Document: People v. Wheeler, 2018 Mich. App. LEXIS 1814

People v. Wheeler, 2018 Mich. App. LEXIS 1814

Court of Appeals of Michigan

April 24, 2018, Decided

No. 327634

Reporter

2018 Mich. App. LEXIS 1814 * | 2018 WL 1935976

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v TODD ALLEN WHEELER, Defendant-Appellant. PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v HOOPER JACKSON PARSLEY, Defendant-Appellant.

Notice: THIS IS AN UNPUBLISHED OPINION. IN ACCORDANCE WITH MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

Subsequent History: Leave to appeal denied by People v. Parsley, 920 N.W.2d 594, 2018 Mich. LEXIS 2507 (Mich., Dec. 21, 2018)

Leave to appeal denied by People v. Wheeler, 920 N.W.2d 586, 2018 Mich. LEXIS 2529 (Mich., Dec. 21, 2018)

Prior History: **[*1]** Kent Circuit Court. LC No. 14-010346-FH.

Kent Circuit Court. LC No. 14-010337-FH.

People v. Wheeler, 2016 Mich. App. LEXIS 1739 (Mich. Ct. App., Sept. 20, 2016)

Core Terms

trial court, incapable, sexual, sexual relations, cases, sever, reason to know, convictions, ineffective, joinder, joining, appellate counsel, cognitive, trial counsel, probability, untainted, credibility, Appeals, criminal sexual conduct, mental incapacity, special education, penetration, engaging, impaired, opined, ineffective assistance, sentenced, adaptive, harmless, counts

Judges: Before: SERVITTO ▾, P.J., and MARKEY ▾ and GLEICHER ▾, JJ.

Opinion

ON REMAND

PER CURIAM.

In these consolidated appeals, defendants appeal as of right their jury trial convictions, which were entered after a joint trial. In Docket No. 327634 defendant, Todd Allen Wheeler, was convicted of three counts of third-degree criminal sexual conduct (two counts of penis-vaginal penetration knowing or having reason to know that the victim is mentally incapable or mentally incapacitated and one count of penis-oral penetration knowing or having reason to know that the victim is mentally incapable or mentally incapacitated), MCL 750.520d(1)(c). Wheeler was sentenced as a second-offense habitual offender, MCL 769.10, to 14 to 22 years, 6 months' imprisonment on each count, with the sentences to run concurrently.

In Docket No. 327924 defendant, Hooper Jackson Parsley, was convicted of three counts of third-degree criminal sexual conduct (one count of penis-vaginal penetration knowing or having reason to know that the victim is mentally incapable or mentally incapacitated, one count of penis-oral penetration knowing or having reason to know that the victim is mentally incapable **[*2]** or mentally incapacitated, and one count of penis-anal penetration knowing or having reason to know that the victim is mentally incapable or mentally incapacitated), MCL 750.520d(1)(c). Parsley was sentenced as a repeat criminal sexual conduct offender, MCL 750.520f, and a fourth-offense habitual offender, MCL 769.12, to 14 to 30 years' imprisonment on each count, with the sentences to run concurrently.

We affirm in both cases.

I. BACKGROUND

These cases involve separate criminal sexual conduct charges lodged against each defendant for engaging in sexual relationships, each with a separate 18-year-old special education high school students. Wheeler rented a room from Parsley and resided in Parsley's home. Wheeler is also the father of one of the alleged victims, S.W., who was involved in a sexual relationship with Parsley. S.W. resided with her grandparents. The other alleged victim, E.S., had been friends with S.W. for years and the two attended school together. E.S. was involved in a sexual relationship with Wheeler. The individual sexual relationships began in September 2014, after both young women had attained 18 years of age. Defendants and the young women began their interactions by spending time at Parsley's home, and engaged **[*3]** in typical dating activities such as going to restaurants, shopping, and various community excursions. Although each defendant was charged separately for crimes relating to separate victims on unspecified dates, and each had a separate preliminary examination, at some point the trial court (sua sponte) determined that the matters would be tried jointly. Parsley's counsel moved to sever the trials but the trial court denied the motion indicating that it saw no reason to do so. At the conclusion of the trial before a single jury, defendants were each convicted of three counts of third degree criminal sexual conduct (CSC III), as indicated above.

On appeal, both defendants claimed there was insufficient evidence to support their convictions and in Docket No. 327924, Parsley additionally argued that the trial court erred in denying his pre-trial motion to sever the trials. *People v Wheeler*, 2016 Mich. App. LEXIS 1739, unpublished per curiam opinion of the Court of Appeals, issued September 20, 2106 (Docket Nos. 327634; 327924). We determined that there was sufficient evidence to support defendants' convictions but found that joinder of their trials was improper under MCR 6.121. *Id.* at 2016 Mich. App. LEXIS 1739, slip op. page 7. Thus, in Docket No. 327634, we affirmed **[*4]** defendant Wheeler's conviction, and in Docket No. 327924, we reversed defendant Parsley's conviction because the trial court erred as matter of law in joining his and Wheeler's charges for trial, and we remanded for a new, separate trial. *Id.* at 2016 Mich. App. LEXIS 1739, slip op. page 8.

The Michigan Supreme Court remanded the consolidated cases to this Court. In Docket No. 327634, the Supreme Court directed us to "address the defendant's claim, raised for the first time in this Court, that his appellate counsel was ineffective for failing to challenge on appeal: (1) the joinder of his and Hooper Jackson Parsley's trials; and (2) his trial counsel's ineffectiveness for failing to oppose that joinder." *People v Wheeler*, 500 Mich 1032; 897 NW2d 742 (2017). The Supreme Court directed that this Court should retain jurisdiction and first remand the matter to the trial court to conduct an evidentiary hearing to determine whether the defendant was deprived of his right to the effective assistance of trial and appellate counsel, and then, after conclusion of the circuit court remand proceeding, to address the ineffective assistance of counsel claims raised by defendant Wheeler. *Id.*

In Docket No. 327924, our Supreme Court vacated "that part of the judgment of the Court of Appeals reversing, **[*5]** without a showing of prejudice, the defendant's convictions because the trial court erred by joining his case with Todd Allen Wheeler's case for trial." *People v Parsley*, 500 Mich 1033; 897 NW2d 742 (2017). Our Supreme Court remanded the case to this Court for consideration of whether the error in joining Parsley and Wheeler's trials was harmless. *Id.*

In Docket No. 327634, this Court, pursuant to our Supreme Court's instruction and order, remanded Wheeler's case to the trial court to appoint counsel to represent Wheeler and to conduct a *Ginther* [1] hearing "to determine whether defendant was deprived of his right to the effective assistance of trial and appellate counsel." The trial court proceedings in Docket No. 327634 have now been concluded and supplemental briefs in both cases have been filed pursuant to orders of this Court. See, *People v Parsley*, unpublished order of the Court of Appeals, entered September

20, 2017 (Docket No. 327924); *People v Wheeler*, unpublished order of the Court of Appeals, entered December 28, 2017 (Docket No. 327634). Based on this Court's ruling and our Supreme Court's directives, the more logical progression is to begin our analysis with Parsley's remand, followed by Wheeler's.

II. DOCKET NO. 327924

This Court **[*6]** has determined that the trial court erred in failing to sever Parsley's trial from that of Wheeler. *Wheeler*, unpub op at 8. Our Supreme Court has implicitly concurred with this decision by vacating only the portion of this Court's judgment reversing Parsley's convictions "without a showing a prejudice," and by remanding the matter to this Court for consideration of "whether the error in joining [the] trials was harmless." *Parsley*, 500 Mich at 1033.

In accordance with MCL 769.26:

> No judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case, on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice.

Our Supreme Court has interpreted and explained this provision as follows:

> Section 26 places the burden on the defendant to demonstrate that "after an examination of the entire cause, it shall affirmatively appear that the error asserted has resulted in a miscarriage of justice." [R] eversal is only required **[*7]** if such an error is prejudicial and that the appropriate inquiry "focuses on the nature of the error and assesses its effect in light of the weight and strength of the untainted evidence." The object of this inquiry is to determine if it affirmatively appears that the error asserted "undermine[s] the reliability of the verdict." In other words, the effect of the error is evaluated by assessing it in the context of the untainted evidence to determine whether it is more probable than not that a different outcome would have resulted without the error. Therefore, the bottom line is that § 26 presumes that a preserved, nonconstitutional error is not a ground for reversal unless "after an examination of the entire cause, it shall affirmatively appear" that it is more probable than not that the error was outcome determinative. [*People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (citations and footnotes omitted).]

Thus, in making such a "determination, the reviewing court should focus on the nature of the error in light of the weight and strength of the untainted evidence." *People v Lyles*, 501 Mich 107, 118; 905 NW2d 199 (2017), quoting *People v Elston*, 462 Mich 751, 766; 614 NW2d 595 (2000).

There were several issues of concern as a result of joining Parsley and Wheeler's trials. Many of the trial witnesses testified about both alleged victims simultaneously, **[*8]** often making it confusing when determining which individual they were discussing. Further, during closing arguments, the prosecutor made statements implying that a degree of complicity existed between Parsley and Wheeler, despite Parsley's avowal that he did not discuss the relationship between him and S.W. with Wheeler, and the absence of any charge of conspiracy. For instance, the prosecutor stated:

> So I think it's obvious that there would be some sort of communication between these two men who lived together, who trust each other to be in each other's homes. Obviously, Mr. Parsley trusted that rent would be paid. Mr. Wheeler trusted that he could bring his daughter over into that home. So there's obviously a relationship between these two men. And, so the logical conclusion that you can draw is that at some point, either the two of them together, or all four of them had some communication together, in order to discuss likes, dislikes, you know. I mean, just anything that you could probably think of that roommates would be talking about, especially when their girlfriends were over. I'm using that term loosely.
>
> * * *
>
> We know that they all spent some sort of time together. Whether it **[*9]** was between June and September or from the middle of August through about the middle of September, time was spent. Time was spent between each of the defendants and each of the victims in this case, way more than any of us have spent.

It is also impossible in retrospect to fully ascertain the effect of the testimony elicited from E.S. and others pertaining to E.S. during the trial and whether the jury was able to fully compartmentalize the information being received from that relating to S.W. In addition, while instructing the jury at the conclusion of the trial, the trial court did not include a generalized instruction to emphasize that the charges against each defendant were to be treated or evaluated separately.

We acknowledge that while these issues are concerning, they do not necessarily dictate the result on remand based on the recognition that "incidental spillover prejudice . . . is almost inevitable in a multi-defendant trial[.]" *People v Hana*, 447 Mich 325, 349; 524 NW2d 682 (1994), amended 447 Mich. 1203, 524 N.W.2d 710 (1994). Rather, in ascertaining whether the erroneous joinder was harmless, the focus must be on the "untainted" evidence and whether "in the context of the untainted evidence . . . it is more probable than not that a different outcome would have **[*10]** resulted without the error." *Lukity*, 460 Mich at 495-596.

Parsley was charged with three counts of CSC-III, contrary to MCL 750.520d(1)(c), which states:

> (1) A person is guilty of criminal sexual conduct in the third degree if the person engages in sexual penetration with another person and if any of the following circumstances exist:
>
> * * *
>
> (c) The actor knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless.

The term "mentally incapable" is defined by MCL 750.520a(j) to mean "that a person suffers from a mental disease or defect that renders that person temporarily or permanently incapable of appraising the nature of his or her conduct." This Court has held that the statutory definition of "mentally incapable" encompasses "not only an understanding of the physical act but also an appreciation of the nonphysical factors, including the moral quality of the act, that accompany such an act," because this interpretation is supportive of "this Court's prior indications that the rationale behind the statutes prohibiting sexual relations with a mentally incapable person is that such a person is presumed to be incapable of truly consenting to the sexual act." *People v Breck*, 230 Mich App 450, 455; 584 NW2d 602 (1998). Because it is undisputed that sexual **[*11]** conduct between Parsley and S.W. occurred on at least three occasions, and both maintain that the conduct was voluntary, the evidence at trial focused on whether: (1) S.W. had the intellectual capacity to consent to engage in the sexual acts, and (2) Parsley knew or had reason to know of S.W.'s diminished intellectual capacity to consent. sexual relationship and Wheeler's knowledge or reason to know that E.S.'s competency to consent was compromised.

At the time of her sexual encounters with Parsley, S.W. was 18 years old and did not have a guardian. At trial, S.W. testified that she was currently attending and had been enrolled during her entire school career in special education classes, and that she had informed Parsley of this enrollment. She testified that she would sometimes complete homework at Parsley's home, with his assistance. S.W. asserted that she completed a health education class in high school that provided information on sexual matters and that upon turning 18 years of age, she elected to discontinue her use of birth control and to not use protection. S.W. indicated that she is aware of sexually transmitted diseases, such as AIDS, and that she was not concerned about **[*12]** the possibility of pregnancy.

Nicole Smith, the social worker at the school attended by S.W., reported that S.W. was categorized to be both emotionally and cognitively impaired, demonstrating less mature reactions to events or incidents. S.W. was described by Smith as being strong willed and believing that upon having attained the age of 18, she was no longer governed by any set of rules. Smith opined that S.W. lacked an awareness of the consequences of her actions and would repetitively engage in the same mistakes and behaviors. Smith acknowledged that S.W. was fully capable of conveying her thoughts and wishes.

Jason Maas, S.W.'s school psychologist, asserted that S.W. demonstrated difficulty in the regulation of her emotions and functioned academically at a first grade or second grade level. Although Maas had never administered tests to S.W. or engaged her in a discussion to ascertain her understanding of the repercussions of engaging in sexual acts, he opined that she did not comprehend the consequences of her actions.

Victoria Wilson, a limited licensed psychologist retained by Adult Protective Services (APS), evaluated S.W.'s need for a guardianship. S.W.'s testing resulted in a **[*13]** full-scale IQ range of 63 to 71, and a Vineland Adaptive Behavior Scale score of 69, placing her in the mild range of cognitive and adaptive impairment. Wilson believed that S.W. was capable of following simple two-step directions, but required prompting to routinely engage in daily hygiene and medication compliance. She opined that S.W. demonstrated impulsivity and anger, and would engage in behaviors that would place her at risk.

Parsley denied discussing his relationship with S.W. with her father (Wheeler), denied knowledge of her special education status, and disavowed any knowledge or suspicion of S.W.'s cognitive and adaptive deficiencies based on his interactions with her. When interviewed by police, Parsley admitted his sexual relationship with S.W., asserted his

belief she was using birth control, and denied that S.W. had any cognitive challenges or incapacities. Parsley acknowledged his own cognitive deficiencies by relating difficulties he had encountered in high school in being able to pass necessary examinations to join the military, and further asserted his own IQ was 71.

The testimony at trial suggested that S.W.'s ability to make informed and rational decisions was impaired. **[*14]** S.W. was prescribed birth control but upon attaining the age of 18 decided without consultation by medical personnel or others that she would discontinue its use, yet she did not fear pregnancy despite her sexual activity. S.W. expressed an awareness of sexually transmitted diseases but did not suggest that she had discussed this matter with Parsley, her sexual partner, or took precautions for self-protection. Testimony was elicited that S.W. was emotionally unstable and impulsive, and would repeatedly engage in behaviors that entailed risk and did not learn from her previous mistakes, albeit the testimony was not specific in providing examples of the alleged risky behaviors. Further contributing to the suggestion that S.W. was incapable of evaluating her needs, was testimony that she required prompting to engage in the most routine of daily health care tasks. S.W.'s election to discontinue birth control while sexually active, yet not be concerned with pregnancy, comported with Nicole Smith's testimony that S.W. was extremely strong-willed but lacked an awareness of the consequences of her actions. Although S.W. was opined to be capable of conveying her thoughts and wishes, the testimony **[*15]** implied that she was unable to contextualize her preferences or recognize the risks attributable to her choices.

As discussed in *People v Cox*, 268 Mich App 440, 446; 709 NW2d 152 (2005) (citation omitted), when evaluating the statutory language in MCL 750.520d(1)(c) pertaining to whether the actor "knows or has reason to know that the victim is mentally incapable" and the suggestion that this language was included in the statute in order to "protect[] individuals who have sexual relations with a partner who appears mentally sound, only to find out later that this is not the case," this Court has instead determined that "[t]he Legislature only intended to eliminate liability where the mental defect is not apparent to a reasonable person." Whether S.W.'s abilities were apparent to Parsley is called into question by Parsley's contention regarding his own restricted cognitive abilities and report of a full-scale IQ score that was not that dissimilar from the one attributed to S.W. Evidence, however, was introduced that Parsley's adaptive skills are such that he was able to serve in the army, live independently, and maintain gainful employment for a number of years following his discharge from the army, thereby demonstrating skills that exceed S.W.'s current levels **[*16]** of adaptive performance.

At this level, the dispute is one of credibility, with the jury's verdict indicating that Parsley should have suspected rather than simply accepted S.W.'s consent. The jurors observed S.W. on the witness stand and were able to judge whether her demeanor communicated her deficiencies or made her ability to consent suspect. Questions of credibility are solely within the purview of the jury. *People v Solloway*, 316 Mich App 174, 181-182; 891 NW2d 255 (2016).

In sum, there was abundant "untainted" evidence, independent of Parsley's relationship with Wheeler, to question both S.W.'s ability to consent to engage in a sexual relationship and Parsley's knowledge or reason to know that S.W.'s competency to consent was compromised. To the extent that Parsley's knowledge presented a question of credibility, the jury was charged with making that credibility determination and did so based on the untainted evidence. As such, while joinder of Parsley's and Wheeler's cases comprised error, the error was harmless because it is not more probable than not that the outcome, Parsley's jury convictions, would not have been different without the error.

III. DOCKET NO. 327634

Our Supreme Court remanded this matter, first requiring the trial court to **[*17]** conduct a *Ginther* hearing, and then requiring this Court to address Wheeler's contentions that his appellate counsel was ineffective for failing to challenge on appeal the joinder of the two cases, and that trial counsel was ineffectiveness for not actively opposing the joinder.

"[T]he test for ineffective assistance of appellate counsel is the same as that applicable to a claim of ineffective assistance of trial counsel. Hence, defendant must show that his appellate counsel's decision not to raise a claim of ineffective assistance of trial counsel fell below an objective standard of reasonableness and prejudiced his appeal." *People v Uphaus*, 278 Mich App 174, 186; 748 NW2d 899 (2008). Defendant must "overcome the presumption that his appellate counsel's decision [to not raise a claim of ineffective assistance of trial counsel] constituted sound strategy." *Id.* Resolution of this issue is contingent, to a significant degree, on the results and findings of the *Ginther* hearing, wherein the trial court's factual findings are entitled to deference. *People v Grant*, 470 Mich 477, 485 n 5; 684 NW2d 686 (2004). Such deference is afforded because of the trial court's opportunity to assess witness credibility. MCR 2.613(C); *People v Dendel*, 481 Mich 114, 130; 748 NW2d 859, amended 481 Mich 1201; 750 N.W.2d 165 (2008). In addition, the trial court was privy to the full context of the proceedings, having **[*18]** presided over the trial and sentencing. A finding is deemed to be clearly erroneous when, despite supporting evidence, this Court, on the whole record, is left with a definite and firm conviction that a mistake was made. *Id.*

On December 1, 2017, the trial court held a *Ginther* hearing to address Wheeler's claims of ineffective assistance of trial counsel. At the hearing, Wheeler's trial counsel, Donald Pebley, testified that he first became aware that Wheeler and Parsley would be tried together when he got a notice for status conference and trial. Pebley testified that he did not file a motion for severance and, when he became aware that Parsley's counsel filed a motion or severance, did not join in that motion because he did not feel that Wheeler and Parsley's defenses were inconsistent or antagonistic. He testified that, in some ways, he felt that having the cases tried together may be a positive thing because it may show that S.W. and E.S. discussed the relationships and were capable of understanding what they were doing. Pebley further testified that his defense strategy from the beginning, which he discussed with Wheeler, was that E.S. was competent to make a decision whether to **[*19]** have a sexual relationship with Wheeler and that defense did not change after the trial court denied Parsley's motion to sever the trials. Pebley testified that he did not encounter any difficulties pursuing his theory of the case because Wheeler's trial was joined with Parsley's, nor

was there any testimony or evidence admitted that he felt negatively impacted Wheeler's case in light of Parsley's case being presented as well. He testified that it "seemed to be identical."

While the qualitative nature of Pebley▼'s election to not challenge the joinder may not have comprised good trial strategy, it does qualify as a trial strategy; albeit not ultimately successful. "That this strategy backfired . . . later . . . does not render counsel's actions unsupportable." *People v Currelley*, 99 Mich App 561, 568; 297 NW2d 924 (1980). With respect to his failure concur in the motion to sever brought by Parsley's trial counsel, because the trial court denied Parsley's motion, Pebley▼'s concurrence would have been futile. The failure of Pebley▼ to file a futile motion cannot be construed to render him ineffective. *People v Brown*, 279 Mich App 116, 142; 755 NW2d 664 (2008).

Moreover, even if Pebley▼ could have established a meritorious basis for severance, to establish prejudice, Wheeler must demonstrate a reasonable probability **[*20]** that the outcome of his trial would have been different but for Pebley▼'s error. *Grant*, 470 Mich at 486.

> A reasonable probability need not rise to the level of making it more likely than not that the outcome would have been different. "The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." [*Id.* (citations omitted).]

Similar to the analysis in Parsley, there was abundant "untainted" evidence, independent of Wheeler's relationship with Parsley, to question both E.S.'s ability to consent to engage in a

Dale Smith, E.S.'s father, testified that E.S. had been in special education for the majority of her academic career and further testified regarding E.S.'s need for constant assistance or prompting to complete routine activities of daily living. Mr. Smith specifically asserted that he informed Wheeler of E.S.'s special education status and testified that he refused to grant Wheeler permission to date E.S. when Wheeler approached him regarding the relationship. Mr. Smith also, however, acknowledged E.S.'s ability to independently use public transportation and a **[*21]** moped, as well as a cellular telephone and a computer tablet, and testified that she had maintained supervised employment for a period of two to three months.

E.S. testified regarding her participation in special education and denied being pressured into have sexual relations with Wheeler. E.S. stated that she specifically waited until she attained 18 years of age before engaging in a sexual relationship with Wheeler and that he informed her of his medical issues of HIV and hepatitis. While E.S., however, asserted that they used a condom for vaginal sex, she did not use any form of protection when engaging in oral sex with Wheeler and did not know what semen was despite asserting a familiarity with what comprised sexually transmitted diseases and a desire to avoid pregnancy.

Nicole Smith confirmed that E.S. is considered to be cognitively impaired and described her as a "follower" and easily manipulated. Jason Maas testified that E.S. is cognitively impaired within the mild range and opined that she is at risk for being taken advantage of and is vulnerable. He further testified that E.S. was incapable of understanding the long-term consequences of her actions. Victoria Wilson tested **[*22]** E.S. and obtained a full-scale IQ score of 67 to 75, confirming her placement within the mild range of cognitive impairment. E.S. was able to comply with or follow simple two-step directions that were concrete but needed prompts to comply with more complex instructions. Wilson recommended the appointment of a partial guardian for E.S. Based on the evidence at trial, it is unlikely that even if Wheeler's trial counsel was ineffective for failing to seek severance that Wheeler would have been acquitted of the charged offenses, particularly given his admission to engaging in the sexual acts with E.S. The final issue for this Court to address is whether Wheeler's appellate counsel was ineffective for failing to raise the trial court's decision to join, and refusal to sever, the two cases for trial as an issue on appeal. Daniel Rust, Wheeler's appointed appellate counsel, testified at the *Ginther* hearing that he considered the facts that Wheeler and Parsley's cases had been joined for trial and a motion to sever the trials had been denied when preparing an appeal brief on Wheeler's behalf. Rust testified that he did not raise the joint trial as an issue on appeal because Wheeler did not **[*23]** want him to raise the issue. According to Rust, Wheeler stated that he was innocent and did not want a new trial but that the Court of Appeals should "dismiss" his case. Wheeler, on the other hand, testified at the *Ginther* hearing that Rust never talked to him about raising the joinder of the trials as an issue on appeal. Wheeler further testified that he wants a new trial.

At the conclusion of the *Ginther* hearing, the trial court opined that he found attorneys Pebley▼ and Rust to be credible witness. The trial court stated that it did not believe Wheeler was a credible witness. The trial court stated that it believed Wheeler to be mentally challenged and having a propensity "to say whatever he wants to assist his counsel in this matter to try and get this case reversed and remanded either for a new trial or dismissed." The trial court stated that it did not believe that there had been a sufficient showing that Pebley▼ or Rust was ineffective and "[a]ccordingly, you can take it to the Court of Appeals and let them deal with it."

Even if this Court were to find that appellate counsel was ineffective for failing to raise this issue on appeal, that does not conclude our analysis. To establish **[*24]** prejudice, it is incumbent on a defendant to demonstrate that, but for the alleged error of counsel, there is a reasonable probability that the outcome would have been different. Consistent with the analysis of Parsley's claim, to the extent that appellate counsel could have established that joinder of the two cases for trial was improper, this error was harmless. Therefore, Wheeler cannot demonstrate actual prejudice because he is unable to establish "a reasonable probability that the outcome would have been different but for counsel's errors." *Grant*, 470 Mich at 486.

We affirm the convictions in both cases.

/s/ Deborah A. Servitto

/s/ Jane E. Markey

/s/ Elizabeth L. Gleicher

30860 JJM

Order

December 21, 2018

157970

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 157970
COA: 327634
Kent CC: 14-010346-FH

TODD ALLEN WHEELER,
Defendant-Appellant.

/

On order of the Court, the application for leave to appeal the April 24, 2018 judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

I, Larry S. 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.

December 21, 2018

Clerk

t1217

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TODD ALLEN WHEELER,

Defendant-Appellant.

UNPUBLISHED
September 20, 2016

No. 327634
Kent Circuit Court
LC No. 14-010346-FH

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HOOPER JACKSON PARSLEY,

Defendant-Appellant.

No. 327924
Kent Circuit Court
LC No. 14-010337-FH

Before: SERVITTO, P.J., and MARKEY and GLEICHER, JJ.

PER CURIAM.

In these consolidated appeals, both defendants appeal as of right their jury trial convictions.

In Docket No. 327634, defendant Todd Allen Wheeler was convicted of three counts of third-degree criminal sexual conduct (counts one and two, penis-vaginal penetration knowing or having reason to know that the victim is mentally incapable or mentally incapacitated; count three, penis-oral penetration knowing or having reason to know that the victim is mentally incapable or mentally incapacitated), MCL 750.520d(1)(c). Wheeler was sentenced as a second-offense habitual offender, MCL 769.10, to 14 to 22 years, 6 months' imprisonment, with credit for 197 days served, on each count with the sentences to run concurrently.

In Docket No. 327924, defendant Hooper Jackson Parsley was convicted of three counts of third-degree criminal sexual conduct (count one, penis-vaginal penetration knowing or having reason to know that the victim is mentally incapable or mentally incapacitated; count two penis-

oral penetration knowing or having reason to know that the victim is mentally incapable or mentally incapacitated; count three, penis-anal penetration knowing or having reason to know that the victim is mentally incapable or mentally incapacitated), MCL 750.520d(1)(c). Parsley was sentenced as a repeat criminal sexual conduct offender, MCL 750.520f, and a fourth-offense habitual offender, MCL 769.12, to 14 to 30 years' imprisonment, with credit for 46 days served, on each count with the sentences to run concurrently.

First, both defendants argue that the evidence was insufficient to support their convictions, which came at the conclusion of a joint trial. A challenge to the sufficiency of the evidence supporting a criminal conviction is reviewed de novo. *People v Harverson*, 291 Mich App 171, 177; 804 NW2d 757 (2010). This Court considers the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the prosecution proved the essential elements of the crime beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

"[A] person is guilty of committing [third-degree] criminal sexual conduct if he engages in [sexual] penetration with another person whom he knew or had reason to know was mentally incapable." *People v Breck*, 230 Mich App 450, 451; 584 NW2d 602 (1998), citing MCL 750.520d(1)(c). " 'Sexual penetration' means sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, but emission of semen is not required." MCL 750.520a(r). " 'Mentally incapable' means that a person suffers from a mental disease or defect that renders that person temporarily or permanently incapable of appraising the nature of his or her conduct." MCL 750.520a(j).

In *Breck*, this Court held that the ability to appraise the nature of conduct "is meant to encompass not only an understanding of the physical act but also an appreciation of the nonphysical factors, including the moral quality of the act that accompany such an act." *Breck*, 230 Mich App at 455. The victim in *Breck* was determined incapable of appraising the nature of his conduct because he "was unable to appraise the nature of the sexual activity in this case as either morally right or wrong" and did not "understand that others could not engage in sexual activity with him without his consent." *Id.* at 455-456. This conclusion was based on testimony from a psychologist that the victim was "mentally retarded," "did not have a basic understanding of the nature of a romantic relationship," was a trusting person who "would quickly make a person his friend and do anything that person asked him to do," was "unable to make personality or character judgments about people," and was incapable "of making an informed decision about whether to engage in sexual relations because he would not understand the long-term ramifications of safe sex or of engaging in a homosexual relationship." *Id.* at 455. In reaching its holding, the *Breck* Court stated that "the rationale behind the statutes prohibiting sexual relations with a mentally incapable person is that such a person is presumed to be incapable of truly consenting to the sexual act." *Id.*

In *People v Cox*, 268 Mich App 440, 443-444; 709 NW2d 152 (2005), this Court concluded that there was sufficient evidence "that the victim was mentally incapable of consenting to the sexual relationship with defendant" because the victim did not understand the nonphysical aspects of his sexual conduct. The defendant in *Cox* argued that the victim understood the physical act of sex as well as the nonphysical and moral aspects of the act, and

the victim was therefore mentally capable to consent to sexual relations. *Id.* at 443. Defendant noted that "the victim attended school, was able to perform automotive repairs, could hold conversations and maintain relationships with people, and could choose his sexual partner." *Id.* However, a psychologist testified that the victim "was mentally deficient," functioned in the range of intelligence that is one step above "mental retardation," had the mental function of between an 11 and 13 year old although he was actually 17 years old, functioned "in the lowest three to five percent range" as compared to his peers, tended not to think about the consequences of his actions beforehand, was easy to manipulate; was a follower, and was "vulnerable to exploitation." *Id.* at 442, 444-445. It was the psychologist's opinion that although the victim was aware of his sexual conduct, "he could not appreciate the social or moral significance of his acts relating to the homosexual encounter with defendant and was incapable of making an informed decision about sexual involvement." *Id.* at 445. There was further testimony that the victim was not ready to live independently, functioned at the emotional level of an eight to ten year old, and was at a fourth or fifth grade intellectual level. *Id.* at 444-445. This Court concluded that the record evidence supported that, "regardless of the victim's awareness of the events as they occurred, he did not understand the nonphysical aspects of the sex acts . . . ." *Id.* at 445.

Here, the evidence was sufficient to support Wheeler's convictions related to his victim, E.S. As an 18-year-old, E.S. functioned at a first or second grade academic level and her life skills were at an elementary level. Her intellectual abilities were in the bottom second percentile, she demonstrated an IQ of 67 to 75[1], and she was in a specialized program at her school for students with cognitive impairments. E.S. struggled with her personal hygiene, such as taking showers, brushing her teeth, and taking medications, and she required frequent reminders to complete these tasks. Although E.S. knew that Wheeler was infected with diseases that could be passed to her through sexual contact, she did not know the names of those diseases; she did not know that she could become infected through semen; she did not know what semen was, and she engaged in unprotected oral sexual intercourse on more than one occasion. The school psychologist opined that E.S. was "at great risk of being taken advantage of" and was incapable of evaluating the possible long-term consequences of sexual activity. Further, E.S. had trouble problem solving, was easily manipulated and victimized, and was a follower. Another psychologist testified that E.S. did not always recognize unsafe situations, and sometimes took risks without thinking through the possible consequences of her behavior.

Although E.S. believed that she was capable of making decisions regarding engaging in sexual activity, understood some important aspects of sexual activity like using condoms to avoid pregnancy, and was capable of a certain degree of independence in some areas, those facts do not necessarily mean that she is capable of appraising the nature of her sexual conduct such that she could truly consent to a sexual relationship. See, e.g., *id.* at 443-446. Like the victim in *Cox*, E.S. was similarly cognitively impaired, vulnerable, and unable to understand the potential consequences of her sexual conduct. Viewing the evidence in the light most favorable to the prosecution, a rational jury could find beyond a reasonable doubt that E.S. suffered from a

[1] A psychologist testified at trial that the "average" range for IQ tests is typically 90 to 109.

mental defect that rendered her incapable of appraising the nature of her conduct and was therefore mentally incapable of consenting to a sexual relationship because she did not possess an understanding of both the physical act and the accompanying nonphysical aspects of the sexual conduct. See *id.* at 445-446; *Breck*, 230 Mich App at 455.

The evidence was also sufficient to support Parsley's convictions related to his victim S.W. As an 18 year old, S.W. functioned at a first or second grade academic level and her life skills were at an elementary level. Her intellectual abilities were in the bottom first percentile, she demonstrated an IQ of 63 to 71, and she was in the cognitive impairment program with E.S. Despite her knowledge of birth control, S.W. chose to stop taking her birth control and to engage in sexual relations with Parsley without using any form of birth control. She was not concerned about becoming pregnant. S.W. took no precautions to protect herself from sexually transmitted diseases, despite knowing that there is a general risk of contracting diseases by having unprotected intercourse. The school psychologist opined that S.W. was "in a vulnerable position right now" and did not understand the consequences of her sexual behavior. Although S.W. believed that she was capable of making decisions regarding whether to engage in sexual activity, there was testimony that S.W. puts herself in dangerous situations without being aware of the consequences and has a tendency to repeat behaviors without learning from previous negative outcomes. A psychologist testified that S.W. was "independent in the areas of eating and toileting," required reminders to shower and take medications, and did not recognize the potential danger of inviting a man whom she had just met on social media to her house the same day. This evidence demonstrates that S.W. also possessed cognitive and psychological traits similar to those of the victim in *Cox*. Viewing the evidence in the light most favorable to the prosecution, a rational jury could find beyond a reasonable doubt that S.W. suffered from a mental defect that rendered her incapable of appraising the nature of her conduct and was therefore mentally incapable of consenting to a sexual relationship because she did not possess an understanding of both the physical act and the accompanying nonphysical aspects of the sexual conduct. See *Cox*, 268 Mich App at 445-446; *Breck*, 230 Mich App at 455.

In Docket No. 327924, Parsley additionally argues that the trial court erred by denying his pre-trial motion to sever the trials because he was prejudiced by his joint trial with Wheeler. The issue is preserved. See *People v Mayfield*, 221 Mich App 656, 660; 562 NW2d 272 (1997). Our review of a trial court's decision not to sever is two-part. First, we review *de novo* whether the joined offenses are related as a matter of law and thus eligible for joinder. *People v Tobey*, 401 Mich 141, 153; 257 NW2d 537 (1977), superseded on other grounds as stated in *People v Williams*, 483 Mich 226; 769 NW2d 605 (2009); *People v Abraham*, 256 Mich App 265, 271; 662 NW2d 836 (2003). If we conclude that the offenses are eligible for joinder, we then review for an abuse of discretion a trial court's decision regarding the severance of trials when multiple defendants are involved. *People v Bosca*, 310 Mich App 1, 43; 871 NW2d 307 (2015), app held in abeyance 872 NW2d 492 (2015). "An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes." *People v Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008).

Defendant did not preserve his alternative argument, that he is at least entitled to a new trial with separate juries, because he never requested a joint trial with separate juries. See *People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778 (1993) ("An objection based on one ground at trial is insufficient to preserve an appellate attack based on a different ground."). Unpreserved

issues are reviewed for plain error. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

MCR 6.121(A) provides:

> **(A) Permissive Joinder.** An information or indictment may charge two or more defendants with the same offense. It may charge two or more defendants with two or more offenses when
>
> (1) each defendant is charged with accountability for each offense, or
>
> (2) the offenses are related as defined in MCR 6.120(B).
>
> When more than one offense is alleged, each offense must be stated in a separate count. Two or more informations or indictments against different defendants may be consolidated for a single trial whenever the defendants could be charged in the same information or indictment under this rule.

MCR 6.120(B)(1), in turn states, in relevant part:

> For purposes of this rule, offenses are related if they are based on
>
> (a) the same conduct or transaction, or
>
> (b) a series of connected acts, or
>
> (c) a series of acts constituting parts of a single scheme or plan.

The staff comment to MCR 6.121 indicates that "[t]he standard for permitting joinder is patterned after 2 ABA Standards for Criminal Justice (2d ed), Standard 13-2.2(a)." That standard provides:

> (a) Two or more defendants may be joined in one accusatory instrument:
>
> (i) charging one offense, or charging two or more unrelated offenses (with each offense stated in a separate count) when each of the defendants is charged with accountability for each offense included; or
>
> (ii) charging two or more offenses (with each offense stated in a separate count) when the offenses are alleged to be related. [*Id.*]

The staff comment to MCR 6.120 indicates that "[t]he standard in subrule (B), defining when two offenses 'are related,' is derived from ABA Standard 13-1.2, and a predecessor standard, ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Joinder and Severance (Approved Draft, 1968), Standard 1.1. Elaboration on this standard may be found in *People v Tobey*, 401 Mich 141 (1977)." ABA Standard 13-1.2 states, "[t]wo or more offenses are related offenses if they are based upon the same conduct, upon a single criminal episode, or

upon a common plan." Our Supreme Court has determined that *Tobey*, 401 Mich 141, has been superseded by MCR 6.120, despite the staff comment. See, *Williams*, 483 Mich 226.

Here, each defendant had a different victim and each was charged separately. Each defendant was charged with conduct relating to penetration of a different victim and no specific dates or times of the penetrations were provided other than September 1, 2014 through September 19, 2014. No conspiracy was alleged, and neither defendant was charged with aiding or abetting the other. Each defendant also had a separate preliminary examination. However, at some point, it was decided (by the trial court on its own motion, presumably, as neither the prosecutor or either defendant moved for a joint trial) that defendants would be tried jointly.[2] Because they were not charged with accountability for each other's offenses, Parsley and Wheeler's informations could be consolidated for a single trial only if each defendant could be charged in the same information or indictment under MCR 6.121(A)(2). That is, the offenses must be "related" as that term is defined in MCR 6.120(B)(1).

Working backward, we first consider whether these defendants' offenses were "a series of acts constituting parts of a single scheme or plan." MCR 6.120(B)(1)(c). In *Williams*, 483 Mich at 228, our Supreme Court determined whether joinder of two offenses, occurring several months apart, for one trial against the same defendant was proper under the prior version of MCR 6.120.[3] Our Supreme Court noted that although the offenses were committed months apart by the defendant, they both involved the defendant's breaking down cocaine and packing it for distribution. Citing the "well-established principle that [w]hen the joined counts are logically related, and there is a large area of overlapping proof, joinder is appropriate," the *Williams* Court determined that "the offenses charged were related because the evidence indicated that defendant engaged in ongoing acts constituting parts of his overall scheme or plan to package cocaine for distribution." *Id.* at 235, 237 (internal quotation marks and citations omitted). In *People v McCune*, 125 Mich App 100, 103; 336 NW2d 11 (1983), this Court quoted the commentary to successor ABA Standard 13-1.2 with respect to "common plan."

> Common plan offenses are the most troublesome class of related offenses. These offenses involve neither common conduct nor interrelated proof. Instead, the relationship among offenses (which can be physically and temporarily remote) is dependent upon the existence of a plan that ties the offenses together and demonstrates that the objective of each offense was to contribute to the achievement of a goal not attainable by the commission of any of the individual offenses. A typical example of common plan offenses is a series of separate offenses that are committed pursuant to a conspiracy among two or more

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[2] Notably, the staff comment to MCR 6.121 states that, "[a] joinder of cases for trial may be based on a prosecution or defense motion."

[3] At the time of the *Williams* defendant's trial, MCR 6.120 defined "related" offenses for purpose of joinder and severance as those based on "(1) the same conduct, or (2) a series of connected acts or acts constituting part of a single scheme or plan." *Williams*, 483 Mich at 233.

defendants. Common plan offenses may also be committed by a defendant acting alone who commits two or more offenses in order to achieve a unified goal.

The charges against each of the defendants in this matter are not logically related to each other; there is no large area of overlapping proof, and each defendant could attain his own goal by committing his own individual offenses. Wheeler was charged with CSC with respect to his actions with E.S. and Parsley was charged with his actions of CSC with respect to S.W. There was no evidence or indication that defendants assisted each other or that their separate acts with separate victims were part of any common plan. If both defendants had gone to a specific place together and systematically groomed young women for the specific purpose of sexually assaulting them (i.e., aiding each other in accomplishing a common goal or both assaulting the same victim), this type of joinder would be justified. Those circumstances are not present here. There is no evidence that defendants here shared a similar motive or employed a similar method.

Moreover, to present all of the essential facts at each defendant's trial does not require the same evidence. E.S.' testimony concerning Wheeler was not necessary to obtain a conviction against Parsley for his actions against S.W., and vice versa. Nor was there any other commonality of evidence. A psychologist's testimony concerning the mental capabilities of each victim was relevant only to that specific victim and thus that specific defendant's charges.

Defendants' charges also did not present "a series of connected acts." MCR 6.120(B)(1)(b). In *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003) this Court found that joinder of a defendant's charges for the murder of two different victims was appropriate "because the shootings occurred within a couple of hours of each other in the same neighborhood, with the same weapon, and were part of a set of events interspersed with target shooting at various outdoor objects. Further, the same witnesses testified to a single state of mind applicable to both offenses." Here, neither Wheeler's nor Parsley's actions were connected to each other. While Parsley did meet his victim through Wheeler because the two defendants lived together, this is a temporal connection, at most. There is no indication that the actual acts of CSC committed by each defendant against his respective victim occurred on the same dates or when both defendants were present.

Finally, the third basis upon which offenses may be considered related under MCR 6.120(B)(1)(c) is if the offenses are based on the same conduct or transaction. We do not find that situation present here.

In *People v Miller*, 165 Mich App 32, 45; 418 NW2d 668 (1987) a single defendant was charged with and convicted of one count of first degree criminal sexual conduct (CSC) and one count of second degree CSC stemming from his alleged molestation of a young boy over a four month period. Defendant sought to have the two count information severed for purposes of trial and the trial court denied his motion, ruling that the two charges would be tried in a single proceeding. On appeal, our Supreme Court found no error in the trial court's ruling, given that that the two acts indicated a series of acts constituting a single scheme or plan. *Id.* at 45. In so ruling, however, the Court first noted that "the charges against defendant are not based on the 'same conduct' since the evidence does not indicate a single transaction." *Id.* In *Williams*, 483 Mich 235 n 8, citing See 2 ABA Standards for Criminal Justice (2d ed.), ch. 13, p. 11, our Supreme Court noted that "[o]ffenses committed at different times and places are not 'related'

merely because they are of the same or similar character." Further, the commentary to the ABA Standards Relating to Joinder and Severance, Standard 13-1.2, instructs:

> The simplest example of a "same conduct" offense may be the case where the defendant's single physical act injures two persons, as where a single gunshot hits two victims. More complex same conduct offenses may involve a course of conduct, as where the same series of physical acts generates charges of resisting arrest and assault.

Again, Wheeler's and Parsley's offenses were committed by each of them, individually, against separate victims. While the offenses each defendant committed may be of similar character, neither's actions generated or caused the charges of the other. Joinder was thus improper because Wheeler and Parsley's charges were not "related" as that term is defined for purposes of joinder. MCR 6.121; MCR 6.120. The trial court erred as a matter of law in joining defendants' charges for trial. See *Williams*, 483 Mich at 231 ("To determine whether joinder is permissible, a trial court must first find the relevant facts and then must decide whether those facts constitute 'related' offenses for which joinder is appropriate. Because this case presents a mixed question of fact and law, it is subject to both a clear error and a de novo standard of review.")

MCR 6.121(B) provides that "[o]n a defendant's motion, the court must sever offenses that are not related as defined in MCR 6.120(B)." Because this rule uses the mandatory "must," the trial court was *required* to sever defendants' charges for trial due to their unrelated nature. See, *In re Forfeiture of Bail Bond*, 496 Mich 320, 328; 852 NW2d 747 (2014) ("the term 'shall,'. . . is a mandatory term, not a permissive one")(quotation omitted). Though Parsley was entitled, by right, to a separate trial, without a necessary showing of prejudice, we note that the fact that defendants here were tried before one jury for unrelated acts casts each defendant in a more negative light by virtue of the fact that they knew other and that the victim in Parsley's case was Wheeler's daughter.

In Docket No. 327634, we affirm defendant Wheeler's conviction based on the grounds presented for appeal. In Docket No. 327924, we reverse defendant Parsley's conviction because the trial court erred as matter of law in joining his and Wheeler's charges for trial and we remand for a new, separate trial. We do not retain jurisdiction.

/s/ Deborah A. Servitto
/s/ Jane E. Markey
/s/ Elizabeth L. Gleicher

Order

Michigan Supreme Court
Lansing, Michigan

July 24, 2017

154577

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 154577
COA: 327634
Kent CC: 14-010346-FH

TODD ALLEN WHEELER,
Defendant-Appellant.

/

On order of the Court, the application for leave to appeal the September 20, 2016 judgment of the Court of Appeals is considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we REMAND this case to the Court of Appeals to address the defendant's claim, raised for the first time in this Court, that his appellate counsel was ineffective for failing to challenge on appeal: (1) the joinder of his and Hooper Jackson Parsley's trials; and (2) his trial counsel's ineffectiveness for failing to oppose that joinder. On remand, while retaining jurisdiction, the Court of Appeals shall remand this case to the Kent Circuit Court to conduct an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436 (1973), to determine whether the defendant was deprived of his right to the effective assistance of trial and appellate counsel. At the conclusion of the hearing, the circuit court shall forward the record and its findings to the Court of Appeals, which shall then address these issues. In all other respects, the application for leave to appeal is DENIED, because we are not persuaded that the remaining questions presented should be reviewed by this Court.

We note that by order dated July 24, 2017, we remanded *People v Parsley* (Docket No. 154734) to the Court of Appeals for consideration of whether the error in joining Parsley's case with the defendant's was harmless.

We do not retain jurisdiction.

t0721

I, Larry S. 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 24, 2017

Clerk

Court of Appeals, State of Michigan

ORDER

People of MI v Todd Allen Wheeler

Docket No. 327634

LC No. 14-010346-FH

Deborah A. Servitto
Presiding Judge

Jane E. Markey

Elizabeth A. Gleicher
Judges

In accordance with the Supreme Court's order issued July 24, 2017, this matter is REMANDED to the Kent Circuit Court. This Court retains jurisdiction.

On remand, the trial court shall initially appoint counsel to represent defendant in this matter. MCR 7.208(H). The trial court shall file a copy of the order of appointment with the clerk of this Court within 14 days of the date of certification of this order.

Within 56 days of the order appointing counsel, the trial court shall conduct an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436 (1973), to determine whether defendant was deprived of his right to the effective assistance of trial and appellate counsel. The court shall cause a transcript of the hearing to be prepared and filed within 21 days after completion of the proceedings. After the transcript is filed, the trial court shall immediately forward its findings and the record to this Court.

Presiding Judge

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

SEP 20 2017
Date

Chief Clerk