

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
September 12, 2013

v

ANDRE LARMAR HUNTER,
Defendant-Appellant.

No. 297542
Wayne Circuit Court
LC No. 09-022865-FC

ON REMAND

Before: MURRAY, P.J., and FORT HOOD and BORRELLO, JJ.

PER CURIAM.

In the prior appeal, defendant appealed as of right his jury trial conviction of first-degree premeditated murder, MCL 750.316(1)(a), and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant argued that his convictions should be reversed because (1) his right to a public trial was violated, (2) his convictions were against the great weight of the evidence, and (3) he received the ineffective assistance of counsel. We affirmed his convictions and sentences. *People v Hunter*, unpublished opinion per curiam of the Court of Appeals, issued August 30, 2012 (Docket No. 297542), slip op, p 1. However, in lieu of granting leave to appeal, the Michigan Supreme Court entered an order that denied leave to appeal on all issues except for that involving the ineffective assistance of counsel, and as to that issue reversed the trial court's finding that defense trial counsel gave credible testimony at the *Ginther*¹ hearing, and vacated our opinion to the extent it relied on that credibility determination made by the trial court. See *People v Hunter*, 493 Mich 1015; 829 NW2d 871 (2013). The Court then remanded the case back to this Court "for reconsideration of the defendant's ineffective assistance claims." *Id.* We now reverse and remand for further proceedings.

To establish that he received ineffective assistance of counsel, defendant must establish that counsel's performance was deficient and that the deficient performance prejudiced him. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). To do so defendant must show that counsel's performance was outside the wide range of professionally

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

competent assistance, *id.* at 689, which in turn requires a showing that counsel made errors so serious that counsel was not functioning as the counsel guaranteed by the Sixth Amendment, *id.* at 687. To satisfy the prejudice prong, defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* at 694. In reviewing this issue, defense counsel is afforded wide latitude on matters of trial strategy. *People v Unger*, 278 Mich App 210, 242-243; 749 NW2d 272 (2008).

As noted at the outset of this opinion, the Supreme Court reversed the trial court's finding that defense trial counsel gave credible testimony at the *Ginther* hearing. Because of that holding, the Court also vacated that part of our opinion that deferred to the trial court's credibility determination, and remanded for us to reconsider the ineffective assistance argument without the finding that defense trial counsel gave credible testimony. In doing so, we hold that defendant was denied the effective assistance of counsel and that there is a reasonable probability that but for the unprofessional errors of counsel, the result of the proceedings would have been different. We base this holding on our conclusion that in failing to interview and call two alibi witnesses, defense counsel was not functioning as counsel to the level guaranteed by the Sixth Amendment as interpreted in *Strickland*.

After the *Ginther* hearing the trial court found that defense counsel was not ineffective for failing to call as a witness or interview Michael Turner and Germeka Whitaker as exculpatory and alibi witnesses, respectively, because according to defense counsel, defendant admitted to counsel that he had indeed committed the crimes. Although decisions regarding whether to call or question witnesses are presumed to be matters of trial strategy, *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999), in light of the trial court's other findings we hold that the failure to contact and call both Turner and Whitaker constituted ineffective assistance of counsel. As noted, the linchpin to the trial court's finding on this issue was defense counsel's testimony that defendant had admitted to him that he shot and killed Hall in retaliation for Hall's prior theft of drugs or money, and that in light of this confession he declined to advance these witnesses' testimony because he could not knowingly present perjured testimony. However, the Supreme Court held that the trial court's favorable credibility finding as to defense trial counsel was clearly erroneous, and so we can no longer rely upon that basis (defendant's alleged confession to the crimes to defense counsel) for the trial court's conclusion on this issue.

In the absence of defense trial counsel's reliance on defendant's alleged confession, we conclude that the remainder of the trial court's findings warrant the conclusion that defendant is entitled to a new trial. For instance, the trial court repeatedly found that the presentation of an alibi witness by the defense would have made it "reasonably probable that a different outcome would have resulted." Indeed, the trial court explicitly stated that "[i]t is quite probable that an alibi defense, properly pursued, could very well have resulted in a 'not guilty' verdict in this case, because the identity of the perpetrator was always up in the air[.]" An alibi defense could have succeeded because, according to the trial court, the condition of the videotape was poor, witnesses expressed confusion about the perpetrator's identity, and so testimony from Walker and Turner could have swayed the jury. And again, the only reason offered by defense counsel for not offering up these witnesses was defendant's alleged confession. Adding to that is the undisputed fact that there had already been one mistrial and the instant jury on three separate occasions indicated that they were deadlocked. This case was not an open and shut one, and the

failure to interview and/or present the alibi defense through witnesses Turner and Whitaker, as well as the failure to provide defendant with discovery and ignoring information about the defense witnesses, constituted the ineffective assistance of counsel.

On de novo review, and for the reasons expressed above,² we hold that defendant established that he was denied the effective assistance of counsel at trial, and therefore he is entitled to a new trial. The trial court's order denying defendant's motion for new trial is, accordingly, reversed.

Reversed and remanded for further proceedings in accordance with this opinion. We do not retain jurisdiction.

/s/ Christopher M. Murray
/s/ Karen M. Fort Hood
/s/ Stephen L. Borrello

² The other instances raised by defendant regarding ineffective assistance of trial counsel are not related to the credibility findings of the trial court, and so we do not revisit our conclusions on those issues.