STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Michigan Court of Appeals
(Donofrio, P.J., Stephens, J., and Ronayne Krause, J.)

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiffs-Appellant,

v

JEFFERY ALAN DOUGLAS,

Defendants-Appellee.
_____/

Supreme Court No. 145646

Court of Appeals No. 301546

Lenawee Circuit Court
No. 09-14365-FC

AMICUS BRIEF ON APPEAL OF ATTORNEY GENERAL BILL SCHUETTE IN SUPPORT OF LENAWEE COUNTY

ORAL ARGUMENT REQUESTED

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Dated: April 1, 2013

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STATEMENT OF QUESTIONS PRESENTED

The Attorney General will address only the first two questions presented by the Court in its October 24, 2012 order:

1. Whether the Court of Appeals erred in concluding that the defendant was prejudiced by his attorney's failure to inform him of a mandatory minimum sentence if convicted of the charged offense where the trial court determined that the defendant refused plea offers because he claimed to be innocent.

   Appellant's answer: Yes.

   Appellee's answer: No.

   The Attorney General's answer: Yes.

2. Whether the remedy for ineffective assistance of counsel may include re-offering a plea bargain to a lesser charge after the defendant has testified at a trial that he did not commit an offense.

   Appellant's answer: No

   Appellee's answer: Yes.

   The Attorney General's answer: No.

INTRODUCTION

A fundamental question underlies the first two legal issues. May a criminal defendant who maintains that he is entirely innocent of the crime plead guilty or plead *nolo contendere* to obtain a favorable plea offer? Although this Court has suggested in *obiter dictum* that a defendant may do so, under Michigan law the answer is no. This conclusion is supported by court rule, statute, the ethical rules, and the law governing collateral challenges to guilty pleas. A defendant who denies all wrongdoing cannot plead guilty in Michigan. The same is true for pleading *nolo contendere*. This controlling principle informs the answer to the first two legal issues that this Court asked the parties to brief.

First, Douglas maintained that he was innocent. At trial, he denied that he engaged in any inappropriate sexual activity with his daughter, (Appellee's Appendix, p. 150b), and testified at the post-conviction *Ginther* hearing that "I'm innocent" of the crime (*id.* at 178b). In Michigan, these contentions are fatal to his claim of prejudice. That is because he would not have been able to establish a factual basis for his crime under MCR 6.302(D)(1) and there would not have been a proper basis on which to seek a *nolo contendere* plea under MCR 6.302(D)(2). To obtain relief, he must show that he would have accepted the plea offer; but the only way Douglas could have done so was to admit that he perjured himself at trial.

Second, this same analysis governs the issue of remedy. Even if the prosecution was required to re-offer the plea and defendant accepted it, the trial court should reject it under MCR 6.302(D) as contrary to Michigan law.

STATEMENT OF FACTS

The Attorney General adopts the statement of facts as presented by the brief of the Lenawee County Prosecutor's Office.

ARGUMENT

I. Douglas cannot prove prejudice because he maintained his innocence and would not have been able to take advantage of the plea offer under Michigan law.

The fact that Douglas testified at trial that he was innocent and did so again at his post-conviction hearing forecloses his opportunity for relief on the claim of ineffective assistance. A criminal defendant cannot both claim he did not commit the crime – denying that he committed the predicate acts that form the basis of the crime – and simultaneously claim that he would have taken advantage of a plea offer. As a consequence, Douglas cannot prove prejudice.

A. Prejudice is a threshold requirement to proving ineffective assistance of counsel at the plea stage.

In the context of a rejected plea, the prejudice component of the *Strickland* test requires a criminal defendant to show that counsel's deficient performance deprived him of the opportunity to plead guilty. In *Lafler v Cooper,* 132 S Ct 1376 (2012), the United States Supreme Court articulated a three-part test for this proof. A defendant must show "a reasonable probability

> [1] that the plea offer would have been presented to the court (i.e.,
>
> > [a] that the defendant would have accepted the plea and
> >
> > [b] the prosecution would not have withdrawn it in light of intervening circumstances),

> [2] that the court would have accepted its terms, and
>
> [3] that the conviction or sentence, or both, under the offer's terms would have been less severe" than the punishment ultimately faced. [*Lafler*, 132 S. Ct. at 1385.]

The question here is whether the defendant "would have accepted the plea" in light of his claim of innocence.

The trial court expressly relied on the fact that Douglas maintained his innocence throughout the proceedings to find that he had failed to prove prejudice:

> In the face of 'I didn't do it,' I don't know how that would have changed anything. I would have said I did do it if I'd known it was 25 years. Well, it just doesn't make sense, and it's not logical. [Appellant's Appendix, p 114a.]

In reversing, the Court of Appeals did not directly address this aspect of the trial court's ruling. It held that Douglas had demonstrated prejudice based on his insistence that he would have taken the plea offer if he had known of the 25-year mandatory minimum rather than a possible 20-year sentence:

> Although the trial court determined that no error had occurred because defendant was aware of the possibility that he could be sentenced to a 20-year term, there is a significant difference between the possibility of a 20-year term with the likelihood of serving a much shorter sentence and the certainty of serving a 25-year minimum term. Defendant has thus shown that the offer was valid, that he would have accepted the offer, and that his convictions and sentences would have been much less severe than those that were imposed after trial. [*People v Douglas,* 296 Mich App 186, 208; 817 NW2d 640 (2012).]

On this basis, the Court of Appeals found that Douglas had proven prejudice. But that satisfies only prong [3] of the *Lafler* test. It does not address prong [1][a]: whether the defendant "would have accepted the plea." The answer to that question is "no."

B. Michigan law does not allow a criminal defendant to maintain his innocence and plead guilty, and similarly there is no basis to allow for a *nolo contendere* plea in that circumstance.

The Michigan court rules provide the beginning place for an analysis on whether Michigan law allows a criminal defendant to both maintain his innocence and tender a plea. The court rules provide for a plea of guilty, *nolo contendere*, or guilty but mentally ill. MCR 6.301(A). The first two options are relevant for this appeal.

For a plea of guilty or *nolo contendere*, the court rules require that the plea be "accurate." MCR 6.302(D). Under this requirement, the trial court is directed to "question" the defendant to establish that there is "support" for a finding of guilt:

> (1) 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. [MCR 6.302(D)(1).]

Likewise, a *nolo contendere* requires a showing that there is evidence to support the plea, and that there is an "appropriate" reason for such a plea:

> (2) If the defendant pleads *nolo contendere*, the court may not question the defendant about participation in the crime. The court must:
>
> (a) state why a plea of *nolo contendere* is appropriate; and
>
> (b) hold a hearing, unless there has been one, that establishes *support for a finding that the defendant is guilty* of the offense charged or the offense to which the defendant is pleading. [MCR 6.302(D)(2) (emphasis added)).]

A criminal defendant may only plead *nolo contendere* with the consent of the trial court. MCR 6.301(B).

Before the establishment of the court rules, the procedure for guilty pleas was governed purely by statute. *People v Barrow,* 358 Mich 267, 272-273; 99 NW2d 347 (1959) (noting that the statutory law preceded the controlling court rule for pleas).[1] Under MCL 768.35, the trial court ensures that the plea is voluntary and is duty bound to "set aside" a guilty plea before sentencing if the trial judge had "reason to doubt the truth" of the plea:

> Whenever any person shall plead guilty to an information filed against him in any court, it shall be the duty of the judge of such court, before pronouncing judgment or sentence upon such plea, to become satisfied after such investigation as he may deem necessary for that purpose respecting the nature of the case, and the circumstances of such plea, that said plea was made freely, with full knowledge of the nature of the accusation, and without undue influence. *And whenever said judge shall have reason to doubt the truth of such plea of guilty, it shall be his duty to vacate the same, direct a plea of not guilty to be entered and order a trial of the issue thus formed.* [MCL 768.35 (emphasis added).]

The statute has been present in Michigan law for more than 100 years – never repealed – and reflects a policy that is based on the fear that criminal defendants who are not guilty of their crime may plead guilty to avoid a trial. This point was articulated by Justice Campbell in the 19th century in addressing the statute:

> The Legislature of 1875, having in some way had their attention called to serious abuses caused by procuring prisoners to plead guilty when a fair trial might show they were not guilty, or might show other facts important to be known, passed a very plain and significant statute designed for the protection of prisoners and of the public. [*Edwards v People*, 39 Mich 760, 761 (1878).]

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[1] The ability to plead guilty *nolo contendere* was added by statute in 1969. MCL 767.37. See 1969 PA 334. *Lichon v Am Universal Ins Co,* 435 Mich 408, 417; 459 NW2d 288 (1990).

This analysis remains equally valid today, as noted by the critical literature in evaluating the *nolo contendere* plea. See 5 LaFave & Israel, Criminal Procedure (3d ed), § 21.4(a), p 796 (one of the dangers of *nolo contendere* pleas is that "some innocent persons will so plead to avoid the expense and notoriety of trial").

This Court has not addressed the statute in many years, but in its last examination, a plurality of the Court affirmed its constitutional validity:

> [D]efendants *do not* have the right to insist on acceptance of guilty pleas under [MCL] 768.35. In those cases where the trial judge is presented with objective facts which would legitimately cause him to doubt the truth of a plea of guilty, [MCL] 768.35 commands him not to accept the plea. [*People v Wolff,* 389 Mich 398, 404; 208 NW2d 457 (1973) (Kavanagh, T.M., C.J., joined by Swainson, J., Williams, J.).]

The dissent in *Wolff* agreed with this point. *Id.* at 418 (Coleman, J., dissenting, joined by Brennan, J.).[2]

In the face of this statute and the corollary court rules, this Court has nevertheless indicated in *obiter dictum* on several occasions that a criminal defendant may plead guilty "even where he denies his guilt." See *People v Haack,* 396 Mich 367, 378; 240 NW2d 704 (1976) ("A guilty plea may be accepted even though the defendant is unsure of his guilt and *even where he denies his guilt* if after careful inquiry the judge satisfies himself that there is a substantial factual basis for the plea and that the plea represents a well-considered and well-advised choice by the defendant.") (internal quotes omitted; emphasis added); *In re Guilty*

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[2] The Court of Appeals has concluded that MCL 768.35 has been superseded by the new court rules insofar as the court rules determine that a plea may only be set aside with the criminal defendant's consent under MCR 6.310(B). *People v Strong,* 213 Mich App 107, 112; 539 NW2d 736 (1995). The issue of a trial court sua sponte setting aside a valid plea is not before the Court.

Plea Cases, 395 Mich 96, 134 n 2; 235 NW2d 132 (1975) (same).[3] In neither of these circumstances was the issue presented about a criminal defendant who sought to both deny his guilt and accept a plea offer.[4] These decisions were based on a dissent from then Judge Levin in *People v Coates,* 32 Mich App 52, 70; 188 NW2d 265 (1971). As *obiter dictum*, they are not binding on this Court. *People v Peltola,* 489 Mich 174, 189; 803 NW2d 140 (2011).[5]

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[3] In his brief, Douglas relies on *People v Mauch,* 397 Mich 646, 667; 247 NW2d 5 (1976) and *People v Wolff,* 389 Mich at 413-414 for this point. See Appellee's Brief, pp 22, 24. The reference in *Mauch* was from Justice Levin's concurrence, *id.* at 667, and the citation from *Wolff* was taken from Justice T.G. Kavanagh's "separate opinion" in which he was writing for himself, *id.* at 413-414. These were not opinions signed by a majority of the Court.

[4] In *In re Guilty Plea Cases,* the Court was examining a circumstance in which the defendant plead nolo contendere at the end of the prosecution's case in chief and the trial court did not place its reasons on the record to justify such a plea. *Id.* at 133-134. In *Haack,* this Court noted that the factual basis was adequate. *Id.* at 378 ("On Haack's statement that he had pointed a revolver he knew was loaded at the deceased and intentionally pulled the trigger, a trier of fact could properly infer intent to kill"). See also *Lichon,* 435 Mich at 420 ("a plea of nolo contendere does not of necessity establish a party's guilt because of the inconclusive and compromise nature of judgments based on nolo pleas.") (internal quotes omitted). Compare *Strong,* 213 Mich App at 109-110 (the Court of Appeals reversed the trial court's decision to vacate a plea where the criminal defendant at sentencing indicated that the crime "never happened" and that he pled guilty to "avoid the habitual" but nevertheless opposed the withdrawal of his plea).

[5] The other cases on which Douglas relies are inapposite. (Appellee's Brief, pp 22, 28.) This Court's order in *People v McCauley,* 493 Mich 872; 821 NW2d 569 (2012) did not address the issue. Also, for the decisions of the Court of Appeals, *People v Smith,* 182 Mich App 436, 442; 453 NW2d 257 (1990) and *People v Trombley,* 67 Mich App 88, 92; 240 NW2d 279 (1976), they are equally unavailing. *Smith* only addressed the issue whether a plea was involuntary where given to avoid the possibility of a conviction for a lesser offense with a greater punishment – which is a different issue than the one here. *Id.* at 442. While *Trombley* explained that a withdrawn plea should not be used at trial, stating only in obiter dictum that the defendant may have pled for reasons "other than guilt." *Id.* at 92-93. These decisions are not controlling.

The seminal case for the claim that one can maintain one's innocence and plead guilty that served as the basis for this Court's statements is the U.S. Supreme Court's decision in *North Carolina v Alford,* 400 US 25 (1970). In *Alford,* the Court held that there is no constitutional violation where a criminal defendant maintains his innocence but nevertheless wishes to plead guilty:

> An individual accused of crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime.
>
> * * *
>
> In view of the strong factual basis for the plea demonstrated by the State and Alford's clearly expressed desire to enter it despite his professed belief in his innocence, we hold that the trial judge did not commit constitutional error in accepting it. [*Alford,* 400 US at 37-38.]

But the Court made clear that this rule does not bind a state that elects to preclude a guilty plea by an accused who seeks to accept a plea offer but professes to be innocent:

> Our holding does not mean that a trial judge must accept every constitutionally valid guilty plea merely because a defendant wishes so to plead. A criminal defendant does not have an absolute right under the Constitution to have his guilty plea accepted by the court, although the States may by statute or otherwise confer such a right. *Likewise, the States may bar their courts from accepting guilty pleas from any defendants who assert their innocence.* [*Id.* at 168 n 11 (citation omitted; emphasis added).]

As a consequence of the Michigan statute that requires the trial court to guard against false pleas and by the court rules that require a factual basis for guilty pleas, Michigan has taken this latter approach. MCL 768.35; MCR 6.302(D). See also *Wolff,* 389 Mich at 420 (Coleman, J., dissenting) ("Both by statute and rule,

Michigan has enunciated the latter policy" barring courts from accepting guilty pleas from defendants who assert their innocence). "The practice in Michigan was not affected by the ruling in *Alford.*" *Wolff,* 389 Mich at 420 (Coleman, J., dissenting).[6] The critical literature supports this conclusion. See Rolis, Jenny Elayne, "The Pragmatic Plea: Expanding Use of the *Alford* Plea to Promote Traditionally Conflicting Interests of the Criminal Justice System," 82 Temp. L. Rev. 1389, 1399 (Spring-Summer 2010): "Courts that have completely rejected the *Alford* plea include Indiana, Michigan, and New Jersey, and federal courts strongly discourage the pursuit of an *Alford* plea by defendants" (footnotes omitted), citing *People v Butler*, 43 Mich App 270, 280; 204 NW2d 325 (1972) (stating that the courts "must look to the ultimate guilt or innocence of the pleaders," noting that *Alford* does not bar the states from refusing to accept pleas from defendants who assert their innocence).

There is a difference, of course, between admitting to all of the predicate acts of a crime but disputing one's moral culpability and denying one's guilt altogether. See *Haack,* 396 Mich at 377, ("[a] factual basis for acceptance of a plea exists if an inculpatory inference can reasonably be drawn by a jury on the facts admitted by the defendant even if an exculpatory inference could also be drawn and defendant

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[6] It is worth noting that the plurality opinion in *Wolff* did not take issue with Justice Coleman's analysis of MCL 768.35 in light of *Alford*. Rather, Justice T.M. Kavanagh, who wrote for himself and to other justices, reasserted the validity of the statute in his plurality opinion. *Wolff,* 389 Mich at 404. This Court approvingly cited *Alford* in a later case, but that was in the circumstance of evaluating whether a defendant who was *unable* to recall the events of crime may enter a plea of guilty but mentally ill. *People v Booth,* 414 Mich 343, 358-359; 324 NW2d 741 (1982).

asserts the latter is the correct inference.") (internal quotes omitted), citing *Guilty Plea Cases,* 395 Mich at 130. The facts in *Wolff* reflected the first dynamic, where the defendant admitted that he drove several men to a store knowing that they were going to commit a robbery. The issue was whether this was an adequate factual basis for the plea and whether it was a false plea because the defendant said at presentencing that he did not "have any guilt in this matter at all." *Wolff,* 398 Mich at 416. But he still admitted at sentencing that he drove them "kn[o]wing they were going to pull off a crime." *Id.* at 417.

That is a very different circumstance than here, where Douglas confirmed that he did not engage in "any type of inappropriate sexual activity" with his daughter. (Appellee's Appendix, p. 150b.) Douglas' denials went to the heart of the elements of the crime, particularly for fourth-degree criminal sexual conduct in that it requires proof that the sexual contact was accomplished for a "sexual purpose." MCL 750.520a(q) (definition of "sexual contact"). In other words, Michigan law does not allow an accused to deny he performed acts that were essential elements of the crime and still plead guilty. A defendant must admit acts that enable a finding of guilt under MCR 6.302(D)(1), or not contest them for a nolo contendere plea under MCR 6.302(D)(2).

There are three additional considerations that support this conclusion.

First, there would be no way to comply with the factual-basis requirement in MCR 6.302(D)(1), which requires that by "questioning the defendant" the court "must establish support for a finding that the defendant is guilty." *Id;* see also

People v Taylor, 387 Mich 209, 224; 195 NW2d 856 (1972) ("conduct such an examination as to show that what the defendant actually did was indeed a crime or otherwise he could not understandingly plead guilty"). It is hard to envision how the plea colloquy could even occur here for Douglas when he repeatedly denied under oath that he engaged in the conduct that would serve as a basis for his plea.

More fundamentally, the purpose of the justice system is not to obtain good outcomes for criminal defendants, but rather to administer justice. This Court explained the point of the importance of accurate pleas when it modified the process for taking pleas:

> But Michigan's rule on acceptance of pleas requires that the court ascertain more about the plea than that the defendant agrees that it is expedient to so plead. The rule is designed to require reasonable ascertainment of the truth of the plea. [*People v Barrows,* 358 Mich 267, 272; 99NW2d 347(1959).]

The system of accepting pleas is not merely about mere "expedien[ce]."[7] It is about obtaining the truth.

The possibility of pleading *nolo contendere* would also not work. As already noted, the court rules require that this occur where "appropriate" and with the consent of the trial court. MCR 6.302(D)(2); MCR 6.301(B). This Court has

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[7] In an unpublished case, the Court of Appeals reflected this practical understanding of the plea process, concluding that the trial court did not clearly err in finding that a defendant would not have accepted the plea offer where he "maintained his innocence throughout the proceedings." *People v Trowbridge,* an unpublished, per curiam opinion of the Court of Appeals, released on September 25, 2012 (No. 300406). See Attachment A, slip op, p 6.

identified the circumstances, in a non-exhaustive list, in which a defendant might appropriately seek to exercise this option:

> Among the justifying circumstances that have been suggested are (1) a reluctance on defendant's part to relate the details of a particularly sordid crime (E.g., sexual assault on a child); (2) the defendant's recollection of the facts may be unclear because he was intoxicated or he committed so many crimes of a like nature that he cannot differentiate one from another; and (3) because he wishes to minimize other repercussions, E.g., civil litigation. [*In re Guilty Plea Cases,* 395 Mich App at 134 (citation omitted).]

The primary Michigan criminal treatise identifies the same justifications. See 1A Gillespie, Michigan Criminal Law & Procedure, § 16.15 (Rev Ed 2008), pp 33-34 (listing loss of memory from "intoxicat[ion]," "civil litigation," or loss of memory more generally as justifications). So Michigan law rejects the idea that a criminal defendant may ask the trial court to accept a *nolo contendere* plea because he did not commit the crime but wishes to take advantage of the plea offer. This Court has expressly rejected such a jaded view of justice. See *Barrows,* 358 Mich at 272 (explaining that mere "expedien[ce]" is not sufficient for a plea); *Edwards*, 39 Mich at 762 ("[i]t is contrary to public policy to have any one imprisoned who is not clearly guilty of the precise crime charged against him"). See also *Taylor,* 387 Mich at 225-226 (identifying the obligation to ascertain the facts to show that "a crime had been committed by the defendant," and noting at the same time that a newspaper reported that "defendants plead guilty in Wayne County although they believe they are innocent just to get out of the jungle that is the Wayne County jail."). A defendant who testifies that he did not commit the acts that form the basis for the plea – who contests the crime – cannot rightly ask to plead no contest.

Second, this understanding of Michigan law comports with the Michigan Rules of Professional Conduct. The contention that a defendant may falsely plead guilty under oath because there is an advantageous plea offer available would run afoul of MRPC 3.3. It provides an obligation for an attorney to ensure that a client does not provide false evidence:

(a) A lawyer shall not knowingly:

* * *

(3) offer evidence that the lawyer knows to be false.

The comments to this rule explain that an attorney who knows that the client will testify falsely has obligations to take action:

> If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the evidence. [MRPC 3.3, Comment.]

The critical literature acknowledges that it sometimes occurs that a criminal defendant will plead guilty even when he is not guilty to obtain the benefit of an advantageous plea offer. See, e.g., 25 Geo J Legal Ethics 1027, "Plea Bargaining, Innocence, and the Prosecutor's Duty to Do 'Justice,'" 1027-1028 ("The innocence problem is the recognition that when a prosecutor offers a defendant the opportunity to plead guilty in exchange for a more lenient punishment, the offer may lead an innocent defendant to plead guilty."). But there is a fundamental difference between a power and right. Cf. *People v Bailey,* 451 Mich 657, 671; 549 NW2d 325 (1996) (distinguishing between a right and a power with respect to jury

nullification). The fact that something may occur does not mean it is justified in law.

Third, Douglas' claim that he may either plead guilty or *nolo contendere* while simultaneously denying that he committed the acts that performed the basis for the conviction would subject pleas to collateral challenge. Under MCR 6.310(B), a defendant may move to withdraw his plea before sentencing where it comports with the "interest of justice." This Court has stated that the trial court's discretion in allowing plea withdrawals should be granted with "great liberality." *People v Bencheck,* 360 Mich 430, 432; 104 NW2d 191 (1960). For such claims, the Court of Appeals has ordered either a remand or granted relief in circumstances in which a defendant maintained his innocence. See, e.g., *People v Thew,* 201 Mich App 78, 96; 506 NW2d 547 (1993) (ordering remand where defendant maintained that he was innocent of felony murder and there was possible defense evidenced on the record); *People v Lewis,* 176 Mich App 690, 693-694; 440 NW2d 12 (1989) (ordering the trial court to allow defendant to withdraw his plea where he asserted his innocence before sentencing and claimed that he was subject to coercion from his attorney). The factual-basis requirement guards are designed to guard against this very kind of challenge – "subsequent false claims of innocence." *Barrows,* 358 Mich at 272. Where the *nolo contendere* plea was based on the fact that the defendant did not commit the crime, the plea would be illusory, i.e., subject to repudiation by the defendant at any time.

And on this point, the suggestion that a criminal defendant may properly elect to accept an advantageous plea offer even where he has told his attorney that he committed no crime suggests – as here – that a defense counsel might somehow be ineffective for advising a client not to plead guilty. That is not the rule in Michigan. See, e.g., *People v Titlow,* an unpublished, per curiam opinion of the Court of Appeals, released on December 11, 2003 (No. 241285). See Attachment B, slip op, p 3 ("When a defendant proclaims his innocence, however, it is not objectively unreasonable to recommend that the defendant refrain from pleading guilty – no matter how 'good' the deal may appear."). The principle Douglas advocates undermines the truth seeking function of the justice system.

Douglas argues on appeal that to apply this Michigan rule would "preclude all changes of pleas that follow an arraignment at which a not guilty plea is entered." (Appellee's Brief, p 23). But this misunderstands the prosecution's argument on appeal. Douglas did not merely contest that there was sufficient evidence to prove the case against him. He affirmatively *testified under oath* – on two separate occasions – that he did not commit the crimes for which he was charged. This same testimony would contradict any plea to fourth-degree CSC. The point is that he cannot demonstrate prejudice because he cannot show how he would legally have been able to plead guilty or *nolo contendere* where he simultaneously insisted that he did not commit the crime.[8] Michigan law does not

[8] There is the additional factual matter that even if Michigan allowed for *Alford* pleas, the trial court did not clearly err in finding that Douglas would not have accepted it.

countenance such "expedient" pleas. *Barrows*, 358 Mich at 272. Only those who are guilty should plead guilty.

The reality is that it is common for defendants to refuse to plead guilty where there is a generous plea offer even though they are guilty, because they believe that they will not be convicted. Such defendants might then testify at trial and falsely swear that they committed no crime. The only way that such a defendant may establish prejudice would be to repudiate the trial testimony and demonstrate through credible evidence that he would have been willing to plead guilty if given proper legal advice. Assuming Douglas is guilty – as the jury found – he was bound to admit his perjury at trial to explain why he would have accepted the plea offer as he now contends. He did not do so. This Court should reverse.

II. Assuming prejudice, the proper remedy here is for the trial court to reject the plea.

If prejudice is proven, *Lafler* says that the prosecutor must reoffer the rejected plea. If the defendant accepts the offer, the state trial court has three options: (1) "vacate the convictions and resentence respondent pursuant to the plea agreement"; (2) "vacate only some of the convictions and resentence respondent accordingly"; or (3) "leave the convictions and sentence from trial undisturbed." *Lafler*, 132 S Ct at 1391. In implementing a remedy, the U.S. Supreme Court did not define the boundaries of a state trial court's discretion but instead left "open to the trial court" how best to exercise its discretion. *Id.* This Court identified two

considerations of relevance: the defendant's earlier willingness to accept responsibility for his actions, and information discovered post-plea. *Id.* at 1389.

The only occasion in which the trial court may address the issue of remedy is where there is proof of prejudice. Assuming that Douglas could demonstrate that he would have been able to take advantage of the plea offer, the question is whether the three *Lafler* remedies would be available for Douglas even though he provided contrary testimony at trial and at his evidentiary hearing.

The proper answer is that the issue would be the trial court's decision in the first instance. And for the reasons stated in the first issue, the trial court should reject the plea agreement under MCR 6.302, a discretion that the *Lafler* Court expressly left to the trial court. See *Lafler,* 132 S Ct at 1391 (quoting MCR 6.302). The Lenawee County prosecutor makes the unimpeachable point that either Douglas lied under oath at trial or would be lying under oath to plead guilty on remand. (Appellant's Br, pp 13-14.)

Douglas argues on appeal that there are many reasons other than guilt for which a defendant might accept a plea and cites precedent from the Sixth Circuit. See Appellee's Brief, p 26 n 9. The Sixth Circuit analysis ultimately relies on the U.S. Supreme Court's decision on *Alford*, and therefore the reasoning of these decisions is predicated on a different legal foundation. See, e.g., *Griffin v United States,* 330 F3d 733, 738 (CA 6, 2003), citing *Alford,* 400 US at 33. Moreover, these decisions themselves are not persuasive even within the *Alford* framework. The Sixth Circuit held that "declarations of innocence" were not clear evidence that a

defendant would have rejected a plea offer with proper legal advice. *Titlow v Burt,* 680 F3d 577, 588 (CA 6, 2012), citing *Smith v United States,* 348 F3d 545, 522 (CA 6, 2003). Contrary to this conclusion, such evidence would logically appear to be strong evidence that a defendant would not have accepted a plea offer. See *Merzbacher v Shearin*, 706 F3d 356, 366 (CA 4, 2013) (finding a state trial court's decision was not objectively unreasonable in determining that the defendant would not have accepted the plea where "he avidly and vociferously maintained his innocence throughout the proceedings").

Moreover, the Sixth Circuit in *Titlow* held that there is no evidence necessary other than the defendant's own testimony to support the claim that he would have taken the plea offer. *Id.* at 589 ("unlike some circuits, this court does not require that a defendant must support his own assertion that he would have accepted the offer with additional objective evidence."). This appears to be a minority rule, because other circuits require objective evidence to support the contention. See *United States v Gordon*, 156 F3d 376, 381 (CA 2, 1998); *Paters v United States*, 159 F3d 1043, 1047 (CA 7, 1998); *Moses v United States*, 175 F3d 1025, 1999 WL 195675, at *1 (CA 8, 1999); *United States v Morris,* 106 Fed. App'x 656, 2004 WL 1598792, at *2 (CA 10, July 19, 2004); *Diaz v United States*, 930 F2d 832, 835 (CA 11, 1991).

The validity of the *Titlow* decision is questionable on both the question whether there can ineffective assistance for counseling against a plea where the client maintains his innocence and on whether a defendant's own testimony is

sufficient evidence to demonstrate that the defendant would have accepted the plea.

The U.S. Supreme Court has granted leave on these questions:

1. Whether the Sixth Circuit failed to give appropriate deference to a Michigan state court under AEDPA in holding that defense counsel was constitutionally ineffective for allowing Respondent to maintain his claim of innocence.

2. Whether a convicted defendant's subjective testimony that he would have accepted a plea but for ineffective assistance, is, standing alone, sufficient to demonstrate a reasonable probability that defendant would have accepted the plea.

3. Whether *Lafler* always requires a state trial court to resentence a defendant who shows a reasonable probability that he would have accepted a plea offer but for ineffective assistance, and to do so in such a way as to "remedy" the violation of the defendant's constitutional right. [*Burt v Titlow*, 2013 WL 656043, __ Sup Ct __ (Feb 25, 2013).][9]

Finally, Douglas relies on *Ebron v Commissioner of Corrections*, 307 Conn 342, 357 n 9; 53 A3d 983 (2012) for the claim that the trial court cannot properly rely on information gained from trial in its considerations about how to fashion a remedy. (Appellee's Br, p 28.) This limitation does not appear in *Lafler*. To the contrary, the U.S. Supreme Court notes that "it is not necessary here to decide as a constitutional rule that a judge is required to prescind (that is to say disregard) any information concerning the crime that was discovered after the plea offer was made." *Lafler*, 132 S Ct at 1389. This Court should not so limit the trial court. But that issue need not be joined because there was no prejudice here, and the Court need not reach the issue of remedy.

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[9] See the website of the U.S. Supreme Court for a listing of questions presented: http://www.supremecourt.gov/qp/12-00414qp.pdf (lasted visited March 28, 2013).

CONCLUSION AND RELIEF REQUESTED

This Court should reverse the decision of the Court of Appeals.

Respectfully submitted,

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Dated: April 1, 2013

A

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALAN STARR TROWBRIDGE,

Defendant-Appellant.

UNPUBLISHED
September 25, 2012

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.

A

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

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[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 advise 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]

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[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 Figgures*, 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. *Figgures*, 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

B

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

VONLEE NICOLE TITLOW,

Defendant-Appellant.

UNPUBLISHED
December 11, 2003

No. 241285
Oakland Circuit Court
LC No. 2001-177745-FC

Before: Cavanagh, P.J., and Jansen and O'Connell, JJ.

PER CURIAM.

Defendant was charged with first-degree murder, MCL 750.316, but was convicted of the lesser offense of second-degree murder, MCL 750.317, following a jury trial. He appeals as of right.[1] We affirm.

I. Facts

Defendant's conviction arises from his involvement in the killing of his elderly, wealthy uncle, Donald Rogers. According to the prosecution's theory of the case, defendant agreed to help his aunt, Billie Rogers, kill Donald so that Billie could quickly inherit Donald's large estate. Defendant allegedly planned to pay for a sex change operation with his share of the proceeds.

Danny Chahine befriended defendant in June 2000, after meeting him in a casino. Defendant was then living with Donald and Billie Rogers. On August 12, 2000, defendant called Chahine on the telephone and tearfully told him that Donald had been found dead on the kitchen floor. Chahine was suspicious because defendant had previously talked about Billie's willingness to pay $25,000 to have her husband killed because he objected to Billie incurring credit card debt in order to gamble at casinos. When Chahine asked defendant if he or his aunt

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[1] Defendant took on the appearance of a woman, and preferred to be called "Nicole." Nonetheless, he denied that he wanted a sex change operation. At trial, witnesses used a combination of male and female pronouns when referring to defendant. Accordingly, some quotations from the trial record refer to defendant as a female. This opinion will generally refer to defendant using male pronouns.

B

had done something to Donald, defendant did not reveal anything incriminating, but said he would explain everything later.

Chahine testified that defendant later confided that he had helped kill Donald Rogers. According to Chahine, he had two inculpatory conversations with defendant: (1) a dinner meeting on August 14 or 15 in which defendant first disclosed the killing; and (2) a second meeting that was secretly recorded. The recording and a transcript of the second meeting were introduced into evidence.

Several of defendant's issues involve allegations against his attorneys. Defendant was represented by a succession of three attorneys. The first attorney negotiated and recommended a plea agreement in which defendant pleaded guilty to manslaughter with a seven to fifteen year sentence. Under the agreement, defendant was required to testify against Billie Rogers and successfully pass a polygraph test denying his involvement in the offense. According to the opinion of the polygraph examiner, defendant was being truthful when he denied being involved in the killing.

Although the record is not fully developed on this point, defendant told a sheriff's deputy at the jail that he planned to plead guilty despite his protestations of innocence. The deputy suggested that it would not be proper to plead guilty to an offense that defendant did not commit, and perhaps defendant should talk with another attorney. The deputy put defendant in touch with an attorney, who in turn recommended that defendant speak with another attorney. That attorney appeared in this matter and, according to defendant, recommended that he withdraw his guilty plea. Defendant moved to withdraw his plea because the agreed upon sentence exceeded the sentencing guidelines range.

The second attorney later moved to withdraw because defendant did not have sufficient resources to pay for a transcript of Billie Rogers' trial.[2] In questioning defendant and counsel, the court learned that counsel's firm had agreed to represent defendant for some jewelry and assignment of a "book deal." The court granted counsel's motion to withdraw from representation, and appointed a third attorney to represent defendant at trial.

II. Effective Assistance of Interim Counsel

In his first issue, defendant argues that he was denied the effective assistance of counsel when his second attorney recommended that he withdraw his guilty plea to manslaughter, which resulted in a trial verdict on the higher offense of second-degree murder. Defendant also argues that the attorney had a conflict of interest when rendering this advice because his law firm had obtained the media rights to defendant's story.

The right to the effective assistance of counsel is not offended unless counsel's performance fell below an objective standard of reasonableness and defendant was so prejudiced that he was deprived of a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994); *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991). Prejudice exists

[2] Billie Rogers was acquitted and eventually died.

when there is a reasonable probability that the result of the proceeding would have been different absent counsel's error. *Pickens*, *supra* at 312; *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002); *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

A. Withdrawal of Guilty Plea

When a defendant pleads guilty, he must be prepared to admit the elements of the offense. MCR 6.302(D)(1). The record discloses that the second attorney's advice was set in motion by defendant's statement to a sheriff's deputy that he did not commit the offense.[3] Defendant offers the affidavit of his first attorney, who negotiated a plea agreement that he thought was in defendant's best interests. When a defendant proclaims his innocence, however, it is not objectively unreasonable to recommend that the defendant refrain from pleading guilty – no matter how "good" the deal may appear. We therefore reject defendant's argument that his second attorney gave him "grossly erroneous advice."[4] On the proofs and arguments offered by defendant, defendant has failed to demonstrate that his second attorney's advice to withdraw his plea fell below an objective standard of reasonableness.[5]

B. Conflict of Interest

We now turn to defendant's allegation that his second attorney acquired an improper interest under MRPC 1.8.[6] Although the type of memorable or "juicy" story that sells books or movies may conflict with a defendant's best interests at trial, in this case defendant's second attorney withdrew before any harm could potentially be done. Defendant has not demonstrated that any impropriety by counsel deprived him of the effective assistance of counsel. See *Cuyler*

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[3] Defendant did not move in the trial court for an evidentiary hearing under *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). Although defendant filed a motion to remand for a *Ginther* hearing in this Court, the motion was denied. Therefore, our review of this issue is limited to mistakes apparent from the record. *People v Juarez*, 158 Mich App 66, 73; 404 NW2d 222 (1987). On appeal, defendant has submitted additional materials that are not part of the lower court record. We will consider these materials for the limited purpose of determining whether they disclose factual support for defendant's ineffective assistance of counsel claim, such that remand for a *Ginther* hearing would be appropriate.

[4] This is not to suggest that defendant's first attorney who negotiated the plea agreement performed deficiently. The record does not disclose what assurances or admissions defendant may have made to his first attorney to cause him to believe that it was in defendant's best interests to tender a plea.

[5] We find without merit defendant's assertion that the actions of the second attorney constituted "state action" for constitutional purposes because attorneys are "officers of the court." Additionally, although the sheriff's deputy is a governmental employee, defendant has not shown any prejudice or violation of his rights based on the deputy's involvement, which was limited to providing generic advice that a person who is innocent should not plead guilty.

[6] MRCP 1.8(d) specifically addresses a lawyer's interest in the client's literary or media rights.

v Sullivan, 446 US 335, 349; 100 S Ct 1708; 64 L Ed 2d 333 (1980) (a defendant must show prejudice unless he can demonstrate that "a conflict of interest *actually affected* the adequacy of his representation") (emphasis added). See, also, *Dukes v Warden*, 406 US 250, 256-257; 92 S Ct 1551; 32 L Ed 2d 45 (1972) (where the defendant could not show that his attorney's conflict of interest affected his decision to plead guilty, the plea was not rendered involuntary and unintelligent by ineffective assistance of counsel).[7]

III. Effective Assistance of Trial Counsel

Next, defendant argues that he was denied the effective assistance of counsel by the manner in which his third attorney conducted the trial.

As noted earlier, because defendant did not make a testimonial record in the trial court in connection with a motion for a new trial or an evidentiary hearing, *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973), our review is limited to details of the alleged deficiencies apparent on the existing record, *People v Juarez*, 158 Mich App 66, 73; 404 NW2d 222 (1987).

A. Eliciting Damaging Testimony/Failure to Impeach

Defendant argues that trial counsel was ineffective when he elicited damaging information from the prosecution's main witness, Danny Chahine, and then failed to impeach Chahine with prior statements contradicting the damaging version. The failure to call witnesses or present other evidence can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense. *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), vacated in part on other grounds 453 Mich 902 (1996). A substantial defense is one which might have made a difference in the outcome of the trial. *Id.*

During cross-examination of Chahine, counsel asked about defendant's statements describing how Donald was killed. Chahine had earlier testified that defendant put his hand over Donald's mouth, but kept a passage open so Donald could breathe. Meanwhile, Billie Rogers was offering increasing sums of money for defendant's cooperation, from $25,000 to $50,000. Counsel asked Chahine about defendant's actions as Billie went for a pillow to suffocate her husband:

> *Q.* But after you indicate that Billie is becoming frustrated and she makes the statement from 25 to $50,000, you never hear Nicole make another statement that she put his – her hand back over Don Rogers' mouth?
>
> *A.* No.

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[7] An attorney who attended an arbitration hearing into the sheriff's deputy's involvement in rendering advice to defendant submitted an affidavit indicating that proofs at the arbitration hearing disclosed that the second attorney's fee agreement included an assignment of book/movie/television rights. At the time the attorney withdrew from representation, he informed the court that a proposed book deal "fell through."

Q. You didn't hear a statement that [defendant] held him down so that the pillow could be placed over his head?

A. I did hear a statement like that.

Q. You did hear that statement?

A. Yes.

Q. What statement did you hear?

A. Billie asked her to help pin him down, so that she could put the pillow on his head.

As a result of this damaging testimony, defendant argues, counsel abandoned a "mere presence" defense, which had earlier been argued in opening statements. Defendant argues that counsel should have impeached Chahine with three prior statements denying that defendant was involved in the smothering of Donald. Those prior statements consisted of the following:

(1) A videotaped interview of Chahine by a police detective, in which Chahine stated that defendant did not say what he was doing at the time Donald was smothered;

(2) Chahine's testimony at Billie Rogers' trial, in which he testified that defendant "did not tell me . . . if she did help her with the pillow or not;" and

(3) Chahine's testimony at the preliminary examination in this matter, in which he testified that defendant told him that he stood back and did not help smother the victim.

Defendant's argument is based on several assumptions. First, he assumes that there was a discrepancy between the trial testimony and the prior versions of the events. At trial, defense counsel finished his cross-examination of Chahine with a clarification that changed the character of the allegation:

Q. And at no time during the conversation [with police] did you tell Detective Tullock that while the pillow [w]as over, Nicole also indicated to you she was holding him down?

A. No. She was holding her [sic] down during some period of time. I don't remember if while the pillow was in his face. All I remember is that Billie asked Nicole to help her pin him down.

Q. So it could have been during the time that they were pouring alcohol down his throat?

A. It could have been.

Because counsel succeeded in getting Chahine to concede that his impression may have been inaccurate, we cannot say that defendant was prejudiced by counsel's failure to impeach him further.

Second, defendant assumes that defense counsel was aware of the materials containing the witness' prior statements. Defendant asserts that certain statements are contained in a transcript of Chahine's videotaped interview with the police, yet he concedes that trial counsel did not have the transcript. Instead, counsel had a copy of the videotape, which may or may not have been intelligible. Defendant also has not shown that trial counsel had a copy of Chahine's testimony from Billie Rogers' trial. Indeed, it was defendant's financial inability to pay for that transcript that led his second attorney to withdraw from the case.

Third, defendant assumes that the "mere presence" theory was abandoned as a result. In fact, during opening statement defense counsel raised several potential defenses, including abandonment, mere presence, and inconsistencies between medical reports and prosecution witnesses' versions of the events. During closing argument, counsel argued that defendant abandoned the endeavor, and was shocked to return and find that Billie Rogers had suffocated her husband. There is nothing in the record to indicate that counsel failed to argue a "mere presence" defense in closing *because of the way Chahine testified.* We may not presume that counsel was ineffective. Indeed, it is possible that counsel declined to argue a "mere presence" defense because it would have diminished the credibility of defendant's version, in which defendant claimed that he was not present when his aunt suffocated the victim.[8]

B. Evidence Attacking Defendant's Character

Defense counsel elicited testimony from defendant that he had worked as an escort, but was not involved in prostitution. This opened the door for the prosecutor to ask about a pending prostitution charge against defendant. On appeal, defendant argues that counsel was ineffective for bringing out such "lifestyle" evidence rather than focusing on guilt or innocence. We disagree. Defendant had testified that he made a lot of money by running an escort service and had a boyfriend who would have paid for the $10,000 sex change operation. Although motive is not strictly an element of an offense, it is always relevant. *People v Rice (On Remand)*, 235 Mich App 429, 440; 597 NW2d 843 (1999). The concession of sordid details about defendant's lifestyle could have negated any financial motive, and also could have created an atmosphere of candor – especially since, as defendant argues on appeal, he made no effort to hide his sexuality from the jury. Defendant has failed to overcome the strong presumption that counsel engaged in sound trial strategy. As for the evidence that defendant was currently charged with prostitution, defendant has not shown that counsel was aware of that charge.

[8] Defendant testified that Billie suffocated her husband while he was still in the bathroom, and defendant came back into the kitchen and asked Billie what she was doing. Billie immediately removed the pillow from the victim's face, but the victim had already stopped moving.

C. Failure to Impeach Witness

During trial, Chahine testified that defendant did not drink much. Defendant argues that this contradicted a planned intoxication defense. Defendant argues that Chahine should have been impeached with prior statements made to the police about defendant's excessive drinking. Again, however, the record does not demonstrate, nor has defendant shown, that counsel was aware of the prior statements. Additionally, even if counsel was aware of the statements, defendant has not shown *why* counsel decided not to impeach the witness with those statements.

D. Jury Instructions and Deliberations

Defendant argues that trial counsel was ineffective for failing to request a jury instruction on the defense of abandonment, and for failing to object to the court's response to a jury note during deliberations.

Defendant has failed to identify the specific instruction he claims counsel should have requested, thereby precluding a determination whether the desired instruction would have accurately stated the law. To the extent defendant suggests that counsel should have requested CJI2d 9.4, we find no error. That instruction would have implied that defendant intended to commit the offense at one time, but "freely and completely gave up the idea of committing the crime." CJI2d 9.4(1). The instruction would have contradicted defendant's assertion that he thought Billie Rogers was joking, and was surprised to find her suffocating her husband.

Regarding the trial court's response to the jury's note, because we conclude in part VI, *infra*, that the court did not err in its response to the jury, we conclude that counsel did not err by failing to object.

E. Failure to Object to Prosecutor's Conduct

Defendant also argues that trial counsel was ineffective for failing to object to the prosecutor's arguments and tactics discussed in part IV, *infra*. Because we find no error in the prosecutor's arguments, defendant has not shown that counsel was ineffective for failing to object.

IV. Prosecutor's Conduct

Defendant next argues that the prosecutor committed at least five forms of misconduct during trial. We will consider each claim separately.

Prosecutorial misconduct issues are decided on a case-by-case basis, and the reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). The propriety of a prosecutor's remarks depends on all the facts of the case. *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). A defendant's opportunity for a fair trial can be

jeopardized when the prosecutor interjects issues broader than the guilt or innocence of the accused. *Rice, supra* at 438.

A. Vouching for Credibility and Allowing Perjury

Defendant argues that the prosecutor vouched for the credibility of its primary witness and failed to disclose that perjury was being committed. In addressing comparisons between Chahine's statements to the police during the investigation, and Chahine's testimony given at trial, the prosecutor asked the officer-in-charge whether the versions were consistent:

> *Q.* Now, the information that – you heard what Mr. Chahine's testimony was over the last two days in Court, did you not?
>
> *A.* Yes.
>
> *Q.* Is that the information that he related to you at the police station in Troy on August the 30th?
>
> *A.* *Generally*, yes.

Defendant argues that this questioning violated his right to due process for three reasons: (1) the prosecutor failed to disclose that Chahine was lying when he implicated defendant; (2) the prosecutor failed to disclose that the officer was lying when he said that Chahine's testimony was consistent with prior statements; and (3) the prosecutor vouched for Chahine's credibility via the officer's testimony. We disagree. Defendant has not shown that any witness committed perjury. Defendant reads too much into the officer's brief response, in which the officer qualified his answer using the word "generally." The officer's testimony may be equally interpreted as conveying that Chahine was presenting a somewhat different story in court because his testimony was only "generally" the same as information given at the police station. While a prosecutor may not ask a witness to comment on the credibility of other witnesses, he may attempt to ascertain which facts are in dispute. See *People v Ackerman*, 257 Mich App 434, 449; 669 NW2d 818 (2003).

Defendant also argues that the prosecutor vouched for the credibility of his witnesses when he stated several times in closing argument that "we know" certain facts, and "that's what happened" and "that was the truth." Again, defendant reads these statements too broadly. Viewed in context, they constituted proper comment on the evidence, and did not suggest that the government had some special knowledge about the facts. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995) (prosecutor cannot suggest that the government has some special knowledge that a witness is testifying truthfully).

B. Shifting the Burden of Proof and Denigrating Defense Counsel

During closing argument, the prosecutor addressed the differing points of view about which evidentiary matters were the most significant:

> The medical testimony in this case is not the crux of this case. This is the crux of tis [sic] case, and Mr. Cataldo [defense counsel] did not address this. Mr.

> Cataldo ran from this. There's an old saying in the law is [sic] that when you have the facts on your side, you pound on the facts. And when you have the law on your side, you pound on the law. And when you have neither the law nor the facts on your side, you pound on the table. That's what's going on here. This was not addressed. Mr. Cataldo says that we have to look at the medical testimony and I say look at the tape [in which defendant expressed remorse for killing Rogers].

Defendant argues that these remarks improperly implied that defense counsel had a duty to address certain facts, and denigrated defense counsel by implying that he was trying to mislead the jury. Viewed in context, however, we believe the remarks reflect a proper attempt to distinguish the different points of view urged by both sides in this case. *Watson*, *supra* at 593.

C. Right to Remain Silent

Next, defendant argues that the prosecutor improperly commented upon his right to remain silent when he asked the arresting officer about statements defendant made upon his arrest in Chicago. The officer testified that he and his partner went to defendant's apartment and informed him that they had a warrant for the murder of Donald Rogers.

> *A.* At this time, Mr. Titlow, spontaneously stated, where's my aunt? Is my aunt under arrest too? At that time, we stopped her and advised her – advised him of his rights and there was no further talking to her.
>
> *Q.* Okay. And you had not asked any questions prior to Titlow making that statement, had you?
>
> *A.* No, sir.
>
> *Q.* You said a spontaneous utterance?
>
> *A.* Yes, sir.
>
> *Q.* Alright. And then after he said that, you advised him of his rights?
>
> *A.* Yes, I did,
>
> *Q.* But what he said was, where's my aunt? Has she been arrested too?
>
> *A.* Yes, sir.
>
> *Q.* Any other comment about why you were arresting him or anything like that?
>
> *A.* No, sir.
>
> *Q.* Just where's my aunt?
>
> *A.* Is she under arrest too.

Evidence that a defendant made a statement and said nothing further does not denigrate the defendant's exercise of the right to remain silent. This isolated reference was not used to impeach defendant or to support the prosecutor's theory that defendant committed the offense and, therefore, does not support a claim of misconduct. See *People v Dennis*, 464 Mich 567, 583; 628 NW2d 502 (2001).

D. "Improper" Questioning of Defendant

Defendant argues that the prosecutor erred by asking about prior arrests not leading to convictions, defendant's sex life and preferences, and financial matters. The defense opened the door to these matters. The prosecutor did not err by asking follow-up questions testing the veracity of defendant's testimony. *People v Knapp*, 244 Mich App 361, 377-378; 624 NW2d 227 (2001) (a defendant may not introduce evidence at trial to sustain his theory and then argue on appeal that the evidence was prejudicial and denied him a fair trial).

E. Arguing Facts Not in Evidence

Finally, defendant argues that the prosecutor argued facts not in evidence when he misquoted Chahine in closing argument by stating that defendant told Chahine, "I don't know why I did it. I don't know why I held Don down while Billie smothered him. These are her words . . . two weeks after the murder." Defendant argues that he never made such a statement to Chahine. We find no error in the prosecutor's attempt to translate Chahine's testimony about defendant's statements into a first-person account by defendant. The gist of the allegations are the same: that defendant told Chahine that he did not know why he participated, and that he held the victim down. Although Chahine later distanced himself from the certainty of this testimony, the prosecutor was free to argue the inference that defendant held Donald Rogers down during the suffocation and not merely while Billie poured liquor down his throat.[9]

V. Continuation of Prosecution

Defendant argues that his due process rights were violated when the prosecutor continued to prosecute him, despite "knowing" that he did not commit the charged offense, knew that he had "passed" a polygraph examination, and had expressed satisfaction with the plea agreement that would have resulted in a manslaughter conviction.

The authority to prosecute for violation of state law is vested solely and exclusively with the prosecuting attorney. A trial court's authority over the discharge of the prosecutor's duties is limited to those activities or decisions by the prosecutor that are unconstitutional, illegal, or ultra vires. A decision to dismiss a case or proceed to trial ultimately rests in the sole discretion of the prosecutor. Absent some reason to conclude that the prosecutor's acts are unconstitutional, illegal, or ultra vires, the prosecutor's decision whether to proceed with a case is exempt from judicial review. *People v Jones*, 252 Mich App 1, 6-7; 650 NW2d 717 (2002). If, however, a prosecutor continues to pursue charges knowing that a defendant is not guilty, the prosecutor would be committing an unconstitutional, illegal, or ultra vires act. Blackstone, Commentaries

[9] The jury was also instructed that the arguments of counsel are not evidence.

(Gavit, ed), p 807 ("[a] conspiracy to indict an innocent man of felony falsely and maliciously, who is accordingly indicted, is an abuse of public justice").

Here, defendant has not shown that the prosecutor "knew" that he did not commit the offense. We may not infer that the prosecutor "knew" that defendant did not commit the offense from the polygraph results or from the prosecutor's willingness to negotiate a guilty plea to a lesser offense. The shortcomings of polygraph examinations are well known. *People v Barbara*, 400 Mich 352, 358-359; 255 NW2d 171 (1977). Defendant deluded himself into believing that he was a woman, and the results of the polygraph examination could also have been delusional and, therefore, unreliable.

VI. Question from Jury

Defendant argues that the trial court erred by failing to respond when the jury asked a question during deliberations. The jury's note inquired about the "malice" element of second-degree murder:

> Does someone's inaction, non-action to stop or prevent a crime resulting in death amount to fulfillment of condition three, second degree murder, knowingly creating a high risk of death, knowing that death would likely be the result of his actions?

The trial court responded, "This is a question that is up to you to decide an answer." Neither party objected on the record.[10]

We find no error in the trial court's response, and therefore no prejudice from defense counsel's failure to object. First, we disagree with defendant's claim that the trial court failed to respond to the jury's question. The court responded by instructing the jury that "[t]his is a question that is up to you to decide an answer." Second, we conclude that the trial court's response was not erroneous. Defendant essentially seeks a ruling that, as a matter of law, inaction can never satisfy the malice requirement of second-degree murder. Defendant cites no authority in support of this proposition. In any event, the trial court separately instructed the jury on the elements of aiding and abetting, explaining that, in order to convict defendant of aiding and abetting murder, it was required to find that he "did something to assist in the commission of the crime," and that he "must have intended the commission of the crime alleged or must have known the other person intended its commission at the time of giving the assistance." Additionally, the court instructed the jury:

> It doesn't matter how much help, advice or encouragement the Defendant gave. However, you must decide whether he intended to help another commit the crime and whether his advice, help or encouragement actually did help, advise or encourage the crime. Even if the Defendant knew that the alleged crime was

[10] Defendant argues on appeal that an objection was made off the record. That assertion is not otherwise supported by the record. As a court of review, we must have a *record* to review.

> planned or being committed, the mere fact that he was present when it was committed was not enough to prove that he assisted in committing it.

Thus, the jury was properly instructed that it could not convict defendant unless it found that he actually intended and assisted in the commission of the crime.

The jury's note was not directed at the court's aiding and abetting instruction, but at the intent element of second-degree murder. In this regard, the court did not err by instructing that this fact-intensive consideration was a matter for the jury to decide. The court's response did nothing to undercut the court's earlier instructions whereby the jury was told that it could not convict defendant of aiding and abetting another unless he actually intended and assisted in the commission of the crime. Viewed as a whole, the court's instructions were not improper. See *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994).

VII. Cumulative Error

Finally, defendant argues that the cumulative effect of several errors deprived him of due process of law. However, because we have found no individual errors, there is no cumulative effect. See *People v Sawyer*, 215 Mich App 183, 197; 545 NW2d 6 (1996).

Affirmed.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Peter D. O'Connell