

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JEFFREY WAYNE GORTON,

Defendant-Appellant.

UNPUBLISHED

April 22, 2004

No. 244719

Wayne Circuit Court

LC No. 02-003193

Before: Wilder, P.J. and Hoekstra and Kelly, JJ.

PER CURIAM.

Defendant was convicted by a jury of one count of first-degree premeditated murder, MCL 750.316(1)(a), two counts of felony murder, MCL 750.316(1)(b), and two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(e) (weapon used) and MCL 750.520b(1)(f) (personal injury). He appeals as of right. We affirm.

Defendant raises a single issue on appeal, claiming that he received ineffective assistance from counsel at trial. The trial court conducted an evidentiary hearing on this issue, pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973). Following the hearing, the trial court ruled that, as measured by the standard set out in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984), counsel's performance was not ineffective. We review the trial court's factual findings for clear error, and its rulings on questions of constitutional law de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Applying this standard, we find no error in the trial court's ruling.

Defense counsel's testimony at the *Ginther* hearing indicates that he prepared a meticulous defense. The defense theory was that defendant had consensual sex with the victim, and defendant's friend who lived near the scene of the crime murdered the victim afterwards, out of jealousy. The friend whom defendant identified was convicted of another sex-related murder between the time of the murder and trial in this case.

Defense counsel took a number of steps to establish this defense. Employing private investigators, he established that the supposed murderer lived close to the crime scene. Cross-examining witnesses, he elicited information he later tied in to this theory. For example, he elicited a statement from an investigator that the supposed murderer was a previous suspect, and he obtained physical descriptions of both the supposed murderer and the suspicious individual eyewitnesses believed to be the murderer. These statements, taken together, could have

indicated that the person the eyewitnesses saw looked more like the man defendant accused than defendant. Counsel planned to tie this information in with defendant's testimony about what happened at the time of the murder, and the testimony of private investigators that the man defendant accused did live near the crime scene.

Defense counsel also testified at the *Ginther* hearing that he employed a psychologist to consult on jury selection. The consultant advised that female jurors of a certain background would be more likely to sympathize with the original defense theory. Following this advice, defense counsel sought to ensure as many women jurors as possible.

Defense counsel testified that it was this action that indirectly led to his inability to put on the defense he had planned. During the trial, defendant told counsel he was very upset that so many women were on the jury and serving in other capacities at trial. Defendant stated that he hated women, that he had murdered many women, including the victim, and that he would gladly murder more women given the chance. He also told counsel that his previous story about how the murder occurred was a lie. Defense counsel testified that he then told defendant that he could offer narrative testimony at trial if he wished, but that counsel would be unable to examine him without suborning perjury. After consulting with jail mates, defendant told counsel he would not testify, but instead would seek to have his conviction overturned on the basis of ineffective assistance of counsel. For these reasons, defense counsel testified, he was unable to present his prepared defense.

Defendant also testified at the *Ginther* hearing, and disputed counsel's account. Defendant testified that the planned defense was an essentially true account of the murder.¹ He also testified that his lawyer told him that he was under pressure from "higher-ups" not to provide a spirited defense, that the case was already lost, and that the only way defendant could win would be if counsel intentionally presented as poor a defense as possible, establishing ineffective assistance of counsel.

Because defendant's and counsel's accounts of what happened were at odds, the trial court had to make a credibility determination. The court decided that counsel's version of events was more credible. We do not find clear error in this determination. *LeBlanc, supra* at 579.

Defendant offers a number of additional instances of ineffective assistance of counsel. Most of these have to do with the failure to cross-examine twelve of the seventeen prosecution witnesses. But as counsel testified at the *Ginther* hearing, his decision not to cross-examine these witnesses was based on sound considerations of trial strategy. The decision, therefore, did not constitute ineffective assistance.

Defendant also states that counsel was ineffective in not making an opening statement. However, counsel testified at the *Ginther* hearing that he had intended to defer the opening statement to avoid giving the prosecution too much advance knowledge of the defense theory. This decision was sound decision of trial strategy. Because counsel later determined that he was

¹ He took exception with several elements of counsel's description of the defense, for example denying that he was homosexual.

unable to present any witnesses without suborning perjury, he never had an opportunity to make the opening statement he planned. The trial court credited this explanation, and having an obligation to defer to its credibility determinations, we will not disturb its ruling.

Defendant also argues that the failure to present witnesses was ineffective assistance of counsel. As we have explained, counsel testified that the failure was the result of his obligation not to be a party to presenting perjury, and the trial court credited this explanation. The failure to present perjured testimony by one's client does not constitute ineffective assistance. *Nix v Whiteside*, 475 US 157, 171; 106 S Ct 988; 89 L Ed 2d 123 (1986). We therefore find no basis for reversing the trial court's ruling.

Defendant also argues that counsel's closing argument was so weak as to constitute ineffective assistance. Although the closing argument was quite brief, and arguably less than forceful, it did state that defendant's guilt had not been proved beyond a reasonable doubt. Further, it stated three elements of the charged offenses as to which, counsel argued, there was a reasonable doubt as to guilt. In light of the evidence against defendant, which even defendant acknowledges in his brief on appeal to have been very strong, it is difficult to see what other argument counsel could have made. This argument thus constituted a decision of trial strategy, and did not constitute ineffective assistance. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999).

Finally, although we explicitly find that counsel was not in any way ineffective, there would be no grounds for reversal even if he had been. A conviction may be reversed because of ineffective assistance of counsel only if counsel's performance was deficient, and the deficiency was so serious as to deprive defendant of a fair trial by rendering the result of the trial unreliable. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). The evidence of defendant's guilt on the first-degree murder count was overwhelming. It included virtually incontrovertible DNA evidence, eyewitness identification of defendant and his car at the murder scene, where he was observed placing what turned out to be the victim's personal property into his car, and properly admitted evidence of his guilt in a strikingly similar crime of such an unusual character that the two crimes could not have been a coincidence. Moreover, because defendant brought the murder weapons with him to the murder scene, and because he was seen giving hostile looks to the victim before the murder, there was proof not only of the act, but of the mental element of premeditation.

Evidence of guilt was equally clear on the criminal sexual conduct counts, there being physical proof of both penetration and infliction of physical injury. This evidence also supports the conviction on the felony-murder count for which the predicate offense was criminal sexual conduct. And because there was clear evidence that defendant robbed the victim of her personal longings, the guilt on the felony-murder count for which larceny was the predicate offense was also clear. The evidence of defendant's guilt being so clear on all counts, we cannot say that his counsel's performance deprived him of a fair trial.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Joel P. Hoekstra
/s/ Kirsten Frank Kelly