

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
September 25, 2012

v

ALAN STARR TROWBRIDGE,

Defendant-Appellant.

No. 300460
Grand Traverse Circuit Court
LC No. 10-011026-FC

Before: MARKEY, P.J., and BECKERING and M. J. KELLY, JJ.

PER CURIAM.

Defendant appeals by right his convictions after a jury trial of three counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a). Defendant was sentenced as a second offender, MCL 769.10, to three terms of life in prison without possibility of parole, MCL 750.520b(2)(c). We affirm.

I. PERTINENT FACTS AND PROCEEDINGS

In 2010, defendant was arrested and charged with five counts of CSC I after his six-year-old daughter disclosed that defendant had inserted his penis into her vagina, mouth, and anus.¹ Prior to this arrest, defendant had previously pleaded guilty to fourth-degree CSC for an incident involving a five-year-old boy. Because of this prior conviction, defendant faced a mandatory sentence of life without possibility of parole if convicted of CSC I. MCL 750.520b(2)(c), as amended by 2006 PA 165 and 2006 PA 169. The charging documents, however, did not mention the mandatory sentence of life without parole. Neither the parties nor the trial court were aware of the mandatory sentence provision until after the conclusion of defendant's trial.

Before trial, the prosecution made several plea offers to defendant. In May 2010, the prosecution offered to allow defendant to plead guilty to one count of CSC I. Defendant rejected that offer and, on July 30, 2010, at a final pretrial, the prosecution offered a plea agreement allowing defendant to plead guilty to two counts of third-degree CSC as a second offender.

¹ Two charges were dismissed at trial when the victim failed to testify about them.

Defendant rejected this offer as well.² On the first day of trial, August 9, 2010, the parties informed the court they had reached a plea agreement for defendant to plead no contest to three counts of third-degree CSC with no habitual offender enhancement. The trial court ruled it would not waive its policy of not entertaining a plea to a reduced charge after the final pretrial.

At the conclusion of defendant's trial, the jury found defendant guilty of all three charged counts of CSC I submitted to them. At sentencing, the trial court judge informed the parties that he had discovered that MCL 750.520b(2)(c) mandated that defendant be sentenced to life without parole for all three counts of first-degree CSC. Defendant moved to adjourn the sentencing to brief the effect of lack of notice to defendant of the mandatory sentence. At the next hearing, the trial court sentenced defendant to three terms of life without parole.

Following sentencing, defendant appealed to this Court and moved to remand to the trial court for an evidentiary hearing to make a record regarding his claim of ineffective assistance of counsel,³ which this Court granted.⁴ At the evidentiary hearing in the trial court, defendant's trial counsel testified that he was unaware that defendant was facing a mandatory sentence of life without parole until the original sentencing date and that he had advised defendant throughout the plea bargaining process about potential sentences using the sentencing guidelines.⁵ Trial counsel further testified that he told defendant that his chances of succeeding at trial were "three to five percent" and that, if he was convicted, defendant faced a minimum prison sentence of thirty years and a maximum sentence that could exceed natural life. Trial counsel also testified that he told defendant that sex offenders typically serve close to their maximum sentence and are rarely paroled early. Trial counsel also testified that in his opinion, if defendant were aware he would be sentenced to life without parole if convicted at trial, defendant would have accepted the final pretrial offer if counsel had recommended it. Defense counsel did not say whether he recommended that defendant accept the July 30 plea offer and acknowledged it was defendant's choice to proceed to trial. Defense counsel further testified he did not know whether defendant would have pleaded guilty rather than no contest under the plea offer made the first day of trial if the trial court had waived the plea cut-off date but would not accept a no-contest plea.

Appellate counsel also filed his own affidavit that averred defendant stated that, "if he had been properly advised by trial counsel regarding the penalty he faced, he likely would have accepted the prosecution's second plea offer (a plea to two counts of CSC 3rd as an habitual

² The one-page pretrial memorandum signed by the prosecutor, defense counsel, and defendant states: "The Defendant understands that the Court will not accept a plea to a reduced charge after the close of the Final Conference."

³ See *People v Ginther*, 390 Mich 436, 443-444; 212 NW2d 922 (1973).

⁴ *People v Trowbridge*, unpublished order of the Court of Appeals, entered June 21, 2011 (Docket No. 300460).

⁵ As stated in their instructions, "the guidelines are *not* applicable to offenses for which the applicable statute establishes a mandatory determinate penalty or a mandatory penalty of life imprisonment for conviction of the offense." See MCL 769.34(5).

offender second)” But defendant did not testify at the hearing and he did not present his own affidavit that he would have pleaded guilty pursuant to the July 30 offer if he knew of the mandatory life sentence without parole if convicted after trial on the charged offenses.

At the conclusion of the evidentiary hearing, the trial court stated its preference for issuing an oral ruling from the bench and scheduled the matter for that purpose. On July 27, 2011, the trial court stated on the record its reasoning for denying defendant relief. Before doing so, however, appellate counsel waived defendant’s presence. In reviewing the facts, the court noted that defendant had rejected the July 30 final pretrial plea offer, which would have capped his maximum sentence at 22 ½ years in prison. Regarding the plea offer the on the first day of trial, the court observed, “I didn’t even consider tolerating that, we won’t do that” as matter of policy to manage the court’s docket. The trial court also added it would not accept a no contest plea unless justified because of actual loss of memory. Consequently, the court focused of the July 30 final pretrial plea offer to determine defendant’s ineffective assistance of counsel claim.

In ruling on defendant’s claim that he was denied the effective assistance of counsel during the plea bargaining phase of the proceedings, the trial court applied the familiar two-prong test of *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984), which this Court applied in *People v McCauley*, 287 Mich App 158, 162; 782 NW2d 520 (2010):

To establish ineffective assistance of counsel, a defendant must show (1) that his attorney’s performance was objectively unreasonable in light of prevailing professional norms, and (2) that, but for his attorney's error or errors, a different outcome reasonably would have resulted. These same standards apply where a defendant’s ineffective assistance of counsel claim is based on counsel’s failure to properly inform the defendant of the consequences of accepting or rejecting a prosecutor’s plea offer. [Citations omitted.]

The trial court first noted that the only evidence before it of what transpired between defendant and trial counsel was the latter’s testimony. And, the court found that counsel’s testimony regarding what defendant might have done with proper advice on the mandatory sentence required by the statute was after-the-fact opinion. But the trial court found that the first prong of *Strickland* test had been satisfied because trial counsel’s “performance was objectively unreasonable in light of prevailing professional norms.” Regarding the second prong, the court reasoned that defendant was required to show a reasonable probability of a different result, i.e. “but for the mistake [of] failing to advise the defendant of this mandatory minimum, that the result would have been different.” The trial court ruled that defendant had not satisfied the second prong of the *Strickland* test, because the court found “it almost certain that the defendant would have made the same decision had he known about the mandatory life sentence.” The court reasoned that trial counsel had advised defendant he was facing a sentence within guidelines of a minimum of 30 years, with a strong possibility of an upward departure because of his prior conviction. The court had also noted that trial counsel had advised defendant that his chances the chances of success at trial were slim, and further reasoned that defendant chose to go to trial knowing he risked being sentenced to what would amount to a life sentence. Consequently, the trial court found that even with proper advice, “[i]t is not reasonably probable that [defendant] would have accepted the plea at [the] final [pretrial] conference.”

In a written addendum to his oral ruling, the trial court set forth an additional reason why “defendant is unlikely to have accepted [the final pretrial offer] even had he received proper advice concerning the penalty for the offenses charged.” Specifically, the trial court found that defendant would not have been willing or able to state a factual basis for accepting a guilty plea:

Throughout the proceedings, the Defendant has maintained his innocence. He testified under oath that this offense did not happen. In the offender’s version of the offense in the presentence report, he reiterates his innocence. And his attorney reiterated his claims of innocence during allocution. That he would admit the truth of what had been charged, including sexual penetration of his five-year-old daughter (which would have been required to plead guilty to criminal sexual conduct 3rd degree), seems unlikely. Yet, such an admission would have been required if Defendant wished to accept the Prosecutor’s plea offer at final conference. MCR 6.302(D)(1).

Defendant now appeals, asserting ineffective assistance of counsel, entitlement to a mistrial, and a claim of cruel and unusual punishment.

II. ANALYSIS

A. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant first claims that he received ineffective assistance of counsel during plea bargaining prior to his trial. Whether a person has been denied the effective assistance of counsel is a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We review the trial court’s findings of fact for clear error, and questions of constitutional law de novo. *Id.*

Defendant argues that his trial counsel’s failure to inform him that he was facing a mandatory life sentence without possibility of parole constituted ineffective assistance of counsel. As the trial court recognized, in order to prevail on his claim of ineffective assistance during pretrial plea bargaining, “defendant must show (1) that his attorney’s performance was objectively unreasonable in light of prevailing professional norms, and (2) that, but for his attorney’s error or errors, a different outcome reasonably would have resulted.” *McCauley*, 287 Mich App at 162. This analysis also applies to counsel’s advice during the plea bargaining process. *Id.*, citing *Hill v Lockhart*, 474 US 52, 57-59; 106 S Ct 366; 88 L Ed 2d 203 (1985). Although decided after the trial court’s ruling in this case, the two-prong *Strickland* standard was reaffirmed as applicable to claims of ineffective assistance of counsel during plea bargaining in *Lafler v Cooper*, 566 US ___; 132 S Ct 1376, 1384; 182 L Ed 2d 398 (2012).

In this case, the parties concede that the first prong of the test for ineffective assistance of counsel, that counsel’s performance was deficient, has been met. In a situation where a defendant is convicted after trial and receives a longer sentence than he or she would have received if a pretrial plea bargain offer had been accepted, a defendant can establish the second prong of the *Strickland* test, prejudice, by showing a reasonable probability that if given proper advice during the plea bargaining process he or she would have accepted the prosecution’s plea offer. See *McCauley*, 287 Mich App at 162-164. This is the prejudice standard employed by the

trial court in this case, and a critical component of the prejudice standard the Supreme Court subsequently adopted for claims of ineffective assistance during the plea bargaining process in *Lafler*. The Court held that to show *Strickland* prejudice “[i]n 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.

The *Lafler* Court expounded that in situations like the present case, the prejudice alleged from ineffective assistance of counsel is having to stand trial and

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.*, 132 S Ct at 1385.]

Thus, the *Lafler* Court’s expanded test for *Strickland* prejudice in the case of a rejected plea offer requires a defendant to show that it is reasonably probable that (1) defendant would have accepted the plea offer, (2) the prosecution would not have withdrawn the plea offer in light of intervening circumstances, (3) the trial court would have accepted defendant’s plea under the terms of the bargain, and (4) defendant’s conviction or sentence under the terms of the plea would have been less severe than in fact were imposed. Here, the trial court found after an evidentiary that defendant had not established a reasonable probability that with proper advice he would have accepted the prosecution’s final pretrial plea offer. This is a factual finding that we review for clear error. *McCauley*, 287 Mich App at 164.⁶

⁶ Because a finding that defendant would not likely have accepted a plea offer even with proper advice is tantamount to finding that the defendant has not established prejudice, it could be argued this determination is reviewed de novo on appeal. See *People v Dendel*, 481 Mich 114, 130, 132 n 18; 748 NW2d 859, amended 481 Mich 1201 (2008) (noting that a trial court’s determination regarding *Strickland* prejudice is reviewed de novo on appeal and that the test for prejudice is an objective one to which appellate courts should not simply defer to the trial court). But *Lafler* makes plain that a defendant’s likely response to proper advice is but one of a four-part test to establish prejudice. Because three of the four elements to establish prejudice require an after-the-fact determination of what the principals engaged in the plea-bargaining process would likely have done under different circumstances, and because of the trial court’s own participation and ability to observe the other participants, the trial court *is* in the best position to make these determinations. Consequently, we believe this Court has correctly determined that the trial court’s finding of what the various plea bargaining actors would have done in different scenarios is a factual determination reviewed for clear error. See *McCauley*, 287 Mich App at 164. Moreover, even if we reviewed the trial court’s finding de novo, we would hold that the objective circumstances support the trial court’s determination that defendant did not establish

Generally, a trial court's factual findings following a *Ginther*⁷ hearing are entitled to deference. *People v Grant*, 470 Mich 477, 485 n 5; 684 NW2d 686 (2004). This is so because the trial court had the 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, amended 481 Mich 1201 (2008). Moreover, in this situation, the trial court had the opportunity to observe the key participants in the plea bargaining process—the prosecutor, defense counsel, and defendant—throughout the pretrial, trial, and post-trial proceedings. 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 was made. *Dendel*, 481 Mich at 130.

Based on the whole record, we are not left with the definite and firm conviction that the trial court made a mistake when it concluded that defendant had not established a reasonable probability that he would have accepted the prosecution's final pretrial plea offer with proper advice regarding the mandatory sentence he faced if convicted at trial. Rather, the record, together with the evidence and lack of evidence presented at the *Ginther* hearing, supports the trial court's finding. First, defense counsel's testimony established that defendant knew his chances of success at trial were extremely small. Second, although defense counsel erroneously used the sentence guidelines to advise defendant regarding the potential sentence he faced, defendant was told that if convicted he likely would be sentenced to such a lengthy term of years that it would be tantamount to a life sentence. Given this advice, defendant still chose to reject a plea bargain that would have capped his maximum prison term at 22 ½ years. Third, defendant failed to present his own testimony, or even an affidavit in which he stated that with proper advice on the mandatory sentence he faced he would have accepted the prosecution's final pretrial plea offer. Although defense counsel testified he believed defendant would have accepted the final plea offer with proper advice and if counsel had recommended it, the trial court clearly accorded little weight to defense counsel's after-the-fact speculation. Finally, the trial court based its finding that it was unlikely that defendant would have accepted the prosecution's final pretrial plea offer even with proper advice regarding the mandatory sentence he faced if convicted at trial on the subsidiary finding that defendant likely would have been unwilling or unable to provide a factual basis for a guilty plea required by MCR 6.302(D)(1).

This last subsidiary finding is supported by the record and deserves further discussion. MCR 6.302(D)(1) provides: "If the defendant pleads guilty, the court, by questioning the defendant, must establish support for a finding that the defendant is guilty of the offense charged or the offense to which the defendant is pleading." Here, defendant maintained his innocence throughout the proceedings; he testified at trial that he did not commit the charged offenses and maintained his innocence in posttrial proceedings. Defendant even failed to submit an affidavit expressing his willingness to plead guilty to two counts of third-degree CSC as offered at the final pretrial. Although the final pretrial memorandum states the prosecution's offer was "plead to 2 cts of csc 3rd & habitual 2nd," there is no evidence this offer was anything other than a reduced-charge guilty plea offer. Further, whether to accept a no contest plea is discretionary with the trial court. MCR 6.301(B). The trial court made it plain while ruling on defendant's prejudice because he did not establish a reasonable likelihood that he would have accepted the prosecution's plea offer even with proper advice.

⁷ See n 3, *supra*.

motion that the facts of this case did not fit within the narrow circumstances in which the court would accept a no contest plea: loss of memory caused by intoxication or injury. But a no contest plea is the only plea bargain offer the record indicates defendant was willing to accept, on the first day of trial. Even defendant's trial counsel did not know whether defendant would have pleaded guilty rather than no contest under the plea offer made the first day of trial if the trial court had waived the deadline for plea bargains.

In sum, the record supports the trial court's factual finding that it is not reasonably likely that defendant would have accepted the prosecution's final pretrial plea offer even if he had been properly advised of the statutory mandatory life sentence if convicted at trial. We cannot say that the trial court's finding is clearly erroneous. *LeBlanc*, 465 Mich at 579; MCR 2.613(C). Consequently, defendant has failed to establish the prejudice prong of his ineffective assistance of counsel claim. *Lafler*, 132 S Ct at 1384; *McCauley*, 287 Mich App at 162.

B. REBUTTAL EVIDENCE AND MISTRIAL

Defendant next argues that the trial court erred in permitting certain rebuttal evidence and in denying his motion for mistrial on the same grounds. We review both a trial court's admission of rebuttal evidence and its decision whether to grant a mistrial for an abuse of discretion. *People v Figures*, 451 Mich 390, 398; 547 NW2d 673 (1996); *People v Ortiz-Kehoe*, 237 Mich App 508, 512-513; 603 NW2d 802 (1999).

At trial, the prosecution called computer forensics specialist Todd Heller, who testified that he examined defendant's computer and that, when searching defendant's internet history, he came across four sites containing child pornography with names such as "supertightvirgins.com," and "incestmovs.com." He further testified to finding evidence of searches for terms such as "young model," "young nude models," "young model child," and "child model nude." Heller also testified that a program that allows for file sharing, had been installed on the computer, and that defendant had used an external hard drive and thumb drive for additional storage. Heller further testified that no child pornography was actually found on the computer and that the external hard drive and thumb drive were never recovered.

During the presentation of defense witnesses, defense counsel called defendant's ex-girlfriend, Shakira Puckett. Puckett testified that she lived with defendant and that they shared a computer for some time before Puckett obtained her own. Puckett also testified that she was an art student and had conducted online searches for young models and nude models for her art projects. She testified that she viewed pornography on defendant's computer, including child pornography featuring teenage girls, and that she was interested in incest and "super tight virgins." However, she also testified that she was not interested in pornography featuring pre-teen girls. Defendant also testified and denied viewing or possessing child pornography.

At the close of defendant's proofs, the prosecution recalled Heller, over defense counsel's objection, to rebut Puckett's testimony. Heller testified upon direct examination that he examined Puckett's computer in addition to defendant's computer and that Puckett's computer contained some adult pornography, but no child pornography. Upon re-direct examination, the following exchange concerning defendant's computer occurred:

Q. Okay. And you were able to find some incomplete files, is that correct?

A. Downloaded incomplete files, correct.

Q. What did those reference?

A. One of them were, title was, new PTHC, which is a common abbreviation in the child porn world as preteen hard core, that's a video. And PTHC is preteen hard core. You have PTSC, which is preteen soft core, that is more child posing nude. Hard core is more engaging in a sexual act with themselves, another child or with an adult.

After Heller's rebuttal testimony, out of the presence of the jury, defense counsel moved for a mistrial on the grounds that Heller's testimony exceeded the proper bounds of rebuttal testimony, and was an improper attempt by the prosecution to get the last word in with the jury. The trial court denied the motion, finding that the testimony directly rebutted Puckett's testimony that she was the one who viewed pornography on defendant's computer because she had stated she had no interest in pre-teen children and the incomplete file was a PTHC file.

"A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial." *Ortiz-Kehoe*, 237 Mich App at 514. Accordingly, a finding of an "irregularity" is necessary to establish a proper basis for a mistrial. In this case, defendant alleges that Heller's rebuttal testimony exceeded the scope of proper rebuttal evidence and, thus, was irregular. Rebuttal testimony is that used to contradict, repel, explain, or disprove evidence produced by the other party, tending to directly weaken or impeach the same. *Figures*, 451 Mich at 399. Rebuttal is limited to the refutation of relevant and material evidence, that is, evidence bearing on an issue properly raised in a case. *People v Bennett*, 393 Mich 445, 449; 224 NW2d 840 (1975). Its relevance should be tested by whether it is justified by the evidence which it is offered to rebut. *Nolte v Port Huron Area Sch Dist Bd of Ed*, 152 Mich App 637, 645; 394 NW2d 54 (1986).

Here, Heller's testimony directly contradicted that of Puckett, who claimed that any pornographic searches or downloads on defendant's computer had been the result of her activity on defendant's computer. Heller's testimony showed that Puckett's computer had no evidence of searches similar to those found on defendant's computer and that the pornography on her computer was all adult in nature. Further, Heller's testimony undermined Puckett's testimony by establishing that there was evidence of an attempted download of preteen hardcore pornography; a type of pornography Puckett had denied an interest in. Moreover, the circumstantial evidence that defendant viewed or possessed incest and child pornography was relevant for the purposes of showing defendant's possible intent in assaulting his daughter and also corroborated the testimony of defendant's daughter, who said that defendant had showed her incestuous child pornography. Puckett's testimony undermined that circumstantial evidence and, because Heller's testimony weakened Puckett's testimony, Heller's testimony was therefore proper rebuttal evidence. Consequently, the trial court did not abuse its discretion admitting the rebuttal evidence or denying defendant's motion for a mistrial.

C. CRUEL AND UNUSUAL PUNISHMENT

Defendant's final argument is that his sentence of mandatory life imprisonment without possibility of parole is cruel and unusual punishment. Defendant failed to assert below this challenge to MCL 750.520b(2)(c). Therefore, this claim is not preserved for appellate review, and defendant is entitled to relief only upon a showing of the plain error affected his substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Michigan's Constitution protects against cruel or unusual punishment, i.e., sentences that are grossly disproportionate. *People v Bullock*, 440 Mich 15, 32; 485 NW2d 866 (1992). If punishment "passes muster under the state constitution, then it necessarily passes muster under the federal constitution." *People v Nunez*, 242 Mich App 610, 618 n 2; 619 NW2d 550 (2000). To determine if a punishment is cruel or unusual, this Court looks to the gravity of the offense and the harshness of the penalty, comparing the penalty to those imposed for other crimes in this state as well as the penalty imposed for the same offense by other states and considering the goal of rehabilitation. *People v Poole*, 218 Mich App 702, 715; 555 NW2d 485 (2000).

This Court has already considered this issue and concluded that the mandatory sentence in MCL 750.520b(2)(c) does not constitute cruel and/or unusual punishment. *People v Brown*, 294 Mich App 377, 389-392; 811 NW2d 531 (2011). We are bound to follow *Brown* until it is reversed or modified by our Supreme Court or a special panel of this Court. MCR 7.215(J)(1). Moreover, we find the reasoning of *Brown* is sound. The sentence imposed is not unprecedented in this state or unusual in light of the punishment for similar crimes in other states. Given the severity of defendant's crimes, the mandatory sentence imposed under MCL 750.520b(2)(c) does not constitute cruel and/or unusual punishment.

We affirm.

/s/ Jane E. Markey
/s/ Jane M. Beckering
/s/ Michael J. Kelly