STATE OF MICHIGAN
COURT OF APPEALS

People of the State of Michigan — Unpublished

Plaintiff-Appellee — January 23, 2018

v

No. 335756

JoEllen Mary Crossett — Emmet Circuit Court

Defendant-Appellant — LC No. 16-004277-FH

Before: Meter, P.J., and Borrello and Boonstra, JJ.

PER CURIAM.

Defendant appeals as of right her conviction following a jury trial on three counts of assaulting, resisting, and obstructing police officers. MCL 750.81d(1). She was sentenced to three nine-month terms of imprisonment, to be served consecutively. For the reasons set forth in this opinion, we affirm.

BACKGROUND

This appeal arises from an incident which took place on May 23, 2015 in Emmet County. On that date

Sheriff's deputies Cody Wheat and Fuller Cowell went to Defendant's residence to arrest her pursuant to a valid warrant. She initially refused commands to place her hands on her head, then resisted being handcuffed, resisted being moved toward the patrol car, and at one point, spit in one of the officer's faces. The actions taken by Plaintiff in resisting arrest were captured by police video and played for the jury. Defendant was convicted as charged and sentenced as indicated above.

Following her conviction, Defendant raised an issue concerning the effectiveness of her trial counsel. Defendant claimed that her trial counsel was ineffective for failing to challenge three prospective jurors for cause, thereby, according to Defendant, leaving her without sufficient peremptory challenges to ensure that she received an impartial jury. This court remanded the matter to the trial court to conduct a Ginther [1] hearing.

1 *People v Ginther,* 390 Mich 436; 212 NW 2d 922 (1973)

At the Ginther hearing it was revealed that during voir dire, three jurors stated they knew people involved in the trial. One of the jurors was Emmet County Medical Examiner (ME) who told counsel that in his capacity as ME he knew both officers. The trial court inquired if knowing the two officers would affect the ME's ability to remain impartial as a juror. The ME explicitly stated that he would not characterize his relationship with either witness as that of a "personal friend or acquaintance," that neither had ever been a guest at his house, that he had never been a guest at either of their houses, and that nothing about his knowledge of the witnesses would affect his impartiality. Even so, defendant requested that defense counsel have the ME dismissed. Defense counsel obliged and the ME was dismissed by means of peremptory challenge.

The trial court's spouse was also a prospective juror who was excused by use of a peremptory challenge. Her dismissal was again the result of defendant's request made to trial counsel.

A third prospective juror stated that Wheat was the liaison officer at the school where she worked. She added that she saw him once per week in passing and at occasional staff meetings and security drills. She told the trial court that she had never been a guest in Wheat's home, nor had he been a guest in hers. She furthered stated that she had no association with Wheat outside of school, and she stated that there was

nothing about her knowledge of him that would affect her impartiality, that she would be able to listen to his testimony and judge it in the same way she would judge the testimony of a complete stranger, and that she knew nothing of defendant or her case prior to trial. Following the trial court's questions, trial counsel asked her if she would be able to hold plaintiff to its burden of establishing the elements of the alleged crimes beyond a reasonable doubt, and if-in the event that a verdict of not guilty was returned-she would be able to continue seeing Wheat in school. To both inquiries, she responded in the affirmative. Notwithstanding her answers to all questions, defendant requested that her trial counsel exercise a peremptory challenge and he obliged.

When questioned during the Ginther hearing as to why he did not challenge any of the three complained of jurors for cause, trial counsel testified that he "consider[ed] all the qualifications of any juror, and whether or not [he could] legally have someone discharged for cause." He testified that in his opinion there was no legal basis on which he could have attempted to remove any of the three jurors at issue for cause. He explained that he used peremptory challenges to dismiss them only because it was defendant's desire that they not remain on the jury during trial.

The trial judge found that defendant had failed to establish ineffective assistance of counsel. This appeal then ensued.

Analysis

On appeal, defendant argues that trial counsel provided ineffective assistance of counsel by failing to challenge the three jurors for cause.

"Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc,* 466 Mich 575, 579 (2002). This court reviews the trial court's findings of fact for clear error. Id. The clear error standard establishes that trial court findings of fact may not be set aside unless clearly erroneous. MCR 2.613(C)

Appropriate deference must be given to the unique opportunity of the trial judge to determine the credibility of witnesses appearing before the court. Id. This court reviews the trial court's conclusions of constitutional law de novo. *LeBlanc,* 465 Mich at 579.

The Constitution of the United States and the Constitution of the State of Michigan both guarantee the right of a defendant in a criminal trial to effective assistance of counsel. U.S. Const, Am VI: Const 1963, art lll, ; 20. The time-honored test to determine

Whether there is any merit to a defendant's claim of ineffective assistance of counsel was laid out by the Supreme Court in *Strickland v Washington,* 466 U.S. 668, 687;104 S Ct. 2052, 2064 (1984). To successfully warrant the reversal of a criminal conviction, the convicted defendant must satisfy two elements: (1) That the counsel for the defense was deficient; and (2) That the deficient performance prejudiced the defense. Id.

As to the first element, the Supreme Court has said that to demonstrate the requisite deficiency, the defendant must show that the defense counsel made errors "so serious that counsel was not functioning as the "counsel" guaranteed to the defendant by the Sixth Amendment." Id. The proper standard for the performance of an attorney is objective; that of the reasonably effective attorney. At 687-88. This requires the complaining defendant to show that defense counsel's performance fell below an objective standard of reasonableness as determined by prevailing professional norms. Id. That said, the court has explicitly stated that judicial scrutiny of an attorney's performance must be "highly deferential." Id. Courts are instructed to begin with a strong presumption that attorneys act with sound judgment and in the best interests of their clients. Id. this is in the effort to avoid the pitfall of evaluating an attorney's performance at the time of trial with the

Benefit of hindsight. Id. In effect, to overcome this presumption, defendants must prove that, under the circumstances at the time of counsel's actions, the challenged actions could not be considered "sound trial strategy." Id. Courts should determine whether, given the circumstances present at the time of counsel's actions, "the identified acts of omissions were outside the wide range of professionally competent assistance." Id.

The second prong of the Strickland test requires that the claimed deficiency have an actual effect on the judgment. Id. At 691 Even if defense counsel's performance was objectively unreasonable, it does not warrant setting aside the conviction if the deficiency had no effect on the judgment. Id. The defendant must demonstrate that counsel's errors were actually prejudicial. Id. At 693. The Supreme Court was clear in stating that it is not enough for the defendant to show that their counsel's errors had "some conceivable effect on the outcome of the proceeding." Id. However, that is not to say that the court requires the defendant to show that a deficient performance more likely than not adversely affected the judgment. Id. Instead, the 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." Id. At 694. A reasonable probability is one that is sufficient to

undermine confidence in the outcome. Id. Much like the presumption in favor of finding effective counsel, courts are to begin with the presumption that finders of fact-whether judges or juries-base their decisions within the bounds of law. Id. At 694-95.

In *Hughes v United States,* 258 F 3d453. 457 (CA 6, 2001), citing *Nguyen v Reynolds,* 131 F3d 1340, 1349 (CA 10, 1997), the Sixth Circuit added relevant guidance on the application of these standards to counsel in conducting voir dire. Counsel is to be afforded particular deference when conducting voir dire, and counsel's actions in doing so are to be considered matters of trial strategy. However, if an impaneled jurors answers to questions raised during voir dire would have given rise to a valid challenge for cause, a defendant may obtain a new trial on the basis of defense counsel's failure to strike the juror. *Hughes,* 258, F3d 453 at 457-58, citing *Mcdonough Power Equip, Inc v Greenwood,* 464 U.S.548, 556; 104 S Ct. 845 (1984) (stating that "to obtain a new trial [where a juror gives a mistaken but honest response to a question during voir dire], a party must first demonstrate that a juror failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause. The motives for concealing information may vary, but only those reasons that affect a juror's impartiality can truly be

said to affect the fairness of a trial.")

In *Ross v Oklahoma,* 487 U.S. 81, 87-88; 108 S Ct 2273; 101 Led2d 80 (1988), the Supreme Court examined a jury trial where the trial court had erroneously denied the defendant's for cause challenge to one of the impaneled jurors, forcing the defendant to use a peremptory challenge. Even so, the court determined that this, alone, did not mandate reversal of the trial court's conviction. Id. At 87. The Court rejected the notion that the loss of a peremptory challenge, itself, constitutes a violation of the Sixth Amendment right to an impartial jury. Id. At 88. Indeed, so long as the jury that ultimately sits is impartial, the fact that the defendant needed to exercise a peremptory challenge-rather than a challenge for cause-is irrelevant. Id. The Sixth Circuit followed this line of reasoning in *United States v Tab,* 259 Fed Appx 684, 690-91 (CA 6, 2007). There, the court reasoned that, so long as the jury that is impaneled is impartial, it matters very little that prospective jurors were removed via challenges for cause or peremptory challenges. Id.

Here, defendant asks this Court to engage in speculation and find that if defendant had the use of the three peremptory challenges used to dismiss the jurors at issue, she would have been granted a more

favorable jury. See *Ross,* 487 U.S. at 87 stating in relevant part: "although we agree that the failure to remove Huling may have resulted in a jury panel different from that which would have otherwise have decided the case, we do not accept the argument that this possibility mandates reversal." There is, of course, no record evidence to support a conclusion that defendant would have been granted a more favorable jury. Further, there is no legal requirement that a defendant be granted a more favorable jury, rather the Sixth Amendment commands that the defendant receive, among other considerations, an impartial jury. See *Ross,* 487 U.S. at 88. Furthermore, as recognized in Ross, peremptory challenges are a means "to achieve the end of an impartial jury. So long as the jury that sits is impartial, the fact that a defendant had to use a peremptory challenge to achieve the result does not mean the Sixth Amendment was violated." Id. Indeed, the defendant makes no argument that the jury that decided this case was biased. In the absence of any such arguments, we are compelled to find, as did the trial court, that defendant has failed to address, much less prove, either of the two prongs of *Strickland.* Therefore, in the absence of proof that there existed proper legal reasons to challenge any of the complained of jurors for cause or that defendant suffered any prejudice as a failure of trial counsel to make such challenges, we concur with the trial court

that defendant has failed to demonstrate that trial counsel did not render effective counsel as guaranteed by the Sixth Amendment and by the Constitution of the State of Michigan.

Affirmed.

/s/ Patrick Meter
/s/ Stephen L. Borrello
/s/ Mark Boonstra

COURT OF APPEALS, STATE OF MICHIGAN

ORDER

People of MI v JoEllen Mary Crossett
Docket No. 335756
LC No. 16-004277-FH

Amy Ronayne Krause
Presiding Judge
Stephen L. Borrello
Michael F. Gadola
Judges

The Court orders that the motion to remand is GRANTED, and this case is REMANDED to the trial court so that defendant may bring a motion in the trial court to supplement the factual record with respect to the issue of ineffective assistance of counsel pursuant to *People v Ginther*, 390 Mich 436: 212 NW2d 922 (1973)

Defendant shall initiate the proceedings on remand with 14 days of the date of this order. The Court retains jurisdiction and the time for proceeding with the appeal in this court shall begin to run upon issuance of an order in the trial court that disposes of the remand proceedings. Defendant shall file with this court a copy of any motion and supporting brief filed in the trial court within 14 days after the date of this order. Defendant shall also file with the clerk of this court copies of all orders entered on remand within 14 after entry. The trial court shall hear and decide the matter within 56

days of the date of this order. The trial court shall make appropriate determinations on the record. The trial court shall cause a transcript of any hearing on remand to be prepared at public expense and filed within 21 days after completion of the proceedings.

The time for proceeding with the appeal shall begin to run 14 days after the date of this order if a motion to initiate the proceedings on remand is not filed in the trial court within that 14-day period.

/s/ Amy Ronayne Krause
Presiding Judge

Court of Appeals of the State of Michigan 1965

A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on APR 20, 2017

/s/ Jerome W. Zimmer Jr.
Clerk

STATE OF MICHIGAN, IN THE
CIRCUIT COURT FOR THE COUNTY OF EMMET
THE PEOPLE OF THE STATE OF MICHIGAN
Plaintiff-Appellee,
Court of Appeals No. 335756

V

Emmet County Circuit Court No.16-4277-FH

JO ELLEN MARY CROSSETT
Defendant-Appellant
Circuit Court Judge Charles Johnson

Rachel Helton	Michael Schuitema (P72718)
Attorney for Defendant	Emmet County Prosecuting Attorney
300 River place Dr., Suite 5600	Attorney for Plaintiff-Appellee
Detroit, MI 48207	200 Division Street
(248)762-8265	Petoskey MI 49770
	(231)348-1725

ORDER DENYING MOTION FOR A NEW TRIAL
At a hearing held at the 57th Circuit Court on May 24, 2017, this Honorable Court holds Plaintiff-Appellant JOELLEN MARY CROSSETT's Motion for a new trial is DENIED.
Date: 6/5/17 /s/ Charles Johnson
Received by MCOA 6/16/2017 11:35:28 AM
Filed 57th Circuit Court 2017 JUN-5 A 8:45

ORDER

Michigan Supreme Court
July 3, 2018 Lansing Michigan
157359

Stephen J. Markman
Chief Justice

Brian K. Zarha
Bridget M. McCormick
David Viviano
Richard H. Bernstein
Kurtis T. Wilder
Elizabeth T. Clement
Justices

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,
V SC:157359
JOELLEN MARY CROSSETT COA:335756
Defendant-Appellant,
EMMET CC : 16-004277-FH

On order of the court, the application for leave to appeal the January 23, 2018 judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the question presented should be reviewed by this court.

Seal of the Michigan Supreme Court. Lansing I, Larry Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the court.

July 3, 2019 /s/ Larry Royster Clerk