Order

Michigan Supreme Court
Lansing, Michigan

May 26, 2023

165098

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 165098
COA: 355416
Wayne CC: 19-007623-AR

MATTHEW LAWRENCE FURMAN,
Defendant-Appellant.

_____/

On order of the Court, the application for leave to appeal the October 27, 2022 judgment of the Court of Appeals is considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we VACATE the judgment of the Court of Appeals and the May 20, 2020 order of the Wayne Circuit Court, and we REMAND this case to the 24th District Court to conduct an evidentiary hearing on whether an outside promise induced the defendant's plea and whether defense counsel was ineffective. In all other respects, leave to appeal is DENIED, because we are not persuaded that the remaining question presented should be reviewed by this Court.

We do not retain jurisdiction.

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I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

May 26, 2023

Clerk

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MATTHEW LAWRENCE FURMAN,

Defendant-Appellant.

UNPUBLISHED
October 27, 2022

No. 355416
Wayne Circuit Court
LC No. 19-007623-01-AR

Before: JANSEN, P.J., and O'BRIEN and HOOD, JJ.

PER CURIAM.

On remand from the Michigan Supreme Court, defendant appeals by leave granted the order of the Wayne Circuit Court reversing an order by the 24th District Court granting defendant's motion to withdraw his *nolo contendere* plea. We affirm.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Defendant, a sergeant with the Melvindale Police Department, was charged with misdemeanor assault or assault and battery, MCL 750.81, and willful neglect of duty, MCL 750.478. These charges arose from defendant's response to a domestic disturbance call in February 2019. While inside the residence, defendant threw a food bowl and used coarse language toward the inhabitants. Defendant also forced an individual to the basement, and the individual fell down the stairs.

Furman pleaded no contest under a plea agreement. In exchange for Furman's no-contest plea to willful neglect of duty, the prosecution agreed to dismiss the assault and battery charge. The plea agreement contained a sentence agreement of one-year probation, among other conditions. When the prosecutor stated the terms of the agreement on the record, he made no mention of a delayed sentence under MCL 771.1.[1] Neither did defense counsel. During the plea

[1] This statute provides that "[i]n an action in which the court may place the defendant on probation, the court may delay sentencing the defendant for not more than 1 year to give the defendant an

colloquy, the district court advised Furman of his trial rights. The district court did not, however, ask whether the plea was the result of undisclosed promises. Item 6 of the plea form, which provided checkboxes for the prosecutor's recommendation for six types of deferred sentences and sentencing alternatives, including MCL 771.1, was unchecked. Furman also signed a SCAO Form DC 213, Advice of Rights, summarizing his constitutional trial rights for misdemeanors. The district court accepted defendant's plea, and he was later sentenced according to the plea agreement. Without prompting, the prosecutor stated at sentencing that "[t]he only indication that we had was that this could not be held under [MCL] 771.1[,] that this was a plea that must remain." In other words, that there was no recommendation for a delayed sentence under the statute.

After sentencing, defendant moved the district court to withdraw his plea on the basis of ineffective assistance of counsel. According to defendant, he received assurances from defense counsel that he would receive a deferred sentence under MCL 771.1. Defendant claimed that he only entered the no-contest plea on the basis of this assurance. The district court granted defendant's motion without explanation.

The prosecution appealed to the circuit court. The circuit court reversed the district court's order granting the plea withdrawal. Defendant filed leave to appeal in this Court, which was denied. *People v Furman*, unpublished order of the Court of Appeals, entered December 17, 2020 (Docket No. 355416). Defendant then sought leave to appeal in the Supreme Court. In lieu of granting leave to appeal, the Supreme Court remanded the case to this Court as on leave granted. *People v Furman*, 507 Mich 1003; 961 NW2d 178 (2021).

II. PLEA WITHDRAWAL

Defendant argues that the circuit court erroneously reversed the district court order allowing the withdrawal of defendant's no-contest plea. We disagree.

A. PRESERVATION AND STANDARD OF REVIEW

A defendant preserves issues related to a plea withdrawal when "the defendant has moved to withdraw the plea in the trial court, raising as a basis for withdrawal the claim sought to be raised on appeal." MCR 6.310(D); see also *People v Armisted*, 295 Mich App 32, 45-46; 811 NW2d 47 (2011). Defendant first claims the circuit court erred in reversing the district court's order because he was denied effective assistance of counsel when counsel allegedly assured defendant he would receive a delayed sentence under MCL 771.1. This argument is preserved because defendant made the same argument in the motion to withdraw his plea. MCR 6.310(D). Defendant's second argument in this appeal avers plea withdrawal was warranted because the district court failed to ask him during the plea-taking process whether anyone promised him anything outside the plea agreement under MCR 6.302(C)(4)(a) and MCR 6.610(F)(6)(a). Defendant did not make this argument in his motion to withdraw his plea, nor did he raise it in

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opportunity to prove to the court his or her eligibility for probation or other leniency compatible with the ends of justice and the defendant's rehabilitation . . . ." MCL 771.1(2).

response to the prosecution's appeal to the circuit court. Defendant raised this issue for this first time in this appeal. Therefore, defendant's second argument is unpreserved. MCR 3.310(D).

Where this Court is reviewing an appeal from the district court to the circuit court, this Court stands in the shoes of the circuit court. See *People v McBride*, 204 Mich App 678, 681; 516 NW2d 148 (1994). As such, this Court applies the same standard of review as the circuit court to the district court's decision. *Id.* "A trial court's ruling on a motion to withdraw a plea is reviewed for an abuse of discretion." *People v Al-Shara*, 311 Mich App 560, 566; 876 NW2d 826 (2015). "An abuse of discretion occurs when the trial court's decision falls outside the range of principled outcomes. A trial court also necessarily abuses its discretion when it makes an error of law." *Id.* (citation omitted).

This case also concerns the interpretation of statutes and court rules, which is reviewed de novo. *People v Kimble*, 470 Mich 305, 308-309; 684 NW2d 669 (2004). "The same broad legal principles governing the interpretation of statutes apply to the interpretation of court rules; therefore, when interpreting a court rule, this Court begins with the text of the court rule and reads the individual words and phrases in their context within the Michigan Court Rules." *People v Traver*, 502 Mich 23, 31; 917 NW2d 260 (2018).

With respect to defendant's preserved issue, "[t]he denial of effective assistance of counsel is a mixed question of fact and constitutional law, which are reviewed, respectively, for clear error and de novo." *People v Brown*, 279 Mich App 116, 140; 755 NW2d 664 (2008). "A decision is clearly erroneous if, although there is evidence to support it, this Court is left with a definite and firm conviction that a mistake has been made." *People v Howard*, 233 Mich App 52, 54; 595 NW2d 497 (1998) (quotation marks and citation omitted). Because, however, defendant did not move the district court or the circuit court for an evidentiary hearing under *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973), this Court's review is limited to mistakes apparent from the record. *People v Mack*, 265 Mich App 122, 125; 695 NW2d 342 (2005).

Because defendant's argument regarding the district court's failure to adhere to the court rules and ask about outside promises is unpreserved, it is reviewed for plain error. *People v Hanks*, 276 Mich App 91, 92; 740 NW2d 530 (2007). "To establish plain error requiring reversal, a defendant must demonstrate that '1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights.' " *Id.*, quoting *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). "An error affects substantial rights when it impacts the outcome of the lower court proceedings." *People v Burkett*, ___ Mich App ___, ___; ___ NW2d ___ (2021) (Docket No. 351882); slip op at 2 (quotation marks and citation omitted). "Reversal is warranted only when the error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings independently of the defendant's innocence." *People v Lockridge*, 498 Mich 358, 393; 870 NW2d 502 (2015).

B. LAW AND ANALYSIS

Under MCR 6.302(A), a trial court may not accept a defendant's no-contest plea unless the court is convinced the plea is "understanding, voluntary, and accurate." A criminal defendant does not have the right to withdraw a plea after the trial court has accepted it, but a defendant "may move to have his or her plea set aside on the basis of an error in the plea proceedings." *People v*

Brinkey, 327 Mich App 94, 97; 932 NW2d 232 (2019) (quotation marks and citation omitted). MCR 6.310(C)(3), which governs, in part, motions to withdraw pleas after sentencing, states:

> If the trial court determines that there was an error in the plea proceeding that would entitle the defendant to have the plea set aside, the court must give the advice or make the inquiries necessary to rectify the error and then give the defendant the opportunity to elect to allow the plea and sentence to stand or to withdraw the plea. If the defendant elects to allow the plea and sentence to stand, the additional advice given and inquiries made become part of the plea proceeding for the purposes of further proceedings, including appeals.

"In other words, under MCR 6.310(C), a defendant seeking to withdraw his or her plea after sentencing must demonstrate a defect in the plea-taking process." *People v Blanton*, 317 Mich App 107, 118; 894 NW2d 613 (2016) (quotation marks, citation, and brackets omitted).

On a defendant's motion to withdraw a plea:

> If the trial court determines that a deviation affecting substantial rights occurred, it shall correct the deviation and give the defendant the option of permitting the plea to stand or of withdrawing the plea. If the trial court determines either a deviation did not occur, or that the deviation did not affect substantial rights, it may permit the defendant to withdraw the plea only if it does not cause substantial prejudice to the people because of reliance on the plea. [MCR 6.610(F)(8)(b).]

Defendant argues that the circuit court erred in reversing the district court's grant of his plea withdrawal in two ways. First, he argues his *nolo contendere* plea was not "knowingly, voluntarily, or intelligently" made because he received ineffective assistance of counsel when defense counsel incorrectly assured defendant he would receive a delayed sentence under MCL 771.1. Second, defendant contends withdrawal of his plea was warranted because the district court failed to follow the plea-taking process by failing to ask him whether "anyone has promised [him] anything beyond what is in the plea agreement" as required by MCR 6.610(F)(6)(a). We address each argument below.

1. INEFFECTIVE ASSISTANCE OF COUNSEL

The right to counsel is guaranteed by the United States and Michigan constitutions. US Const, Am VI; Const 1963, art 1, § 20. This includes the right to effective assistance of counsel, *People v Vaughn*, 491 Mich 642, 669; 821 NW2d 288 (2012), which, by extension, applies to the plea-bargaining process, *Lafler v Cooper*, 566 US 156, 162; 132 S Ct 1376; 182 L Ed 2d 398 (2012). In *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984), the United States Supreme Court held a defendant's conviction could be reversed on the basis of ineffective assistance of counsel if defense counsel was "deficient" and defendant was prejudiced as a result. To demonstrate ineffective of counsel, a defendant must show: "(1) counsel's performance fell below an objective standard of reasonableness and (2) but for counsel's deficient performance, there is a reasonable probability that the outcome would have been different." *People v Trakhtenberg*, 493 Mich 38, 51; 826 NW2d 136 (2012).

"A claim of ineffective assistance of counsel may be based on counsel's failure to properly inform the defendant of the consequences of accepting or rejecting a plea offer." *People v Douglas*, 296 Mich App 186, 205; 817 NW2d 640 (2012), aff'd in part and rev'd in part on other grounds 496 Mich 557 (2014), citing *Hill v Lockhart*, 474 US 52, 57-58; 106 S Ct 366; 88 L Ed 2d 203 (1985). "In the context of pleas a defendant must show the outcome of the plea process would have been different with competent advice." *Lafler*, 566 US at 163. "The test is whether the attorney's assistance enabled the defendant to make an informed and voluntary choice between trial and a guilty plea." *People v Corteway*, 212 Mich App 442, 446; 538 NW2d 60 (1995). "[I]n order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill*, 474 US at 59. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 US at 694.

"The failure to accurately inform a defendant of the consequences of his or her plea may constitute a defect in the plea-taking process because the defendant may not have been capable of making an understanding plea." *People v Coleman*, 327 Mich App 430, 443; 937 NW2d 372 (2019). "The court may not accept a plea of guilty or nolo contendere unless it is convinced that the plea is understanding, voluntary, and accurate." MCR 6.302(A). "Guilty pleas have been found to be involuntary or unknowing on the basis of ineffective assistance of counsel where defense counsel failed to explain adequately the nature of the charges or the consequences of the guilty plea." *Corteway*, 212 Mich App at 445. This means defense counsel must provide defendant sufficient information to "make an informed and voluntary choice" as to his plea. *Id.* at 446.

In granting defendant's motion to withdraw the plea, the district court stated: "But [the plea] was placed on the record by the Prosecutor and everybody understood it. All right. How much time do you need to prepare for a jury trial?" From this statement, it is, at best, unclear whether the district court concluded that defendant was denied effective assistance of counsel. Ordinarily, we would remand the issue to the district court for an evidentiary hearing to establish a factual basis whether defendant was denied effective assistance of counsel, which defendant requests in his brief on appeal.

A remand for an evidentiary hearing is, however, unwarranted. This is the *second* appeal regarding this issue—the first being the prosecution's appeal to the circuit court. The basis of defendant's motion to withdraw his plea was because defendant believed he was not afforded effective assistance of counsel. Yet, defendant did not move for an evidentiary hearing in either the district court or the circuit court. The circuit court even mentioned the lack of an evidentiary hearing in its analysis. Defendant should not benefit from his failure to move for an evidentiary hearing in the first instance. See *People v Szalma*, 487 Mich 708, 726; 790 NW2d 662 (2010) ("[A] party may not harbor error at trial and then use that error as an appellate parachute."). Because defendant failed to move the lower courts for an evidentiary hearing, the question of an evidentiary hearing as to the issue of effective assistance of counsel is waived by defendant. *Id.*

Further, remand for an evidentiary hearing is unwarranted because defendant failed to move this Court to remand under MCR 7.211(C)(1)(a)(ii), which states: "The appellant may move to remand to the trial court. The motion must identify an issue sought to be reviewed on appeal and show . . . that development of a factual record is required for appellate consideration of the

issue." Because defendant requests an evidentiary hearing in the context of his arguments on appeal, and not through a motion to this Court, it is procedurally inadequate for this Court's consideration. See *People v Bass*, 317 Mich App 241, 276 n 12; 893 NW2d 140 (2016) (rejecting a defendant's request for an evidentiary hearing because it was made in a Standard 4 brief and not by motion).

Defendant makes the meritless request that this Court consider several exhibits evincing the need for an evidentiary hearing. These exhibits include: (1) a March 30, 2020 decision by the labor arbitration tribunal; (2) defendant's polygraph report; and (3) defendant's affidavit. A defendant may be entitled to withdraw his or her plea when the defendant presents "credible evidence that the plea was the product of fraud, duress, or coercion." *People v Patmore*, 264 Mich App 139, 152; 693 NW2d 385 (2004) (quotation marks and citation omitted). And, "a trial court is generally barred at the evidentiary hearing from considering testimony or affidavits inconsistent with statements made during the plea hearing." *People v Samuels*, ___ Mich App ___, ___; ___ NW2d ___ (2021) (Docket No. 353302); slip op at 5 (quotations marks and citation omitted). "However, guilty pleas may be withdrawn on the basis of promises of leniency if the record contains some support for the defendant's claim, other than the defendant's postconviction allegation." *People v Jackson*, 203 Mich App 607, 612-613; 513 NW2d 206 (1994) (quotation marks and citation omitted).

It appears that defendant believes that this Court should consider the factual value of this evidence as an indication that defendant's plea was involuntarily made. In light of this evidence, defendant asks this Court to remand to the district court for an evidentiary hearing. Defendant confuses the role of this Court. This Court's function is not to act as fact-finder, see, e.g., *People v Bulmer*, 256 Mich App 33, 36; 662 NW2d 117 (2003), and this Court may not consider an expanded record on appeal, *People v Powell*, 235 Mich App 557, 561 n 4; 599 NW2d 499 (1999). Even if this Court were inclined to remand the case for an evidentiary hearing, defendant waived the opportunity for an evidentiary hearing by failing to request it in the first instance, as discussed above. Therefore, defendant's attempt to have this Court consider an expanded record as a basis to remand lacks merit.

In the absence of an evidentiary hearing, the next question is whether there is evidence apparent from the record demonstrating that defendant was denied effective assistance of counsel. *Mack*, 265 Mich App at 125. Defendant's motion to withdraw his plea argued that his plea was not "knowingly, voluntarily, or intelligently" made because defendant was under the false impression he would receive a delayed sentence under MCL 771.1. According to defendant, he "was assured by his attorney that he would receive a delayed sentence under MCL 771.1," and defense counsel "conveyed this to the prosecutor and to [the district court]." The problem with defendant's argument is there is no actual record suggesting defense counsel "assured" defendant of the delayed sentence, or that this assurance was relayed to the prosecutor or the district court. At the sentencing hearing, the prosecutor stated: "The only indication that we had was that this could not be held under [MCL] 771.1[,] that this was a plea that must remain." While this statement suggests that the parties had ex parte discussions about the *possibility* of a delayed sentence under MCL 771.1, it does not show defendant was "assured" a delayed sentence. Moreover, the box on the plea form for MCL 771.1 was left unchecked, and defendant signed this form.

The first part of a claim of ineffective assistance of counsel requires a defendant to show "counsel's performance fell below an objective standard of reasonableness[.]" *Trakhtenberg*, 493 Mich at 51. There is simply nothing in this record demonstrating that defense counsel's actions fell below an objective standard of reasonableness such that defendant's plea was not "understanding, voluntary, and accurate." MCR 6.302(A). Indeed, the facts show that defendant was provided an advice of rights, which he signed, and confirmed to the district court he understood. He assured the district court that his no-contest plea was made freely and voluntarily. Moreover, at sentencing, the prosecution indicated defendant would not receive a delayed sentence under MCL 771.1, and defendant did not object. Because our review is limited to mistakes apparent from the record, *Mack*, 265 Mich App at 125, and there was no mistake in this record regarding promises made to defendant by his counsel that would give rise to ineffective assistance, the circuit court correctly concluded that the district court abused its discretion in granting defendant's motion to withdraw the plea.[2]

2. OUTSIDE PROMISES

Defendant next argues that the circuit court erred in reversing the district court's order because the district court failed to ask defendant during the plea hearing whether anyone promised him anything beyond what is in the plea agreement. MCR 6.302(A) states, in part: "The court may not accept a plea of guilty or nolo contendere unless it is convinced that the plea is understanding, voluntary, and accurate." In the context of plea agreements, the trial court must ask a defendant about the nature of the plea agreement to determine whether a plea is voluntary. MCR 6.302(C)(4). Specifically, "[t]he court must ask the defendant . . . whether anyone has promised anything beyond what is in the plea agreement." MCR 6.302(C)(4)(a).

The district court did not ask defendant whether anyone made a promise outside the plea agreement. This was an error given MCR 6.302(C)(4)(a) states a court "must" ask a defendant this question. See, e.g., *People v Fosnaugh*, 248 Mich App 444, 449; 639 NW2d 587 (2001) ("[T]he word 'must' is mandatory language . . . ."). However, defendant raised this issue for the first time in his appeal to this Court. This appeal is the third opportunity defendant had to raise this issue. Defendant did not argue this issue in either his motion to withdraw his plea or in response to the prosecution's appeal to the circuit court. Because defendant failed to make this argument in either of the lower courts, defendant waived this issue, and we decline to consider it now. *Szalma*, 487 Mich at 726.

[2] In a footnote in his brief on appeal, defendant makes a passing remark suggesting defense counsel was ineffective by failing to ask the *circuit court* for an evidentiary hearing. Aside from a quotation from the United States Supreme Court case, *Evitts v Lucey*, 469 US 387, 396; 105 S Ct 830; 83 L Ed 2d 821 (1985), stating due process includes the right to effective assistance of counsel, defendant offers no argument or explanation regarding the effectiveness of counsel in the circuit court. Thus, any argument with respect to counsel's effectiveness in the circuit court is abandoned for appellate review. *People v Van Tubbergen*, 249 Mich App 354, 365; 642 NW2d 368 (2002) ("Issues insufficiently briefed are deemed abandoned on appeal.").

Affirmed.

/s/ Kathleen Jansen
/s/ Colleen A. O'Brien

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

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v

MATTHEW LAWRENCE FURMAN,

Defendant-Appellant.

UNPUBLISHED
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No. 355416
Wayne Circuit Court
LC No. 19-007623-01-AR

Before: JANSEN, P.J., and O'BRIEN and HOOD, JJ.

HOOD, J. (*dissenting*).

I respectfully dissent. It is uncontested that the district court made two errors in this case. First, during defendant Matthew Lawrence Furman's plea colloquy, it failed to ask whether the plea was the result of outside or undisclosed promises. See MCR 6.302(C)(4); MCR 6.610(F)(6)(a). When Furman later moved to withdraw his plea, claiming that his plea was based on his understanding, and his attorney's undisclosed promise, that he would receive a deferred sentence under MCL 771.1, the district court made a second error: it granted the motion to withdraw his plea without explanation.

Acknowledging that these two errors occurred, the question we now face is what, if anything, we should do to correct them. Instead of reinstating an obviously defective plea, I would reverse and remand to the district court for an evidentiary hearing to determine if Furman's substantial rights were violated.

I. BACKGROUND

The majority opinion accurately describes the factual and procedural background of this case.

II. STANDARD OF REVIEW

Here, where this Court is reviewing an appeal from the district court to the circuit court, this Court stands in the shoes of the circuit court. See *People v McBride*, 204 Mich App 678, 681;

516 NW2d 148 (1994). This Court applies the same standard of review as the circuit court to the district court's decision. *Id*.

"A trial court's ruling on a motion to withdraw a plea is reviewed for an abuse of discretion." *People v Al-Shara*, 311 Mich App 560, 566; 876 NW2d 826 (2015) (citation omitted). "An abuse of discretion occurs when the trial court's decision falls outside the range of principled outcomes. A trial court also necessarily abuses its discretion when it makes an error of law." *Id*. (citations omitted). We review the interpretation of statutes and court rules de novo. *People v Kimble*, 470 Mich 305, 308-309; 684 NW2d 669 (2004).

III. LAW AND ANALYSIS

Furman argues the circuit court erroneously reversed the district court's order allowing the withdrawal of his no contest plea. I agree that the district court abused its discretion by failing to state the basis for its decision to grant Furman's motion to withdraw, failing to make findings on how the errors underlying the withdrawal affected Furman's substantial rights, and failing to make findings on how the withdrawal prejudiced the prosecution, if at all. Instead of affirming the circuit court's decision to reinstate an obviously defective plea, I would remand to the district court for the district court to address how the defective plea affected Furman's substantial rights.

The majority aptly describes the legal standards for accepting an "understanding, voluntary, and accurate" no-contest plea, see MCR 6.302(A), and for a criminal defendant's motion to withdraw or set aside his plea on the basis of an error in the plea proceedings, see MCR 6.310(C)(3); MCR 6.610(F)(8)(b). Critically, a trial court is only required to grant a motion to withdraw when it determines that a deviation in the plea taking process affecting substantial rights has occurred. See MCR 6.610(F)(8)(b).

Furman makes two arguments. First, he argues his counsel was ineffective because he incorrectly promised him a delayed sentence under MCL 771.1. Second, he argues that the district court failed to follow the plea-taking process by not asking whether "anyone has promised [him] anything beyond what is in the plea agreement." To succeed on either argument, Furman must show that his substantial rights were affected. The legal question of whether Furman's substantial rights were affected turns on a single factual question: was there actually an outside promise? Without the answer to this question—the question the district court was supposed to ask—Furman cannot succeed on his argument, and we cannot have confidence in the integrity of his conviction. I would remand for a hearing to address this issue. I address each of Furman's two arguments below.

A. DEFECTIVE PLEA COLLOQUY

Beginning with Furman's unpreserved claim of error related to the defective plea colloquy, I would remand to the district court for an evidentiary hearing under MCR 7.216(A)(5). Furman has satisfied the first two prongs of the plain error analysis, but we are unable to address the third prong because the nature of the error created a factual gap in the record. I would, therefore, remand to the district court for fact finding. See MCR 7.216(A)(5).

Furman's argument regarding his defective plea is unpreserved and therefore subject to plain error analysis. See MCR 6.310(D) (providing that a defendant preserves issues related to a

plea withdrawal when "the defendant has moved to withdraw the plea in the trial court, raising as a basis for withdrawal the claim sought to be raised on appeal"); see also *People v Armisted*, 295 Mich App 32, 45-46; 811 NW2d 47 (2011).[1] In order to receive relief under the plain-error rule, a defendant bears the burden of proving that: (1) an error occurred, (2) the error was plain, i.e., clear or obvious, and (3) the plain error affected substantial rights, i.e., prejudiced defendant by affecting the outcome of the proceedings. *People v Hanks*, 276 Mich App 91, 92; 740 NW2d 530 (2007), quoting *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). "An error affects substantial rights when it impacts the outcome of the lower-court proceedings." *People v Burkett*, 337 Mich App 631, 635; 976 NW2d 864 (2021) (quotation marks and citation omitted). "Reversal is warranted only when the error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings independently of the defendant's innocence." *People v Lockridge*, 498 Mich 358, 393; 870 NW2d 502 (2015).

Regarding the first prong of the plain error analysis, I agree with the majority that the district court did make an error during the plea colloquy when it failed to ask if the plea was the result of outside promises or inducements. See MCR 6.302(C)(4) ("The court must ask the defendant . . .whether anyone promised anything beyond what is in the plea agreement."); MCR 6.610(F)(6)(a). Because the district court was required to ask this question, and it did not, Furman has satisfied the first prong of the plain error analysis. As discussed below, the nature of the error affects this Court's ability to assess whether the error prejudiced him.

Having concluded that the error occurred, I would also conclude that the error was "plain," or "clear and obvious" for two reasons. First, the requirement that the district court ask a defendant about outside promises or inducements related to the plea is plainly stated in the court rules. See MCR 6.302(C)(4)(a); MCR 6.610(F)(6)(a). Second, separate from the explicit requirement in the court rules, the district court was required to ensure that the plea was knowingly, intelligently, and voluntarily made. This mandate requires the district court to inquire if there are outside threats, promises, or inducements that have led to the plea, separate from any explicit direction in the court rules. In short, the error was clear and obvious.[2]

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[1] MCR 6.310(D) bars a defendant convicted on the basis of a plea from raising on appeal any claim of noncompliance with the court rules unless the defendant has first moved to withdraw his plea with the trial court on the same basis. Because Furman moved to withdraw his plea on the basis of an undisclosed outside promise, without explicitly arguing that the district court failed to ask about an undisclosed promise, I would conclude that the issue is subject to plain-error analysis rather than completely barred. Had the district court made sufficient findings related to the motion to withdraw his plea, the defect in the plea colloquy would have been apparent. I would not bar Furman from raising this issue because of the district court's errors in addressing Furman's motion that raised substantially similar issues with the plea. See *Peterman v Dep't of Natural Resources*, 446 Mich 177, 183; 521 NW2d 499 (1994) (indicating that a party should not be penalized by a trial court's failure to address an issue).

[2] The obviousness of this error undercuts the majority's focus on the fact that Furman could have raised this argument in his motion to withdraw or during the circuit court appeal. Admittedly,

The third prong of the plain error analysis, substantial rights, is complicated due to the nature of the error. To demonstrate that the error affected his substantial rights, a defendant must show that the error affected the outcome of the proceedings. See *Armisted*, 295 Mich App at 46. Here, the answer to this question is necessarily tied to the fact question of whether Furman actually was promised deferred sentencing under MCL 771.1 either by his lawyer or by someone else. Ordinarily, Furman would have been tasked with presenting evidence sufficient to rebut his own sworn statements, made at the plea hearing, that the plea was not the result of outside promises or inducements. See MCR 6.302(C)(4)(a); see also *People v Samuels*, ___ Mich App ___, ___; ___ NW2d ___ (2021) (Docket No. 353302); slip op at 5 ("[A] trial court is generally barred at the evidentiary hearing from considering testimony or affidavits inconsistent with statements made during the plea hearing . . . .") (quotation marks and citation omitted). The court, however, may allow a defendant to withdraw a plea on the basis of promises of leniency if the record, beyond a defendant's postconviction statements, supports the defendant's claims. *People v Jackson*, 203 Mich App 607, 612-613; 513 NW2d 206 (1994) (citation omitted).

Here, however, the court neglected to inquire whether there were outside promises, so Furman never made such sworn statements. Aside from the plea agreement, there is no other information in the record that supports or refutes Furman's claim.[3]

The prosecution's argument that the district court "substantially complied" with the requirements for a plea colloquy is misplaced. The prosecution cites *Al-Shara*, 311 Mich App at 560, in support of the position that this Court should review the district court's deviation from the court rules related to plea taking under the doctrine of substantial compliance. See *id.* at 571-572. I acknowledge that the district court was not required to follow "talismanic" compliance with MCR 6.302(C)(4)(a). See *id*. at 572. This means that the district court could have asked Furman whether his plea was the result of outside promises in any way it chose. It does not mean that the court could dispense with asking this question altogether. Although the district court complied with

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Furman should have raised the issue of the defect in the plea colloquy separate from his argument that there was an outside promise. But the issues are inseparable. Both the district court, when addressing Furman's motion to withdraw, and the circuit court, when addressing the prosecution's appeal, would have discovered the obvious defect in the plea colloquy upon a cursory review of the plea transcript. If Furman's ineffective assistance of counsel claim were based on something else, his failure to point out the defect earlier would carry more weight. Here, his claim of ineffectiveness is based on an outside promise. The first step in addressing this claim would be to look to the answer to the required question during the plea colloquy.

[3] Furman attached several exhibits to his brief that are outside of the record: (1) a March 30, 2020 decision by the labor arbitration tribunal; (2) Furman's polygraph report; and (3) Furman's affidavit. A defendant may be entitled to withdraw his or her plea when the defendant presents "credible evidence that the plea was the product of fraud, duress, or coercion." *People v Patmore*, 264 Mich App 139, 152; 693 NW2d 385 (2004) (quotation marks and citation omitted). This Court's function is not to act as factfinder, see, e.g., *People v Bulmer*, 256 Mich App 33, 36; 662 NW2d 117 (2003), and this Court may not consider an expanded record on appeal, *People v Powell*, 235 Mich App 557, 561 n 4; 599 NW2d 499 (1999) ("[I]t is impermissible to expand the record on appeal.").

other aspects of MCR 6.302, the critical inquiry on outside promises is wholly absent. Without these direct questions, or a signed advice of rights covering the same questions, the record is silent on whether an outside promise or threat induced Furman's plea.

The district court's error during the plea colloquy was compounded by the district court's laconic decision to grant Furman's motion to withdraw. It is unclear from the record whether the district court granted the motion to withdraw because of the error in the plea colloquy, the claim of ineffective assistance of counsel, or some other reason. More critically, the district court failed to make findings related to whether there was evidence of an outside promise, whether the errors affected Furman's substantial rights, and whether the prosecution would be prejudiced by the withdrawal.

Without these findings and conclusions, this Court cannot confidently assess whether there was an outcome-determinative error. This leaves two options: (1) affirm the circuit court's decision that the district judge abused the court's discretion because of the insufficiency of its findings; or (2) remand for the collection of additional evidence.

In my view, a remand for an evidentiary hearing before the district court under MCR 7.216 is the best of these two options. It protects Furman's right to a fair process. It does not prejudice the prosecution anymore than the prosecution has already been prejudiced by the delay during appeal. And it protects the interests of the parties, the Court, and the public in ensuring the integrity of Furman's conviction. For these reasons, I would remand for an evidentiary hearing.

B. INEFFECTIVE ASSISTANCE OF COUNSEL

If we were to remand to the district court to hold an evidentiary hearing in order to address whether the defective plea colloquy affected Furman's substantial rights, the district court would effectively answer the evidentiary questions that bear on Furman's ineffective assistance of counsel claim.

Furman claims the circuit court erred in reversing the district court's order because he was denied effective assistance of counsel when counsel allegedly assured Furman he would receive a delayed sentence under MCL 771.1. Unlike Furman's other argument, this argument is preserved because Furman effectively made the same argument in the motion to withdraw his plea.[4] See MCR 6.310(D). With respect to Furman's preserved issue, "[t]he denial of effective assistance of counsel is a mixed question of fact and constitutional law, which are reviewed, respectively, for clear error and de novo." *People v Brown*, 279 Mich App 116, 140; 755 NW2d 664 (2008). "A decision is clearly erroneous if, although there is evidence to support it, this Court is left with a

[4] In his motion to set aside his plea, Furman did not explicitly raise the ineffective assistance issue in the district court. Rather, Furman's motion to set aside the plea describes trial counsel assuring him that he would receive a delayed sentence under MCL 771.1, but it does not reference ineffective assistance of counsel. This is sufficient to preserve this issue.

definite and firm conviction that a mistake has been made." *People v Howard*, 233 Mich App 52, 54; 595 NW2d 497 (1998) (quotation marks and citation omitted).

As the majority correctly notes, Furman did not move the district court or the circuit court for an evidentiary hearing under *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). Rather, he made his first request for a *Ginther* hearing in his appeal to this Court; therefore, this Court's review is limited to mistakes apparent from the record. See *People v Mack*, 265 Mich App 122, 125; 695 NW2d 342 (2005). That is, unless we remand for such a hearing under MCR 7.216(A)(5) (providing that the Court, in its discretion, and on the terms it deems just, may remand the case for the trial court to take additional evidence).

Due to the defective plea colloquy, without factfinding regarding Furman's assistance of counsel, I cannot confidently conclude that Furman's right to counsel was not violated. The majority well describes the legal standards for ineffective assistance of counsel claims. Put simply, a defendant must show: "(1) counsel's performance fell below an objective standard of reasonableness and (2) but for counsel's deficient performance, there is a reasonable probability that the outcome would have been different." *People v Trakhtenberg*, 493 Mich 38, 51; 826 NW2d 136 (2012); see also *People v Corteway*, 212 Mich App 442, 445; 538 NW2d 60 (1995) ("Guilty pleas have been found to be involuntary or unknowing on the basis of ineffective assistance of counsel where defense counsel failed to explain adequately the nature of the charges or the consequences of the guilty plea.") (Citations omitted).

For the same reasons that we are unable to adequately answer whether the district court's defective plea colloquy affected Furman's substantial rights, we are unable to determine whether his counsel was ineffective. The district court did not make sufficient findings. In granting Furman's motion to withdraw the plea, the district court stated: "But [the plea] was placed on the record by the Prosecutor and everybody understood it. All right. How much time do you need to prepare for a jury trial?" I agree with the majority that from this statement, it is unclear whether the district court concluded Furman was denied effective assistance of counsel.

Again, the majority correctly notes that ordinarily it would be appropriate to remand the issue to the district court for an evidentiary hearing to establish a factual basis whether Furman was denied effective assistance of counsel. Furman requests the same in his brief to this Court. But, the prosecution correctly notes that this was the first time Furman made such a request. I acknowledge that Furman did not move this Court to remand under MCR 7.211(C)(1)(a)(*ii*). MCR 7.211(C)(1)(a)(*ii*) states: "The appellant may move to remand to the trial court. The motion must identify an issue sought to be reviewed on appeal and show that development of a factual record is required for appellate consideration of the issue." Nonetheless, this Court has authority, on terms it deems just, to "remand the case to allow additional evidence to be taken." MCR 7.216(A)(5). If we were to exercise that authority to remand on the closely related issue of whether the district court's failure to comply with MCR 6.302 and MCR 6.610 affected Furman's substantial rights, as described earlier, I would also direct the district court to make fact findings sufficient to address Furman's ineffective assistance of counsel claim.

IV. CONCLUSION

For the reasons stated above, I would remand for the district court to conduct an evidentiary hearing. On remand, I would direct the district court to make fact findings regarding whether an outside promise induced Furman's plea, whether defense counsel was ineffective in communicating the consequences of his plea, and other areas of inquiry consistent with this dissenting opinion and the court rules. For these reasons, I must dissent.

/s/ Noah P. Hood