

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ISSAC JAMES BURCH,

Defendant-Appellant.

UNPUBLISHED

June 17, 2021

No. 352708

Berrien Circuit Court

LC No. 2019-015208-FH

Before: GLEICHER, P.J., and CAVANAGH and LETICA, JJ.

PER CURIAM.

Defendant appeals by delayed leave granted¹ his guilty plea conviction of assault by strangulation, MCL 750.84, arguing that he should be permitted to withdraw his plea because he did not understand the proceedings, was not properly advised of the plea offer by his attorney, and was coerced by the trial court into pleading guilty. We affirm.

On March 7, 2019, defendant and the victim had been dating for about seven months. On that date, at about 8:00 p.m., they had an argument at the victim’s apartment. Defendant and the victim were breaking up and the victim told defendant that he had to leave. As defendant was packing up his things, he was allegedly taking items that did not belong to him. According to the victim, as defendant was leaving the apartment he “cocked up his fist” and tried to throw a punch at her but he did not strike her at that point. “He missed me, and then he ended up pushing me into the entertainment center, and then onto the ground. He choked me and raised his fist at me again, and that’s when his friend . . . pulled him off of me . . .” Defendant had choked her with one hand while she was lying on the ground, causing her some difficulty breathing. After defendant’s friend left, the victim and defendant started arguing again and defendant pushed her back onto the floor. She then pushed defendant toward the door and was trying to close the door when he reached his arm around the door and began choking her, causing her to have difficulty breathing. Defendant then pushed the door back open and spit in the victim’s face before leaving. A police

¹ *People v Burch*, unpublished order of the Court of Appeals, entered March 23, 2020 (Docket No. 352708).

officer photographed the victim's injuries, including her neck which had a three to four-inch red linear mark.

After defendant's arrest² he made numerous attempts to contact the victim, including from jail about nine times.³ Following a preliminary examination held on April 9, 2019, defendant was bound over on the charge of assault by strangulation, as well as a count of domestic violence, third offense, and a count of resisting and obstructing arrest.

A status conference was held on June 19, 2019 and defendant appeared with his court-appointed counsel, Carri Briseno. The trial was scheduled for the following week and defendant, through his counsel, requested an adjournment on the ground that defendant believed "there's additional discovery that just has not been found yet." The court denied the adjournment request and asked if there was an "offer from the People." The prosecuting attorney replied in the affirmative, stating that if defendant pleaded guilty to assault by strangulation—a 10-year felony—the prosecution would dismiss the charge of domestic violence, third offense, as well as "the supplements . . . [h]e supplemented three times for three prior felonies which raises his maximum to life."⁴ The prosecution added that it would also dismiss the charge of resisting and obstructing arrest and that the City prosecutor in Niles had agreed to dismiss two misdemeanor ordinance violations against defendant, retail fraud and disturbing the peace. The prosecution further noted that there was a "jail video" showing defendant saying that he had a witness who would come to trial and say "certain things" although defendant admitted that the witness was not actually present at the time of the assault; thus, the prosecution stated, if defendant pleaded guilty she would also not add a charge of tampering with a witness—a 10-year felony. The prosecution stated that if defendant went to trial and lost, the scoring of the sentencing guidelines, with all of his supplements, resulted in a minimum sentence range of 38 to 152 months. But if defendant accepted the plea offer, the scoring of the sentencing guidelines resulted in a minimum sentence range of about 38 to 76 months.

The trial court then turned to defendant and asked if he had discussed the plea offer with his attorney before he came into the courtroom and defendant replied, "Not really, no." The court asked defendant what he had been doing "back there" and defendant said that he was sitting in a jail cell, locked up with another person. The court then turned to defense counsel and asked if she had been speaking with defendant and counsel replied: "We've spoken over the course of this," and then turned her attention to the scoring of the guidelines as approximated by the prosecuting attorney and noted that she had scored them a little lower. Defendant tried to interject a couple of

² A bench warrant was issued for defendant's arrest arising from this incident. Defendant was arrested on March 20, 2019, after hiding in a bathroom and refusing to come out which resulted in a charge of resisting and obstructing arrest.

³ Defendant's attempts to contact the victim resulted in a contempt of court charge for violation of a bond condition. At a hearing on the charge, defendant testified that he did not know the victim's phone number and he thought he was calling his mother to ask for help with his bond situation. Defendant was found guilty of the contempt charge and sentenced to 60 days in jail.

⁴ The Amended Information dated June 14, 2019 contained a fourth-offense notice regarding three prior convictions for felonies or attempts to commit felonies.

times, saying “But here’s the - - thing. . . .” And the court cut defendant off, saying: “Do you wanna take the deal or not, Mr. Burch?” Defendant appeared to indicate that he wanted to accept a different deal that he had been previously offered, but the trial court interrupted and again asked: “Do you want to take the plea agreement or not, sir?” Defendant asked if he could talk to his attorney and he was allowed to speak to his attorney. Defense counsel then stated that it involved “a little clarification on guidelines . . . that’s all.” Then defendant was told to stand at the podium, and the following exchange occurred:

The Defendant: Your Honor, I was offered a 5-year

The Court: Mr. Burch, I - -

The Defendant: - - plea negotiation - -

The Court: - - I’m not involved in the plea discussions. That’s between the lawyers.
I - -

The Defendant: And this - -

The Court: - - stay out - -

The Defendant: - - is why the - -

The Court: - - of those - -

The Defendant: I’m just lettin’ you know. This is - -

The Court: - - intentionally.

The Defendant: - - is why I’m so confused because - -

The Court: Mr. Burch - -

The Defendant: - - they’re not - -

The Court: - - please don’t speak. Just - - It’s better not to speak. You’re being recorded now.

Miss Briseno [defense counsel]: Okay. I’m – I’m absolutely positive that my client was advised of a prior - - of - - of prior offers and that he declined to accept all prior offers.

The Court: Okay.

The Defendant: That’s not my - -

The Court: Is he - -

The Defendant: - - understanding.

The Court: Is he gonna take the offer today, Miss Briseno?

The Defendant: Can I still get the five - - Is it [sic] five-year deal on the table, still?

Miss Briseno: The - - The offer at this time was as put on the record, it's that As -
- Assault by erlest [sic] yes, Assault by Strangulation, which is a 10-year felony
and then, everything else, will be dismissed, and the prosecutor also agrees not to
charge you with Tampering with a Witness.

The Defendant: Alright, whatever.

The Court: Does he wanna do that or not?

Miss Briseno: I believe he does, your Honor.

The Court: Okay. Please raise your right hand. . . . Do you solemnly or affirm,
under the pains and penalties of perjury, that the testimony you're about to give in
the matter now pending before the Court will be the truth, the whole truth and
nothing but the truth?

The Defendant: Yes, your Honor.

The Court: Okay. How old are you, Mr. Burch?

The Defendant: Thirty-eight.

The Court: Okay, go ahead and take a look at that rights form and sign it please. I
don't need all the oth - - other information, if he can just sign it.

The Defendant: I'm just confused.

* * *

The Defendant: I just don't understand how I got offered one deal one - - last week
and now it's this different deal this week.

* * *

The Defendant: I just - - I'd just like to put on the record, your Honor, that I was -

The Court: Stop - -

The Defendant: - - offered a

The Court: - - talking, Mr. Burch.

The Defendant: - - five-year

The Court: I'm gonna hold you in contempt. I've had enough nonsense from you this morning. I've had a long day and I - - I don't want any nonsense from you.

The Defendant: I'm sorry, your Honor.

Thereafter, the trial court questioned defendant about the factual circumstances of the charged offense of assault by strangulation and defendant pleaded guilty to the charge. Before concluding the proceedings, the trial court noted that defendant had sent the court three or four letters⁵ and the court advised defendant not to write any more letters.

At sentencing on August 12, 2019, the trial court noted that defendant's prior record variable (PRV) score⁶ was 80, for a PRV level of F, and that the scoring of the sentencing guidelines resulted in a minimum sentence range of 29 to 57 months. The prosecution recommended a lengthy prison sentence, noting the dangerous nature of the charged offense, as well as defendant's history of 31 misdemeanors, some felonies, and some "priors with other women." When asked by the court if defense counsel had anything to say, counsel responded: "Your Honor, I don't have any statements at this time." Defendant was also asked if he had anything to say and he said: "No, your Honor." The court proceeded to note that defendant had been in prison before on assaultive convictions, had 31 prior misdemeanors, about 5 prior felony convictions, and presently had three personal protection orders against him by three different women—his wife, a former significant other, and the victim in this case. The court noted that it was a fair recommendation to sentence defendant at the maximum end of the guidelines to protect the public and community, and sentenced defendant to 57 to 120 months in prison. This appeal followed.

Defendant argues that he should be permitted to withdraw his guilty plea because he did not understand the proceedings, was not properly advised of the plea offer by his attorney, and was coerced by the trial court into pleading guilty. We disagree.

"A defendant convicted on the basis of a plea may not raise on appeal . . . any [] claim that the plea was not an understanding, voluntary, or accurate one, unless the defendant has moved to withdraw the plea in the trial court, raising as a basis for withdrawal the claim sought to be raised on appeal." MCR 6.310(D). In this case, defendant did not seek to withdraw his guilty plea in the trial court as involuntary or unknowing; therefore, appellate review is precluded under MCR 6.310(D). See *People v Baham*, 321 Mich App 228, 234-235; 909 NW2d 836 (2017). However, defendant has also raised an ineffective assistance of counsel claim with respect to his guilty plea, which can serve as a basis for relief despite the failure to comply with MCR 6.310(D). *Id.* at 235.

⁵ The lower court record contains four letters from defendant to the presiding judge dated (1) April 18, 2019 (stating in part that he had been unable to discuss his case with his attorney, Ms. Briseno); (2) May 20, 2019 (stating in part that his attorney was not filing pretrial motions on his behalf); (3) June 4, 2019 (stating in part that his attorney was refusing to file pretrial motions on his behalf); and (4) June 6, 2019 (stating in part that his attorney had not investigated his case).

⁶ Defendant's offense variable (OV) score was 30, for an OV level of III.

But because this issue is unpreserved and a *Ginther*⁷ hearing was not conducted our review of defendant's ineffective assistance of counsel claim is limited to errors apparent on the record. See *People v Unger*, 278 Mich App 210, 253; 749 NW2d 272 (2008).

A defendant is entitled to the effective assistance of counsel during the plea-bargaining process. *People v Douglas*, 496 Mich 557, 591-592; 852 NW2d 587 (2014). Just as in other contexts, a defendant must show that his attorney's representation fell below an objective standard of reasonableness and but for counsel's error there is a reasonable probability that the result would have been different. *Id.* at 592 (citation omitted). In other words, "the outcome of the plea process would have been different with competent advice." *Id.* (citation omitted). "When ineffective assistance of counsel is claimed in the context of a plea, the pertinent inquiry is whether the defendant tendered the plea voluntarily and understandingly." *People v Swirles (After Remand)*, 218 Mich App 133, 138; 553 NW2d 357 (1996); see also *People v White*, 307 Mich App 425, 431; 862 NW2d 1 (2014).

Defendant has failed to establish that he was denied the effective assistance of counsel. Defendant's claims—that he did not understand the proceedings and was not properly advised of the offer—are based solely on the fact that he wanted to accept a previous plea offer that was no longer being offered by the prosecution. In other words, defendant's alleged confusion concerned why he was not being offered the same plea bargain that he had previously rejected. But the prosecution was not required or duty-bound to offer the same plea bargain that defendant had rejected. See, e.g., *People v Heiler*, 79 Mich App 714, 719-721; 262 NW2d 890 (1977). And defense counsel is not ineffective for failing to obtain a particular plea offer from the prosecution. Defendant does not argue on appeal that the guilty plea he tendered was not made voluntarily or understandingly because of his counsel's performance. See *People v Armisted*, 295 Mich App 32, 48-49; 811 NW2d 47 (2011). For example, defendant does not claim that his counsel failed to explain the nature of the charges against him or that he was unable to make an informed decision regarding available options. See *People v Corteway*, 212 Mich App 442, 445; 538 NW2d 60 (1995). It is clear from the record that during the plea hearing, defendant was apprised of the plea offer that was currently being offered to him. While defendant denied discussing the plea offer with his counsel while he was in a holding cell, defense counsel clarified to the court that she and defendant had discussions about plea offers over the course of the pending matter. Defense counsel specifically assured the court that defendant had been advised of all prior offers and had declined to accept all prior offers. Although the failure of counsel to convey a plea offer entirely may constitute ineffective assistance of counsel, *People v Williams*, 171 Mich App 234, 241; 429 NW2d 649 (1988), in this case, the plea offer was conveyed and accepted on the record. And even if defense counsel's performance fell below an objective standard of reasonableness for not speaking to defendant in his holding cell about the plea offer at issue—which we are not conceding—

⁷ *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

defendant has failed to show how he was prejudiced, i.e., that the outcome of the plea process would have been different. Accordingly, defendant has failed to establish that he was denied the effective assistance of counsel during the plea-bargaining process.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ Mark J. Cavanagh
/s/ Anica Letica