

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SHAWN KEVIN BALLARD,

Defendant-Appellant.

UNPUBLISHED
February 28, 2003

No. 225560
Macomb Circuit Court
LC No. 98-001651-FC

Before: Jansen, P.J. and Hoekstra and Gage, JJ.

Gage, J. (*dissenting*).

I respectfully dissent. My colleagues have reversed the trial court on ineffective assistance of counsel. While I agree with the majority's position that a defendant bears a heavy burden to establish ineffective assistance of counsel, I do not believe defendant has met that burden in this case.

The right to counsel is not offended unless counsel's performance falls below an objective standard of reasonableness and the defendant was so prejudiced that he was deprived of a fair trial. *Strickland v Washington*, 466 US 668, 688; 104 S Ct 2052, 2065; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994); *People v Tommolino*, 187 Mich App 14; 466 NW2d 315 (1991). Prejudice exists when the court can conclude that there is a reasonable probability that the result of the proceeding would have been different – that is, the jury would have had a reasonable doubt about guilt. *Pickens, supra* at 312; *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). Effective assistance of counsel is presumed and defendant bears a heavy burden of proving otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

The majority bases its conclusion of ineffective assistance on defendant's trial counsel's failure to object to certain testimony of the prosecution's expert witness, Chris Dyke, regarding the probability of a fingerprint match. The majority maintains that counsel's failure to object to this testimony was so unreasonable that it effectively wiped out the presumption of a fair trial.

Ms. Dyke testified regarding a fingerprint found on the car used in the robbery, indicating that the print had six points of comparison. She indicated that she prefers to err on the side of caution and because her own standard for matching prints requires seven points of comparison, she could not make an absolute identification of the print as defendant's. However, she further testified that because the match was so good and one hundred percent on all six points that were

available, while she could not say with absolute certainty, she was ninety-nine percent sure it was defendant's print.

The seven-point standard the witness normally used was a subjective one that she set for herself. She did not testify that it was a community-wide standard, only that she prefers to "err on the side of caution." Further and most significantly her conclusions were not based on the fact that she was only able to match six points. Indeed there were only six points available and they matched one hundred percent. Based on her experience she opined that she was ninety-nine percent certain it was defendant's fingerprint.

Trial counsel did not walk away from the witness' assertion. He effectively cross-examined the witness and cast doubt on her conclusions by pointing out that she did not meet her own standard. He elicited testimony from the witness that the pattern on the print was "normal," and that other persons have similar prints. He also highlighted the fact that the witness could not state with absolute certainty that the print matched defendant. In addition, counsel thoroughly conducted a re-cross. It cannot be said counsel failed to challenge the testimony. Counsel handled the matter in a way that constituted fair trial strategy.

During the *Ginther*¹ hearing regarding the effective assistance of counsel, trial counsel was likewise very effective. Counsel testified that he did not realize that the expert was going to talk in terms of a ninety-nine percent probability or something of that nature, but he did in fact, challenge her testimony. He elicited the acknowledgement that other examiners use a higher point standard and that Ms. Dyke could not say with certainty that this was a positive match. He also elicited testimony that experts differ all the time and that opinion testimony is only that expert's opinion.

At the hearing, a defense expert indicated there is no set international standard for the number of points necessary for a comparison and that each individual examiner must set his or her own standard. Although the expert testified that there is no basis for an examiner testifying that there is a ninety-nine percent probability that a print came from a known individual, he also testified that he could not disagree with an examiner's conclusion that there was a match if that examiner used a standard based on even three points of comparison. When cross-examined at the hearing, Ms. Dyke acknowledged that based on her own personal standard, she did not find a match. In its decision, the court confirmed that Ms. Dyke testified that she found no match.

It appears there is no established standard regarding how many points of comparison are necessary to declare a match. I tend to agree with the trial court that there is little difference between testimony that "there is a match" and testimony that "there is a ninety-nine percent certainty that it is the defendant's print." While I do not absolutely conclude that Ms. Dyke's testimony was admissible, a definitive conclusion is unnecessary where, as here, it relates to an ineffective assistance of counsel claim. Here, the pertinent question is whether trial counsel's failure to object to the evidence was an objectively unreasonable error and denied defendant a fair trial. See *Pickens, supra*. Although it is evident that trial counsel did not refrain from explicitly objecting to the probability because of some trial strategy, one can hardly say that his

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

cross-examination of the witness at trial was not tantamount to an objection and challenge of the evidence. Under these circumstances, it cannot be said that counsel's performance was so unreasonable that counsel was not performing as counsel guaranteed by the constitution.

Even if counsel erred in failing to specifically object to the testimony, I would maintain that the error was harmless at best and that defendant has not shown the requisite prejudice. As previously addressed, trial counsel vehemently challenged and cast doubt over Ms. Dyke's testimony. At certain moments during trial, the court even stressed that there was no fingerprint match. Thus, the jury was made well aware of the fact that there was no conclusive fingerprint match.

A major component of an ineffective assistance of counsel claim is that defendant must demonstrate a reasonable probability "that, but for counsel's error, the result of the proceedings would have been different, *and* the attendant proceedings were fundamentally unfair or unreliable." *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). The evidence against defendant was strong in this case. The victim identified defendant out of a photographic lineup. During defendant's interrogation, when Detective Pierog told him that a witness had identified him as the robber, defendant replied, "how could they identify me, I had a mask on." Although defendant attempted to down play this statement by claiming that other detectives had told him that the robber wore a mask, the detective present at the time of defendant's arrest denied telling defendant that the robber wore a mask. Further when Detective Pierog informed defendant that the fingerprint technician could neither confirm nor deny that a latent fingerprint on the car was his, defendant replied, "Hey, look, I wasn't the driver. If you've got the prints there it's not mine." Detective Pierog then informed defendant that the fingerprint had been taken from the passenger's side mirror. Both statements made by defendant placed him squarely at the scene and could indirectly amount to an outright admission of his involvement in the offense.

Although Ms. Dyke's testimony was incriminating to defendant, it was sufficiently challenged by trial counsel and the court. I am unable to conclude that the testimony effectively removed any reasonable doubt that the jurors may have harbored of defendant's guilt. In light of the other evidence of defendant's guilt, any mistake on the part of trial counsel was unlikely to have influenced the verdict, or to have called into question the fairness or reliability of defendant's trial.

I would affirm the conviction.

/s/ Hilda R. Gage