STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 24, 2008
v	No. 273485 Macomb Circuit Court
DAVID BRIAN BINIENDA, Defendant-Appellant.	LC No. 2006-001701-FH

Before: Whitbeck, P.J., and Owens and Schuette, JJ.

PER CURIAM.

Defendant David Binienda appeals as of right his conviction by a jury of assault with intent to do great bodily harm less than murder.[1] The trial court[2] sentenced Binienda as a third habitual offender[3] to a prison term of 4 to 20 years, with credit for 136 days served. The charge arose from an altercation during which Binienda allegedly slashed Kenneth Valentine's face with a knife. We affirm.

I. Basic Facts And Procedural History

Douglas Finkle testified that on April 4, 2006, he was eating lunch at a Salvation Army lunchroom when Binienda walked up behind Finkle and punched him in the back of the head. Finkle said that he had known Binienda for a couple months before the incident and had bought marijuana from Binienda in the past. Finkle claimed that Binienda became angry with Finkle when he stopped buying marijuana after Binienda doubled the price. After Binienda hit him, Finkle finished eating and left the building, but Binienda followed him.

Kenneth Valentine testified that he saw Binienda punch Finkle in the back of the head and followed Binienda out of the building. Valentine asked Binienda not to bother Finkle because he "recently had a stroke and hitting him in the head wasn't the smart thing to do[,]" but Binienda threw a punch at Valentine. Valentine then punched Binienda. Finkle said that

[1] MCL 750.84.

[2] Macomb Circuit Judge Roland L. Olzark (retired).

[3] MCL 769.11.

Valentine did not have anything in his hand when he punched Binienda and denied that Valentine had a pipe or brass knuckles. Valentine similarly denied that he hit Binienda with anything other than his fist. Finkle, Valentine, and Timothy Roberts then all left in Finkle's Jeep.

The men drove to a convenience store where Finkle bought a twelve pack of beer, and they drank some of the beer in Valentine's driveway. Finkle said that he drank one beer and that Valentine and Roberts each had two or three beers, but on cross-examination, Finkle said that he had drunk two beers. Finkle said that he believed that Roberts had been drinking before Finkle met him.

After drinking, Finkle was driving his Jeep, with Roberts in the passenger seat and Valentine in the back seat, when he decided to check his apartment because Binienda knew where he lived, and he feared that Binienda might break a window or try to break in. When Finkle turned into his apartment complex, he saw Binienda walking through a park across the street from his complex, carrying a yellow bag in one hand and a knife in the other. Finkle further testified as follows:

> [Binienda] ran around the front of my Jeep, and my window was down. And he came up beside the window and he started screaming at me. And then all of the sudden the knife came in and I had my hand on the door handle and I opened it, and I hit him with the door handle. I closed it. I did not close the window. . . . the knife and his fist came in and hit me in the side of the face.

Finkle said that he did not get cut, but he noticed later at the hospital that his hat had been cut.

According to Finkle, Valentine then yelled from the backseat, "You want a piece of me?" Binienda answered, "yes[,]" ran to the back of the Jeep, and Valentine exited the vehicle. Through the rearview mirror, Finkle saw Binienda cut Valentine down the left side of his face. Binienda then ran off. Finkle denied that Valentine had been armed with anything. Valentine testified that he did not notice a knife when Binienda reached into the Jeep. Valentine said that he exited the vehicle and said, "Look this is it. Stop bothering the man." Valentine said that he first saw the knife when Binienda tried to slash his neck but managed instead to cut him "from my left ear down to my jaw bone just under my chin." Valentine denied that he was armed when Binienda cut him. Roberts called 911 on his cell phone, and they met the police at a hospital.

Binienda testified that he had a meal at the Salvation Army on the day of the incident and denied that he hit Finkle, but he admitted that he pushed Finkle. Binienda said that while talking on the phone, he felt something steel hit him in the back of the head and turned to see Valentine attacking him with brass knuckles; Valentine hit him two or three times with the brass knuckles. Binienda claimed that Valentine had also assaulted him under a bridge about a week before. An ambulance took Binienda to the hospital.

Constance Lamb testified that she was working in the emergency room at Mt. Clemens Regional Hospital when Binienda came in by ambulance with a bleeding two-inch laceration over his right eye. She said that Binienda smelled of alcohol when he arrived and described him as upset and "verbally abrasive." She said that security had to be called so she could examine the injury. She also said that, at one point, Binienda stood up, went to a sink and mirror,

pounded his fist while looking into the mirror, and said that "he was going to find the n----- that did this to him and slice him."

Binienda said that he left the hospital at 3:30 or 4:00 p.m., bought a beer, and went under a bridge to drink the beer. According to Binienda, Valentine and Roberts lived under the bridge. Binienda threw Roberts and Valentine's mattresses in the river and picked up Valentine's knife. While under the bridge, Binienda "got a feeling" that Finkle and Valentine were looking for him, armed himself with Valentine's knife, and started walking home. While Binienda walked home, Finkle, Valentine, and Roberts pulled up to him in a car, and Valentine got out and went after Binienda. Binienda denied reaching into the vehicle and said he took out the knife, backed away, and said, "Look, man, I have a knife." He said he could not run away because he was hurting too much from the earlier assault. Valentine dove at Binienda and cut himself on the knife that Binienda was holding.

Macomb County Sheriff's Deputy Dan Durrani testified that he found a knife near the alleged crime scene. Another officer, Daniel Barbuela, testified that while looking for a white male in a brown leather jacket, he spotted Binienda near the crime scene, cuffed him, and placed him in the back of a patrol car. Officer Barbuela said that Binienda was "highly aggravated" and "very irate[,]" that Binienda appeared intoxicated, and that he could smell intoxicants on Binienda's breath. Officer Barbuela said that Binienda "kept swearing at [him]" during the entire time they were at the scene. Binienda tried several times to kick out the driver's side window while in the patrol car and told Officer Barbuela that he was going to kick him in the head when he got out of the car. When asked if Binienda said anything about the person that he claimed had assaulted him, Officer Barbuela said that Binienda asked him, "What are we going to do about the n-----[?]"

The jury found Binienda guilty of assault with intent to do great bodily harm less than murder.[4]

II. Substitution Of Counsel

A. Standard Of Review

Binienda argues that the trial court committed error requiring reversal when it denied his request to replace appointed counsel. "A trial court's decision regarding substitution of counsel will not be disturbed absent an abuse of discretion."[5]

B. Legal Standards

Although an indigent defendant is guaranteed the right to appointed counsel, he is not entitled to have appointed counsel replaced for any reason merely desired by the defendant.[6]

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[4] MCL 750.84.

[5] *People v Traylor*, 245 Mich App 460, 462; 628 NW2d 120 (2001).

[6] *Id.*

"Appointment of a substitute counsel is warranted only upon a showing of good cause and where substitution will not unreasonably disrupt the judicial process."[7]

C. Applying The Standards

Although Binienda recites the procedural history of the proceedings below, he does not argue or explain how the trial court erred in denying his request to replace appointed counsel. Therefore, this argument is abandoned.[8]

Nevertheless, we conclude that Binienda's expressions of dissatisfaction with how defense counsel was handling his case did not adequately demonstrate a breakdown in the attorney-client relationship to warrant substitution of counsel. Moreover, as will be discussed below, good cause was not supported by Binienda's allegations that defense counsel was ineffective. Therefore, we conclude that the trial court did not abuse its discretion in denying Binienda's request for substituted counsel.

III. Prosecutorial Misconduct

A. Standard Of Review

Binienda argues the prosecutor engaged in numerous instances of prosecutorial misconduct. Because Binienda did not object to the alleged instances of prosecutorial misconduct below, these issues are not preserved.[9] "[A] defendant's unpreserved claims of prosecutorial misconduct are reviewed for plain error."[10]

B. Legal Standards

The propriety of a prosecutor's remarks depends on all the facts of the case.[11] Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial.[12]

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[7] *Id*. (citations omitted).

[8] *People v Mackle*, 241 Mich App 583, 604 n 4; 617 NW2d 339 (2000) ("A party may not merely state a position and then leave it to this Court to discover and rationalize the basis for the claim.").

[9] *People v Pipes*, 475 Mich 267, 277; 715 NW2d 290 (2006).

[10] *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

[11] *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002).

[12] *People v Brown*, 267 Mich App 141, 152; 703 NW2d 230 (2005).

C. Applying The Standards

(1) Witness Credibility

Binienda argues that the prosecutor engaged in misconduct by (1) implying that he should not be believed based on the inconsistency of his statements and (2) by vouching for the credibility of Finkle's and Valentine's testimony. We disagree.

A prosecutor may not vouch for the credibility of a witness to the effect that he has special knowledge regarding the witness's testimony.[13] However, "[a] prosecutor may argue from the facts that a witness, including the defendant, is not worthy of belief, and is not required to state inferences and conclusions in the blandest possible terms."[14]

Although the prosecutor argued that Finkle and Valentine had been truthful and that Binienda was lying, the prosecutor never argued that he possessed special knowledge regarding any witnesses' credibility and based his argument regarding credibility solely on the evidence. Accordingly, the prosecutor's comments regarding credibility did not amount to prosecutorial misconduct.

(2) Badgering Witness

Binienda argues that the prosecutor badgered him when the prosecutor used a police report of an alleged prior assault against Binienda to impeach him and asked Binienda if he could read. Because the prosecutor made this comment in response to Binienda's claim that he told the police that Valentine assaulted him with brass knuckles a few hours before the alleged crime at issue, the comment was not improper. Moreover, even assuming the question was improper, this isolated comment was not outcome determinative.[15]

(3) Use Of Hearsay Testimony

Binienda argues that the prosecutor engaged in misconduct by admitting the police report because it was hearsay and that his conviction should be reversed because it was supported by inadmissible hearsay. However, the police report was not admitted as evidence but was used to impeach Binienda's testimony as a prior inconsistent statement and a party admission.[16] The other incident that Binienda argues constitutes inadmissible hearsay concerns use of the police report solely to refresh the recollection of an officer who was testifying, which is also

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[13] *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995).

[14] *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996) (citations omitted).

[15] *Watson*, *supra* at 586.

[16] MRE 801(d)(1), (2).

permissible.[17] "[P]rosecutorial misconduct cannot be predicated on good-faith efforts to admit evidence."[18]

(4) Use Of Perjured Testimony

Binienda argues that the prosecutor introduced perjured testimony because Finkle and Valentine testified that the alleged crime occurred near Binienda's apartment, but police reports indicated that the crime occurred on a certain street corner. Binienda does not cite where the record would show that the location described in the police report is distinguishable from the area near Finkle's apartment. This Court need not consider an allegation when an appellant fails to cite where the record would support it.[19] Moreover, even if the police reports differed from the witnesses' testimony, such a discrepancy would effect the weight of the evidence and not its admissibility.

(5) Use Of Other Acts Evidence

Binienda argues that the prosecutor admitted other act evidence without proper notice in violation of MRE 404(b) when he elicited testimony and admitted evidence that Binienda attempted to cut Finkle with a knife before assaulting Valentine. The evidence did not amount to other act evidence under MRE 404(b) because it concerned Binienda's behavior during the crime at issue.

> "[W]here a witness has testified to a fact or transaction which, standing alone and entirely unconnected with anything which led to or brought it about, would appear in any degree unnatural or improbable in itself, without reference to the facts preceding and inducing the principal transaction, and which, if proved, would render it more natural and probable; *such* previous facts are not only admissible and relevant, but they constitute a necessary part of such principal transaction—a link in the chain of testimony, without which it would be impossible for the jury properly to appreciate the testimony in reference to such principal transaction."[20]

Here, the alleged assault on Finkle occurred just seconds before the assault at issue, and requiring exclusion of this evidence would have amounted to presenting the prosecution's case in a vacuum.

Binienda also argues that Finkle's hat, which was purportedly cut with a knife was published to the jury but "[t]his admission has been deleted from transcript to prevent review by this Court." Binienda cites no reason why the hat should not have been shown to the jury beyond his argument that the evidence was inadmissible as prior-act evidence, which lacks merit

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[17] MRE 803(5).

[18] *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999).

[19] *Mackle, supra* at 604 n 4.

[20] *People v DerMartzex*, 390 Mich 410, 413-414; 213 NW2d 97 (1973), quoting *People v Jenness*, 5 Mich 305, 323-324 (1858) (emphasis by *DerMartzex*).

for reasons already considered. Binienda also provides this Court with no evidence to support his allegation. Even assuming that the prosecutor somehow altered the transcripts, Binienda has failed to show that such conduct would have been outcome determinative because the jury heard testimony that the hat was cut, and any alleged alteration of the transcripts would have occurred, if at all, after the trial.

(6) Use Of Expert Medical Testimony

Binienda argues that the prosecutor personally offered expert medical testimony when he argued during closing argument that Valentine's wound was an offensive wound. "A prosecutor may not make a statement of fact to the jury that is unsupported by evidence, but she is free to argue the evidence and any reasonable inferences that may arise from the evidence."[21] Considering the prosecutor's comment in light of Binienda's testimony that Valentine cut himself on the knife when Binienda merely held it in front of him, the prosecutor's comment was a reasonable inference based on the evidence.

(7) Misrepresentation Of Record

Binienda argues that the prosecutor misrepresented the record when he argued that Binienda had been searching for Valentine, changed his story that Valentine hit him with a pipe and could not get his story straight, did not act in self-defense and did not retreat. For reasons already considered, these arguments were reasonable assertions based on evidence and were not improper.

(8) Violation Of Attorney-Client Relationship

Binienda argues that the prosecutor intruded on the attorney-client relationship by meeting with Binienda before trial without his attorney and threatening and trying to intimidate him into taking a plea bargain. Even assuming Binienda's allegations are correct, Binienda's statement to the judge at the start of trial regarding the issue demonstrates that the alleged incident occurred before trial. Binienda does not explain how the incident before trial could have affected the outcome of the trial, so his argument lacks merit.

IV. Ineffective Assistance Of Counsel

A. Standard Of Review

Binienda argues that his defense counsel denied him the effective assistance of counsel for numerous reasons, each of which we address in turn. "When no *Ginther*[22] hearing has been conducted, our review of the defendant's claim of ineffective assistance of counsel is limited to mistakes that are apparent on the record."[23]

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[21] *People v Ackerman*, 257 Mich App 434, 450; 669 NW2d 818 (2003).

[22] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

[23] *People v Mack*, 265 Mich App 122, 125; 695 NW2d 342 (2005).

B. Legal Standards

To establish a claim of ineffective assistance of counsel, a defendant must demonstrate that defense counsel's performance was deficient in that it fell below an objective standard of professional reasonableness, and that it is reasonably probable that, but for counsel's ineffective assistance, the result of the proceeding would have been different.[24] "Defendant must overcome the strong presumption that counsel's performance was sound trial strategy."[25]

C. Applying The Standards

(1) Misstatements During Opening Statement

Binienda argues that trial counsel denied him the effective assistance of counsel because defense counsel misstated Binienda's version of the confrontation during his opening statement. Binienda argues that, if defense counsel had communicated with Binienda, he would not have presented a version of events that was inconsistent with Binienda's testimony. We disagree.

Although defense counsel stated during opening statement that Valentine attacked Binienda earlier in the day with a pipe, and Binienda testified that Valentine used brass knuckles, defense counsel's statement was consistent with the police report and with police testimony.[26] Because Binienda elected to take the stand, it is likely that the discrepancy between Binienda's statement in the police report and his testimony would have been raised during cross-examination even if defense counsel had not mentioned it. Thus, there is no reasonable probability that defense counsel's statement made any difference.

(2) Failure To Argue Self-Defense During Closing Argument

Binienda argues that defense counsel was ineffective because he failed to argue Binienda's self-defense claim during closing argument. We disagree. Defense counsel's failure to mention self-defense during closing argument did not violate an objective standard of professional reasonableness, nor did it likely make a difference in the outcome because defense counsel had requested and received a self-defense instruction. Because "jurors are presumed to follow their instructions[,]"[27] the jury considered whether Binienda acted in self-defense even without defense counsel mentioning it during closing argument.

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[24] *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

[25] *People v Dixon*, 263 Mich App 393, 396; 688 NW2d 308 (2004).

[26] When asked about the discrepancy, Binienda explained that he was disoriented when he made the police statement and that the pipe he had referred to was actually used during an incident a week earlier.

[27] *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

(3) Failure To Investigate Or Call Witnesses

Binienda argues that defense counsel failed to investigate or call requested defense witnesses. "[W]hether to call or question witnesses are presumed to be matters of trial strategy."[28] It cannot be said, based on the existing record, that defense counsel did not interview the witnesses that Binienda lists in his supplemental brief, that any of the witnesses were available, or that they would have offered testimony favorable to Binienda.

"Furthermore, the failure to call witnesses only constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense."[29] With the exception of Tim Roberts, none of the proposed witnesses were present when Binienda allegedly acted in self-defense. Indeed, Binienda does not provide the names for many of his proposed witnesses and argues that defense counsel should have knocked on doors to find favorable witnesses. It is not apparent from the existing record that Roberts would have testified favorably to Binienda, and Roberts' written statement that Binienda provides to this Court is not part of the lower court record and, thus, not subject to this Court's consideration.[30] In any event, the statement indicates that Roberts would have offered testimony similar to Valentine and Finkle regarding the assault for which Binienda was convicted and that Binienda had been walking toward Finkle's apartment when the assault occurred, which Binienda had denied. Accordingly, failure to call Roberts did not deny Binienda a substantial defense.[31]

Binienda also argues that defense counsel should have called his cellmate to testify essentially that Binienda was not a racist. Failing to call the cellmate did not deprive Binienda of a substantial defense because Binienda had not been charged with a racially motivated crime. Further, declining to call a character witness was a matter of trial strategy because such testimony would have opened the door to rebuttal testimony regarding Binienda's character.[32]

(4) Failure To File Pretrial Motions

Binienda argues that defense counsel failed to file appropriate pretrial motions because, after Binienda requested on July 19, 2006, that the trial court address his motions that were filed on May 22, 2006, the trial court stated that the motions had not been filed. The trial court was mistaken when it stated that no motions had been filed because two motions were filed in the lower court record on May 24, 2006. Further, the motions were filed less than two weeks before

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[28] *Dixon*, *supra* at 398.

[29] *Id*.

[30] *Detroit Leasing Co v Detroit*, 269 Mich App 233, 237; 713 NW2d 269 (2005).

[31] Although Binienda interprets Roberts' written statement to the police as saying that Roberts witnessed the alleged assault at the Salvation Army, Roberts' statement suggests that he was told about the alleged assault, which would have been inadmissible hearsay, and it cannot be said, based on the existing record, that defense counsel did not determine that such testimony would have been inadmissible and that Roberts' only admissible testimony could have only supported the prosecutor's case.

[32] MRE 404(a)(1).

Binienda entered a *Cobbs* plea,[33] and Binienda complained they had not been heard just one week after Binienda withdrew the plea. Thus, Binienda has not shown that defense counsel's alleged delay violated an objective standard of professional reasonableness because the motions would have been moot if the plea bargain had been successful.

Regarding Binienda's arguments that defense counsel failed to bring other motions, Binienda does not explain what motions should have been brought. "A party may not merely state a position and then leave it to this Court to discover and rationalize the basis for the claim."[34] We also note that when requesting a continuance to consider Binienda's proposed motions, defense counsel said that he would review them and file motions that were legally proper, and we cannot say based on the existing record that Binienda's other proposed motion would have been legally proper.

Binienda also argues that defense counsel abandoned the motion to suppress pre-arraignment statements because he had been arrested and not *Mirandized*.[35] Binienda does not explain what statements should have been suppressed. "A party may not merely state a position and then leave it to this Court to discover and rationalize the basis for the claim."[36] Binienda may be referring to a question Binienda posed to Officer Durrani that used a racial slur in reference to Valentine. Durrani's testimony indicates that the question was volunteered, and "statements volunteered by Binienda need not be suppressed at trial, even if the remarks were not preceded by *Miranda* warnings."[37] There is also no indication that Binienda was subjected to custodial interrogation, so there is simply no basis on the record to bar any statements Binienda may have made before his arraignment.[38] Further, Binienda's argument that his conviction should be reversed because of unspecified statements obtained in violation of *Miranda* similarly lacks merit.

(5) Defense Counsel "Discrediting" Himself

Binienda argues that defense counsel "discredited himself" by arguing that Valentine did not realize that he was injured until someone pointed it out to him. Because Valentine testified

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[33] *People v Cobbs*, 443 Mich 276, 277; 505 NW2d 208 (1993). Before trial, Binienda pleaded guilty before Judge Richard L. Carretti under a *Cobbs* agreement that would have capped his sentence at one year in the Macomb County Jail. When the trial court asked whether he understood the plea bargain agreement, Binienda answered, "It's a year in county jail and it has to be approved by you on sentencing date. And if you don't approve it, I have the right to withdraw the plea." After the trial court ruled that it would not sentence Binienda to a year or less in jail given Binienda's record, Binienda stated that he wished to withdraw the plea and proceed to trial.

[34] *Mackle, supra* at 604 n 4.

[35] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

[36] *Mackle, supra* at 604 n 4.

[37] *People v Fisher*, 166 Mich App 699, 708; 420 NW2d 858 (1988).

[38] See *id*.

that he did not immediately realize the severity of his injury and that his roommate shook his head when he asked to just go home, Binienda's argument that defense counsel discredited himself lacks merit, nor do we find that there is any reasonable probability that the statement could have made any difference to the trial outcome.

(6) Failure To Cross-Examine Witnesses

Binienda argues that defense counsel failed to cross-examine witnesses but gives only one example, arguing that defense counsel should have better cross-examined Officer Anderson when he identified Binienda in a photo depicting his injuries and described Binienda's injuries. Because Binienda has not provided this Court with the photo at issue, Binienda has not demonstrated an error that is apparent on the existing record. The prosecutor also argued that the photo was relevant because it was arguably inconsistent with Binienda's claims that he had been repeatedly hit with either a pipe or brass knuckles. Moreover, the jury was in the best position to view the photos and determine the probative value of the photo or whether the photo was too dark to depict anything.

(7) Failure To Test Prosecutor's Case

Binienda argues that defense counsel failed to "subject the [p]rosecutor's case to meaningful adversarial testing," but does not explain his theory, abandoning the issue.[39]

(8) Failure To Notify Binienda Regarding Plea

Binienda argues that defense counsel failed to tell Binienda that the trial court had communicated to defense counsel when Binienda entered his plea that it might not accept the one-year cap provision of Binienda's *Cobbs* plea. Binienda explained to the trial court when he took the plea that he understood that the trial court did not have to accept it. Even assuming error, Binienda has not shown a reasonable probability that the alleged error could have affected the outcome.

(9) Failure To Object To Prosecutorial Misconduct

Binienda argues that defense counsel denied him the effective assistance of counsel by failing to object to the prosecutor's misconduct. Binienda's arguments of prosecutorial misconduct are without merit or did not effect the outcome for reasons already considered. A claim of ineffective assistance of counsel cannot be predicated on an alleged failure to pursue a meritless or futile position.[40]

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[39] *Mackle, supra* at 604 n 4.

[40] *People v Jordan*, 275 Mich App 659, 668; 739 NW2d 706 (2007); *Mack, supra* at 130.

V. *Brady* Violation

A. Standard Of Review

Binienda argues that the prosecutor withheld exculpatory evidence. A trial court's decision on discovery requests is reviewed for an abuse of discretion.[41]

B. Legal Standards

Under *Brady v Maryland*,[42] the prosecutor must turn over all evidence within its possession that is favorable to the accused and material to guilt or punishment.[43]

> In order to establish a *Brady* violation, a defendant must prove: (1) that the state possessed evidence favorable to the defendant; (2) that he did not possess the evidence nor could he 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.[44]

C. Applying The Standards

Binienda requests many documents that may not exist, and even requests a police report that Binienda was familiar with at trial and an ambulance report that he testified that he and his attorney or his attorney had a copy of. Further, Binienda has not proven that any of the requested evidence would have been favorable to him or that he could not have obtained the documents himself with reasonable diligence.

Binienda argues that the prosecutor should turn over the video of the trial proceeding because it would show Officer Amro altering a police report, which Binienda purportedly saw him do. Binienda has not proven that the prosecutor possessed the evidence, that Binienda could not have obtained it, or that the evidence would have been favorable, and Binienda provides no evidence that would support this allegation.

Affirmed.

/s/ William C. Whitbeck
/s/ Donald S. Owens
/s/ Bill Schuette

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[41] *People v Fink*, 456 Mich 449, 458; 574 NW2d 28 (1998).

[42] *Brady v Maryland*, 373 US 83, 87; 83 S Ct 1194; 10 L Ed 2d 215 (1963).

[43] Accord *People v Stanaway*, 446 Mich 643, 666; 521 NW2d 557 (1994).

[44] *People v Lester*, 232 Mich App 262, 281; 591 NW2d 267 (1998).