STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 24, 2013
v	No. 309195 Wayne Circuit Court
SHANAN LAMAR HARRIS, Defendant-Appellant.	LC No. 11-001841-FH

Before: BORRELLO, P.J., and K. F. KELLY and GLEICHER, JJ.

PER CURIAM.

During the early morning hours of January 15, 2011, an Escalade driven by defendant Shanan Lamar Harris ran a red light on Livernois. Police in an unmarked vehicle witnessed the infraction and stopped the Escalade. Police officer George Alam, one of the two officers involved in the ensuing traffic stop, claimed that defendant removed a handgun from his lap and placed it atop the purse of Krystal Kline, the Escalade's front-seat passenger. The prosecution charged defendant with carrying a concealed weapon, MCL 750.227, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b.

Defendant structured his defense around challenging Alam's credibility. In his opening statement, defense counsel Randall Upshaw framed the case as follows:

> The young[ ]lady, Miss Kline, . . . [s]he's licensed. The guns were hers. She had them on her. . . .
>
> But possession is knowing you possessed a weapon. And what Officer Alam is testifying to is not the truth.

Kline proceeded to contradict Alam's account, asserting that the weapon was legally registered to her and had remained in her purse until Alam removed it. Alam's partner, Officer Jon Gardner, admitted that he had not seen defendant touch the gun. The two backseat passengers in the Escalade did not testify at defendant's trial.

The jury convicted defendant as charged. Defendant contends that his trial counsel performed ineffectively by failing to call as witnesses the two backseat passengers, who testified at a *Ginther*[1] hearing that defendant did not touch a weapon during this incident. The trial court ruled that counsel's failure to produce the backseat passengers did not prejudice defendant. We conclude that defense counsel performed ineffectively by failing to present the testimony of one of the backseat passengers, and that but for this error, it is reasonably likely that defendant would have been acquitted. We therefore reverse the circuit court's denial of defendant's motion for a new trial and remand for further proceedings.[2]

I. THE TRIAL EVIDENCE

The prosecution called only two witnesses at trial: Officers Alam and Gardner. Alam recounted that when defendant's Escalade failed to stop at the red light, he maneuvered his semi-marked police car along the passenger side of the Escalade and motioned for the passenger to lower the window. Defendant exclaimed: "'oh, man, I thought you were the guys from the club that were chasing me.'" According to Alam, defendant appeared "extremely nervous and started rambling" while "looking down on his lap like there's something there." When Alam inquired whether there were any weapons in the vehicle, defendant "looked down at his lap and then he looked up and said, 'huh?'" Alam repeated the question. Defendant stated, "'I do. But it's not mine, it's hers,'" gesturing to Kline.

"The minute he said yes," Alam recalled, "I opened the scout car and stood up and start[ed] approaching his car on the . . . passenger side." At the same moment, defendant grabbed something with his right hand from "his waist, side . . . his like seat area." As Alam continued to approach the Escalade he saw defendant's "hand placing the gun on the top of the female['s] purse," which lay between her left leg and the center console.

Alam recounted that he reached through the open window, grabbed the gun, and advised Gardner that there was a weapon in the car. Defendant then announced that Kline had "a CCW," meaning a permit to carry a concealed weapon. Alam maintained that as Gardner removed defendant from the vehicle defendant began screaming, "'hey baby, tell them it's your gun.'" Alam asked Kline if she had any guns and she replied, "I have a gun." Alam seized Kline's purse and found a second, smaller handgun inside. Alam insisted that Kline never claimed ownership of the larger weapon.

Once outside the vehicle, Kline provided Alam with her permit to carry a concealed weapon. However, a LEIN check reported the permit as invalid. The police then arrested both defendant and Kline. Later investigation revealed that Kline had legally registered both weapons and possessed a valid permit to carry them.

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

[2] Our resolution of this issue renders moot defendant's challenges that this conviction was based on insufficient evidence and was against the great weight of the evidence.

Gardner recalled that defendant apologized for running the red light and claimed that "he was being followed by somebody." When Alam asked if there were any weapons in the car, defendant "stated at first, he said, no. And then, he was asked again, and he said, yes, but it's hers." Gardner stated that he walked around the back of the Escalade to the driver's side and removed defendant from the vehicle. At that point Gardner heard defendant beseeching Kline: "'tell him it's your gun.'"[3] On cross-examination, Gardner admitted that Alam had not alerted him that defendant had a gun. Gardner never saw defendant touch a weapon and did not see Alam remove the larger gun from the vehicle. Gardner initially claimed that he could not "recall" whether anyone asserted ownership of the larger gun, but upon being reminded of his preliminary examination testimony, indicated that Kline represented that both guns were hers.

Alam and Gardner testified that while the events unfolded they became aware that two passengers sat in the Escalade's back seat. After placing defendant and Kline under arrest, the officers instructed the backseat passengers to leave the scene, and they obeyed. The officers did not take statements from those witnesses.

Defendant called Kline as his first witness. Kline testified that she had a valid license to carry a concealed pistol and had registered both weapons. When the police stopped the Escalade, she recounted, both guns were inside her purse. Kline denied that defendant had touched either weapon and insisted that she informed the officers that she owned both guns. Kline described the initial conversation with the officers as follows:

> *Q.* Did there subsequently become [sic] a conversation about a gun?
>
> *A.* Yes, subsequently.
>
> *Q.* Did you hear [defendant's] response when he was asked whether there was a gun in the vehicle?
>
> *A.* Yes. He said, no.
>
> *THE PROSECUTOR.* Objection, Your Honor, as to hearsay.
>
> *THE COURT.* Yes, that's hearsay.
>
> *MR. UPSHAW.* Okay.
>
> *Q.* (By Mr. Upshaw continuing): When Officer Alam said – after you heard Officer Alam state whether there was a gun in the car, did you say anything?

[3] On cross-examination, Gardner was impeached with his preliminary examination testimony, in which he averred that before Alam exited the patrol car and approached the Escalade, defendant stated that there was a gun in the vehicle and it was not his.

A. Yes, I held up my purse and said yes. But, simultaneously he said no, because –

Q. Okay, you can't say what he said.[4]

A. Okay.

Q. Okay? But, simultaneously you have a conversation, but you told Officer Alam you had a gun in your purse?

A. Correct.

On cross-examination, Kline conceded that since their arrests, she and defendant had "grown closer." Although Kline denied that the two shared a "romantic relationship," she admitted that they had "invented a product together" and were jointly engaged in selling it. Kline denied that anyone had been following them when they left "the club."

Defendant also called as a witness the police officer in charge of the case. Defense counsel attempted to elicit testimony that although the guns had been processed for fingerprints, none of the prints matched those of defendant. The trial court precluded this testimony based on the prosecutor's objection that the officer was "not a representative from the Michigan State Police," and therefore was not the proper person to present such evidence.[5] Defendant called no additional witnesses.

The prosecutor's closing argument focused on attacking Kline's credibility. The prosecutor argued that Kline could not have entered "a club" with both weapons, contended that "[t]he little gun is for her and the big gun is for the Defendant," and asserted that Kline "has a bias to testify that both of them are her guns." Defense counsel's closing highlighted that the prosecutor failed to introduce any fingerprint evidence and had neglected to question Kline about how she had entered the club with the guns in her purse. In response to the prosecutor's allegation of bias, counsel argued that whether defendant was "sleeping with her" had nothing to do with the evidence. In rebuttal, the prosecutor argued:

> And then, this whole talk about sexual relationship and who you're not having sex with. It doesn't matter. Bottom line, these two have a relationship.

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[4] These statements did not qualify as hearsay because they were not offered to prove their truth.

[5] At the trial's outset, the prosecutor moved to amend her witness list to add the Michigan State Police detective who had performed a latent print examination. Defense counsel objected, and the trial court sustained his objection. Thus, defense counsel created a situation in which he could not elicit potentially exculpatory evidence. Moreover, Upshaw and the prosecutor stipulated at the trial's outset that the gun had been tested for fingerprints and that defendant's fingerprints were not found on the weapon, yet Upshaw neglected to mention these stipulated facts to the jury.

> She has a bias, she has a motive, it's why she doesn't want him to get in trouble. Oh, yeah, and he's her business partner, too.
>
> She has nothing to lose to come and say that both of these guns are hers; both the little gun loaded and the bigger gun loaded, ready to go, both of them.

The jury began deliberating at 4:31 p.m. and was dismissed approximately one hour later. At 11:07 a.m. the next day, the trial court placed on the record that the jury had submitted two written questions. The first recited: "With regard to the second element in the second count [carrying a concealed weapon], does it matter under the law under which Defendant was charged, whether Defendant knew the pistol was in the vehicle only for seconds prior to Officer Alam discovering the large gun in the vehicle?" The parties agreed to respond, "If you find that the Defendant did not knowingly possess the pistol . . . then you cannot find the Defendant guilty. If you find the Defendant did knowingly possess the pistol, then you can find him guilty."

The second question read: "Does possession mean the gun was on the Defendant's person or does it mean the gun was in the car Defendant was driving?" The answer crafted by the parties provided, "If you find the Defendant possessed the pistol in his hand, you may find him guilty. If you find the Defendant did not possess the gun in his hand, you may find him not guilty."[6] At 1:44 p.m., the trial court placed on the record that the jury had requested Alam's testimony and had been instructed to "use your collective memories to try and recall that." Because the jury continued to deliberate, the court instructed the reporter to replay an audio version of Alam's testimony. The jury reported its verdict at 3:34 p.m., convicting defendant as charged.

II. THE *GINTHER* HEARING

Defendant moved for a new trial or a *Ginther* hearing based on trial counsel Randall Upshaw's failure to call two eyewitnesses: the backseat passengers. The trial court agreed to conduct a *Ginther* hearing.

Mychol Blanks appeared at the *Ginther* hearing pursuant to a subpoena. She testified that she sat behind defendant in the Escalade, and next to Rodney Davis, her date that evening. She recalled that when the passenger window came down, an officer asked Kline whether there were any weapons in the car. Kline stated, "Yes, I have," and no one else responded. Blanks testified that she had no recollection of hearing defendant respond. She recalled that defendant never took his hands from the steering wheel before being told to place his keys on the dashboard and she had expressed surprise when Kline revealed the presence of her weapons. Blanks denied that defendant "move[d] in any way toward Crystal Kline after the police motioned the car over." Blanks affirmed that she "was in a position to see [defendant] at all times."

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[6] This answer was overly simplistic and slightly inaccurate as a defendant can constructively possess a weapon. However, the instruction required stronger proof from the prosecutor and therefore did not prejudice defendant.

Blanks stated that she did not know defendant or Kline well, and had met them only a week or two earlier at a party. She denied having seen either of them in possession of a gun until after the police stopped the car and denied that defendant had begged Kline to "tell them it's your gun." Blanks related that Kline's purse was on her lap rather than the seat near the console.

Blanks met with Upshaw before the trial and advised him that she had an appointment at 2:30 p.m. on the day scheduled for trial. Blanks recounted that Upshaw indicated, "If you had to leave, leave. He can't make me stay and he could see if I could testify Monday if they don't call me on the stand." She reported to the court that morning at 9:00 a.m. pursuant to Upshaw's subpoena. The subpoena required her to remain in the courthouse until excused by the court. Blanks did not see Upshaw after noon and left the courthouse at 2:30 p.m. She returned the next day (Friday) and was told that the case had concluded.

Davis's recollection of the traffic stop for the most part mirrored that of Blanks. He recalled that when the officers initiated the stop, defendant stated "we ain't got no weed or nothing in here and I heard Crystal say, yeah, I'm a licensed gun carrier, I've got guns." Davis denied that defendant passed a weapon to Kline, that Kline placed a weapon in her purse, or that defendant asked Kline to tell the officers that the gun belonged to her. Davis claimed that when Kline revealed she had a gun, "it kind of shocked me." At the time of defendant's trial and the *Ginther* hearing, Davis was incarcerated in Ohio. He admitted that he considered himself defendant's "good friend" and asserted that Upshaw never contacted him about the events that evening.

Upshaw recollected that Blanks arrived at the courthouse on time on the day of trial and then informed him that she had to leave at 2:30 p.m. He did not seek the judge's assistance in scheduling her testimony out-of-order or ordering her to remain available. When Upshaw discovered that Blanks had departed, he neither requested an adjournment nor brought the matter to the court's attention despite that he had successfully moved to reopen the proofs in his abortive effort to introduce evidence concerning the absence of fingerprints on the gun. Nor did Upshaw request an opportunity to reopen the proofs the next day. Upshaw stated that he knew of Davis's incarceration, admitted that he made no effort to contact him or to seek court assistance to secure his presence at trial, and conceded that Davis and Blanks may have had relevant information. He also conceded that he had anticipated Kline's cross-examination regarding her relationship with defendant. Upshaw agreed that his affidavit accurately averred that his failure to call Blanks and Davis was not a trial strategy.

III. THE TRIAL COURT'S OPINION

The trial court concluded in a written opinion that defendant was not prejudiced by trial counsel's failure to present Blanks or Davis as trial witnesses, reasoning:

> First, there were minor inconsistencies in the testimony between the various accounts given by Ms. Kline, Ms. Blanks, and Mr. Davis. Additionally, the court noted that during the examination of Mr. Davis who was a lifelong friend of the defendant, it appeared that defendant was feeding answers to Mr. Davis by nodding his head yes or no. Both of these factors lead the court to question the veracity and credibility of . . . Ms. Blanks and Mr. Davis.

* * *

> Defendant claims that by offering the corroborating testimony from Ms. Blanks and Mr. Davis, he could have possibly overcome the alleged bias of Ms. Kline. The court is not persuaded by this argument, because as noted above, at least with regards to Mr. Davis, a claim of bias could have also been made. Moreover, on this point, the court finds that the proposed testimony of Ms. Blanks and Mr. Davis would have been cumulative.

The court specifically expressed disbelief that "the testimony from Ms. Blanks or Mr. Davis would have been outcome determinative or that defendant was denied due process, a fair trial, or that its omission undermined the confidence of the verdict." In ruling on defendant's motion for reconsideration, the trial court reiterated that "it wasn't ineffective assistance of counsel on Mr. Upshaw's part that requires a new trial."

IV. STANDARDS OF REVIEW

"Whether a defendant received ineffective assistance of counsel presents a mixed question of fact and constitutional law." *People v Armstrong*, 490 Mich 281, 289; 806 NW2d 676 (2011). "A judge must first find the facts, then must decide whether those facts establish a violation of defendant's constitutional right to the effective assistance of counsel." *People v Grant*, 470 Mich 477, 484; 684 NW2d 686 (2004). We review the trial court's factual findings for clear error and consider de novo its constitutional determinations. *Armstrong*, 490 Mich at 289. Regard should be given to the trial court's opportunity to assess the credibility of the witnesses who appeared before it. MCR 2.613(C); *People v Dendel*, 481 Mich 114, 130; 748 NW2d 859 (2008), mod 481 Mich 1201 (2008). "A finding is clearly erroneous when, although there is evidence to support it, [this Court], on the whole record, is left with a definite and firm conviction that a mistake has been made. *Dendel*, 481 Mich at 130 (quotation marks and citation omitted).

V. ANALYSIS

A. EFFECTIVENESS

"'[I]t has long been recognized that the right to counsel is the right to the effective assistance of counsel.'" *United States v Cronic*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984), quoting *McMann v Richardson*, 397 US 759, 771 n 14; 90 S Ct 1441; 25 L Ed 2d 763 (1970). In *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984), the United States Supreme Court held that a convicted defendant's claim of ineffective assistance of counsel includes two components: "First, the defendant must show that counsel's performance was deficient. . . . Second, the defendant must show that the deficient performance prejudiced the defense." To establish the first component, a defendant must show that counsel's performance fell below "an objective standard of reasonableness" under "prevailing professional norms." *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). With respect to the prejudice aspect, the defendant must demonstrate a reasonable probability that but for counsel's errors, the result of the proceedings would have differed. *Id*. at 663-664. The defendant must overcome the strong presumptions that his "counsel's conduct falls within the

wide range of reasonable professional assistance," and that his counsel's actions represented sound trial strategy. *Strickland*, 466 US at 689.

A defense counsel possesses "wide discretion in matters of trial strategy." *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). This Court may not "substitute our judgment for that of counsel on matters of trial strategy, nor will we use the benefit of hindsight when assessing counsel's competence." *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009) (quotation marks and citation omitted).

> "Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." [*Wiggins v Smith*, 539 US 510, 521; 123 S Ct 2527; 156 L Ed 2d 471 (2003), quoting *Strickland*, 466 US at 690-691.]

Although not directly addressed by the trial court, we conclude that defense counsel's failure to present Blanks' testimony and to investigate Davis fell below an objective standard of reasonableness. Upshaw conceded that his failure to call Blanks was not a matter of trial strategy. He expressed no misgivings about Blanks' credibility and knew or should have known that cross examination would not have elicited biases similar to those of Kline. Upshaw admitted awareness of Blanks' scheduling conflict and of her plan to leave the courthouse at 2:30 p.m. regardless of whether she had been called to testify. Yet Upshaw offered no explanation for neglecting to advocate for taking her testimony out-of-order or the next day, for the issuance of a bench warrant, or for failing to bring Blanks' absence to the court's attention, particularly in light of Blanks' violation of the subpoena. Moreover, Upshaw's questioning informed the jury several times that the backseat passengers had witnessed the entire police encounter.

An objectively reasonable attorney would not have foregone the testimony of an available witness that directly rebutted Alam's version of events. This is especially true given that defendant's only real hope of an acquittal rested on convincing the jury that Alam's account of the interaction was not completely accurate. As to Davis, "strategic choices made after less than complete investigation" do not merit the same deference as true strategies. *Strickland*, 466 US at 690-691. Upshaw's failure to interview Davis, whom Upshaw knew to be a potentially corroborating witness, cannot be attributed to any strategy.

B. PREJUDICE

The question next presented is whether defendant sustained prejudice due to Upshaw's ineffectiveness. *Strickland*'s second prong focuses on whether the defendant demonstrates "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 does not require certainty; nor does it consist of a mere possibility that "a reasonable doubt might have been established if counsel acted differently. Instead, *Strickland* asks whether it is 'reasonably likely' the result

would have been different." *Harrington v Richter*, 562 US __; 131 S Ct 770, 791-792; 178 L Ed 2d 624 (2011) (citations omitted).

Upshaw's failure to present Blanks' testimony prejudiced defendant. By failing to call Blanks as a witness Upshaw permitted the jury to infer that both she and Davis would have testified unfavorably to defendant. Further, Blanks' testimony was not cumulative to that of Kline and a reasonable probability exists that it would have created reasonable doubt as to defendant's guilt.

Upshaw's trial strategy pitted the veracity of a police officer against that of a woman engaged in a romantic and business relationship with the defendant. Despite that Kline was subject to impeachment based on both bias and motive, the jury struggled to reach a verdict. After a number of hours of deliberation, the jury's first question suggested that at least one juror disbelieved Alam's testimony that defendant had the gun in his lap: "With regard to the second element in the second count, does it matter under the law under which Defendant was charged, whether Defendant knew the pistol was in the vehicle only for seconds prior to Officer Alam discovering the large gun in the vehicle?" The second further supports that at least one juror harbored doubt that defendant had held a gun in his lap, as Alam claimed.[7]

Blanks' testimony likely would have been outcome determinative. Unlike Kline, Blanks had no motive to lie for defendant, and knew him only briefly before the encounter with the police. Her testimony directly refuted that of Alam on the key issue of defendant's possession of a weapon at the time of the stop. Moreover, Blanks was an eyewitness in a position to see and hear the events unfolding at close range – much closer than Alam.

In rejecting defendant's ineffective assistance claim, the trial court labeled Blanks' testimony as "cumulative" and pointed out that "there were minor inconsistencies in the testimony between the various accounts given by Ms. Kline, Ms. Blanks, and Mr. Davis." We first address whether Blanks' testimony in fact qualified as "cumulative." Although Blanks would have *corroborated* some of Kline's testimony, it was not "cumulative." "Evidence is cumulative when it 'supports a fact established by existing evidence.'" *Stewart v Wolfenbarger*, 468 F3d 338, 358 (CA 6, 2006), quoting *Washington v Smith*, 219 F3d 620, 634 (CA 7, 2000), quoting Black's Law Dictionary (7th ed), p 577. "Evidence that provides corroborating support to one side's sole witness on a central and hotly contested factual issue cannot reasonably be described as cumulative." *Mosley v Atchison*, 689 F3d 838, 848 (CA 7, 2012).

Defendant's actions at the time of the stop were far from established by Kline's testimony – they remained in vigorous dispute. Blanks' testimony would have measurably strengthened Kline's version of events. This was, after all, a "swearing match" in which defendant's sole eyewitness was discredited. Although there was some overlap in their recitations of the events, Kline's credibility was heavily tarnished during her cross-examination. Blanks' version of the events would have bolstered rather than merely restated Kline's, adding "a great deal of

[7] "Does possession mean the gun was on the Defendant's person or does it mean the gun was in the car Defendant was driving?"

substance and credibility" to the defense. *Stewart*, 468 F3d at 359 (quotation marks and citation omitted). Here, Blanks would have served as the "'tiebreaker' witness whose credibility – unlike that of the other . . . witness[] – had not been impeached." *Vasquez v Jones*, 496 F3d 564, 576 (CA 6, 2007). Thus, we find utterly unpersuasive the trial court's ruling that because Blanks' testimony was "cumulative" its omission did not prejudice defendant.

Nor are we persuaded that Blanks' evidence was inconsistent with that of Kline, and therefore not credible.[8] Blanks disagreed with Kline regarding whether defendant had spoken when asked whether there was a gun in the car (Kline testified that defendant "said, no," while Blanks did not recall defendant saying anything). Our review of the evidence reveals no other area in which the two women's testimonies disagreed. Furthermore, minor testimonial inconsistencies may render one side's evidence *more* credible rather than less so, dispelling any notion that the witnesses are simply "trained seals" or script-followers. For example, Alam and Gardner disagreed regarding several matters, including whether Kline represented that both guns were hers and whether Alam announced to Gardner that defendant had a gun. Moreover, whether any inconsistency in Blanks' testimony would have rendered her incredible was, fundamentally, a jury question.

This was a close case that rose or fell on whether the jury believed the testimony of the car's occupants rather than that of police officer Alam. Our review of the record leads us to conclude that it was "reasonably likely" that Blanks' testimony would have tipped the scales in favor of reasonable doubt. *Harrington*, 131 S Ct at 791-792. Counsel's failure to present Blanks' testimony and to investigate Davis fell below an objective standard of reasonableness. The trial court clearly erred by concluding that Upshaw's deficient performance did not prejudice defendant.

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

/s/ Stephen L. Borrello
/s/ Kirsten Frank Kelly
/s/ Elizabeth L. Gleicher

[8] We note the obvious inconsistency in the trial court's ruling. If the two women in fact testified inconsistently, Blanks' testimony could not have been "merely cumulative."