

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL ALEXANDER BROWN,

Defendant-Appellant.

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UNPUBLISHED

June 26, 2001

No. 212123

Wayne Circuit Court

Criminal Division

LC No. 97-001480

Before: Sawyer, P.J., and Griffin and O'Connell, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of second-degree murder, MCL 750.317, two counts of assault with intent to commit murder, MCL 750.83, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to concurrent terms of life imprisonment for the second-degree murder conviction and 50 to 100 years each for the assault convictions, and a consecutive two-year term for the felony-firearm conviction. He appeals as of right. We affirm.

Defendant argues that reversal is required because the case was reassigned from Judge Thomas Brookover to Judge Leonard Townsend without complying with MCR 8.111(B), because the record does not contain a written order identifying the reason for reassignment, thereby depriving him of due process. We disagree. The record indicates that there was good cause for reassignment because, on defendant's adjourned trial date, Judge Brookover was in the middle of a trial and Judge Townsend was available. In any event, defendant has failed to show that he was prejudiced by the reassignment and, therefore, has not established a due process violation. *People v Simonds*, 135 Mich App 214, 225; 353 NW2d 483 (1984); *US v Erwin*, 155 F3d 818, 825 (CA 6, 1998).

Next, defendant argues that the trial court abused its discretion by allowing evidence of his prior convictions to be admitted for impeachment purposes. We disagree. The court did not abuse its discretion to the extent that it ruled that defendant's 1988 and 1992 breaking and entering convictions were admissible. MRE 609(a)(2); *People v Parchas*, 227 Mich App 236, 241-242; 575 NW2d 316 (1997). While it appears that defendant's other convictions did not qualify for admission because they were too old, MRE 609(c), we conclude that any error in admitting these other convictions does not require reversal because defendant has failed to show

that it is more probable than not that the outcome would have been different without the error. *People v Lukity*, 460 Mich 484, 497; 596 NW2d 607 (1999).

Defendant also contends that the court erred in allowing him to be impeached by evidence of his prison confinement. According to the record, however, the testimony occurred when defense counsel asked a witness to clarify how long he had known defendant. There was no attempt to impeach defendant's credibility. Nonetheless, we note that prior prison confinement may be a proper subject of impeachment. *Wilbur v Flood*, 16 Mich 40, 43-45; 93 Am Dec 203 (1867). Either way, the evidence did not affect the outcome of trial and, therefore, reversal is not warranted.

Next, defendant contends that the prosecutor's remarks during his rebuttal argument were improper and denied him a fair trial. Because there was no objection to the challenged remarks at trial, we will review this issue only for plain error affecting defendant's substantial rights. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). To merit reversal, defendant must show a clear or obvious error that was prejudicial, i.e. affected the outcome of the proceedings. *People v Carines*, 460 Mich 750, 763-764, 774; 597 NW2d 130 (1999); *Schutte*, *supra*. The challenged remarks concerning defense counsel were responsive to defense counsel's closing argument. Considered in this context, they were not plainly erroneous. *People v Messenger*, 221 Mich App 171,181; 561 NW2d 463 (1997). Further, the remaining challenged remarks did not amount to improper vouching, but rather, were properly based on the evidence at trial. *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997).

Next, defendant argues that he was denied the effective assistance of counsel at trial and sentencing. We disagree.

Because an evidentiary hearing was never held in connection with this issue, we limit our review to mistakes apparent from the record. *People v Fike*, 228 Mich App 178, 181; 577 NW2d 903 (1998). A defendant's claim that counsel's assistance was so defective as to require reversal of a conviction has two components. First, the defendant must show that counsel's performance was deficient. This requires a showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires a showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction resulted from a breakdown in the adversary process that renders the result unreliable. *People v Hoag*, 460 Mich 1, 5-6; 594 NW2d 57 (1999). In attempting to persuade a reviewing court that counsel was ineffective, a defendant must also overcome the presumption that the challenged action was trial strategy, and must establish "a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. *Id.* at 6.

Contrary to what defendant argues, defendant's due process rights were not violated simply because his statement to the police was not recorded. *Fike*, *supra* at 183-186. Therefore, counsel was not ineffective for failing to seek suppression on that basis. *People v Torres (On Remand)*, 222 Mich App 411, 425; 564 NW2d 149 (1997).

Defendant also argues that counsel was ineffective because he did not move to suppress the statements given by himself and his daughter on the grounds that they were coerced. Because the record does not factually support defendant's claims of coercion, this claim fails.

Next, defendant argues that counsel erred by failing to timely object to the improper reassignment of the case. As mentioned previously, however, defendant has failed to show that he was prejudiced by the reassignment and, therefore, counsel was not ineffective.

Defendant also contends that defense counsel should have presented evidence of his mental and psychological condition at sentencing. However, it is apparent that the court was aware of defendant's mental history, because the presentence report states that defendant was a paranoid schizophrenic. On the record before this Court, there is no basis to conclude that the court was not appraised of defendant's mental history or that additional information was necessary.

Accordingly, defendant has failed to show that he was denied the effective assistance of counsel.

Next, defendant argues that reversal is required because the court's instructions on reasonable doubt were deficient. We disagree. Defendant did not object to the court's instructions at trial, thereby precluding appellate relief absent plain error affecting defendant's substantial rights. *Carines, supra* at 774; *People v Snider*, 239 Mich App 393, 420; 608 NW2d 502 (2000).

The court's failure to include "moral certainty" language in the definition of reasonable doubt did not constitute plain error. *People v Hubbard (After Remand)*, 217 Mich App 459, 487; 552 NW2d 493 (1996). The court's instructions properly conveyed that a reasonable doubt is an honest doubt based upon reason. *People v Jackson*, 167 Mich App 388, 392; 421 NW2d 697 (1988). Because it is not plainly apparent that the jury was not adequately advised of the prosecution's burden and what constituted a reasonable doubt, *Hubbard (After Remand), supra*, this issue does not merit relief.

In light of our resolution of the foregoing issues, we reject defendant's claim that he was denied a fair trial because of the cumulative effect of several errors. *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999).

Finally, defendant contends that the court's comments at sentencing showed that it improperly made an independent finding that he was guilty of first-degree murder and based its sentence on this fact. See *People v Grimmatt*, 388 Mich 590; 202 NW2d 278 (1972), overruled in part on other grounds *People v White*, 390 Mich 245, 258; 212 NW2d 222 (1973). We disagree. The record indicates that the court's sentences were based on defendant's substantial prior criminal record, the fact that he had been on parole for only one month before he committed the instant offense, and that he involved his eight-year-old daughter in the events. Further, notwithstanding that defendant was not tried for first-degree murder because the charge was reduced before trial, the court could properly consider that the facts at trial supported a first-degree murder conviction as an aggravating factor. *People v Fleming*, 428 Mich 408, 418; 410

NW2d 266 (1987). Under these circumstances, we cannot conclude that the trial court abused its discretion in sentencing defendant.

Affirmed.

/s/ David H. Sawyer  
/s/ Richard Allen Griffin  
/s/ Peter D. O'Connell