

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
August 16, 2012

v

NATHAN ROBERT-FRANK KASPER,

Defendant-Appellant.

No. 304481
Cass Circuit Court
LC No. 11-010015-FH

Before: MARKEY, P.J., and SHAPIRO and RONAYNE KRAUSE, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of unarmed robbery, MCL 750.530; and conspiracy to commit larceny from a person, MCL 750.357. He was sentenced as an habitual offender, second offense, MCL 769.10, to 7 to 22 years and 6 months' imprisonment for unarmed robbery and 5 to 15 years' imprisonment for conspiracy to commit larceny from a person. Defendant appeals by right. We affirm.

Defendant argues that the prosecutor shifted the burden of proof to defendant through comments she made in her closing argument. Because defendant did not object at trial, the issue is unpreserved. *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008). Unpreserved claims of prosecutor misconduct are reviewed for plain error affecting defendant's substantial rights. *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004).

In each of the first three challenged sections of the prosecutor's closing argument, the prosecutor argued that pieces of inculpatory evidence were uncontradicted. The mere fact that the prosecutor noted that some inculpatory evidence was uncontradicted did not shift the burden of proof to defendant. *People v Callon*, 256 Mich App 312, 331; 662 NW2d 501 (2003). In the fourth challenged portion, the prosecutor remarked in rebuttal that there was no testimony to support defendant's theory of the case, that another man, named Fluff, was involved. This comment was in response to defense counsel's closing argument, and the prosecutor's attack on the credibility of defendant's theory of the case did not shift the burden of proof. *Id.* "[W]here a defendant testifies at trial or advances, either explicitly or implicitly, an alternate theory of the case that, if true, would exonerate the defendant, comment on the validity of the alternate theory cannot be said to shift the burden of proving innocence to the defendant." *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995). There was no plain error.

Defendant also argues that his trial counsel was constitutionally deficient in failing to object to prosecutorial misconduct in closing arguments. Our review of this claim is limited to mistakes apparent on the record. See *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). To establish ineffective assistance of counsel, a defendant must show that his attorney's performance fell below an objective standard of reasonableness and that this was so prejudicial as to deprive him of a fair trial. *Thomas*, 260 Mich App at 456. As discussed above, the prosecutor's closing argument did not impermissibly shift the burden of proof to defendant. Counsel is not required to make frivolous or meritless objections. *Id.* at 457.

Defendant also argues that no evidence supported the trial court's scoring offense variable (OV) 1, MCL 777.31 (aggravated use of a weapon), at ten points, or assigning one point for OV 2, MCL 777.32 (lethal potential of weapon possessed or used). A trial court's scoring decision is reviewed to "determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score." *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). Here, there was evidence in the record to support the trial court's finding that a can of food was used as a weapon, which in turn supported the trial court's scoring of OV 1 and OV 2. See *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). Specifically, evidence at trial indicated the victim was beaten with a can, resulting in a "huge gash" on his forehead, which bled substantially and required treatment at a hospital. The trial court did not abuse its discretion in scoring OV 1 at ten points and OV 2 at one point. *McLaughlin*, 258 Mich App at 671.

We affirm.

/s/ Jane E. Markey
/s/ Douglas B. Shapiro
/s/ Amy Ronayne Krause