

**STATE OF MICHIGAN
IN THE SUPREME COURT**

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

-v-

ASHLY DRAKE SMITH,

Defendant-Appellant.

Supreme Court No. 149357

Court of Appeals No. 312721

Circuit Court No. 12-4553-01

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DEFENDANT-APPELLANT'S SUPPLEMENTAL BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES i

STATEMENT OF JURISDICTION..... iii

STATEMENT OF QUESTION PRESENTED..... iv

STATEMENT OF FACTS.....1

I. TRIAL COUNSEL DEPRIVED MR. SMITH OF HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO FILE A TIMELY ALIBI NOTICE AND BY FAILING TO CONDUCT A REASONABLE ALIBI INVESTIGATION....14

A. Trial counsel performed deficiently when she failed to file an alibi notice or conduct a reasonable investigation into Mr. Smith’s alibi.....15

1. *Prevailing professional norms impose a duty to conduct a prompt and thorough investigation.....15*

2. *The adequacy of an alibi investigation must be judged from counsel’s perspective at the time the alibi notice deadline expired.....16*

3. *Mr. Smith’s trial lawyer performed deficiently because she allowed the alibi notice deadline to lapse before conducting any investigation.....17*

4. *Even when viewed from a later point in time, counsel could not strategically choose to forgo an alibi defense because she had not conducted the requisite investigation.....19*

5. *Counsel’s ineffectiveness is further highlighted by her failure to move for a directed verdict of acquittal under MCR 6.419(C).....23*

B. Mr. Smith suffered prejudice from trial counsel’s failure to investigate and present alibi witnesses.....25

1. *The trial court misapplied Strickland’s prejudice analysis because it did not weigh the missing alibi testimony against the otherwise flimsy evidence supporting Mr. Smith’s conviction.....26*

2. *The alibi testimony undermines confidence in the verdict.....28*

SUMMARY AND REQUEST FOR RELIEF30

APPENDIX A (Order Directing Oral Argument on Application).....A

CMS*Defendant-Appellant's MSC Supplemental Brief Nov 14, 2014_26345.docx*
Ashly Drake Smith

TABLE OF AUTHORITIES

CASES

| | |
|---|------------|
| <i>Brown v Smith</i> , 551 F3d 424 (CA 6, 2008) | 30 |
| <i>Clinkscale v Carter</i> , 375 F3d 430 (CA 6, 2004)..... | 21 |
| <i>Foster v Wolfenbarger</i> , 687 F3d 702 (CA 6, 2012)..... | 23, 24, 28 |
| <i>Henry v Scully</i> , 918 F Supp 693(SD NY, 1996), aff'd 78 F3d 51 (CA 2, 1996) | 16 |
| <i>Hodge v Hurley</i> , 426 F3d 368 (CA 6, 2005)..... | 30 |
| <i>Kimmelman v Morrison</i> , 477 US 365; 106 S Ct 2574; 91 L Ed 2d 305 (1986) | 18 |
| <i>People v Armstrong</i> , 490 Mich 281; 806 NW2d 676 (2011)..... | 31 |
| <i>People v Dalessandro</i> , 165 Mich App 569; 419 NW2d 609 (1988) | 17 |
| <i>People v Dean</i> , 103 Mich App 1; 302 NW2d 317 (1981) | 21 |
| <i>People v Ginther</i> , 390 Mich 436; 212 NW2d 922 (1973) | 15 |
| <i>People v Grant</i> , 470 Mich 477; 684 NW2d 686 (2004) | 18, 19 |
| <i>People v Henry</i> , 239 Mich App 140; 607 NW2d 767 (1999)..... | 15 |
| <i>People v Johnson</i> , 451 Mich 115; 545 NW2d 637 (1996) | 17 |
| <i>People v LaVearn</i> , 448 Mich 207; 528 NW2d 721 (1995)..... | 16 |
| <i>People v LeBlanc</i> , 465 Mich 575; 640 NW2d 246 (2002) | 15 |
| <i>People v Merritt</i> , 396 Mich 67; 238 NW2d 31 (1976) | 20 |
| <i>People v Pickens</i> , 446 Mich 298; 521 NW2d 797 (1994) | 16, 22 |
| <i>People v Smith</i> , __ Mich __; 853 NW2d 707 (October 3, 2014)..... | 1 |
| <i>People v Trakhtenberg</i> , 493 Mich 38; 826 NW2d 136 (2012)..... | 22, 30, 31 |
| <i>People v Travis</i> , 443 Mich 668; 505 NW2d 563 (1993)..... | 19, 20, 21 |
| <i>People v Ullah</i> , 216 Mich App 669; 550 NW2d 568 (1996)..... | 29 |
| <i>State v Lawson</i> , 352 Or 724; 291 P3d 673 (2012) | 32 |
| <i>Strickland v Washington</i> , 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984) | passim |

| | |
|---|--------|
| <i>Washington v Hofbauer</i> , 228 F3d 689 (CA 6, 2000)..... | 30, 31 |
| <i>Wiggins v Smith</i> , 539 US 510; 123 S Ct 2527; 156 L Ed 2d 471 (2003)..... | 18, 19 |

CONSTITUTIONAL PROVISIONS, STATUTES, & COURT RULES

| | |
|------------------------------|--------|
| US Const, Am VI..... | 14 |
| US Const, Am XIV | 14 |
| Const 1963, art 1, § 17..... | 14 |
| Const 1963, art 1, § 20..... | 14 |
| MCL 750.110a(2) | 1 |
| MCL 750.224f..... | 1 |
| MCL 750.227b(2) | 1 |
| MCL 750.360..... | 1 |
| MCL 750.529 | 1 |
| MCL 768.20(1) | 17, 19 |
| MCL 768.21(1) | 12, 17 |

SECONDARY SOURCES

| | |
|--|----|
| Coleman, et al., <i>Don't I Know You? The Effect of Prior Acquaintance/Familiarity on Witness Identification</i> , <i>The Champion</i> (April 2012)..... | 28 |
| Smith, <i>Taking Strickland Claims Seriously</i> , 93 Marq L Rev 515 (2009)..... | 16 |

STATEMENT OF JURISDICTION

Defendant-Appellant was convicted in the Wayne County Circuit Court following a bench trial, and a Judgment of Sentence was entered on September 12, 2012. In accord with MCR 6.425(F)(3), the trial court filed a Claim of Appeal on Defendant-Appellant's behalf on September 28, 2012, pursuant to the indigent defendant's timely request for the appointment of appellate counsel filed on the same date. The Court of Appeals had jurisdiction over this appeal of right under Const 1963, art 1, §20, MCL 600.308(1), MCL 770.3, MCR 7.203(A), and MCR 7.204(A)(2). Defendant-Appellant filed a timely application for leave to appeal to this Court within 56 days of the Court of Appeals' unpublished opinion. MCR 7.302(C)(2). On October 3, 2014, this Court ordered oral argument on Mr. Smith's application and directed the parties to file supplemental briefs. *People v Smith*, __ Mich __; 853 NW2d 707 (October 3, 2014) (Docket No. 149357) (attached as Appendix A).

STATEMENT OF QUESTION PRESENTED

- I. DID TRIAL COUNSEL DEPRIVE MR. SMITH OF HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO FILE A TIMELY ALIBI NOTICE AND BY FAILING TO CONDUCT A REASONABLE ALIBI INVESTIGATION?

Court of Appeals answers, "No".

Defendant-Appellant answers, "Yes".

STATEMENT OF FACTS

This appeal stems from a bench trial held before the Honorable David J. Allen of the Wayne County Circuit Court. Defendant-Appellant Ashly Drake Smith stands convicted of five offenses: armed robbery,¹ first-degree home invasion,² larceny in a building,³ possession of a firearm by a felon,⁴ and felony-firearm.⁵ (TT 8/21/12 at 3-6).⁶ These convictions rest entirely upon the identification testimony of the lone eyewitness. The finder of fact never heard from Mr. Smith's alibi witnesses. This Court has ordered oral argument on Mr. Smith's application for leave to appeal the affirmance of his convictions. *People v Smith*, __ Mich __; 853 NW2d 707 (October 3, 2014) (Docket No. 149357) (attached as Appendix A). At issue is "whether the defendant was deprived of his right to the effective assistance of trial counsel." *Id.*

A. Factual Background

The events underlying Mr. Smith's conviction took place inside an apartment in Westland, Michigan, on January 11, 2012. (TT 8/20/12, at 10). The complainant, Shawn Kelly,⁷ grew marijuana in the apartment and lived there with his brother. (TT 8/20/12, at 12, 14, 26, 31).

¹ MCL 750.529.

² MCL 750.360.

³ MCL 750.110a(2).

⁴ MCL 750.224f.

⁵ MCL 750.227b(2).

⁶ The transcript of the preliminary examination is cited as "Prelim." The transcript of Mr. Smith's arraignment in circuit court is cited as "AOI 5/21/12." Pretrial transcripts are cited as "PT," with additional reference to the date of proceedings. The trial transcripts are cited as "TT," with additional reference to the date of proceedings. The sentencing transcript is cited as "ST 9/12/12."

⁷ The record contains two different spellings of the complainant's surname. *Compare* (Prelim 5) ("Kelley") *with* (TT 8/20/12 at 26) ("Kelly"). For the sake of clarity, this brief will refer to him as "Mr. Kelly."

Mr. Kelly was home alone on the night in question; his brother was still at work. (TT 8/20/12, at 26-27).

Around 7:20 PM, as Mr. Kelly played video games on his phone, he heard the door to his apartment open. (TT 8/20/12 at 28). At first, he thought nothing of this, as he believed his brother had arrived home from work early. (TT 8/20/12 at 27). He soon saw a man walk into the room with a handgun pointed at him. (TT 8/20/12 at 28-29). The perpetrator demanded money and marijuana. (TT 8/20/12 at 30). When Mr. Kelly went to reach for the marijuana, the perpetrator ordered him to lie face down on the ground. (TT 8/20/12 at 32, 33). As Mr. Kelly left his couch to comply, he noticed a second individual standing in the darkness of the hallway behind the man with the gun. (TT 8/20/12 at 33).

While Mr. Kelly was on the ground, he heard one of the men ask where the jars of marijuana were located. (TT 8/20/12 at 35, 36). After Mr. Kelly informed these two men that he did not have a large amount of marijuana, he heard them rummaging through his belongings. (TT 8/20/12 at 37). A few minutes later, Mr. Kelly heard the two men leave his room, walk down the stairs, and exit the building. (TT 8/20/12 at 37-38). He soon discovered that several items missing from his room, including a Playstation 3, a laptop, an iPad, \$150 cash, his identification, and his cellular phone. (TT 8/20/12 at 38).

Mr. Kelly did not immediately call the police after the incident because he did not have a phone. (TT 8/20/12 at 38). Instead, Mr. Kelly went downstairs, locked his front door, and waited for his brother to come home from work. (TT 8/20/12 at 38-40). Although a computer had been left behind, Mr. Kelly did not use it to summon the police; instead, he logged onto Facebook in an attempt to identify the individuals that robbed him. (TT 8/20/12 at 40-41). He contacted a couple of people before determining who he believed robbed him. (TT 8/20/12 at

41). He concluded that the man with the gun was 'Trey,' someone he had seen around the neighborhood. (TT 8/20/12 at 25, 55). Mr. Kelly contacted a girl named 'Stephanie,' who was Mr. Smith's ex-girlfriend. (TT 8/20/12 at 43-44). Stephanie identified 'Trey' as Mr. Smith. (TT 8/20/12 at 52).

Afterwards, Mr. Kelly posted a racially disparaging comment on his Facebook page about the man he believed to be the robber. (TT 8/20/12 at 42). The comment denigrated the robber for being of mixed-race heritage. (TT 8/20/12 at 42, 44). Mr. Kelly testified that he also posted a comment that there would be a "bullet waiting" for the person who robbed him if that person were to come back to his house. (TT 8/20/12 at 54).

Through Facebook, Mr. Kelly also contacted Amanda Tony,⁸ who was Mr. Smith's girlfriend at the time. (TT 8/20/12 at 52). Mr. Kelly testified that he told Ms. Tony that he was "pretty sure" about the identity of the person who robbed him. (TT 8/20/12 at 65). The remainder of this conversation, however, was not disclosed at trial. (TT 8/20/12 at 64-65).

Mr. Kelly's brother arrived home from work around 9:10 PM, nearly two hours after the robbery. (TT 8/20/12 at 28, 39). Mr. Kelly used his brother's cell phone to call the police. (TT 8/20/12 at 39). When Westland police officers arrived at his house, Mr. Kelly verbally explained what had happened, but did not give a written statement. (TT 8/20/12 at 39).

The next day, on January 12, 2012, Lieutenant Thad Nelson of the Westland Police Department (WPD) went to Mr. Kelly's home to speak with him about the incident. (TT 8/20/12 at 39-40). During the interview, Mr. Kelly identified the man he suspected to be the robber. (TT 8/20/12 at 10-11). Using this identification, Lt. Nelson then created a six-person photographic

⁸ The pre-sentence report uses a different spelling to refer to Mr. Smith's girlfriend: Amanda Toney. (PSR 3). For the sake of clarity, this brief will use the spelling which appears in the trial transcripts.

lineup for Mr. Kelly. (TT 8/20/12 at 11). Mr. Kelly selected Mr. Smith's photograph and identified him as the perpetrator. (TT 8/20/12 at 11).

Mr. Kelly told Lt. Nelson that he also recognized the second man's voice as belonging to "Unc" or "Uncle," someone he had met through a mutual acquaintance known only as "Terry." (TT 8/20/12 at 14, 49-50). Unc had previously visited Mr. Kelly's apartment to purchase marijuana. (TT 8/20/12 at 15, 31, 35). Of course, as Mr. Kelly acknowledged, several other people knew he sold marijuana from his house, and, specifically, that that marijuana was kept in jars in his room. (TT 8/20/12 at 31). At any rate, Lt. Nelson followed up with Terry, who indicated that Unc's real name might possibly be "Tim." (TT 8/20/12 at 16). Lt. Nelson never identified Unc, nor did he link him to Mr. Smith.

Mr. Smith was arrested more than two months after this identification. (TT 8/20/12 at 12). The record does not disclose the reason for this delay. The police did not recover the stolen items or any weapons. (TT 8/20/12 at 13). Nor did they make any other arrests.

B. Procedural History

The prosecution charged Mr. Smith with five crimes: (1) armed robbery; (2) first-degree home invasion; (3) larceny in a building; (4) possession of a firearm by a felon; and (5) felony-firearm. (Felony Information). The trial court appointed Susan Reed to represent Mr. Smith on May 21, 2012. (AOI 5/12/12, at 3; Circuit Court Docket Entries). As of June 4, 2012, trial counsel still had not met with Mr. Smith. (PT 6/4/12, at 4). Counsel did not file a notice of alibi.

A little more than a month before trial, on July 12, 2012, counsel asked the Court to appoint an investigator. (PT 7/12/12, at 3). She indicated that "I have a list of witnesses that I need to be interviewed and possibly subpoenaed for trial." (PT 7/12/12, at 3). The Court granted

this motion and appointed the Iverson Agency to assist counsel. (PT 7/12/12, at 3; Order Appointing Defense Investigator).⁹

Trial began on August 20, 2012, and ended the next day. The prosecution relied almost exclusively on Mr. Kelly's identification of the defendant. (TT 8/20/12 at 68-77). Mr. Kelly testified that he was "110% sure" of his identification, despite his more hesitant statements to Ms. Tony. (TT 8/20/12 at 65). He acknowledged that "I did also second-guess myself because I wanted to be, you know I wanted to make sure I had the right guy." (TT 8/20/12, at 66). He added that, "...[T]he more I look back on it I was, you know I convinced myself I did see what I seen." (TT 8/20/12, at 66).

The defense, on the other hand, maintained that Mr. Smith was not the perpetrator. (TT 8/20/12 at 8-9). The defense asserted that Mr. Kelly's identification was tainted by his bias towards persons of mixed-race heritage. (TT 8/20/12 at 8-9, 77-81). As evidence of this bias, the defense pointed to Mr. Kelly's Facebook activity and the racially charged statements he made immediately after the incident. (TT 8/20/12 at 8-9, 77-81).

Defense counsel made no mention of Mr. Smith's alibi during her opening statement or her closing argument. (TT 8/20/12, at 8-9, 77-81). At the close of the prosecution's case-in-chief, however, counsel stated for the record that, "I have subpoenaed witnesses on my client's behalf, but after the way the testimony has gone it [sic] and further discussion with my client I am not going to call the witness." (TT 8/20/12, at 67). Mr. Smith answered affirmatively when asked, "Is that okay with you[?]" (TT 8/20/12, at 67-68).

The next day, on August 21, 2012, Judge Allen found Mr. Smith guilty as charged. (TT 8/21/12 at 5-6). Sitting as the trier of fact, the trial court found Mr. Kelly to be a credible

⁹ The Court's "Order Appointing Defense Investigator" can be found in the circuit court file.

witness. (TT 8/21/12 at 5). Further, the court stated Mr. Kelly's racist comments on Facebook did not raise questions about the reliability of his identification. (TT 8/21/12 at 5).

At sentencing on September 12, 2012, Mr. Smith argued that his appointed counsel was ineffective. (ST 9/12/12 at 8-11). He stated that counsel had visited him on only one occasion, a short meeting the night before trial. (ST 9/12/12 at 9). He stated that counsel had admitted to him that she was very busy with her high-profile representation of Joseph Gentz. (ST 9/12/12 at 9). Further, Mr. Smith complained that counsel refused to call any of the alibi witnesses that were present at trial to testify on his behalf. (ST 9/12/12 at 10-11).

C. *Ginther* Hearing

Mr. Smith appealed by right to the Court of Appeals, challenging his attorney's failure to properly investigate his alibi defense. On Mr. Smith's motion, the Court of Appeals remanded the case to the trial court for an evidentiary hearing on this claim. *People v Ashly Drake Smith*, unpublished order of the Court of Appeals entered June 19, 2013 (Docket No. 312721). Per this order, Mr. Smith filed his motion for a new trial on July 3, 2013. The motion asserted the same argument presented in Mr. Smith's motion to remand: that his trial lawyer performed ineffectively by failing to adequately investigate or present his alibi defense. *Id.*

Five witnesses testified at the evidentiary hearing: (1) trial counsel, Susan Reed, (2) the defendant, Mr. Smith, (3) alibi witness Sarah Urban, (4) alibi witness Melissa Mulroy, and (5) alibi witness Timothy Mulroy. Judge David Allen, who had presided over the bench trial, was no longer part of the Wayne County Circuit Court's Criminal Division by the time of the evidentiary hearing. (GT-I 3-4).¹⁰ Instead, the hearing was held before his successor, Judge Mark T. Slavens. (GT-I 3-4). Judge Slavens declined to weigh the alibi testimony against the

¹⁰ Transcripts of the *Ginther* hearing are cited as "GT," with additional reference to the volume of proceedings.

identification testimony of the lone eyewitness. (GT-I 7). Instead, he focused exclusively on Mr. Smith's ineffectiveness claim. (GT-I 16).

1. Alibi Testimony

Mr. Smith testified that he did not rob the complainant. (GT-I 51). Three alibi witnesses corroborated his testimony: Sarah Urban, Melissa Mulroy, and Timothy Mulroy. Each of these witnesses lived in the same apartment complex as Mr. Smith. (GT-I 48-49). That complex was located at 29865 Cherry Hill in Inkster, approximately four miles away from the scene of the robbery in Westland. (GT-I 48, 50). All three alibi witnesses confirmed that on the night of the robbery, Mr. Smith was ill and splitting his time between his own apartment and Ms. Urban's apartment across the hall. (GT-I 51-52, 72-73, 84-85, 104).

The evening of January 11, 2012, was memorable in part because nearly everyone was suffering from the stomach flu. (GT-I 53, 71, 85). Between 6:30 PM and 8:30 PM, Ms. Urban, Ms. Mulroy, and Mr. Smith gathered in Ms. Urban's apartment to share chicken noodle soup and watch television. (GT-I 74, 85). Mr. Smith spent much of that two-hour time period lying on Ms. Urban's couch. (GT-I 71-72, 84-85). But on one or two occasions, he went across the hall to call his girlfriend, who was in the hospital with the flu. (GT-I 52-53, 74, 85). Ms. Urban testified that when Mr. Smith left her apartment, he would return within five or ten minutes. (GT-I 73). Similarly, Ms. Mulroy testified that Mr. Smith never left for more than twenty minutes. (GT-I 84).

Timothy Mulroy, the defendant's roommate, was not part of the gathering across the hall. (GT-I 98). He had treated his then-girlfriend to dinner and a movie, and he returned home at some point around 7:00 PM. (GT-I 106-107). When he returned, he saw Mr. Smith sleeping on a futon. (GT-I 107). A short time later, around 7:30 PM, he received a telephone call from

someone named Nick Horn. (GT-I 108). The caller told Mr. Mulroy that the complainant had just been robbed and was accusing Mr. Smith of being the robber. (GT-I 108-109). Mr. Mulroy believed that all of this had happened between 7 PM and 8 PM, but conceded that "I don't know the exact time[.]" (GT-I 110).

Sixteen months later, Mr. Mulroy signed an affidavit averring that when Nick Horn called, "Ashly Smith was sleeping on the couch in Sarah Urban's apartment," not on the futon in his own apartment. (GT-I 100, 111). At the evidentiary hearing, Mr. Mulroy testified that that was a mistake. (GT-I 112). He signed the affidavit despite this mistake because there was a "crunch for time." (GT-I 113). But Mr. Mulroy did not wish to testify without first correcting this mistake. (GT-I 112-113).

2. *Trial Counsel's Testimony*

Mr. Smith's trial lawyer, Susan Reed, did not present the alibi witnesses. At the *Ginther* hearing, she testified that she typically handles more than seventeen court-appointed cases at any given time. (GT-I 23). She received her appointment in this case on May 21, 2012. (GT-I 25-26); (AOI 5/21/12, at 3). By the time of the first pre-trial conference on June 4, 2012, she still had not met with Mr. Smith. (GT-I 26); (PT 6/4/12, at 4). By the time of the second and final pre-trial conference on July 12, 2012, she had only spoken with Mr. Smith in the courtroom bullpen. (GT-I 28). Counsel did not meet with Mr. Smith at the Wayne County Jail until the night before trial. (GT-I 28, 31, 57).

Counsel did obtain the services of an investigator. (GT-I 29); (PT 7/12/12, at 3). The investigator served subpoenas on the defendant's alibi witnesses. (GT-I 29). Counsel was not certain whether the investigator had done anything beyond simply serving subpoenas. (GT-I 29). The investigator had not generated any written reports, but she may have relayed to counsel at

least one witness's statements. (GT-I 30). (Timothy Mulroy testified that he may have briefly spoken to an investigator, whereas Sarah Urban and Melissa Mulroy testified that they had not.) (GT-I 74, 86-87, 105).

Counsel and Mr. Mulroy may have briefly conversed before trial, but neither of them was certain. (GT-I 31, 105). Counsel first spoke with the remaining alibi witnesses on the day of trial. (GT-I 31). Before trial, she decided that if she pursued an alibi defense, she would only call Timothy Mulroy. (GT-I 43). She explained:

I find that the more you put witnesses on, as we know everybody remembers things differently and witnesses will tend to testify about what they remember, but it might differ from what one of their friends remembers. And that was a concern at that point that if all four of them got on the stand then the prosecutor would be able to you know show discrepancies in everything they're saying, which that in itself I think would weaken the case. (GT-I 43).

Counsel did not indicate why she picked Timothy Mulroy over Sarah Urban and Melissa Urban. Both Mr. Smith and Ms. Urban, on the other hand, testified that counsel indicated that she had picked Mr. Mulroy because he was dressed more nicely than the others. (GT-I 66, 74).

Counsel ultimately decided not to call any alibi witnesses after the prosecution rested its case-in-chief. (GT-I 32). She testified that "I thought the case was going in such a way that the alibi witnesses might have be[en] giving the prosecutor something to attack rather than focusing on their complainant." (GT-I 32). She was also troubled by the alibi witnesses' statements that they were "in and out all day." (GT-I 34, 41).

Counsel may have spoken with Mr. Smith about forgoing the alibi defense. (GT-I 38-39). She was not sure if it was a long conversation, or whether an off-record discussion even took place. (GT-I 40). The trial transcript reflects this exchange:

THE COURT: Okay. People have rested. Ms. Reed, what's your pleasure?

MS. REED: Your Honor, I have subpoenaed witnesses on my client's behalf, but after the way the testimony has gone [in] and further discussion with my client I am not going to call the witness. Is that okay with you, mister –

MR. SMITH: Yes, ma'am.

THE COURT: Okay. (TT 8/20/12, at, 67-68).

Ms. Reed testified that "I gave him my opinion and what I thought we should do and he agreed. (GT-I 40). Mr. Smith also testified, "by her being a professional I guess I just went—I knew I wasn't guilty, so I just went along." (GT-I 60).

Counsel acknowledged that she never filed an alibi notice or witness list. (GT-I 32). She did not mention an alibi defense during the pre-trial conferences. (GT-I 32). Nor did she mention it in her opening statement to Judge Allen. (GT-I 32). Counsel did, however, mention the alibi witnesses to the trial prosecutor. (GT-I 37). The trial prosecutor told counsel that she had no objection to the presentation of an alibi defense without notice. (GT-I 37). Further, counsel expressed confidence that Judge Allen would have allowed the alibi defense despite the lack of notice. (GT-I 37).

Counsel testified that she knew that motions for directed verdict work differently in bench trials than they do in jury trials. (GT-I 35); MCR 6.419(C). But she did not make such a motion because "I didn't see it as an option." (GT-I 36). Counsel could not elaborate on why such a motion was not an option for her. (GT-I 36).

3. *Trial Court's Findings*

The trial court found that counsel made a strategic decision not to present an alibi defense. (GT-II 36). The court found that counsel made this choice based on the alibi witnesses' inability to account for Mr. Smith for the entire time period. (GT-II 31, 36). The court added

that the testimony at the *Ginther* hearing supported this decision, since Timothy Mulroy believed that Mr. Smith was in his own apartment for most of the time period between 7 PM and 8 PM, whereas Sarah Urban and Melissa Mulroy testified that he spent the majority of the time in Ms. Urban's apartment. (GT-II 33-36).

The trial court further found that counsel had conducted an adequate investigation. (GT-II 37). It noted that counsel was aware of the alibi witnesses and took steps to subpoena them. (GT-II 37). The court also took judicial notice of the fact that many judges of the Wayne County Circuit Court will often allow defendants to present an alibi defense even when there has been no notice. (GT-II 31). Finally, the court noted that Mr. Smith had acquiesced to counsel's decision; he did not complain about her failure to present an alibi defense or her lack of communication until after the verdict. (GT-II 32, 33, 38).

Additionally, the trial court found that Mr. Smith had not been prejudiced by the absence of an alibi defense. (GT-II 38). The court based this conclusion on the "inconsistencies in these testimony [sic] between the two young ladies and the young man on where he was." (GT-II 38). The trial court also noted counsel's testimony that had she pursued an alibi defense, she would have called only one witness to avoid any inconsistencies. (GT-II 32).

D. Opinion of the Court of Appeals

The Court of Appeals affirmed in a divided opinion. *People v Ashly Drake Smith*, unpublished opinion per curiam of the Court of Appeals issued April 1, 2014 (Docket No. 312721). Judges Saad and Fort Hood voted to uphold Mr. Smith's convictions. *Id.* at 4 (majority opinion of Saad and Fort Hood, JJ.). The majority found that trial counsel had conducted a sufficient investigation by subpoenaing Mr. Smith's alibi witnesses and interviewing them on the date of trial. *Id.* at 3. The majority wrote that "[a]lthough trial counsel did not file a notice of

alibi[,]” the record established that Judge Allen “would allow an untimely notice of alibi.” *Id.* at 3. Her decision not to present an alibi defense, therefore, could properly be deemed strategic. *Id.*

Judge Gleicher, on the other hand, voted to grant Mr. Smith a new trial. *Smith*, dissent slip op at 8. The dissent found that “[counsel’s] decision not to consult with defendant until the eve of trial, her neglect to file an alibi defense, and her failure to interview the alibi witnesses until the day of trial, were objectively unreasonable and deprived defendant of a substantial defense.” *Id.* at 5. The dissent rejected the notion that Judge Allen would have allowed alibi testimony despite counsel’s failure to file the proper notice. *Id.* at 6. After all, MCL 768.21(1) required Judge Allen to exclude the evidence. *Id.*

The dissent also rejected the majority’s conclusion that counsel had conducted a reasonable investigation. *Id.* at 5-8. First, counsel did not meet privately with her client until the evening before trial. *Id.* at 5. The dissent wrote that “I am hard pressed to conclude that a single short meeting, conducted within hours of a capital trial, objectively qualifies as reasonable.” *Smith*, slip op at 5. “[T]he failure to meet with defendant in advance of the eleventh hour, combined with [counsel’s] failure to personally interview the alibi witnesses, resulted in grossly inadequate representation.” *Id.* As a consequence, counsel “was unprepared to consider presenting an alibi defense because absent reasonable investigation, she could not meaningfully comprehend the strengths or weaknesses of an alibi defense.” *Id.*

The dissent further explained that counsel’s proffered reasons for failing to present an alibi defense fell short of a valid strategic justification. *Id.* at 6-7. As for counsel’s belief that she had already demonstrated reasonable doubt in her cross-examination of the complainant, the dissent noted that counsel could have first tested this theory with a motion for a directed verdict of acquittal under MCR 6.419(C). *Id.* at 7-8. As for counsel’s conclusion that the alibi witnesses

lost sight of Mr. Smith for brief intervals, the dissent noted that “the witnesses’ testimonies rendered it unlikely that an ill defendant would arise from Urban’s couch, drive to another location and conduct an armed robbery, only to return and continue watching television.” *Id.* at 7.

As for prejudice, the dissent noted that “Urban and Melissa Mulroy substantially agreed that defendant was sick with the stomach flu and spent the evening of the robbery lying on Urban’s couch, except for brief intervals when he returned to his own apartment across the hall.” *Smith*, dissent slip op at 9. These intervals were “too short to have driven to Kelly’s place to conduct an armed robbery.” *Id.* Thus, while not conclusive as to defendant’s whereabouts every moment that evening, the testimony most assuredly cast reasonable doubt that defendant robbed Kelly.” *Id.* Moreover, “[t]he weaknesses of Kelly’s testimony enhance the prejudicial impact of [counsel’s] unreasonable failure to present the testimony of at least Urban and Melissa Mulroy.” *Id.* From this, the dissent concluded:

Had Reed performed effectively, she would have investigated and sorted out the alibi testimony well in advance of trial, filed an alibi notice, and based her decision whether to proceed with the alibi evidence on Judge Allen’s directed verdict ruling. Assuming that Judge Allen found that Reed’s cross-examination failed to create reasonable doubt, I believe that the alibi evidence would have done so. Absent presentation of this readily-available evidence, the accuracy of the guilty verdict deserves no confidence. Accordingly, I respectfully dissent. [*Id.* at 9-10].

Mr. Smith now seeks leave to appeal to this Court.

I. TRIAL COUNSEL DEPRIVED MR. SMITH OF HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO FILE A TIMELY ALIBI NOTICE AND BY FAILING TO CONDUCT A REASONABLE ALIBI INVESTIGATION.

Issue Preservation

On remand, the trial court presided over an evidentiary hearing on this issue pursuant to *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). A claim of ineffective assistance of counsel may be presented for the first time on appeal because it involves a constitutional error which likely affected the trial's outcome. *People v Henry*, 239 Mich App 140, 146; 607 NW2d 767 (1999).

Standard of Review

The performance and prejudice components of an ineffective assistance of counsel claim are mixed questions of fact and law. *Strickland v Washington*, 466 US 668, 698; 104 S Ct 2052; 80 L Ed 2d 674 (1984). This Court applies *de novo* review to the trial court's legal conclusions, but reviews its factual findings for clear error. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

Analysis

Criminal defendants are entitled to the ineffective assistance of counsel. US Const, Ams VI, XIV; Const 1963, art 1, §§ 17, 20; *Strickland*, 466 US at 686; *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994). Ineffectiveness results when: (1) counsel's performance falls below an objective standard of reasonableness; and (2) there is a reasonable probability that the outcome of the proceedings would have been different but for the errors. *Strickland*, 466 US at 694; *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995). The dissent correctly concluded that both prongs have been satisfied in the instant case because "[counsel's] decision not to consult with defendant until the eve of trial, her neglect to file an alibi defense, and her

failure to interview the alibi witnesses until the day of trial, were objectively unreasonable and deprived defendant of a substantial defense.” *Smith*, dissent slip op at 5.

A. Trial counsel performed deficiently when she failed to file an alibi notice or conduct a reasonable investigation into Mr. Smith’s alibi.

To establish deficient performance, the defendant must overcome the presumption that trial counsel’s actions were based on reasonable trial strategy. *Strickland*, 466 US at 694. But “[m]erely labeling [counsel’s] errors “strategy” does not shield his performance from Sixth Amendment scrutiny.” *Henry v Scully*, 918 F Supp 693, 715 (SD NY, 1996), *aff’d* 78 F3d 51 (CA 2, 1996). Counsel will still be found ineffective despite a “strategic” decision if the strategy employed was not a sound or reasonable one. *People v Dalessandro*, 165 Mich App 569, 574; 419 NW2d 609 (1988). To be reasonable, counsel’s performance must conform to “prevailing professional norms.” *Strickland*, 466 US at 688.

1. Prevailing professional norms impose a duty to conduct a prompt and thorough investigation.

The *Strickland* Court cited American Bar Association standards as “guides to determining what is reasonable.” *Id.* (citing ABA “Defense Function” standards). These standards impose a duty of “prompt investigation.” *ABA Standards for Criminal Justice: Defense Function*, Standard 4-1.3(e) (emphasis added). This Court also uses the Michigan Rules of Professional Conduct to assess the reasonableness of counsel’s performance. *People v Johnson*, 451 Mich 115, 125; 545 NW2d 637 (1996). MRPC 1.3 provides: “A lawyer shall act with reasonable diligence and promptness in representing a client.” *Id.* (quoting MRPC 1.3).

Indeed, adequate preparation is a prerequisite to strategic decision-making. “Common sense suggests that lawyers cannot reasonably decide to pursue certain lines of defense to the exclusion of others unless they have first investigated the pertinent options.” Stephen F. Smith,

Taking Strickland Claims Seriously, 93 Marq L Rev 515, 522 (2009). Thus, as *Strickland* and its progeny make clear, uninformed decisions cannot be considered reasonable trial strategy:

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. [*Strickland*, 466 US at 690-691.]

The principal concern is not whether counsel should have presented an alibi defense. Rather, “we focus on whether the investigation supporting counsel’s decision . . . *was itself reasonable.*” *Wiggins v Smith*, 539 US 510, 523; 123 S Ct 2527; 156 L Ed 2d 471 (2003) (emphasis in original). “[A] complete lack of pretrial preparation puts at risk both the defendant’s right to an ample opportunity to meet the case of the prosecution . . . and the reliability of the adversarial testing process.” *Kimmelman v Morrison*, 477 US 365, 385; 106 S Ct 2574; 91 L Ed 2d 305 (1986) (internal citations and quotations omitted).

2. *The adequacy of an alibi investigation must be judged from counsel’s perspective at the time the alibi notice deadline expired.*

This Court “evaluate[s] defense counsel’s performance from counsel’s perspective at the time of the alleged error and in light of the circumstances.” *People v Grant*, 470 Mich 477, 487; 684 NW2d 686 (2004) (citing *Strickland*, 466 US at 689). This rule shields counsel from “the distorting effects of hindsight[.]” *Strickland*, 466 US at 689. But it also serves to protect defendants from “post hoc rationalization of counsel’s conduct[.]” *Wiggins*, 539 US at 526-527. In other words, this Court does not defer to excuses made after the fact. Instead, “counsel’s words and actions before and at trial are the most accurate evidence of what his strategies and theories were at trial.” *Grant*, 470 Mich at 487.

In this case, counsel's performance must be assessed from the time she allowed the alibi notice deadline to expire. MCL 768.20(1) requires defendants to file notice¹¹ of their intent to present an alibi defense at least ten days before trial. This requirement serves several goals, including: (1) safeguarding against surprise and wrongful use, (2) allowing the prosecution time to investigate, (3) protecting the public, and (4) improving trial efficiency. *People v Travis*, 443 Mich 668, 676 n 7, n 8; 505 NW2d 563 (1993). When the defendant fails to provide timely notice, "the court *shall* exclude evidence offered by the defendant for the purpose of establishing an alibi[.]" MCL 768.21(1) (emphasis added). From that point forward, the choice no longer belongs to counsel.

3. *Mr. Smith's trial lawyer performed deficiently because she allowed the alibi notice deadline to lapse before conducting any investigation.*

The Court of Appeals majority examined the wrong time period. It focused on counsel's perspective at the time the prosecution rested its case-in-chief. *Smith*, majority slip op at 3. Counsel identified this as the moment she decided not to call the alibi witnesses. (GT-I 32). But by this point, it was already too late. The alibi defense had already been forfeited.

Both the Court of Appeals majority and the judge who presided over the *Ginther* hearing credited counsel's assertion that the trial judge would have forgiven the notice requirement. *Smith*, majority slip op at 3; (GT-II 31). The dissent, however, expressed doubt about "the trial court's willingness to disregard the law (and the prosecutor's indifference to this violation)[.]" *Smith*, dissent slip op at 6. Given the mandatory statutory language, "it is highly likely that the prosecutor would have strenuously objected to a last-minute, stealth alibi defense." *Id.*

¹¹ The notice must specify the location where the defendant claims to have been at the time of the offense. MCL 768.20(1). It must also identify the alibi witnesses by name. *Id.*

Such an objection would have left the trial court with few options. It is true that “the sanction of preclusion is extreme and should be limited to only the most egregious cases.” *People v Merritt*, 396 Mich 67, 82; 238 NW2d 31 (1976). But the trial court was unlikely to grant a continuance at such a late stage. On the contrary, the trial court had already taken witnesses out of order in its zeal to complete the trial quickly. *See Smith*, majority slip op at 3.

The trial court was also unlikely to exercise its limited discretion to accept an untimely alibi notice in view of extenuating circumstances. *See Travis*, 443 Mich at 683. This discretion depends in large part upon “the reason for nondisclosure.” *Id.* at 682. Because counsel’s untimeliness was due to her lack of diligence, the trial court was unlikely to have any option but preclusion. *See id.* at 684 (holding that the trial court erred in allowing the prosecution to rebut an alibi defense, where the prosecution failed to file the required notice even though it “should have known of the alibi defense before trial”).

The Court of Appeals majority ignored the larger question: why would competent counsel risk preclusion in the first place? The Sixth Circuit has found “nothing reasonable about failing to file an alibi notice within the time prescribed by the applicable rules when such failure risks wholesale exclusion of the defense.” *Clinkscale v Carter*, 375 F3d 430, 443 (CA 6, 2004). A defendant who files an alibi notice is not required to proceed with the defense at trial. *People v Dean*, 103 Mich App 1, 6; 302 NW2d 317 (1981). The notice merely preserves the right to present an alibi; it does not irretrievably commit to it. *Id.*; *Clinkscale*, 375 F3d at 443. Thus, “there would be nothing to lose, yet everything to gain, from filing the alibi notice[.]” *Id.*

For that reason, “a number of courts have found ineffective assistance of counsel in violation of the Sixth Amendment where, as in this case, a defendant’s trial counsel fails to file a timely alibi notice and/or fails adequately to investigate potential alibi witnesses.” *Id.* (citations

omitted). Indeed, this Court found deficient performance under similar circumstances in *Pickens, supra*. The defense attorney in that case decided to present an alibi notice months before trial, but failed to file the notice required by MCL 768.20(1). *Pickens*, 446 Mich at 304, 327. The trial court excluded the alibi testimony, and the defendant was ultimately convicted. *Id.* at 304. On appeal, the defendant challenged his attorney’s effectiveness. *Id.* The *Pickens* Court could find no prejudice because the record failed to disclose how the alibi witness would have testified. *Id.* at 327. But this Court agreed that counsel performed deficiently and that her “failure to properly file notice of an alibi was inexcusable neglect.” *Id.* at 327.

In this case, when viewed from counsel’s perspective ten days before trial, there can be no strategic reason for allowing the alibi notice deadline to lapse. At that point in time, counsel had not yet interviewed the alibi witnesses. (GT-I 31). Nor had she met with her client outside of the courtroom. (GT-I 28, 31, 57). “[A] sound defense strategy cannot follow an incomplete investigation[.]” *People v Trakhtenberg*, 493 Mich 38, 55; 826 NW2d 136 (2012). Counsel therefore performed deficiently by allowing the alibi notice deadline to lapse without conducting any investigation.

4. *Even when viewed from a later point in time, counsel could not strategically choose to forgo an alibi defense because she had not conducted the requisite investigation.*

Counsel’s eleventh-hour investigation fails to support her decision to forgo an alibi defense. Again, counsel’s investigation came far too late. The deadline for perfecting an alibi defense had already expired. But even if counsel’s investigation is measured from the morning of trial, it fell well short of what the Sixth Amendment requires.

Counsel testified that she did not call the alibi witnesses because they could not completely account for Mr. Smith’s whereabouts on the date in question. (GT-I 34). Her

concern was that the witnesses “were in and out all day.” (GT-I 34). Of course, the robbery did not happen over the course of an entire day. Rather, the complainant testified that it happened around 7:30 PM and lasted for a matter of minutes. (GT-I 34, 49).

Out of the three alibi witnesses, only Timothy Mulroy was “in and out all day.” (GT-I 34, 106-107). The other two witnesses—Sarah Urban and Melissa Mulroy—remained in Ms. Urban’s apartment throughout the evening. (GT-I 73, 85). They, along with Mr. Smith, were suffering from the stomach flu and did not wish to venture out. (GT-I 73, 85). Mr. Smith spent most of the two-hour period between 6:30 PM and 8:30 PM inside Ms. Urban’s apartment. (GT-I 52, 73, 84). When he did leave to go across the hall to his own apartment, it was only for a few minutes at a time and never more than 20 minutes. (GT-I 52, 73, 84).

Counsel concluded that this testimony did not provide a complete alibi. (GT-I 34). But “[i]f trial counsel truly believed [this] . . . [s]he should have done more to investigate the alibi.” *Foster v Wolfenbarger*, 687 F3d 702, 707 (CA 6, 2012). She could have elicited evidence that the robbery occurred at least four miles away from the apartment complex where Mr. Smith and the alibi witnesses lived. (GT-I 51). She could have further elicited evidence that this is about a 16-minute round trip in light traffic. Google Maps, available at <http://goo.gl/maps/6hnoG> (last accessed November 14, 2014). Given this distance, it is exceedingly unlikely that the flu-ridden Mr. Smith could have completed the robbery in the allotted twenty minutes. This, coupled with the fact that the complainant never indicated that the robber exhibited any symptoms of the flu, is enough to raise doubts about the accuracy of the identification.

Counsel also expressed concern that if she called more than one alibi witness, she would have to address any inconsistencies between the witnesses’ accounts. (GT-I 43). She did not, however, uncover any inconsistencies in her abbreviated investigation. Further, as the dissent

noted below, the testimonies of Ms. Urban and Melissa Mulroy displayed only “a single, relatively minor inconsistency as to the time that defendant was absent from Urban’s apartment (five to 10 minutes versus 20 minutes at most)[.]” *Smith*, dissent slip op at 7. “[M]inor inconsistencies often enhance credibility and are often resolved by a careful review of the evidence in advance of trial.” *Id.*

Counsel identified Timothy Mulroy as the witness she would have called if she had pursued an alibi defense. (GT-I 43). This selection betrays her lack of investigation. The significance of Timothy Mulroy’s testimony is not that it lends further support to Mr. Smith’s alibi. Rather, his testimony is important because it helps to explain how the other witnesses could distinguish the night of the robbery from other nights.

The robbery took place in January, but police did not arrest Mr. Smith until March. (TT 8/20/12 at 10, 12). A factfinder might question how Ms. Urban and Melissa Mulroy could be so certain that the night of Mr. Smith’s illness coincided with the night of the robbery. Timothy Mulroy provided the answer. He testified that he learned of the robbery on the night it happened, thanks to a call he received from someone named Nick Horn. (GT-I 106-107).

Timothy Mulroy did place Mr. Smith inside his own apartment rather than Ms. Urban’s. (GT-I 108). But his testimony suggests confusion as to whether he was describing the same time period as Ms. Urban and Melissa Mulroy. It is evident that Timothy Mulroy did not come home at 7:00 PM as he believed. (GT-I 106-107). He testified that he came home only after taking his girlfriend to dinner and a movie. (GT-I 106-107). Those two activities are rarely completed so early in the evening.

Further, Timothy Mulroy indicated that his estimate of time was based in part upon his telephone conversation with Nick Horn. (GT-I 109). Nick Horn was not present for the robbery,

yet he told Timothy Mulroy that it had been perpetrated only fifteen minutes earlier. (GT-I 109). Nick Horn also reported that the complainant was blaming Mr. Smith. (GT-I 109).

These details suggest that Timothy Mulroy received the telephone call much later than he remembered. After all, the robbers had taken the complainant's phone. (TT 8/20/12, at 38). This prevented him from calling the police until his brother came home at around 9:10 PM, nearly two hours after the robbery. (TT 8/20/12, at 28, 39). Further, the complainant did not immediately identify Mr. Smith as the perpetrator; rather, he reached that conclusion only after conducting his Facebook research. (TT 8/20/12, at 40-41).

At any rate, Mr. Mulroy admitted that "I don't know the exact time[.]" (GT-I 110). The dissent attributed this to "the erosion of Mulroy's memory over time." *Smith*, dissent slip op at 7. In contrast, Ashly Smith, Sarah Urban, and Melissa Mulroy all testified consistently that Mr. Smith was in Ms. Urban's apartment during the relevant time period. (GT-I 52-53, 74, 85). Counsel apparently selected Timothy Mulroy not because of what he had to say, but because he was the best dressed. (GT-I 66, 74). To the extent that counsel based her decision on the female witnesses' attire, that could have been avoided with a pretrial telephone call.

All of this is evidence of an inadequate investigation. Indeed, counsel's own testimony indicates that she did little in the way of preparation before the first day of trial. She received her appointment in this case on May 21, 2012. (GT-I 25-26); (AOI 5/21/12, at 3). By the time of the first pre-trial conference on June 4, 2012, she still had not met with Mr. Smith. (GT-I 26); (PT 6/4/12, at 4). By the time of the second and final pre-trial conference on July 12, 2012, she had only spoken with Mr. Smith in the courtroom bullpen. (GT-I 28). Counsel did not meet with Mr. Smith at the Wayne County Jail until the night before trial began on August 20, 2012. (GT-I 28, 31, 57). She did not speak to Melissa Mulroy or Sarah Urban until the date of trial. (GT-I

74, 86-87). And if she spoke to Timothy Mulroy before trial, it was only briefly. (GT-I 31, 105). These minimal efforts fall well short of what *Strickland* requires.

5. *Counsel's ineffectiveness is further highlighted by her failure to move for a directed verdict of acquittal under MCR 6.419(C).*

Finally, the trial court found that counsel strategically chose not to present an alibi defense so as not to detract from the weakness of the prosecution's case. (GT-II 30-31). But because this was a bench trial, counsel did not have to make this choice at all. MCR 6.419(D) provides:

In an action tried without a jury, after the prosecutor has rested the prosecution's case-in-chief, the defendant, ***without waiving the right to offer evidence if the motion is not granted***, may move for acquittal on the ground that a reasonable doubt exists. The court may then determine the facts and render a verdict of acquittal, or may decline to render judgment until the close of all the evidence. If the court renders a verdict of acquittal, the court shall make findings of fact. [MCR 6.419(D) (emphasis added)].

Under this rule, counsel did not have to guess at whether the trial court would find a reason to doubt the complainant's identification testimony. Rather, counsel could have tested the waters by first seeking an acquittal based on reasonable doubt. If that failed, counsel would have retained the ability "to offer evidence if the motion is not granted[.]" MCR 6.419(D).

There is no strategic reason for failing to pursue such an option. Indeed, trial counsel could not articulate one at the *Ginther* hearing:

- Q. Is it fair to say that in a bench trial the Judge actually has the power to consider the evidence under the traditional reasonable [doubt] standard and if there's an acquittal the case is over, if there's a conviction then the defendant has the ability to present additional evidence. Does that sound right?
- A. That sounds about right.
- Q. Okay. Was there any reason why you didn't take that approach?

A. No.

Q. Were you aware—You were aware of the rule at that time?

A. At the time, yes, but I didn't see that as an option.

Q. Why not?

A. I didn't.

Q. Okay. Can you elaborate on that?

A. No, I can't. [(GT-I 36)].

Contrary to what the trial court found, this was not a case where counsel “did not file a motion for directed verdict because she felt that the Judge would just find there was a question of fact with regard to the identification.” (GT-II 30-31). This might be true for jury trials, where motions for direct verdict are granted only if the evidence is insufficient as a matter of law. MCR 6.419(A). But in a bench trial, a directed verdict may enter if the judge finds reason to doubt the facts submitted by the prosecution. MCR 6.419(D). This allows the defense to have its cake and eat it, too—a defendant can first argue for an acquittal based on reasonable doubt, and if that fails, the defendant can present evidence in support of his innocence.

Again, there was no strategic justification for refusing to take this two-step approach. “[T]he alibi defense was completely consistent with, and in fact complimentary to, trial counsel’s theory of mistaken identification. *Foster*, 687 F3d at 708. Counsel acknowledged that her theory was that “whatever happened there [with the robbery] it was not Mr. Smith, but that he was singled out because of a racial animus that the complainant had against him.” (GT-I 25). As counsel conceded, this theory was not at all inconsistent with the alibi witnesses’ testimony that Mr. Smith could not have committed the crime. (GT-I 40-41).

In short, counsel's investigation fell well short of what is required to justify her failure to present an alibi defense as "strategic." She did not meet privately with her client until the night before trial; and she did not conduct any real interviews of the alibi witnesses until the morning of trial. This is likely attributable to the fact that at any one time, counsel is handling upwards of seventeen cases. (GT-I 23). Prevailing professional norms dictate that "Defense counsel should not carry a workload that, by reason of its excessive size, interferes with the rendering of quality representation[.]" *ABA Standards for Criminal Justice: Defense Function*, Standard 4-1.3(e). They also impose a duty of "*prompt* investigation." Standard 4-4.1 (emphasis added). Because counsel failed to live up to these standards, her decision not to present an alibi defense cannot be upheld as strategic.

B. Mr. Smith suffered prejudice from trial counsel's failure to investigate and present alibi witnesses.

The second *Strickland* prong requires the defendant to establish a "reasonable probability" that the outcome would have been different but for counsel's deficient performance. *Strickland*, 466 US at 694; *People v Ullah*, 216 Mich App 669, 684; 550 NW2d 568 (1996). This burden is satisfied "even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." *Strickland*, 466 US at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694

The prejudice inquiry focuses upon two factors: (1) the strength or weakness of the case against the defendant; and (2) the effect of the error involved. As the *Strickland* Court explained, certain errors are more harmful than others. *Id.* at 695. "Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect." *Id.* at 695-696. "Moreover, a verdict or

conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support.” *Id.* at 696.

1. *The trial court misapplied Strickland’s prejudice analysis because it did not weigh the missing alibi testimony against the otherwise flimsy evidence supporting Mr. Smith’s conviction.*

Because the Court of Appeals majority found counsel’s efforts to be sufficient, it did not conduct a prejudice inquiry. The trial court’s prejudice inquiry focused exclusively on the alibi testimony and its perceived flaws. (GT-II 38-39). At no point did the court assess the weakness of the complainant’s identification—a critical part of the *Strickland* analysis. *Id.* at 695-696. This may be because the judge who conducted the *Ginther* hearing did not preside over the bench trial. Whatever the case, the trial court failed to properly assess just how much confidence can be placed in the verdict.

Convictions which hinge on a single witness’s identification require particular scrutiny. This Court has recognized that “[w]here there is relatively little evidence to support a guilty verdict to begin with (e.g., the uncorroborated testimony of a single witness), the magnitude of errors necessary for a finding of prejudice will be less than where there is greater evidence of guilt.” *Trakhtenberg*, 493 Mich at 56 (quoting *Brown v Smith*, 551 F3d 424, 434-435 (CA 6, 2008)). See also *Hodge v Hurley*, 426 F3d 368, 376 (CA 6, 2005) (finding prejudice in sexual abuse case with no physical evidence, where the case turned entirely on credibility of dueling witnesses); *Washington v Hofbauer*, 228 F3d 689, 707-708 (CA 6, 2000) (finding prejudice in a credibility contest after counsel failed to object to prosecutor’s improper emphasis on evidence of defendant’s bad character).

In *Trakhtenberg*, “the key evidence that the prosecution asserted against [the] defendant was the complainant’s testimony[.]” *Id.* at 56. Defense counsel failed to elicit evidence that

would have impeached that testimony while at the same time corroborating the defendant's theory of the case. *Id.* This Court concluded that the absence of this evidence undermined confidence in the reliability of the conviction, particularly "in a case that essentially boil[s] down to whether the complainant's allegations . . . [are] true." *Id.* at 57 (quoting *People v Armstrong*, 490 Mich 281, 293; 806 NW2d 676 (2011)).

The instant case also pivoted on "the uncorroborated testimony of a single witness[.]" *Id.* at 56. The prosecution called only two witnesses at trial. The first, Lieutenant Thad Nelson, merely discussed the statement he took from the complainant and the photographic identification procedure he administered. (TT 8/20/12 at 10-11). His testimony, as the trial court phrased it at the end of the bench trial, "doesn't tell us a whole lot[.]" (TT 8/21/12 at 3).

Thus, Mr. Smith's conviction rested entirely upon the complainant's identification testimony. Although Mr. Kelly expressed "110%" confidence in his identification at trial, he exuded far less certainty during his Facebook exchange with the defendant's girlfriend on the night of the incident. (TT 8/20/12 at 65-66). Indeed, it was only after conducting his Facebook research that Mr. Kelly "convinced myself I did see what I seen." (TT 8/20/12, at 66).

This evidence is far from overwhelming. It is well-established that eyewitnesses' confidence in the accuracy of their own identification is an unreliable predictor of actual accuracy. *State v Lawson*, 352 Or 724, 777; 291 P3d 673, 704 (2012) ("Despite widespread reliance . . . on the certainty of an eyewitness's identification, studies show that, under most circumstances, witness confidence or certainty is not a good indicator of identification accuracy."). Indeed, "DNA exonerations have occurred in numerous cases in which the defendant was erroneously identified by an eyewitness who had prior experience with him."

Coleman, et al., *Don't I Know You? The Effect of Prior Acquaintance/Familiarity on Witness Identification*, *The Champion* (April 2012), p. 56, fn 32.¹²

Moreover, it is highly probable that Mr. Kelly's identification of Mr. Smith was tainted by his bias towards persons of mixed-race heritage. As Mr. Kelly conceded, he posted racially disparaging remarks on Facebook about Mr. Smith after deciding that he must have been the culprit. (TT 8/20/12 at 42, 44). This bias casts even more doubt on the accuracy of his identification.

2. *The alibi testimony undermines confidence in the verdict.*

Given the weakness of the complainant's identification, the testimony of even one alibi witness would have had a major impact on the trial court's factual findings. At the very least, the alibi testimony establishes that Mr. Smith was too sick to do much of anything on the date in question. (GT-I 53, 71, 85).

Moreover, the complainant testified that the robbery took place around 7:30 PM and lasted for a matter of minutes. (GT-I 34, 49). The complainant lived about four miles away from Mr. Smith's apartment complex, which is about a 16-minute drive round-trip through city traffic. (GT-I 51). See Google Maps, <http://goo.gl/maps/6hnoG> (last accessed November 14, 2014). Mr. Smith, however, spent much of the time between 6:30 and 8:30 PM lying on Ms. Urban's couch. (GT-I 71-72, 84-85). So even though Sarah Urban and Melissa Mulroy could not account for Mr. Smith for the full two-hour period between 6:30 PM and 8:30 PM, they did testify that he only left the apartment for minutes at a time and was never gone for more than twenty minutes. (GT-I 73, 84). This, coupled with the fact that the complainant never indicated

¹² This article is available at http://scholarship.law.duke.edu/faculty_scholarship/2658 (last accessed November 14, 2014).

that the robber exhibited any symptoms of the flu, is enough to raise doubts about the accuracy of the identification.

As discussed above, Timothy Mulroy likely came home later in the evening. His timeframes are somewhat inconsistent with how Sarah Urban and Melissa Mulroy testified. But as counsel noted, this is a typical occurrence when multiple lay witnesses testify about a single event. (GT-I 43). It can happen with alibi witnesses, and it often happens with witnesses for the prosecution. (GT-I 43). At any rate, Mr. Mulroy's testimony is significant because it helps to explain why this date was so memorable for the alibi witnesses. Both Mr. Mulroy and Ms. Urban heard about the robbery on the night it happened, thanks to the word-of-mouth that followed the complainant's Facebook postings. (GT-I 74, 104); (TT 8/20/12 at 42, 44). Additionally, Melissa Mulroy heard about the accusation within a week. (GT-I 86). They immediately discounted the accusation because they knew Mr. Smith could not have committed the crime. (GT-I 109).

For all of these reasons, it is reasonably probable that the outcome would have been different had counsel produced these witnesses. Mr. Smith's convictions rest in large part upon dubious identification testimony that was unduly influenced by Facebook hearsay and the complainant's admitted racial bias. (TT 8/20/12 at 42, 44). Given these circumstances, counsel's failure to present alibi witnesses constituted ineffective assistance that denied Mr. Smith a fair trial. He is therefore entitled to a new trial.

SUMMARY AND REQUEST FOR RELIEF

WHEREFORE, for the foregoing reasons, Defendant-Appellant respectfully asks this Honorable Court to either grant leave to appeal or peremptorily reverse his convictions for the reasons stated by the dissenting judge below.

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

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Dated: November 14, 2014

Order

Michigan Supreme Court
Lansing, Michigan

October 3, 2014

Robert P. Young, Jr.,
Chief Justice

149357

Michael F. Cavanagh
Stephen J. Markman
Mary Beth Kelly
Brian K. Zahra
Bridget M. McCormack
David F. Viviano,
Justices

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 149357
COA: 312721
Wayne CC: 12-004553-FC

ASHLY DRAKE SMITH,
Defendant-Appellant.

On order of the Court, the application for leave to appeal the April 1, 2014 judgment of the Court of Appeals is considered. We direct the Clerk to schedule oral argument on whether to grant the application or take other action. MCR 7.302(H)(1). The parties shall submit supplemental briefs within 42 days of the date of this order addressing whether the defendant was deprived of his right to the effective assistance of trial counsel. The parties should not submit mere restatements of their application papers.

Received

OCT 7 2014

SADO Lansing



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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.

October 3, 2014

Clerk

APPENDIX A

STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

Supreme Court No. 149357

-v-

Court of Appeals No. 312721

ASHLY DRAKE SMITH,
Defendant-Appellant.

Circuit Court No. 12-4553-01

CERTIFICATE OF SERVICE

STATE OF MICHIGAN)
COUNTY OF INGHAM)

CHRISTOPHER M. SMITH, Attorney at Law, hereby certifies that on November 14, 2014, he mailed one copy of the following: DEFENDANT-APPELLANT'S SUPPLEMENTAL BRIEF and CERTIFICATE OF SERVICE Re:

Wayne County Prosecutor
Appellate Division
1100 Frank Murphy Hall of Justice
1441 St Antoine
Detroit, MI 48226



CHRISTOPHER M. SMITH (P70189)

IDEN NO. 26345

STATE APPELLATE DEFENDER OFFICE

DAWN VAN HOEK
DIRECTOR

JONATHAN SACKS
DEPUTY DIRECTOR

www.sado.org
Client calls: 313.256.9822



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LANSING AREA:
Phone: 517.334.6069 • Fax: 517.334.6987

November 14, 2014

Clerk
Michigan Supreme Court
925 West Ottawa, 4th Floor
P. O. Box 30052
Lansing, MI 48913

Re: People v Ashly Drake Smith
Supreme Court No. 149357
Court of Appeals No. 312721
Circuit Court No. 12-4553-01

Dear Clerk:

Enclosed please find the original and seven (7) copies of the following documents for filing in your Court: Defendant-Appellant's Supplemental Brief and Certificate of Service.

Thank you for your assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "C. M. Smith".

Christopher M. Smith
Assistant Defender

Enclosures

cc: Wayne County Prosecutor
Ashly Drake Smith
File 26345

