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Minn. Stat. § 480A.08, subd. 3 (2012).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1647**

State of Minnesota,
Respondent,

vs.

Jon Stephen Erickson,
Appellant.

**Filed May 27, 2014
Affirmed
Schellhas, Judge**

Washington County District Court
File No. 82-CR-11-3167

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Pete Orput, Washington County Attorney, Robin M. Wolpert, Assistant County Attorney,
Stillwater, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Benjamin J. Butler, Assistant
Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Schellhas, Presiding Judge; Halbrooks, Judge; and
Harten, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to
Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

SCHELLHAS, Judge

Appellant challenges the district court's denial of his postconviction-relief petition in which appellant claimed that ineffective assistance of trial counsel caused him to reject a plea offer. We affirm.

FACTS

In August 2011, respondent State of Minnesota charged appellant Jon Erickson with domestic assault by strangulation and fourth-degree criminal sexual conduct. Erickson hired an attorney to represent him; discharged that attorney; and hired a different attorney, who was admitted to the Minnesota bar in October 2010. In November, the state made a written plea offer to Erickson in which it proposed that, if Erickson pleaded guilty to fourth-degree criminal sexual conduct, the state would agree to a cap of 90 days' jail time with the mandatory five-year conditional-release period and ten-year predatory-offender-registration requirement. The state would dismiss the charge of domestic assault by strangulation. In January 2012, the state amended its complaint to add charges of third-degree criminal sexual conduct and fleeing a peace officer by means other than a motor vehicle. But the state's plea offer remained open until February 10, 2012.

Erickson rejected the state's plea offer and proceeded to trial, and a jury found him guilty of all charges. At his sentencing hearing, Erickson and his attorney stated that Erickson believed that he was innocent until he heard the victim's trial testimony. The district court sentenced Erickson concurrently to one year and one day in prison for his

conviction of felony domestic assault by strangulation, 62 months' imprisonment with a ten-year conditional-release period for his conviction of third-degree criminal sexual conduct, and 90 days in jail for his conviction of fleeing a peace officer by means other than a motor vehicle. The court imposed no sentence for fourth-degree criminal sexual conduct. Erickson appealed from the judgment of conviction but then moved this court to stay the appeal and remand for postconviction proceedings. This court granted Erickson's motion, and he petitioned the district court for postconviction relief, claiming ineffective assistance of trial counsel and seeking specific performance of the state's plea offer or, alternatively, a new trial. The district court conducted an evidentiary hearing at which Erickson waived his attorney-client privilege "regarding conversations specifically about plea negotiations," and Erickson and his attorney testified. The court denied Erickson postconviction relief.

This appeal follows.

D E C I S I O N

[W]hen [appellate courts] review a postconviction court's denial of relief on a claim of ineffective assistance of counsel, [appellate courts] will consider the [postconviction] court's factual findings that are supported in the record, conduct a de novo review of the legal implication of those facts on the ineffective assistance claim, and either affirm the court's decision or conclude that the court abused its discretion because postconviction relief is warranted.

State v. Nicks, 831 N.W.2d 493, 503–04 (Minn. 2013). We will not disturb the district court's factual findings unless they are clearly erroneous. *See id.* at 503. To prevail on an ineffective-assistance-of-counsel claim, an appellant must show that "(1) his counsel's

performance fell below an objective standard of reasonableness, and (2) that a reasonable probability exists that the outcome would have been different but for counsel's errors." *Andersen v. State*, 830 N.W.2d 1, 10 (Minn. 2013) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984)).

Here, the district court found that

[Erickson's attorney] gave inaccurate and misleading information to [Erickson] when [the attorney] told [Erickson] that [Erickson] could not be sentenced for more than one count of the Amended Complaint, did not inform [Erickson] of his sentencing exposure if convicted on both felony counts, and misinformed [Erickson] about the possible violations for which conditional release could be revoked.^{1]}

The court concluded that the attorney's performance "[fell] below the objective standard of reasonableness because it would tend to affect a defendant's decision to reject a plea bargain and proceed to trial." The state does not challenge the court's findings or its conclusion that the attorney's performance fell below objectively reasonable standards.

Erickson argues that his attorney's performance was unreasonable because the attorney advised Erickson to reject the State's pre-amendment plea offer. The record reflects that the attorney referred to the offer as a "non-offer" and did not push Erickson to accept the offer. The attorney's actions were reasonable because Erickson was maintaining his innocence and fired his previous attorney in part for strongly advising Erickson to take the plea. *See Burt v. Titlow*, 134 S. Ct. 10, 17 (2013) ("Although a defendant's proclamation of innocence does not relieve counsel of his normal responsibilities under *Strickland*, it may affect the advice counsel gives."). Erickson also

¹ Erickson actually faced three felony counts.

argues that his attorney was not authorized to represent Erickson as a private client because the professional-liability-insurance section of the attorney's Minnesota Judicial Branch attorney-detail page indicates that he "does NOT represent private clients." The record supports the district court's finding that the attorney was authorized to practice law because the authorized-to-practice-law section of the attorney's attorney-detail page indicates that he is authorized.

Prejudice to Erickson

Erickson argues that, but for the ineffective assistance of his attorney, a reasonable likelihood exists that he would have accepted the plea. "A defendant is prejudiced by . . . ineffective assistance of counsel if there is a reasonable likelihood that the plea bargain would have been accepted had the defendant been properly advised." *Leake v. State*, 737 N.W.2d 531, 533 (Minn. 2007). "A reasonable probability means a probability sufficient to undermine confidence in the outcome," a standard somewhere between showing that counsel's deficient conduct had "some conceivable effect on the outcome of the proceeding" and "more likely than not altered the outcome in the case." *Leake v. State*, 767 N.W.2d 5, 10 (Minn. 2009) (quotations omitted). Appellate courts consider "the totality of the evidence before the judge or jury in making this determination." *Id.* (quotation omitted).

Erickson testified at his postconviction hearing that he rejected the plea offer because he believed that "the worst case scenario" upon conviction would be 36 months in prison, no mandatory sentence, and a "probable" probationary stayed sentence. On appeal, Erickson states that he accepts the district court's finding that his attorney told

Erickson he faced a 48-month presumptive sentence. The attorney testified as follows. Erickson asserted his innocence and thought that the victim would not give credible testimony. Erickson discharged his previous attorney in part because the attorney had not tried many cases and had “strongly advised” Erickson to take the plea. Predatory-offender registration “was a major concern” for Erickson, who denied “the sexual component” of the charges and felt that registration would be inappropriate. Erickson’s “final statement” on accepting a plea offer was that he “would plead to the fleeing if he didn’t have to register as a predatory offender.” The attorney believed that the only way for Erickson to avoid predatory-offender registration was to prevail at trial. *See* Minn. Stat. § 243.166, subd. 1b(a)(1)(iii) (2010).

Erickson argues that he likely would have accepted the state’s plea offer had he been properly advised by legal counsel. He points to his postconviction testimony that he would have accepted the plea offer had he known his “max sentencing exposure” and argues that “prejudice *can be shown* if loss of the plea opportunity led to a trial resulting in a conviction on more serious charges or the imposition of a more severe sentence,” quoting *Lafler v. Cooper*, 132 S. Ct. 1376, 1387 (2012) (emphasis added). Citing *Titlow v. Burt*, 680 F.3d 577, 588–90 (6th Cir. 2012), *rev’d on other grounds*, 134 S. Ct. 10 (2013), Erickson argues that “the sheer volume of misinformation fed to Erickson by [the attorney]” about his potential sentence “makes it reasonably likely that Erickson would have accepted the offer had he known his true sentencing exposure.” In *Burt*, the Sixth Circuit stated that a “substantial disparity between the plea offer and the post-trial sentence provides evidence that the defendant would have accepted the plea.” 680 F.3d at

588. *But see Sanders v. United States*, 341 F.3d 720, 721–23 (8th Cir. 2003) (concluding that defendant failed to show prejudice even though defendant asserted “that he would have changed his mind and pleaded guilty if only he had been advised correctly about his sentencing exposure” and was sentenced to 175 months in prison as compared to the plea’s 60 months in prison), *cert. denied*, 540 U.S. 1199 (2004); *Burt*, 134 S. Ct. at 17 (noting that “a defendant convinced of his or her own innocence may have a particularly optimistic view of the likelihood of acquittal, and therefore be more likely to drive a hard bargain with the prosecution before pleading guilty”).

Erickson also argues that he could have provided an adequate factual basis for fourth-degree criminal sexual conduct. He testified at the postconviction hearing that he remembered that he pulled down the victim’s pants. And the attorney testified that, during pretrial discussion of the plea, Erickson admitted that he had a “scuffle” with the victim. Fourth-degree criminal sexual conduct occurs where “the actor uses force or coercion to accomplish the sexual contact.” Minn. Stat. § 609.345, subd. 1(c) (2010). A person engages in sexual contact by “touching . . . the clothing covering the immediate area of the intimate parts” without consent when that touching is “committed with sexual or aggressive intent.” Minn. Stat. § 609.341, subd. 11(a)(iv) (2010). But Erickson’s retrospective belief that he could have offered facts sufficient to support a guilty plea is unpersuasive because he rejected the state’s plea and strongly maintained his innocence.

Erickson also argues that he could have offered a *Norgaard* plea to fourth-degree criminal sexual conduct. Through a *Norgaard* plea, a defendant “plead[s] guilty without admitting guilt if he or she has no memory, through amnesia or intoxication, of the

offense.” *Butala v. State*, 664 N.W.2d 333, 336 n.2 (Minn. 2003) (citing *State ex rel. Norgaard v. Tahash*, 261 Minn. 106, 113–14, 110 N.W.2d 867, 872 (1961)). But, here, the postconviction testimony of Erickson and the attorney shows that Erickson knew that he pulled down the victim’s pants during a scuffle, demonstrating that he had at least some memory of the offense. Erickson therefore fails to show a reasonable probability that he could have successfully attempted to offer a *Norgaard* plea to fourth-degree criminal sexual contact.

In its postconviction order, the district court noted that Erickson “testified that he would never have risked going to prison for 62 months given his parents’ health problems and would have accepted the plea offer if he knew the true consequences of a conviction.” But the court was unpersuaded, stating,

[Erickson] was aware that he was facing at least a 48 month sentence, with a possible 32 months of that in prison. [Erickson] steadfastly denied the charges prior to trial and continued to maintain after trial that he did not remember the sexual assault. . . . While [Erickson] may have come to believe the events happened when he heard the victim’s testimony, prior to trial he consistently denied the charges. Given [Erickson]’s adamant denial of the charges prior to trial and the fact that he rejected an offer that included a stay of execution of sentence and a cap of 90 days in the Washington County Jail, the Court cannot find it reasonably likely that [Erickson] would have accepted the plea offer if he had known that his possible prison sentence was 62 months instead of 48 months, or even 36 months as [he] testified he had been told by [his attorney].

We will not disturb the district court’s credibility determination. *See Opsahl v. State*, 710 N.W.2d 776, 782 (Minn. 2006) (“[T]he postconviction court is in a unique

position to assess witness credibility, and we must therefore give the postconviction court considerable deference in this regard.”).

The district court concluded that Erickson “ha[d] not shown a reasonable probability that, but for [the attorney]’s errors, he would have accepted the plea offer.” In addressing the prejudice prong of the *Strickland* test, the court noted that the attorney testified that Erickson “strongly disputed committing the sexual assault and believed he was not capable of doing it”; the attorney testified that Erickson discharged his first attorney, in part, because the attorney strongly advised him to take the state’s plea offer; Erickson told the attorney that he would plead to fleeing a peace officer if he did not have to register as a predatory offender but he would not plead to anything else; and Erickson rejected a plea offer that included a stay of execution of sentence and a cap of 90 days in the Washington County Jail. Record evidence supports the district court’s conclusion that Erickson was not prejudiced.

We conclude that Erickson has failed to show that the district court abused its discretion because Erickson failed to show a reasonable probability that he would have accepted the plea had he been properly advised.

Affirmed.