STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 13, 2004
v	No. 244274 Wayne Circuit Court
LINTELLO ALEXANDER, Defendant-Appellant.	LC No. 01-011866

Before: Donofrio, PJ., and Griffin and Jansen, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for two counts of armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to forty to sixty years' imprisonment for each armed robbery count to be served concurrently, and consecutive to two years' imprisonment for the felony-firearm conviction. On appeal, defendant argues his counsel was ineffective for failing to file a motion to suppress defendant's statement to the police, as well as prosecutorial misconduct. Because the record does not support either of defendant's claims on appeal, we affirm.

Defendant purchased a used automobile from Cars Plus in Detroit. About a week later defendant returned to the dealership and stated that he wanted to sell the van back. Defendant and Joseph Thomas, the manager of the dealership agreed upon a price. Thomas paid defendant, but stated that he would have to apply for a state tax refund for the remaining approximately $300 in sales tax paid. One week later defendant returned to Cars Plus and asked Thomas for the money. Thomas informed defendant that he had not yet received the refund from the state but gave defendant $100 from his personal funds.

Defendant returned to the dealership and requested the rest of his money from Thomas. When Thomas explained that he did not have the money yet, defendant grabbed the victim and demanded the money. A fight ensued and during the melee Thomas grabbed his gun out of an open drawer in his desk. Defendant knocked Thomas to the ground, commandeered the weapon, and put the gun in Thomas' mouth. Defendant said "where's the money?" After Thomas responded that there was money in his pockets, defendant ripped out Thomas' pockets and took two thousand dollars and his cell phone.

On his way out of the office, defendant encountered Tommy Lee Anderson, a customer looking at cars in the lot. Defendant approached Anderson and asked him about a salesman.

Anderson responded that he did not know the location of the salesman. Defendant then showed him the gun and asked him for money saying "give it up or I'll blow your brains out." Anderson complied and gave defendant the money from his pocket amounting to $60. Defendant accused Anderson of having more money and poked him with the gun. Anderson showed defendant that he did not have any more money in his wallet. Andersen testified at trial that defendant then ran off and robbed another person.

Defendant now appeals his jury trial convictions for two counts of armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant first argues that his counsel was ineffective for failing to move to suppress his statement to the police. Defendant failed to raise this issue as evidence of his counsel's ineffective assistance at any time before the instant appeal, as such this claim of error is not preserved. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). An unpreserved, nonconstitutional error is reviewed for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 761-762; 597 NW2d 130 (1999). This Court's review of defendant's claim of ineffective assistance of counsel is limited to mistakes apparent on the record because defendant did not move for a new trial or a *Ginther* hearing before the trial court. *People v Werner*, 254 Mich App 528, 534; 659 NW2d 688 (2002).

Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law. *People v Leblanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). While we review a trial court's findings of fact for clear error, we review questions of constitutional law de novo. *Id.* In order for a defendant to establish a claim that he was denied his state or federal constitutional right to the effective assistance of counsel, he 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 Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). To prove deficient performance, a defendant must overcome the strong presumption that his counsel's action constituted sound trial strategy under the circumstances. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). To prove prejudice, a defendant must affirmatively demonstrate a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Id*. at 302-303.

Defendant claims that his counsel was ineffective at trial because he did not seek to suppress defendant's statement to the police on the basis that defendant had not voluntarily given the statement. Sergeant Otha Craighead interviewed defendant at the hospital approximately a month following the robbery in the present case. Defendant was in the hospital after being shot in the chest during an unrelated robbery attempt where he was the victim. In his brief on appeal, defendant claims that he was both medicated and in some pain when he gave his statement to the police admitting to robbing both Thomas and Anderson, and his attorney should have moved to suppress his statement on this basis.

In order to determine if a statement is voluntarily given, the police conduct must be examined to determine whether, in the totality of the circumstances, the statement to police was the product of a free and unconstrained choice. *People v Abraham*, 234 Mich App 640, 645; 599 NW2d 736 (1999). Sergeant Otha Craighead testified at trial that when he arrived at the hospital to interview defendant, defendant was sitting up and watching television. Craighead advised defendant of his rights, and defendant signed the written form advising him of his rights indicating that he understood. Defendant spoke clearly and lucidly and did not make any

complaints and then told his version of the robbery. On appeal, aside from conclusory statements in his brief, defendant provides us with no evidence whatsoever that his statement was not made voluntarily. Since there is no evidence that defendant's statement was not given as the product of a free and unconstrained choice, we find no error. Defense counsel is not required to make meritless objections. *People v Knapp*, 244 Mich App 361, 386; 624 NW2d 227 (2001).

Moreover, the record shows that defense counsel made a motion to redact a portion of defendant's statement prior to its admission. The trial court denied the motion. This is plainly a matter of trial strategy and, in general, this Court will not second-guess a counsel's judgment on matters of trial strategy. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). That a strategy does not work does not render its use ineffective assistance of counsel. *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001). Counsel was not ineffective.

Defendant next argues that he was denied his right to a fair trial when the prosecutor withheld evidence from the defense and the trial court failed to remedy the prosecution's misconduct. To the extent defendant claims that his right to due process was violated by the prosecutor's failure to disclose exculpatory evidence, defendant presents a constitutional question subject to de novo review. *People v Lester*, 232 Mich App 262, 276-278; 591 NW2d 267 (1998).

"A criminal defendant has a due process right of access to certain information possessed by the prosecution." *Lester, supra*, 232 Mich App 281, citing *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963). Due process requires disclosure of evidence that may lead a jury to entertain a reasonable doubt about a defendant's guilt. *Lester, supra*, at 281, citing *Giglio v United States*, 405 US 150, 154; 92 S Ct 763; 31 L Ed 2d 104 (1972). "[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady, supra*, at 87. 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. [*Lester, supra* at 281-282 (citations omitted).]

At trial, during the testimony of an officer from the evidence technicians unit, the officer referred to his written report from the scene of the crime. Defense counsel determined at this time that the officer was referring to a report that had not been turned over to the defense. Defense counsel did not object to the use of the report, but asked to view the report before the prosecution proceeded with direct examination. The trial court denied the request and ruled that defense counsel could view the report prior to cross examination.

Defendant argues on appeal that defendant's due process rights were violated when the prosecution did not turn over the police report at issue until the middle of trial despite its obligation to provide the defense with all evidence bearing on defendant's guilt or innocence.

The prosecution claims, and we agree, that there is no *Brady* violation because defendant could have obtained the police report with the exercise of due diligence. Defendant made no showing that the prosecution in any way withheld the evidence from defendant. Moreover, there can be no *Brady* violation when the evidence possessed by the state is not favorable to the defendant. Defendant even admits in his brief on appeal that the report was not "technically 'favorable'" to the defense. In any event, defendant has not shown that "had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different." *Lester, supra*, 232 Mich App at 281-282. For these reasons, we find no *Brady* violation, and as such conclude that the trial court did not err in allowing the prosecution to utilize the report in its case in chief.

Affirmed.

/s/ Pat M. Donofrio
/s/ Richard A. Griffin
/s/ Kathleen Jansen