S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 29, 2013
v LEEANN SHANTELLE THAIN, Defendant-Appellant.	No. 308127 Berrien Circuit Court LC No. 2011-000399-FH

Before: HOEKSTRA, P.J., and RONAYNE KRAUSE and BOONSTRA, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of embezzlement by a person of trust in an amount between $1,000 and $20,000, MCL 750.174a(4)(a), and fraudulent use of a financial transaction device, MCL 750.157q. The trial court sentenced defendant to 90 days in jail and to five years' probation for each offense. We vacate and remand for a new trial.

I. BASIC FACTS AND PROCEDURAL HISTORY

Defendant's convictions arose out of her role as legal guardian of her biological mother, Kathleen Cavinder, who suffered a brain aneurysm that impaired her short term memory, and allegations that between January, 2008 and June, 2009, defendant embezzled money from Kathleen and fraudulently used her credit cards. During the years defendant served as guardian, defendant drove from her home in Baroda, Michigan, to Kathleen's home in Elkhart, Indiana, every Wednesday. In early 2009, defendant arranged for Kathleen's mail to be sent to her Michigan residence, and shortly thereafter, Kathleen began complaining to her brother, Ken Cavinder, about defendant's performance as her guardian. Suspecting defendant was embezzling money from Kathleen, Ken filed a report with Detective Steve Nash of the Indiana State police. In the course of his investigation, Nash discovered that numerous purchases during 2008 and 2009 were made with Kathleen's credit cards in Baroda, Michigan, and that several checks from Kathleen's accounts were made out to defendant's husband. At trial, defendant testified that Kathleen gave defendant permission to take money from Kathleen's accounts because she was struggling financially. According to defendant, Kathleen agreed to treat this money as reasonable compensation for defendant's guardianship services. Kathleen denied entering into such an agreement, and testified that she never consented to defendant using her money.

On November 2, 2011, the jury convicted defendant of fraudulent use of a financial transaction device and embezzlement by a person of trust in an amount between $1,000 and

$20,000. The trial court held a hearing on restitution following sentencing. At the restitution hearing, the prosecution presented a chart detailing defendant's transactions and requested $43,614.19 in restitution. Defendant did not appear. Arguing on her behalf, Ernest L. White III, defendant's trial counsel, reiterated defendant's assertion that Kathleen had authorized defendant to use her accounts. White argued that he had given the prosecution's chart to defendant and that defendant stated she owed $3,300 of the $43,614.19 total. The trial court ordered $43,614.19 in restitution.

On December 4, 2012, defendant filed a motion with this Court to remand for an evidentiary hearing, arguing that she received ineffective assistance of counsel at trial and at the subsequent restitution hearing. Defendant argued that at trial, White failed to admit into evidence documents that corroborated defendant's testimony, failed to adequately question defendant on documents that had been admitted, and failed to explain to the jury the exculpatory nature of these documents. Defendant furthered argued that during the restitution hearing, White neglected to admit certain documents to challenge the amount requested by the prosecution. On January 10, 2013, this Court granted defendant's motion to remand for an evidentiary hearing to determine whether defendant received ineffective assistance of counsel at trial and at the restitution hearing. See *People v Thain*, unpublished order of the Court of Appeals, entered January 10, 2013 (Docket No. 308127).

Following the *Ginther*[1] hearing, the trial court denied defendant's motion for a new trial and a new restitution hearing, finding that defendant did not satisfy either prong of the ineffective assistance of counsel test as required in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984), reh den 467 US 1267; 104 S Ct 3562; 82 L Ed 2d 864 (1984). Specifically, the trial court held that defense counsel's stated trial strategy of depicting the case as a "bookkeeping nightmare" and attempting to convince the jury that defendant acted accidentally, rather than intentionally, was sound trial strategy and that, therefore, defendant's actions in failing to admit certain pieces of evidence was not objectively unreasonable. Further, the trial court found that, even if defense counsel acted unreasonably, no evidence existed that was likely to change the jury's conclusion that defendant had, deliberately and without authorization, used Kathleen's money to pay defendant's mortgage and tax payments. Therefore defendant could not demonstrate that her defense counsel's actions were outcome determinative.

II. INEFFECTIVE ASSISTANCE OF COUNSEL—TRIAL

Defendant first argues that her trial counsel was ineffective for a variety of reasons. Claims of ineffective assistance of counsel involve mixed questions of law and fact. *People v Gioglio (On Remand)*, 296 Mich App 12, 19; 815 NW2d 589, vacated in part on other grounds 493 Mich 864 (2012). This Court reviews the trial court's findings of fact for clear error, and reviews de novo questions of constitutional law. *Id*. at 19-20. To establish ineffective assistance of counsel, a defendant must demonstrate that her counsel's performance fell below an objective

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

standard of reasonableness and that she suffered prejudice as a result. *People v Armstrong*, 490 Mich 281, 290; 806 NW2d 676 (2011); *Strickland*, 466 US at 687-693. A defendant bears the burden of establishing the factual predicate for a claim of ineffective assistance of counsel. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

A. FIRST *STRICKLAND* PRONG

Defendant first contends that defense counsel admitted an exhibit, Trial Exhibit C, without understanding it, and as a result, failed to demonstrate to the jury the importance of the document. During his case-in-chief, defense counsel admitted Trial Exhibit C, a January, 2008, credit card statement from Kathleen's Teacher's Credit Union (TCU) account with a balance of $14,148.97. Defense counsel conceded at trial that he did not know what the document was. Defendant also asserts that defense counsel did not read a large portion of relevant discovery material and failed to admit documents into evidence that would have corroborated defendant's testimony, undermined Kathleen's testimony, and would have contradicted assertions made by the prosecution during closing arguments. The discovery material consisted of several of Kathleen's credit card statements, including the TCU statements before January, 2008.

Defense counsel's conduct with regard to Trial Exhibit C was objectively unreasonable. Counsel conceded that he did not know what Exhibit C was, and he neither asked defendant questions about Exhibit C nor mentioned the exhibit in his closing argument. Although this Court "will not second-guess strategic decisions with the benefit of hindsight," *People v Dunigan*, 299 Mich App 579, 590; 831 NW2d 243 (2013), we can find no strategic value in trial counsel admitting an exhibit but failing to explain its significance to the jury. Further, Exhibit C would have supported defendant's testimony that Kathleen's frivolous spending caused her to incur a large credit card debt and a high interest rate. Thus, defense counsel's failure to explain this exhibit was objectively unreasonable.

We also conclude that defense counsel's failure to review financial statements from the years prior to 2008 was objectively unreasonable. Defense counsel explained that because the embezzlement charge concerned financial transactions after January, 2008, he believed the discovery material, which contained documents dated before 2008, was irrelevant. Defense counsel has a duty to "prepar[e], investigat[e], and present[] all substantial defenses." *People v Chapo*, 283 Mich App 360, 371; 770 NW2d 68 (2009). "[A] court must determine whether the strategic choices [were] made after less than complete investigation," and "any choice is reasonable precisely to the extent that reasonable professional judgments support the limitations on investigations." *People v Trakhtenberg*, 493 Mich 38, 52; 826 NW2d 136 (2012) (quotations omitted; alteration in original). Because defense counsel did not read any pre-2008 discovery material, he was incapable of making an informed decision as to whether to admit the documents at trial. Based on the January, 2008 TCU statement that he admitted as Exhibit C at trial, defense counsel should have reviewed the 2007 TCU statements to determine who was responsible for the $14,148.97 balance. See *People v Grant*, 470 Mich 477, 488; 684 NW2d 686 (2004) ("Counsel had readily available to him information that should have prompted further inquiries."). Had defense counsel looked at the TCU statements, he would have noticed that during 2007, over $15,000 was spent near Elkhart, Indiana, where Kathleen lived, while only $68 was spent near Baroda, Michigan, where defendant lived. As Kathleen maintained throughout trial that she only shopped near Elkhart, these statements would have been consistent

with defendant's testimony that Kathleen spent frivolously. Thus, the TCU credit card statements would have questioned Kathleen's credibility. Although "[d]ecisions regarding what evidence to present . . . and how to question witnesses are presumed to be matters of trial strategy, as is a decision concerning what evidence to highlight during closing argument," *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008) (citation omitted), by failing to investigate and admit the pre-2008 TCU statements, question defendant about Trial Exhibit C, and mention Exhibit C in closing argument, defense counsel undermined his argument that there was no evidence that Kathleen was missing money, and he afforded the prosecution the ability to argue in closing that the $14,148.97 balance set forth by Exhibit C was evidence of Kathleen's missing money. Defendant has overcome the presumption of trial strategy because defense counsel's decisions regarding Trial Exhibit C and the rest of the TCU documents were not the product of a complete investigation. See *Trakhtenberg*, 493 Mich at 52.

Further, admission of the pre-2008 records would have supported defense counsel's stated strategy of presenting the case as a "bookkeeping nightmare" and would have bolstered defendant's credibility by corroborating her testimony regarding Kathleen's spending habits. Although this Court defers to counsel's strategic decisions, "counsel's failure to investigate and substantiate defendant's primary defense was not a strategic decision, erroneous only in hindsight. It was a fundamental abdication of his duty to conduct a complete investigation, and it restricted his ability to make reasonable professional judgments and put forth his case." *Grant*, 470 Mich at 480.

Defendant also argues that defense counsel was ineffective for failing to obtain a box of documents, allegedly in the control of the victim, that according to defendant contained documentary evidence that supported her testimony that she reimbursed the victim in cash for some expenditures and otherwise had the victim's permission to use her money. However, although there was testimony at trial concerning such a box, the box was not produced at trial or at the *Ginther* hearing. Because defendant did not establish the factual predicate for this claim, White's failure to obtain the box was not objectively unreasonable, and as such, defendant cannot demonstrate deficient performance in this regard. See *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003).

Finally, despite defense counsel's characterization of his trial strategy at the *Ginther* hearing, at trial defendant testified that she had received the victim's permission to use her funds to pay certain personal expenses, that some amounts were reimbursed by defendant in cash, and that defendant and the victim had an agreement that other funds would not be repaid but would instead be considered compensation for defendant's services as a guardian. Defense counsel argued at closing arguments that defendant was entitled to reasonable compensation as a guardian. Thus, it appears that notwithstanding counsel's (and the trial court's) characterization, defense counsel did not rely entirely on the "bookkeeping nightmare" strategy but also argued that defendant had permission or authorization to use at least some of the victim's funds. This argument would have been aided by documentary evidence that corroborated defendant's testimony and bolstered her credibility.

At the evidentiary hearing, defense counsel was presented with discovery documents detailing two credit card accounts in the victim's name: a Bank of America credit card account opened with zero percent interest in May, 2008, and a Citibank credit card account opened in

November, 2007. The Citibank statements indicated that between November, 2007 and March, 2008, approximately $3,000 was spent near Elkhart, Indiana. While the statements from November, 2007, through February, 2008 were sent to Kathleen's Indiana residence, the March, 2008 statement was addressed to defendant's Michigan residence. White acknowledged that these Citibank credit card statements supported defendant's assertion that Kathleen was recklessly spending her money and that defendant changed Kathleen's mailing address to Michigan upon discovering Kathleen's excessive expenditures. Furthermore, the Bank of America documents indicated that balance transfers were made to the Bank of America account from the victim's high interest accounts with Citibank and Discover, and that no purchases were made using the Bank of America credit card. Defense counsel conceded that the Bank of America records were consistent with defendant's testimony that she opened a zero percent interest credit card account and transferred balances to it in order to pay off the high interest Citibank and Discover credit cards. Not only would the Bank of America records have strengthened defendant's credibility, they also would have contradicted Kathleen's assertion that defendant maxed out the credit cards defendant opened in her name, thereby undermining Kathleen's credibility. We conclude that defense counsel's failure to investigate and/or enter this documentary evidence was objectively unreasonable.

The trial court appears to have concluded that defense counsel's choice of a "bookkeeping nightmare" strategy over a "consent" strategy was a reasonable choice of trial strategy, and that therefore defense counsel's failure to investigate or present the evidence described above was also strategic—part of a plan to keep "the jury as confused as possible." However, the trial court did not explain how defense counsel's failure to introduce documentary evidence that corroborated defendant's testimony, bolstered defendant's credibility, and undermined Kathleen's credibility was part of a sound trial strategy. "[A] court cannot insulate the review of counsel's performance by calling it trial strategy." *Trakhtenberg*, 493 Mich at 52. Defendant's allegations of ineffective assistance of counsel went beyond a mere choice of trial strategies. We conclude that defense counsel failed to exercise reasonable professional judgment in conducting his investigation into this case, and that this failure lead to a failure to develop support for counsel's theory of the case, whether that theory was that defendant's actions were accidental rather than purposeful or that defendant had the victim's permission to use her funds. *Id*. at 53-54.

B. SECOND *STRICKLAND* PRONG

Having concluded that defense counsel performed unreasonably at trial, we find that defendant is also able to demonstrate prejudice. "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Strickland*, 466 US at 693. Rather, to show prejudice, the defendant must establish that, but for counsel's unprofessional acts or omissions, there is a reasonable probability that the result of the proceeding would have been different. *Armstrong*, 490 Mich at 290. In considering the effect of counsel's errors on the outcome of the trial, we "keep[] in mind that some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect." *Id*. at 23 (internal quotation omitted).

Here, the essential issue at trial was whether defendant had received authorization from Kathleen to use her funds for defendant's personal use. Kathleen testified, among other things,

that defendant "maxed out her credit cards." During closing arguments, defense counsel argued that the prosecution had not demonstrated where any "missing money" was, to which the prosecution stated "It's in the credit card debt. That's where it is."

As stated above, defense counsel was in possession of evidence that would counter Kathleen's claim that defendant "maxed out" her credit cards. Had defense counsel fully investigated the discovery materials provided, counsel could have presented evidence indicating that defendant in fact took steps to reduce Kathleen's credit card balances, and that the bulk of the TCU credit card's balance was accrued through purchases made in Indiana prior to 2008.

Kathleen was established as having memory problems. Evidence that she also had a problem with frivolous spending and that most of her expenditures were made in her home town would undermine her credibility in asserting that money was "missing" or that she would necessarily "kn[o]w darn well" that she did not make any particular purchases. We conclude that defense counsel's failure to fully investigate the financial evidence in this case rendered him unable to effectively cross examine Kathleen and attack her credibility. Such cross-examination would have been a "direct attack on the factual basis" of the prosecution's theory, which hinged on Kathleen's testimony that she never authorized defendant to use her funds. See *Grant*, 470 Mich at 495; see also *Trakhtenberg*, 493 Mich at 56 ("[T]he reliability of defendant's convictions was undermined by defense counsel's failure to introduce impeachment evidence and evidence that corroborated defendant's testimony."); see also *Armstrong*, 490 Mich at 292 ("[A] reasonable probability exists that this additional attack on the complainant's credibility would have tipped the scales in favor of finding a reasonable doubt about defendant's guilt."). This attack on Kathleen's credibility and memory issues may well have affected the jury's view of Kathleen's testimony regarding not only the credit cards but the checks and other funds as well. We conclude that defense counsel's failure to make such an attack, engendered by counsel's failure to adequately investigate and prepare for cross-examination, "tipped the scales" of the credibility determination, the central issue in this case. *Armstrong*, 490 Mich at 292.

We therefore vacate defendant's convictions and remand for a new trial on the grounds that defendant was denied the effective assistance of counsel.

III. INEFFECTIVE ASSISTANCE OF COUNSEL—RESTITUTION HEARING

Defendant also alleges that she was denied effective assistance of counsel at her restitution hearing because defense counsel failed to rebut the amount requested by the prosecution for restitution. Although our conclusion that defendant was denied the effective assistance of counsel at trial relieves this Court of the necessity of addressing this issue, see *People v Richmond*, 486 Mich 29, 35; 782 NW2d 187 (2010), we note that the record contains sufficient evidence for us to make the independent conclusion that defendant was denied the effective assistance of counsel at the restitution hearing.

At the restitution hearing, the trial court awarded $43,614.19 in restitution. Defense counsel testified that his strategy at the restitution hearing was to have defendant indicate the

portions of the restitution amount requested by the prosecution that she believed should have been excluded from the total amount sought. Defense counsel testified at the *Ginther* hearing that the trial court provided notice of the hearing[2] and that he was surprised at defendant's nonattendance, and that he was prepared to put defendant on the witness stand at the hearing. However, defense counsel also admitted that he was aware that the trial judge scheduled a separate restitution hearing due to the complexity of the matter, yet nonetheless made no effort to gather any documentation to aid his representation of defendant, but instead relied on defendant to bring documents to the restitution hearing that would have disputed the amount requested by the prosecution, and he did not contact defendant during the two-month period between defendant's sentencing and the restitution hearing. In fact, defense counsel's sole preparation for the restitution hearing appears to have been limited to physically attending the hearing and bringing his case file. The hearing lasted approximately two minutes.

We conclude that defense counsel's conduct at the restitution hearing was objectively unreasonable. Although White relayed defendant's claim at the restitution hearing that she was responsible for $3,300 of the $43,614.19 requested by the prosecution, White did not make any effort to support this assertion. In *Grant*, 470 Mich at 497, the Supreme Court noted that "[w]hen defense counsel agreed to represent defendant, he committed himself to conducting an adequate investigation of the case." Because White failed to conduct his own investigation into how the prosecution arrived at $43,614.19 or provide any support for the $3,300 restitution amount that he proposed, his performance at the restitution hearing fell below an objective standard of reasonableness. See *id*.

The trial court found that defense counsel's performance was not objectively unreasonable at the restitution hearing because "Defense Counsel was able to explain the basis for Defendant's objections." However, the transcript of the restitution hearing (which encompasses less than five pages and contains six sentences of substantive argument on the part of defense counsel) indicates that defense counsel merely stated defendant's belief that she was only responsible for $3,300 of the restitution amount. We conclude that such cursory representation was objectively unreasonable in light of the complex nature of the restitution award in this case. See *Grant*, 470 Mich at 497.

Defendant is also able to demonstrate that her counsel's performance prejudiced her. Defendant argues on appeal that an $18,863 withdrawal from Kathleen's retirement account should not be included in the restitution award because she used this money to pay Kathleen's credit card debt. TCU credit card statements presented at the *Ginther* hearing indicate that Kathleen's TCU credit card balance was $13,653.49 as of December 14, 2007. On February 28

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[2] The record reflects that notice of the hearing was served on the parties "and/or" the attorneys of record more than two months before the hearing; the order also states that defendant was in jail at the time the order was issued but does not, contrary to defendant's claim, contain any notation that indicates the notice was *not* actually sent to her directly. This Court is unable to determine from the face of the order whether the notice was sent to defendant directly or only given to defendant's attorney.

and March 13 of 2008, two payments totaling $7,280 were made, reducing the balance from $13,836.70 to $6,665.41. Additionally, only minor charges were made on the card in early 2008; these charges total considerably less than $7,280. The financial documents presented at the *Ginther* hearing support defendant's claim that she used $7,280 of the $18,863 withdrawal to pay Kathleen's credit card debt. The statements indicate that the $7,280 payment went towards the payment of primarily 2007 charges. As stated above, documentary evidence submitted at trial indicated that the TCU credit card charges made in 2007 were made in Indiana, which is circumstantial evidence that they were made by Kathleen. Additionally, defendant was not charged for any conduct that occurred in 2007. Thus, the record suggests that at least a portion of the $7,280 was used to pay for expenses that were incurred by the victim, or in any event for expenses that were outside the scope of restitution. MCL 780.766(2) requires the trial court to order that a defendant "make full restitution to any *victim of the defendant's course of conduct that gives rise to the conviction*." Emphasis added. Expenses incurred by the victim in 2007 could not be part of defendant's conduct that gave rise to the conviction, which per the amended felony information, occurred from January 1, 2008 to June 30, 2009. Had defense counsel provided adequate representation to defendant at the restitution hearing, it is probable that the outcome of the restitution hearing would have been different. Defendant can therefore demonstrate prejudice. *Armstrong*, 490 Mich at 290; *Strickland*, 466 US at 687-693.

Vacated and remanded for a new trial. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ Amy Ronayne Krause
/s/ Mark T. Boonstra