was relevant.

MRE 403 excludes relevant evidence only if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ." *People v Kowalski*, 492 Mich 106, 136-137; 821 NW2d 14 (2012). Evidence becomes unfairly prejudicial when "there exists a danger that *marginally* probative evidence will be given undue or preemptive weight by the jury." *Id.* (emphasis in original; internal quotation and citation omitted).

As discussed, the evidence was not merely marginally probative. It bolstered the prosecution's theory that there was one gunman and one gun, thereby implicating defendant as the accomplice. Moreover, there was minimal unfair prejudice because defense counsel elicited testimony from the sergeant indicating the difficulty of firing .380-caliber rounds from a nine-millimeter gun. In response to questioning, the sergeant explained that of the six rounds he fired, two misfired, three failed to automatically eject, and all six casings had bulging problems. Furthermore, the jury was aware that the gun or guns used at the crime were not recovered and that the rounds used for testing were not exact replicas of the originals. Based on the entire testimony, it would have been clear to a jury that it was possible, although difficult, for the two rounds to have been fired from the same gun. Thus, the probative value of the evidence was not outweighed by the risk of unfair prejudice, and the trial court did not abuse its discretion in admitting the expert testimony.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Henry William Saad
/s/ Douglas B. Shapiro