

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant/Cross-Appellee,

v

ADIL TOMA,

Defendant-Appellee/Cross-Appellant.

UNPUBLISHED

August 4, 1998

No. 203029

Oakland Circuit Court

LC No. 94-134322 FC

Before: Neff, P.J., and O’Connell and Young, Jr., JJ.

PER CURIAM.

Plaintiff appeals by leave granted the trial court’s order reversing defendant’s convictions for first-degree felony murder, MCL 750.316(1)(b); MSA 28.548(1)(b), and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b; MSA 28.424(2), on the basis that defendant received ineffective assistance of counsel at trial. We affirm.

Defendant’s convictions stemmed from the shooting death of Steven Burge. Burge’s girlfriend at the time, Margo McPherson, and her two children, had twice lived with defendant for short periods. Evidence showed that defendant had made romantic advances toward McPherson, which she claimed to have rebuffed. McPherson and her children moved from defendant’s home and into an apartment, where Burge joined them shortly thereafter.

At trial, the prosecution presented evidence that defendant engaged in a pattern of stalking McPherson, then, on November 29, 1993, at approximately 10:30 p.m., broke through the front door of McPherson’s apartment. According to the prosecution’s theory, a struggle ensued, and defendant shot Burge in the head and poured gasoline over his body. The prosecution presented testimony from neighbors who stated that they had come to Burge’s aid, and who identified defendant as the gunman. Witnesses also saw defendant’s car drive away from the scene.

Defendant maintains that McPherson had driven him to her apartment and attempted to pressure him to help her pay a \$3,000 debt for illegal drugs. According to defendant, the neighbors who had identified defendant as the gunman had participated with others in the attempted “shakedown,”

the neighbors were armed with guns, and one of them in fact fired the shot that killed Burge during the melee that ensued after defendant refused to comply with McPherson's demands for money.

After the jury convicted defendant of first-degree felony murder and felony-firearm, this Court granted defendant's motion to remand to enable the trial court to determine whether defendant was denied effective assistance of counsel. *People v Toma*, unpublished order of the Court of Appeals, entered September 25, 1996 (Docket No. 184936). Upon taking testimony at defendant's *Ginther*¹ hearing, the trial court reversed defendant's convictions and granted his motion for a new trial because it found that he had been convicted without effective assistance of counsel.

Dispositive of this appeal is the court's finding that defense counsel failed to clarify defendant's testimony concerning the events leading up to Burge's murder. Defendant, who speaks Arabic but has a very limited command of English, spoke through an interpreter at trial. The interpreter repeatedly mispronounced the names of the persons defendant alleged to have been involved in the fracas leading to Burge's murder, and otherwise presented a confusing and incomplete rendition of defendant's testimony. On appeal, the prosecutor argues that the trial court erred in granting defendant a new trial because defendant failed to establish that he was seriously prejudiced by his attorney's mistakes. We disagree.

We review a decision to grant a new trial for an abuse of discretion. *People v Herbert*, 444 Mich 466, 477; 511 NW2d 654 (1993). An abuse of discretion occurs only where a court's action is so violative of fact and logic as to constitute perversity of will or defiance of judgment. *People v Laws*, 218 Mich App 447, 456; 554 NW2d 586 (1996).

The federal and state constitutions guarantee a criminal defendant the right to the assistance of counsel. US Const, Am VI; Const 1963, art 1, § 20. The constitutional right to counsel is a right to *effective* assistance of counsel. *United States v Cronin*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984); *People v Pubrat*, 451 Mich 589, 594; 548 NW2d 595 (1996). To establish ineffective assistance of counsel, defendant must establish that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). Defendant must further show that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, and that the attendant proceedings were fundamentally unfair or unreliable. *People v Poole*, 218 Mich App 702, 717-718; 555 NW2d 485 (1996).

Our review of the trial transcript, and of the evidence presented at the *Ginther* hearing, persuades us that the trial court correctly determined that defense counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. The rambling translation of defendant's testimony failed to present the jury with a fair opportunity to understand defendant's version of events or assess defendant's credibility. Counsel's failure to take measures to present defendant's side of the story in clear terms for the jury's consideration was a mistake so serious as to constitute a failure to function as an attorney as guaranteed by the Sixth Amendment. See *People v Reed*, 198 Mich App 639, 646; 499 NW2d 441 (1993), *aff'd* 449 Mich 375; 535 NW2d 496 (1995). Nor can the failure to present defendant's explanation of the events at issue be considered sound trial strategy in

this instance, where defendant's testimony offered the only direct rebuttal of the prosecution's theory. See *id.* at 647.

The prosecution argues that the evidence of defendant's guilt was so overwhelming, and defendant's protestations of innocence so implausible, as to render any deficiencies on defense counsel's part nonprejudicial to defendant. Although we agree that the prosecution presented a strong case for defendant's guilt,² we cannot go so far as to presume guilt where the jury was deprived of a chance to fully comprehend defendant's exculpatory testimony due to counsel's ineffectiveness. Credibility of a witness is for the jury to adjudge. *People v DeLisle*, 202 Mich App 658, 662; 509 NW2d 885 (1993). In this case, we find no abuse of discretion in the trial court's determination that defendant's conviction and accompanying mandatory life sentence cannot stand where defense counsel failed to present defendant's exculpatory testimony in a way that allowed the jury to comprehend and consider it fully.

We also find error requiring a new trial in the admission at trial of certain testimony of the forensic psychologist, who interviewed defendant pursuant to notice that defendant intended to interpose an insanity defense. Defendant ultimately chose not to pursue the insanity defense at trial, but the court, over objection, allowed the forensic psychologist to testify to inconsistent statements defendant made during his examination regarding his actions on the night of Burge's murder. This testimony was clearly inadmissible, according to the provisions of the statute setting forth the procedures for presenting an insanity defense:

Statements made by the defendant to personnel of the center for forensic psychiatry, to other qualified personnel, or to any independent examiner during an examination shall not be admissible or have probative value in court at the trial of the case on any issues other than his or her mental illness or insanity at the time of the alleged offense. [MCL 768.20a(5); MSA 28.1043(1)(5).]

Where a defendant chooses not to pursue an insanity defense at trial, and his mental state is not otherwise at issue, statements made in the course of a court-ordered psychiatric examination are not admissible as substantive evidence of guilt or for impeachment. *People v Jacobs*, 138 Mich App 273, 276-278; 360 NW2d 593 (1984). We caution the trial court on retrial not to repeat the mistake of allowing such testimony.

Because we are affirming the trial court's decision to grant a new trial on the grounds discussed above, we need address neither the prosecutor's other issues on appeal, nor defendant's issues on cross appeal.

Affirmed.

/s/ Janet T. Neff
/s/ Peter D. O'Connell
/s/ Robert P. Young, Jr.

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

² We concur with the prosecution that the facts linking the defendant to this crime are overwhelming. The facts of this case indicate that the assailant wore a Halloween mask and doused the victim with gasoline. Hair samples matching those found in the mask and a hat located at the scene were obtained from defendant, and defendant's fingerprint was found on a piece of tape attached to the mask. Police also found blood matching the victim's blood type on the boots defendant was wearing when he was arrested. In addition, the assailant left a gasoline can at the scene. Uncontradicted evidence established that, at the time of his arrest, defendant's car and a hat he was wearing smelled strongly of gasoline, and the hat found at the scene also tested positive for gasoline. Finally, an officer who was transporting defendant after an attempted arraignment testified that defendant volunteered the following: "They count five. They say I killed five people. I only killed one." However, we emphasize, even where the evidence of guilt is overwhelming, defendant is still entitled to present exculpatory testimony in a manner that is comprehensible to the jury.