

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
January 28, 2014

v

MAURICE JOEL WILLIAMS,
Defendant-Appellant.

No. 313022
Van Buren Circuit Court
LC No. 06-015106-FC

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

PER CURIAM.

Defendant Maurice Williams appeals as of right his jury trial convictions of assault with intent to commit murder, MCL 750.83, and armed robbery, MCL 750.529. Defendant was sentenced to concurrent terms of 225 months to 50 years' imprisonment, with 156 days' credit applied. We affirm.

This case arises out of an incident during which defendant, Timothy Sanders, and Fitzpatrick Blakely beat and robbed the victim. At trial, witness testimony established and DNA evidence supported that defendant hit the victim in the head with a baseball bat four times.

Defendant first asserts that his trial counsel was ineffective because he failed to object to the testimony of a witness, Raymond Rittenhouse, who testified that defendant previously physically beat and harassed him. "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). However, where, as here, a defendant fails to move for a new trial or evidentiary hearing regarding his ineffective of assistance of counsel claim, review of the issue is limited to mistakes apparent on the record. *Id.*

To establish a claim of ineffective assistance of counsel, a defendant "must show that his attorney's representation fell below an objective standard of reasonableness and that this was so prejudicial to him that he was denied a fair trial." *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000) (citations omitted). There is a strong presumption that counsel's action was sound trial strategy. *Id.* This Court has previously held that a failure to object to inadmissible evidence is an action falling below an objective standard of reasonableness. *People v Douglas*, 296 Mich App 186, 200; 817 NW2d 640 (2012). To show prejudice, a defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Toma*, 462 Mich at 302-303 (quotations and citation omitted).

To determine whether counsel's failure to object was objectively unreasonable, we must first determine whether the testimony was objectionable. It is very clear that part of the testimony was objectionable; however, this is a case in which it is clear not objecting was a part of trial strategy. Defendant cites part of the testimony, however, does not mention that defense counsel also cross-examined both Raymond Rittenhouse and co-defendant Fitzpatrick Blakely about these previous incidents. Defense counsel then repeatedly used this testimony to argue that Blakely, and not defendant, had assaulted the victim in this case. Matters of trial strategy will not be second-guessed and we will not do so here. *People v Williams*, 240 Mich App 316, 331-332; 614 NW2d 647 (2000)

Additionally, in light of the overwhelming evidence of defendant's guilt, even if there had been ineffective assistance of counsel for failing to object, there is no "reasonable probability" that, but for this "error", the result of the proceeding would have been different. *Toma*, 462 Mich at 302-303. Eyewitness testimony established that defendant, Blakely, and Sanders were in Sanders's car minutes before the crime occurred. Blakely's testimony and defendant's admissions corroborated this testimony. The victim told police that he suffered a surprise attack from three men, which Blakely corroborated. Blakely testified that defendant beat the victim with a bat; the bat was found at defendant's home. Blood on the bat matched the victim's DNA. The coat defendant wore during the crime had both his and the victim's DNA on it. Defendant cannot, on this record, demonstrate a "reasonable probability that . . . the result of the proceeding would have been different," *id.* at 302-303, if counsel had objected to Rittenhouse's testimony.

Defendant next argues that the prosecution impermissibly shifted the burden of proof to him during closing arguments. This Court reviews "forfeited claims of allegedly improper conduct by the prosecutor for plain error that affected the defendant's substantial rights." *People v Fyda*, 288 Mich App 446, 460-461; 793 NW2d 712 (2010). "To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999) (citation omitted). Regarding errors of prosecutorial misconduct, we "cannot find error requiring reversal where a curative instruction could have alleviated any prejudicial effect." *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008).

"Prosecutorial-misconduct issues are decided case by case, and the reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context." *People v Abraham*, 256 Mich App 265, 272-273; 662 NW2d 836 (2003) (citation omitted). A prosecutor may not imply in closing argument that the defendant must prove something or present a reasonable explanation for damaging evidence because such an argument tends to shift the burden of proof." *Fyda*, 288 Mich App at 463-464 (citation omitted). However, "[t]he nature and type of comment allowed is dictated by the defense asserted . . . When a defense makes an issue legally relevant, the prosecutor is not prohibited from commenting on the improbability of the defendant's theory or evidence." *People v Fields*, 450 Mich 94, 116; 538 NW2d 356 (1995). More importantly, "the general rule is that the prosecutor may comment as long as such comment does not impermissibly refer to defendant's silence." *Id.* at 111 n 21.

Defendant asserts that the prosecution's argument that there was no evidence showing that Blakely swung the bat impermissibly shifted the burden of proof to defendant. We disagree. The statement addressed an issue made "legally relevant," *Fields*, 450 Mich at 116, by defendant's assertion of a theory that Blakely hit the victim with the bat. It was not error for the prosecutor to comment on the lack of evidence supporting that defense. *Id.* Thus, there was no plain error. *Carines*, 460 Mich at 763.

Defendant finally argues that the trial court abused its discretion in denying his motion for a new trial, which was based on an alleged violation of *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963). This Court remanded to the trial court for a hearing regarding this alleged violation. *People v Williams*, unpublished order of the Court of Appeals, entered March 22, 2013 (Docket No. 313022). Defendant argues that the prosecution failed to disclose Blakely and Sander's polygraph reports and this impacted the outcome of trial. This argument has no merit.

"This Court reviews a trial court's decision to grant or deny a motion for new trial for an abuse of discretion." *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003). "Underlying questions of law are reviewed de novo, while a trial court's factual findings are reviewed for clear error." *Id. People v Terrell*, 289 Mich App 553, 559; 797 NW2d 684 (2010).

To establish a *Brady* violation, a defendant must prove: "(1) that the state possessed evidence favorable to the defendant; (2) that the defendant did not possess the evidence nor could the defendant have obtained it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different." *People v Schumacher*, 276 Mich App 165, 177; 740 NW2d 534 (2007).

The trial court did not clearly err in finding "that the state possessed evidence favorable to the defendant." *Id.* However, the record shows that defendant possessed the polygraph results at some point just before or during the trial. While he did not possess the reports themselves, as a matter of law, no *Brady* violation occurred because defendant actually possessed the results and defense counsel indicated that he made extensive use of the information contained in the report during cross-examination of Blakely and that the information in the polygraph. More importantly, even if defense counsel had been in possession of the reports themselves in a timely manner the trial court correctly found that there was no reasonable probability that the outcome of the proceedings would have been different, *id.*; thus, we conclude that the trial court did not abuse its discretion in denying a new trial based on the alleged *Brady* violation.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Jane E. Markey
/s/ Amy Ronayne Krause