

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KRISS DALE SMITH,

Defendant-Appellant.

UNPUBLISHED

June 25, 2002

No. 232170

Oakland Circuit Court

LC No. 00-174183-FH

Before: Zahra, P.J., and Cavanagh and White, JJ.

PER CURIAM.

Defendant appeals as of right his convictions of first-degree home invasion, MCL 750.110a(2), domestic violence, MCL 750.81(2), and malicious destruction of personal property under \$200, MCL 750.377(a)(1)(d). The trial court sentenced defendant as a third-felony offender to four to forty years for first-degree home invasion, and to ninety-three days for each of the misdemeanors, domestic violence and malicious destruction of property, with ninety-three days' credit for time served for each. We affirm.

Defendant first argues that he was denied a fair trial by the prosecutor's repeated references in closing argument to the evidence as "undisputed," because the comments indirectly commented on defendant's failure to testify and improperly shifted the burden of proof to him, and that his trial counsel was ineffective for failing to object to the prosecutor's remarks in closing. We disagree.

The prosecution may not comment on a defendant's failure to testify as this argument infringes on the right against self-incrimination. *People v Davis*, 199 Mich App 502, 517; 503 NW2d 457 (1993). A prosecutor may not suggest in closing argument that defendant must prove something or present a reasonable explanation for damaging evidence, as such argument may have the tendency to shift the burden of proof. *People v Guenther*, 188 Mich App 174, 180; 469 NW2d 59 (1991).

The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Legrone*, 205 Mich App 77, 82-83; 517 NW2d 270 (1994). We review questions of misconduct case by case, examining the pertinent portion of the record. *Id.* "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." *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). However, this Court will not find reversible error if the

prejudicial effect of the prosecutor's comments could have been cured by a timely objection and curative objection. *Id.*

In the instant case, because defendant is the only one that could have disputed the evidence, the prosecutor's repeated references to the evidence being "undisputed" were less than prudent.¹ However, the remarks were not direct references to defendant's failure to testify, and when read in the context of the whole trial, were "not manifestly intended to be . . . of such a character that the jury necessarily took them to be a comment on the failure of defendant to testify." *Guenther, supra* at 178-179. Nor did the prosecutor's remark in closing that "I ask you to listen carefully to see if the arguments are coming regarding the elements of the case," improperly shift the burden of proof to defendant.

The prosecutor did not make similar remarks in rebuttal argument, and the trial court's final jury instructions clearly stated that it was the jury's task to fact-find, that the prosecution had the burden of proof, that defendants are presumed innocent, that defendant had an absolute

¹ In *Guenther, supra*, the Court observed:

Courts in this state generally have held that a prosecutor's remark that the evidence was uncontradicted or undisputed does not amount to improper comment on a defendant's failure to testify even though the defendant was the only person who could have provided contradictory testimony. See, e.g., *People v Parker*, 307 Mich 372, 376; 11 NW2d 924 (1943), *People v Lasenby*, 107 Mich App 462, 469; 309 NW2d 572 (1981) (and cases cited therein), and *People v Jacobini*, 34 Mich App 84, 86; 190 NW2d 720 (1971). But see *People v Centers*, 141 Mich App 364, 377-378; 367 NW2d 398 (1985), rev'd and remanded on other grounds 422 Mich 951 (1985). A prosecutor's remark that evidence is undisputed is proper in urging the weight to be given the testimony. *People v Earl*, 299 Mich 579, 582-583; 300 NW 890 (1941). Also see *People v Mancill*, 393 Mich 132; 223 NW2d 289 (1974). [*Guenther, supra* at 177.]

However, the Court also stated:

The prosecutor's subsequent statement that the victim's testimony was "unrebuttable" was a proper comment on the weight to be given the victim's testimony or the veracity of the victim. Although under Michigan law the prosecutor's comment, in isolation, was not improper, **we suggest that prosecutors should not use such expressions when only the defendant could have disputed or rebutted the undisputed or unrebutted evidence.** Many jurisdictions view these types of comments as improper references to a defendant's failure to testify. See anno: *Comment or argument by court or counsel that prosecution evidence is uncontradicted as amounting to improper reference to accused's failure to testify*, 14 ALR3d 723. [*Id.* at 178.]

right not to testify, and that the fact that he did not testify could not be used against him. We conclude that any prejudicial effect could have been cured by a timely instruction and that defendant has not shown outcome determinative plain error. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Nor has defendant shown that counsel's failure to object to the prosecutor's closing remarks constituted ineffective assistance of counsel. To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994), citing *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984), and *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994). Defendant did not move for a *Ginther*² hearing or a new trial based on ineffective assistance of counsel, thus our review of that claim is limited to mistakes apparent on the record. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997). Given the court's instructions regarding the burden of proof and defendant's right not to testify, defendant cannot show that the prosecutor's remarks affected the outcome of the trial.

Defendant also argues that his trial counsel was ineffective when he argued that defendant was guilty of domestic violence and malicious destruction of property without obtaining defendant's express consent outside the jury's presence, thus depriving him of a jury trial on those charges. We disagree.

The instant case arose out of events at the home of defendant's then-girlfriend, with whom defendant had a son. The defense theory of the case as presented by defense counsel was that defendant had been staying with his girlfriend at her townhouse for several months, including at the time of the incident in question, and that he had implied permission to enter. Defense counsel asserted in his opening statement that the evidence would show that defendant and his girlfriend had a fight and it got out of hand. He ended by saying "at the end of this trial, I will ask you to find Kriss Smith not guilty of this most serious charge, home invasion in the first degree. That's a felony charge we're here today on, and this court is the highest trial court in the state. And that's your road map." Trial counsel did not concede completely defendant's guilt. The defense strategy was to maintain that defendant was innocent of the felony home invasion charge, on the basis that he had been staying at the townhouse and had implied permission to enter, and to, in effect, concede that the evidence, if believed, could support convicting defendant of the two misdemeanor charges of domestic violence and malicious destruction of property. Defendant does not argue that he objected to the strategy at trial or sentencing. Trial counsel's strategy was legitimate and was reasonable under the circumstances. See *People v Emerson (After Remand)*, 203 Mich App 345, 349; 512 NW2d 3 (1994) (court will not second guess defense counsel's strategy of admitting guilt of lesser offense); *People v Walker*, 167 Mich App 377, 382; 422 NW2d 8 (1988) (court will not second-guess accepted trial strategy of admitting guilt to lesser offense, noting: "where the evidence obviously points to defendant's guilt, it can be better tactically to admit to the guilt and assert a defense or admit to guilt on some charges but maintain innocence on others."), overruled on other grounds *People v Mitchell*, 456 Mich 693;

² *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

575 NW2d 283 (1998); *People v Wise*, 134 Mich App 82, 98-99; 351 NW2d 255 (1984) (defense counsel's stating in opening statement that defendant would admit to conspiracy and breaking and entering held not ineffective assistance of counsel, court noting that in light of "defendant's confession to the police that he had committed the breaking and entering and had been present during the rapes and armed robbery, defendant's credibility would have been lost if he had testified denying any involvement at all.")

Affirmed.

/s/ Brian K. Zahra
/s/ Mark J. Cavanagh
/s/ Helene N. White