STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED April 22, 2014
v	No. 318303 Calhoun Circuit Court
LEO DUWAYNE ACKLEY, a/k/a LEO DUANE ACKLEY, JR. and LEO DUWAYNE ACKLEY II, Defendant-Appellee.	LC No. 2011-003642-FC

Before: OWENS, P.J., and MURRAY and RIORDAN, JJ.

PER CURIAM.

The prosecution appeals as of right the trial court's order granting defendant a new trial because he was denied effective assistance of counsel during his trial for first-degree felony murder, MCL 750.316(b), and first-degree child abuse, MCL 750.136b(2). We reverse.

A jury convicted defendant of first-degree child abuse and first-degree felony murder, following the death of his girlfriend's three-year-old daughter who sustained a brain injury while under defendant's care. The prosecution presented evidence that the child's injuries were the result of physical abuse. However, defendant asserted that the child fell out of bed while sleeping. Following his convictions, defendant appealed as of right to this Court and moved this Court to remand for a *Ginther*[1] hearing, arguing that he was entitled to a new trial because his trial counsel, Kenneth E. Marks, was ineffective for failing to challenge the non-accidental theory of death presented by the prosecution's experts with a defense expert. We granted defendant's motion and instructed the trial court to conduct an evidentiary hearing and to rule on defendant's motion for a new trial. *People v Ackley*, unpublished order of the Court of Appeals, entered May 24, 2013 (Docket No. 310350).

In evaluating defendant's motion for a new trial, the trial court limited the issue to whether defense counsel was ineffective for failing to ask the court for additional funds to explore a second expert witness. At the *Ginther* hearing, Marks testified that his theory of

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

defense was that the child's injuries were caused by an accidental fall. Marks, who was appointed, was initially given $1,500 to retain an expert witness. Marks spoke with Dr. Brian Hunter, a pathologist. After reviewing the facts of this case, Dr. Hunter opined that the child's death was not accidental. In particular, Dr. Hunter told Marks that he did not believe an accidental fall off the bed could cause the type of force that would have been necessary to cause the child's injuries. As such, Dr. Hunter told Marks that he did not feel comfortable testifying on behalf of the defense. He testified that Dr. Hunter did not advise him to seek a different expert in order to obtain a different opinion. Rather, he believed that Dr. Hunter simply told him that if he wanted an expert who would testify, he should contact Dr. Mark Shuman[2] or Dr. Werner U. Spitz.

Dr. Hunter testified at the *Ginther* hearing and recalled that he spoke with Marks about this case, and that before he charged Marks a fee, he informed Marks that he believed that an accidental theory of death was implausible. Although he admitted that there was a difference of opinion in the medical community with regard to short falls, Dr. Hunter opined that the child's injuries were not caused by a short fall, as defendant had alleged. Specifically, he testified that a vast majority of forensic pathologists would consider an accidental theory of death in this case to be "bunk," and described the theory as "a story of convenience while [defendants] are trying to figure out something else." Nonetheless, Dr. Hunter told Marks that he should contact Dr. Shuman, a forensic pathologist in Florida, who had conducted more research on short falls. Dr. Hunter believed that Dr. Shuman could be helpful in creating reasonable doubt in this case, but acknowledged that Dr. Shuman would not "buy into every story the defense is selling." Dr. Hunter testified that he explained the different theories with regard to short falls and the possible expertise of Dr. Shuman. Dr. Hunter recalled that he "was steering [Marks toward] Dr. Shuman as opposed to [himself]" because Dr. Hunter did not think he was the best expert Marks could obtain with regard to the issues in this case. However, Dr. Hunter did not recall telling Marks to contact Dr. Spitz.

Shortly after this initial conversation, Dr. Hunter testified that Marks contacted him again and told him that Dr. Shuman "was not going to work out," but he would like Dr. Hunter's assistance to prepare for the case. At the *Ginther* hearing, it was established that Marks never contacted Dr. Shuman. Marks testified that he did not seek additional funds from the trial court to retain Dr. Shuman, because he did not feel it would be prudent to seek another expert, based on what Dr. Hunter told him. He also testified that he did not feel there was a need for expert testimony concerning whether the child's death was accidental. Rather, he chose to hire Dr. Hunter to provide him advice on how to cross-examine the prosecution's expert witnesses and attack its case. For instance, Dr. Hunter told Marks to introduce to the jury that perhaps the child did more than roll off the bed, that she might have been jumping on the bed, and that jumping could have caused her to hit her head and sustain injury. Dr. Hunter also told Marks to question the prosecution's experts with regard to the amount of force that would be required to cause the child's injuries, because Dr. Hunter did not believe that the experts would know the requisite amount of force. He also instructed Marks to question the prosecution's experts with regard to

[2] Also referred to as Dr. Mark Shulman in the lower court record.

whether shaken baby syndrome could cause retinal hemorrhages, and to question whether the retinal hemorrhages in this case were caused by herniation of the brain, rather than some form of trauma. Finally, Dr. Hunter provided Marks with specific questions to ask Dr. Joyce DeJong, one of the prosecution's experts, with regard to abusive head trauma, shaken baby syndrome, short falls, and blunt force trauma. Marks testified that he believed he effectively cross-examined Dr. DeJong regarding whether a short fall could cause death by questioning her in such a way that she admitted that she did not know the amount of force that would be required to cause the child's injuries.

During the *Ginther* hearing, the parties stipulated to the admission of an affidavit prepared by Dr. Spitz, but no evidence of Dr. Shuman's opinion was presented. Dr. Spitz reviewed the autopsy report, photographs of the child, a letter written by one of the prosecution's expert witnesses, Dr. Stephen Guertin, and the trial transcripts in this case, and opined that the bruises on the child's body were not the product of abuse, and that they could have been caused by attempted medical treatment or CPR. Dr. Spitz also believed that the child's head injuries were the product of an accident, and opined that the child suffered from "a relatively mild impact." Dr. Spitz further averred that the child's death could not be attributed to shaken baby syndrome or any type of abusive head trauma. Marks testified that he was aware of Dr. Spitz before trial began, but was not aware whether Dr. Spitz would provide favorable testimony.

The trial court granted defendant a new trial because it concluded that Marks was objectively unreasonable for failing to seek out either Dr. Spitz or Dr. Shuman, and that Marks's deficient performance prejudiced defendant. The trial court determined that the evidence was clear that Dr. Hunter told Marks that he did not believe the injuries were accidental and that he did not feel comfortable testifying. The trial court found that Dr. Hunter told Marks "I'm not your guy," but to contact Dr. Shuman. The trial court also determined that Marks knew expert testimony would be important in this case and was told, before trial, to speak to Dr. Spitz or Dr. Shuman. Despite all of this, Marks did not contact other experts or present expert testimony at trial. Further, the trial court determined that Dr. Spitz and Dr. Shuman's opinions, which supported the defense's accidental-fall theory, were directly contrary to the prosecution's theory and the evidence presented, thereby creating a reasonable probability that a different verdict would have resulted. On appeal, the prosecution argues that the trial court abused its discretion when it concluded that defendant was entitled to a new trial because Marks's performance was objectively reasonable, and even if Marks's performance was objectively unreasonable, defendant was not prejudiced.

"We review for an abuse of discretion a trial court's decision to grant or deny a new trial. An abuse of discretion occurs when the trial court's decision is outside the range of principled outcomes." *People v Russell*, 297 Mich App 707, 715; 825 NW2d 623 (2012) (quotation marks and citation omitted). "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We review questions of law de novo and the trial court's findings of fact for clear error. *Id.* "Clear error exists when the reviewing court is left with a definite and firm conviction that a mistake was made." *People v McDade*, 301 Mich App 343, 356; 836 NW2d 266 (2013).

A defendant is denied effective assistance of counsel in violation of the Sixth Amendment if defense counsel's performance was deficient and that deficient performance prejudiced the defense. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Defense counsel's performance is "measured against an objective standard of reasonableness under the circumstances and according to prevailing professional norms," to determine whether it was deficient. *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004), citing *Strickland*, 466 US at 687-688. To establish that the deficient performance prejudiced the defense, defendant must show "that counsel's errors were so serious as to deprive the defendant of a fair trial," *Strickland*, 466 US at 687, "such that there is a reasonable probability that but for counsel's unprofessional errors the trial outcome would have been different." *Solmonson*, 261 Mich App at 663-664.

Further, a reviewing court presumes that trial counsel was effective, and in order to show that counsel's performance fell below an objective standard of reasonableness, a defendant must overcome the strong presumption that his counsel's conduct constituted reasonable trial strategy. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). "An attorney's decision whether to retain witnesses, including expert witnesses, is a matter of trial strategy." *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009). "In general, the failure to call a witness can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense." *Id.* (quotation marks and citation omitted). "A substantial defense is one that might have made a difference in the outcome of the trial." *People v Chapo*, 283 Mich App 360, 371; 770 NW2d 68 (2009) (quotation marks and citation omitted).

As discussed, the primary factual findings supporting the trial court's decision were that the trial court found that Dr. Hunter told Marks to contact Dr. Shuman or Dr. Spitz, because he did not feel comfortable testifying for the defense; yet, Marks failed to do so, even though Dr. Spitz's opinion was directly contrary to the prosecutor's theory. The trial court acknowledged that Marks vigorously cross-examined the prosecution's expert witnesses, but the trial court's ultimate decision seems to imply that it did not feel this was enough. We find that there is no clear error in the trial court's findings of fact, but conclude that, on those facts, the trial court erred by finding that the decision not to consult an additional expert rose to the level of a constitutional violation.

First, we find that defense counsel's performance did not fall below an objective standard of reasonableness, because his decision not to consult a second expert constituted trial strategy. Defense counsel is not required to continue seeking experts until he finds one who will offer favorable testimony. See *People v Eliason*, 300 Mich App 293, 300; 833 NW2d 357 (2013). The record shows that based on what Dr. Hunter told Marks, Marks determined that it would not be prudent to seek out another expert. Dr. Hunter strongly opined that a vast majority of forensic pathologists consider the accidental, short-fall theory to be nonsense and was merely a "story of convenience." After reviewing the different theories of short falls with Marks, Dr. Hunter told Marks that Dr. Shuman may be able to cast some reasonable doubt, but he also stated that Dr. Shuman does not always "buy into every story the defense is selling." After receiving Dr. Hunter's opinion, it was reasonable for Marks to conclude that consulting a second expert would not be useful. Dr. Hunter's opinion certainly casts doubt as to whether Dr. Shuman, or any other forensic pathologist, would provide favorable testimony for the defense. Additionally, with regard to Dr. Spitz, Marks testified that he did not know Dr. Spitz would be able to provide

favorable testimony, and Dr. Hunter never recalled mentioning Dr. Spitz, let alone providing Marks with information on what he might opine. Thus, rather than calling an expert witness, the record shows that defense counsel consulted Dr. Hunter on how to effectively cross-examine the prosecution's expert witnesses and expose vulnerabilities in their testimony. At trial, defense counsel vigorously cross-examined the prosecution's experts and even got Dr. DeJong to admit that she did not know how much force was required to cause the injuries that the child sustained. Additionally, to support the defense's theory that the death was accidental, defense counsel called two character witnesses who attested to defendant's trustworthiness and good rapport with children. We will not second-guess defense counsel's strategy to rebut the prosecution's evidence by cross-examining the witnesses and presenting character evidence rather than calling an expert witness. *Id.* The record shows that after consulting with one expert, Marks considered the options available and concluded that it would not be the best trial strategy to present expert testimony at trial. For that, it cannot be said that defense counsel was constitutionally ineffective.

Second, even if we were to conclude that Marks should have consulted an additional expert, his failure to do so did not deprive defendant of a substantial defense, as it would not have made a difference in the outcome of the trial. *Chapo*, 283 Mich App at 371. The evidence shows that shortly after defendant moved into the mother's home, she began to have concerns about the child's health, particularly her hair loss and increased bruising. The child also began to regress in her toilet training and was eating less. Dr. Guertin testified that these behaviors were indicative of abuse. It was also established that defendant would routinely watch the child and her sister while the mother was at work, and on the day in question, the child was under defendant's care when he found her unconscious.

Further, defendant's actions afterwards were also peculiar. For instance, rather than seeking out help, he poured cold water over the child to attempt to revive her. Despite not having a telephone, he did not reach out to neighbors for help, even though they were outside, and he did not drive the child to the hospital immediately. Rather, he drove the unconscious child to his mother's for help. But before doing so, he went back into the house to retrieve the couple's dog.

Moreover, it was established that the child died as a result of a severe brain injury, resulting in hemorrhaging of the brain. The prosecution presented five expert witnesses, who all opined that the child's injuries were the result of physical abuse. These five experts agreed that the injuries were too severe to have been caused from a fall from the bed. Rather, they opined that they were the result of blunt force trauma or shaking. Further, it was noted that defendant allegedly found the child face down, which Dr. Guertin determined was suspect due to the severe injury in the back of the child's head. There were also various bruises on the child's body that the experts opined were the result of physical abuse. For instance, Dr. Guertin observed large bruises on the child's neck that suggested she had been choked. Dr. Michelle Halley testified that the child's retinal hemorrhaging was not from CPR, and Dr DeJong testified that it was rare for children to suffer retinal hemorrhaging in accidents of any kind. Additionally, the child's sister expressed concerns to her biological father about spending time with defendant, and the biological father also noticed bruises on the sister's body after defendant moved into the home.

As discussed, Marks vigorously cross-examined the prosecution's numerous expert witnesses, exposing vulnerabilities in their testimony. He took the time to consult an expert on ways he could effectively attack the prosecutor's theory. He also presented character witnesses to testify to defendant's good rapport with children, and defendant testified in his own defense. Although Dr. Spitz would have testified that the child's injuries were the result of a "mild impact" and her death was accidental, five other experts testified that the injuries were very severe and could not have been caused by a fall. There was also overwhelming evidence that the child suffered from physical abuse, and began displaying signs of abuse shortly after defendant moved into the home. The child was also under defendant's care. Thus, on this record, we cannot conclude that defense counsel's failure to consult an additional expert would have changed the outcome, as to deprive defendant of a substantial defense.

Finally, defendant raises several additional claims of ineffective assistance of counsel as alternate grounds for affirming the trial court's grant of a new trial. He also raises a claim of instructional error and a claim that he is entitled to a new trial based on newly discovered evidence as alternate grounds for affirmance. We decline to address these claims, as they were not raised by the prosecution on appeal or properly raised by defendant in a cross-appeal pursuant to MCR 7.207. See *In re McLeodUSA Telecom Servs, Inc Complaint*, 277 Mich App 602, 621 n 8; 751 NW2d 508 (2008) ("An appellee is limited to the issues raised by the appellant unless it cross-appeals as provided in MCR 7.207.").

Reversed.

/s/ Donald S. Owens
/s/ Christopher M. Murray
/s/ Michael J. Riordan