STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 18, 2012
v	No. 308062 Clinton Circuit Court
THOMAS ELWYN HOYT, Defendant-Appellant.	LC No. 11-008787-FH

Before: HOEKSTRA, P.J., and BORRELLO and BOONSTRA, JJ.

PER CURIAM.

Defendant appeals as of right his jury conviction of felonious assault, MCL 750.82. Defendant was sentenced as a fourth-offense habitual offender, MCL 769.12, to serve 5 to 15 years' imprisonment. Because we conclude that there is not a reasonable probability that the outcome of the proceedings would have been different if defendant had known about the 911 call recording before trial and because we conclude that the trial court's assessment of 50 points for offense variable (OV) 7 was not an abuse of discretion, we affirm.

Defendant's conviction arises from an altercation between him and his father, hereafter the victim. The victim testified that defendant became angry when the victim refused to allow defendant to take two bicycle tires from the victim's home. Defendant struck the victim in the head with a crescent wrench. The victim ended up receiving six stitches. After the victim fell to the ground, defendant began punching and kicking him. The victim's neighbor also testified about the assault. She indicated that defendant stopped by her apartment about half an hour before the assault occurred. She testified that later she heard a commotion and that when she looked out her window she observed the victim on the ground and saw defendant striking the victim's head and kicking his legs and back. Defendant admitted that he was at the victim's home on the day of the assault; however, defendant denied striking the victim with a crescent wrench and denied striking or kicking the victim. Defendant testified that the victim shoved him up against a wall after they argued about the bicycle tire and that defendant "shrugged" the victim off, causing the victim to fall into a pile of stuff in the victim's apartment. Defendant testified that he did not notice any bruises or bleeding on the victim's face.

The victim testified that after the assault, defendant took both bicycle tires and rode away. The victim told a neighbor to call 911, and waited for the police to arrive. There was no specific testimony during trial regarding who called 911 or what the caller reported to the 911

operator. The responding officer testified that the victim had obvious head wounds and that there was a lot of blood. A crescent wrench covered in skin and hair was located just inside of the apartment door.

After his conviction and sentencing, defendant elected to appeal, and his appointed appellate counsel filed a request pursuant to the Freedom of Information Act, MCL 15.231 *et seq*., and acquired a recording of the 911 call regarding the incident. In the recording, an unknown caller reports that "the black man in number 4 is beating up the guy in number 8." Defendant, who is not African American, filed a motion for new trial based on the newly discovered 911 recording. The lower court found that the recording was exculpatory, but nonetheless denied defendant's request for a new trial, stating: "It all seems . . . to the court that this evidence wouldn't make a difference, particularly in the absence of any evidence of the presence of anyone else at or near the location at the time of the occurrence." Similarly, the lower court found that because defendant faced no prejudice as a result of the nondisclosure of the 911 recording, he did not have a valid claim for ineffective assistance of counsel. Defendant now appeals as of right.

Defendant first argues that he is entitled to a new trial because the prosecution's failure to provide him with the recording of the 911 call constituted a denial of due process.

We review a trial court's decision to grant or deny a new trial for an abuse of discretion. *People v Terrell*, 289 Mich App 553, 558-59; 797 NW2d 684 (2010). A trial court commits an abuse of discretion when its decision is outside the range of principled outcomes. *Id.* We review defendant's due process claim de novo. *People v Schumacher*, 276 Mich App 165, 176; 740 NW2d 534 (2007).

A criminal defendant has a due process right to obtain evidence possessed by the prosecutor if the evidence is favorable to the accused and material to guilt or punishment. *People v Stanaway*, 446 Mich 643, 666; 521 NW2d 557 (1994); *Brady v Maryland*, 373 US 83, 87; 83 S Ct 1194; 10 L Ed 2d 215 (1963). Evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Youngblood v West Virginia*, 547 US 867, 869-870; 126 S Ct 2188; 165 L Ed 2d 269 (2006) (quotation marks and citation omitted). See also *Stanaway*, 446 Mich at 666 ("Material has been interpreted to mean exculpatory evidence that would raise a reasonable doubt about the defendant's guilt."). The prosecutor's duty to disclose such evidence arises regardless of whether the defendant makes a request. *Id.* The duty to disclose extends to impeachment evidence as well as exculpatory evidence, and applies to evidence that is known only to police investigators and not to the prosecutor. *Youngblood*, 547 US at 869-870. In order to establish a *Brady* violation, a defendant must demonstrate that (1) the state possessed favorable evidence, (2) the evidence was suppressed by the state, and (3) "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Id.* at 870.

Initially, we note that on appeal the prosecutor does not challenge the trial court's finding that the 911 recording was exculpatory. Further, it is not disputed that police investigators or the prosecutor had knowledge of the 911 recording. Thus, the determinative issue is whether the

evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.

In this case, the victim, who is defendant's father, and the victim's neighbor, who is defendant's ex-girlfriend and who has a continuing friendship with defendant, unequivocally identified defendant as the assailant. Moreover, defendant admitted he was visiting his father the day of the incident, and he admitted that they argued over bicycle tires. In light of the strong evidence identifying defendant as the assailant, it is unlikely that an anonymous 911 call suggesting that the assailant was an African American man would have affected the outcome of the proceedings. Therefore, we conclude that defendant has failed to demonstrate any violation of his right to due process because the allegedly suppressed evidence could not "reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Id.* Thus, defendant has not demonstrated a *Brady* violation.

Defendant also claims that defense counsel's failure to obtain the 911 recording before trial constituted ineffective assistance of counsel.

Whether defense counsel was ineffective presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We review questions of constitutional law de novo and the trial court's findings of fact for clear error. *Id.* In order to prevail on an ineffective assistance of counsel claim, the burden is on the defendant to demonstrate that defense counsel's performance fell below an objective standard of reasonableness, and that the deficiency so prejudiced defendant as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 302-303, 311-312; 521 NW2d 797 (1994). To demonstrate prejudice, defendant must show a "reasonable probability that, but for counsel's error, the result of the proceeding would have been different." *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

Defendant's ineffective assistance of counsel claim fails for the same reasons as his *Brady* claim. Defendant has failed to demonstrate that there is a reasonable probability that the outcome of the trial would have been different had defense counsel discovered the 911 recording before trial in light of the overwhelming evidence identifying defendant as the perpetrator. Thus, we conclude that defendant has failed to demonstrate the prejudice required to prevail on a claim of ineffective assistance of counsel. *Id.*

Defendant also argues that the trial court erred by assessing 50 points for OV 7, MCL 777.37 (aggravated physical abuse).

We review a trial court's scoring decision to determine "whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score." *People v Lechleitner*, 291 Mich App 56, 62; 804 NW2d 345 (2010) (quotation marks and citation omitted). We will uphold a trial court's scoring decision if it is supported by "any evidence." *People v Steele*, 283 Mich App 472, 490; 769 NW2d 256 (2009).

Under OV 7, 50 points may be assessed for "sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered . . . ." MCL 777.37(1)(a). Sadism is defined as "conduct that subjects a victim to extreme or prolonged pain

or humiliation and is inflicted to produce suffering or for the offender's gratification." MCL 777.37(3). Defendant objected to the score of 50 points under OV 7 during sentencing, and the prosecution contended that 50 points should be scored because defendant's conduct subjected the victim to "prolonged pain or humiliation" and was "intended to inflict suffering or for the offender's gratification." The trial court agreed that a score of 50 points was appropriate, stating that the assault was a "fairly significant encounter that lasted a fairly significant amount of time" and resulted in physical violence that "was far beyond a single spontaneous assaultive act."

This Court recently held that OV 7 should be scored "in particularly egregious cases involving torture, brutality, or similar conduct designed to *substantially* increase the victim's fear," and not "in every case in which some fear-producing action beyond the bare minimum necessary to commit the crime was undertaken." *People v Glenn*, 295 Mich App 529, 536; 814 NW2d 686 (2012) (emphasis in original). Because all crimes against a person involve the infliction of a certain amount of fear and anxiety, "OV 7 is designed to respond to particularly heinous instances in which the criminal acted to increase that fear by a substantial or considerable amount." *Id.*

In this case, evidence presented at trial established that defendant struck the victim with a crescent wrench several times in the front and back of his head. Then, once he fell to the ground, defendant repeatedly struck him in the head and kicked him in the legs and back. Defendant could have committed felonious assault with just a single blow of the crescent wrench. By striking several times, and continuing to beat the victim once he fell to the floor, defendant substantially increased the violence necessary to commit the sentencing offense. The trial court found that defendant's conduct "lasted a fairly significant amount of time," and consisted of violence "far beyond a single spontaneous assaultive act." We acknowledge that this is a close question; however, because the evidence supports this finding, we cannot conclude that the score was an abuse of discretion.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Stephen L. Borrello
/s/ Mark T. Boonstra