

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

UNPUBLISHED
October 23, 2012

Plaintiff-Appellee,

v

No. No.304248
Kalamazoo Circuit Court
LC No. 2010-002000-FC

LONNIE HANEY,

Defendant-Appellant,

Before: BECKERING, PJ., and OWENS and RONAYNE KRAUSE, JJ.

AFTER REMAND

PER CURIAM.

This case returns to this Court after remand to the trial court. On the first day of trial, the prosecutor offered to allow defendant Lonnie Haney to plead guilty to a lesser charge of second-degree criminal sexual conduct (CSC II) with a recommended minimum sentence of 86 months. Defendant rejected the plea offer. A jury then convicted defendant of three counts of first-degree criminal sexual conduct (CSC I), committed by an individual 17 years of age or older against an individual less than 13 years of age, MCL 750.520b(2)(b). The trial court sentenced defendant as an habitual offender, third offense, MCL 769.11, to concurrent sentences of 25 to 40 years' imprisonment for each CSC I conviction. Defendant appealed as of right, arguing, among other things, that he did not receive effective counsel regarding the plea offer. We affirmed in part and remanded, directing the trial court to conduct an evidentiary hearing to develop a factual record and to determine whether defendant received ineffective assistance of counsel under the framework articulated by the United States Supreme Court in *Lafler v Cooper*, 566 US___; 132 S Ct 1376; 182 L Ed 2d 398 (2012), regarding the plea offer that was tendered outside the courtroom on the first day of trial. The trial court held an evidentiary hearing on July 25, 2012, and after developing the factual record, found that defendant's counsel was not ineffective. We affirm.

“Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law.” *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The trial court must first find the facts and then decide whether those facts constitute a violation of

the defendant's constitutional right to effective assistance of counsel. *Id.* We review de novo the trial court's constitutional determinations and review for clear error its factual findings. *Id.* The clear-error standard is highly deferential; this Court will only determine that a trial court's finding is clearly erroneous when it is left with the definite and firm conviction that the trial court has made a mistake. *People v Gioglio*, 296 Mich App 12, 20-21; 815 NW2d 589 (2012). To prevail on his claim of ineffective assistance of counsel, defendant must meet the two-part test stated by the United States Supreme Court in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). First, defendant must show that his counsel's performance "fell below an objective standard of reasonableness" under prevailing professional norms. *Strickland*, 466 US at 687-688. Second, defendant must show that his counsel's deficient performance prejudiced his defense. *Id.* at 687.

A defendant's Sixth Amendment right to counsel extends to the plea-bargaining process. *Lafler*, 132 S Ct at 1384. Counsel's assistance must be sufficient to enable the defendant "to make an informed and voluntary choice between trial and a guilty plea." *People v Corteway*, 212 Mich App 442, 446; 538 NW2d 60 (1995). A defense counsel must explain the range and consequences of available choices in sufficient detail to enable a defendant to make an intelligent and informed choice, although a counsel cannot possibly ensure that a defendant comprehends everything. *People v Jackson*, 203 Mich App 607, 614; 513 NW2d 206 (1994). Where counsel has sufficiently informed a defendant of the nature of the charges and the consequences of a plea, a defendant can make an informed and voluntary choice of whether to accept the plea offer or go to trial without a specific recommendation from counsel. *Corteway*, 212 Mich App at 446. When establishing prejudice in the context of pleas, "a defendant must show the outcome of the plea process would have been different with competent advice." *Lafler*, 132 S Ct at 1384. In an instance where a defendant rejects a plea offer based on the ineffective advice of counsel,

a defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (*i.e.*, that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed. [*Id.* at 1385.]

A review of the record of the July 25, 2012, evidentiary hearing shows that there was conflicting testimony regarding what happened after a plea offer was made outside the courtroom by the prosecutor. Specifically, defendant testified that he had a short conversation regarding the plea offer with his lead counsel in the courtroom. Defendant testified that he was confused by the entire proceeding and was advised by counsel to "stand on your innocence." Defendant testified that he maintained his innocence and rejected the plea offer. Lead defense counsel testified that, after receiving the plea offer, he met with defendant at a table in the holding area in the basement of the courthouse. Lead defense counsel testified that the plea offer was made in response to the victim being reluctant to testify and that he informed defendant of this fact. He also testified that he informed defendant of the specific terms of the plea offer, including the lesser charge and the shorter sentence. Lead counsel further testified that he discussed the evidence against his client, explained that penetration as it is understood in lay

terms is not necessary for penetration under Michigan law, and that the plea offer was an opportunity for defendant to exercise some control over the outcome of the proceedings. Lead defense counsel testified that his client maintained that he did not have intercourse with the victim and rejected the plea offer. Defense co-counsel testified that he was in the hallway where the plea offer was made, that lead defense counsel left to go to the basement to talk with defendant after the offer was made, and that defendant and lead defense counsel later entered the courtroom together. He also testified that defendant was uninterested in a plea bargain and maintained his innocence throughout his defense.

On the basis of this factual record, the trial court found the following facts: (1) lead defense counsel communicated the specific terms, including sentencing, of the plea offer to defendant in the basement holding area; (2) defendant was aware that the victim was reluctant to testify; (3) defendant was aware of the prosecution's evidence against him; (4) defendant was aware of the 25-year mandatory minimum sentence upon conviction of the CSC I charge¹; (5) defendant discussed the offer with counsel; (6) while not giving a specific recommendation, counsel informed defendant that "this is your opportunity to exercise some control over what takes place"; (7) defendant weighed the plea offer after discussing it with counsel; (8) defendant maintained his innocence and rejected the plea offer; and (9) defendant would have rejected the plea offer regardless of defense counsel's advice. The trial court then concluded that defendant had not established a claim of ineffective assistance of counsel.

Given the testimony at the evidentiary hearing, we conclude that the trial court's factual findings are not clearly erroneous as we are not left with a definite and firm conviction that a mistake has been made. See *Gioglio*, 296 Mich App at 20-21. We further conclude that defendant has not established that he received ineffective assistance of counsel. First, defendant has not shown that his counsel's performance was objectively unreasonable under prevailing professional norms. See *Strickland*, 466 US at 687-688. Defendant's counsel explained the plea offer and the range and consequences of available choices in sufficient detail to enable defendant to make an intelligent and informed choice; after weighing his options, defendant made an informed and voluntary choice to reject the plea offer and to continue the trial. See *Corteway*, 212 Mich App at 446; *Jackson*, 203 Mich App at 614. Second, because defendant would have rejected the plea offer regardless of defense counsel's advice, defendant has failed to establish that, but for his attorney's advice, there is a reasonable probability of a different outcome. See *Strickland*, 466 US at 687; *Lafler*, 132 S Ct at 1384-1385.

Affirmed.

/s/ Jane M. Beckering
/s/ Donald S. Owens
/s/ Amy Ronayne Krause

¹ As we noted in our prior opinion, the record defies defendant's contention that he was unaware of the 25-year mandatory minimum for the CSC I charges. On the first day of trial and before the plea offer made in chambers, the trial court inquired about the status of the parties' plea-bargain negotiations, and a discussion occurred on the record—in defendant's presence—regarding the 25-year mandatory minimum.