STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 7, 2013
v	No. 304509 Oakland Circuit Court
MICHAEL DEAN WORDEN, Defendant-Appellant.	LC No. 2010-234803-FH

Before: WILDER, P.J., and GLEICHER and BOONSTRA, JJ.

PER CURIAM.

A jury convicted defendant Michael Dean Worden of first-degree home invasion, MCL 750.110a, and assault with a dangerous weapon (felonious assault), MCL 750.82, for breaking into a Pontiac home in the middle of the night and hitting a resident on the head with a lead pipe during the subsequent melee. Contrary to defendant's appellate challenges, the trial court did not coerce the jury into reaching a hasty verdict and the court's imposition of a fee under the Crime Victim's Rights Act (CVRA) as it existed at the time of trial was not an ex post facto penalty. The prosecutor's commentary during closing argument, regarding defendant's failure to contradict the state's evidence, is challenged as overzealous and erroneous, and defense counsel's failure to object to the prosecutor's argument as improperly commenting on defendant's exercise of his right to remain silent is challenged as ineffective assistance of counsel. However, we find no error of law on these points, and there are no grounds requiring reversal, especially because the prosecution presented overwhelming evidence to support defendant's guilt. We affirm.

BACKGROUND

Defendant is a tattoo artist. A few days before the incident, defendant tattooed Mandy Nickerson and Eugene Green. Nickerson and Green believed that the tattoos were free, given to encourage the couple to host a "tattoo party" at which their guests would pay for defendant's services. Defendant apparently disagreed. On the evening of August 25, 2010, defendant and his girlfriend, Misty Shipp, appeared at the Nickerson-Green home, demanded payment and threatened violence. Green called 911 and defendant and Shipp left.

At approximately 1:30 a.m. while the home's residents were upstairs sleeping, defendant and Shipp returned. Defendant pushed in a window and began to enter the house. Nickerson, Green, and their housemates, Allen and Leslee Field, awoke and attempted to eject defendant. A

physical fight ensued on the home's front porch, during which defendant hit Allen on the head with a lead pipe. Leslee called 911 and defendant and Shipp again fled the scene. Officers travelling to the Nickerson-Green home encountered defendant and Shipp walking nearby and placed them under arrest.

II. JURY COERCION

Defendant argues that he was denied a fair trial when the court coerced a hasty verdict by keeping the jurors "late" without advising them that they could resume deliberations the next day. Defendant's trial took only one day, beginning at approximately 9:30 a.m. The court released the jury to deliberate at 4:46 p.m. and they returned their verdict at 5:24, 38 minutes later. When the court released the jury to deliberate, it gave the following instruction:

> A verdict in a criminal case must be unanimous. In order to return a verdict it's necessary that each of you agrees on that verdict. In the jury room you'll discuss the case among yourselves, but ultimately, each of you will have to make up your own mind. Any verdict must represent the individual considered judgment of each juror. It is your duty as jurors to talk to each other and make every reasonable effort to reach [sic] agreement. Express your opinions and your reasons for them, but keep an open mind as you listen to your fellow jurors. Rethink your opinions and don't hesitate to change your mind if you decide you were wrong. Try your best to work out your differences. However, although you should try to reach agreement, none of you should give up your honest opinion about the case just because other jurors disagree with you or just for the sake of reaching a verdict. In the end your vote must be your own and you must vote honestly and in good conscience.

We review unpreserved constitutional challenges for plain error that affected the defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-765; 597 NW2d 130 (1999). "Claims of coerced verdicts are reviewed case by case, and all the facts and circumstances, including the particular language used by the trial court, must be considered." *People v Vettese*, 195 Mich App 235, 244; 489 NW2d 514 (1992). As noted by the Court of Appeals for the Eighth Circuit, "'[t]he relevant inquiry . . . is whether the court's communications pressured the jury to surrender their honest opinions for the mere purpose of returning a verdict.'" *United States v Crotteau*, 218 F3d 826, 835 (CA 8, 2000) (alterations in original), quoting *United States v Kramer*, 955 F2d 479, 489 (CA 7, 1992).

The trial court would have been well-advised to inform the jury that it could return the following day to continue deliberations if needed. See *Zeitz v Mara*, 290 Mich 161, 164-167; 287 NW2d 418 (1939); *Vettese*, 195 Mich App at 245. Yet, the court in no way coerced the jury to reach a verdict before it was ready; its instructions were neutral and nonthreatening. Compare *People v Strzempkowski*, 211 Mich 266, 267; 178 NW 771 (1920) ("Now, if this jury is unable to determine such a case, I think it is the duty of the court to dismiss the jury and call another jury."); *People v Malone*, 180 Mich App 347, 351; 447 NW2d 157 (1989) (finding that the court coerced the jury into reaching a hasty verdict when it threatened to call a deadlock if the jury did not decide the case that day). We discern no error in this regard.

III. EX POST FACTO

Defendant contends that the trial court violated the Ex Post Facto Clauses of US Const, art I, § 10, and Const 1963, art 1, § 10 by assessing a $130 fee under the CVRA. At the time defendant committed his offense, MCL 780.905(1)(a) required the assessment of a $60 fee. Before defendant's trial, the Legislature amended the act to require a $130 fee. 2005 PA 315. In its appellate brief, the prosecution agreed with defendant's claim of error. One week after the brief was filed, however, this Court resolved this exact issue and found no ex post facto violation.

We review de novo claimed ex post facto violations. See *People v Callon*, 256 Mich App 312, 315; 662 NW2d 501 (2003).

> The ex post facto clauses of both the state and federal constitutions prohibit inflicting a greater punishment for a crime than that provided for when the crime was committed. A statute violates ex post facto principles if it (1) makes punishable that which was not, (2) makes an act a more serious criminal offense, (3) increases the punishment, or (4) allows the prosecution to convict on less evidence. [*People v Earl*, 297 Mich App 104, 111; __ NW2d __ (2012) (quotation marks and citations omitted).]

An assessment under the CVRA "is neither restitution nor punishment." *Id.* at 113. The CVRA is not punitive in nature and does "not affect matters of substance." *Id.* at 114.

Even though the CVRA was amended after the date of defendant's offense, because the imposition of a fee under the Act is neither restitution nor punishment, it does not implicate a violation of the ex post facto doctrine. *Id.* at 113-114. Defendant is therefore not entitled to relief.

IV. PROSECUTORIAL MISCONDUCT

Defendant asserts that the prosecutor improperly and repeatedly told the jurors during closing argument that the testimony and evidence was "uncontroverted" and "uncontradicted," thereby implying that defendant had a duty to testify to present his version of events and shifting the burden of proof onto defendant to prove his innocence. Defendant failed to preserve his challenge by raising a contemporaneous objection and requesting a curative instruction. *Callon*, 256 Mich App at 329. Generally, "we review [prosecutorial misconduct claims] de novo to determine if the defendant was denied a fair and impartial trial." *People v Mann*, 288 Mich App 114, 119; 792 NW2d 53 (2010). Our review of unpreserved claims, however, is limited to plain error, supporting reversal only when the error "resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of the judicial proceedings." *Callon*, 256 Mich App at 329, citing *Carines*, 460 Mich at 763. Thus, reversal would not be warranted unless any prejudicial effect of the prosecutor's comments could not have been cured by a timely instruction. *People v Williams*, 265 Mich App 68, 70-71; 692 NW2d 722 (2005), aff'd 475 Mich 101 (2006).

During the prosecutor's closing argument, a major theme was defendant's failure to contradict the prosecution's evidence:

Number one, you're [sic] got uncontradicted testimony from each one of the witnesses who knew about that window. The window was in perfect condition, screen on, window closed, locked, until the defendant was seen pushing the window open by Ms. Nickerson and grabbing her . . . .

* * *

Finally, number four with regard to home invasion, my only element, my last element is that there was someone present in that house when he did this. And the crazy thing is [sic] is there's eight people in this house; eight people. Uncontradicted testimony that at the time he committed this it wasn't just Mandy Nickerson standing there alone, all of those adults and the four children were there too.

* * *

Now, did defense counsel attempt to challenge their memories of what they occurred – had occurred? Absolutely. Well, that's his job. And you can't fault him for doing that but even when you think of how they responded from the stand there really wasn't anything that contradicted any of the other testimony when you take it altogether. I mean, the fact of the matter is is [sic] that nothing changed the fact that they all testified that the defendant opened the window and leaned in and grabbed Ms. Nickerson. That's the home invasion.

* * *

There's no testimony from any of the witnesses that suggests there was an accidental strike. What was his intent? I propose to you that his intent was to either injure Allen Field – if you feel thing [sic] I don't know what else you could do but injure, intend to injure somebody with this thing; or make Allen Field reasonably fear an immediate battery.

* * *

There was no testimony that you heard that Mr. Worden that night did not have the ability to actually strike Allen Field, quite the contrary. The testimony was clear based on everything that you heard that he absolutely had the ability to do it.

* * *

I propose to you though that the evidence is uncontroverted. And although defense counsel may question about what they may or may not have remembered with great specificity, *they were all consistent about what they did remember. They were consistent at the time of the exam; they were consistent at the time they testified here*. (Emphasis added).

Defense counsel did not object. Instead, he opened his closing argument by stating, "Ladies and gentlemen, unreliable, uncredible [sic] and unsupported by the physical evidence.

That describes the testimony that you have heard from the witnesses in this case." Defense counsel also highlighted that the four complainants "all had some type of common bond or relationship to each other that influences the testimony that they have provided you with today." Counsel further argued that the condition of the window was inconsistent with the complainants' story that defendant pushed it out of the frame and tried to drag Nickerson through the opening.

We conclude on the whole record that the prosecutor's arguments did not shift the burden of proof onto defendant to prove his innocence. Indeed, the prosecutor expressly stated that he bore the burden of establishing each element of the charged offenses beyond a reasonable doubt before describing the evidence and how it supported the state's case. The challenged "comments were merely an argument that the jury need not believe defendant's version." See *People v Fields*, 450 Mich 94, 108; 538 NW2d 356 (1995).

Whether the prosecutor improperly commented on defendant's decision not to testify is a closer issue. In Michigan, a criminal defendant is protected by both statute and the constitution from having his silence at trial used against him. MCL 600.2159 provides that a criminal defendant's "neglect to testify shall not create any presumption against him, nor shall the court permit any reference or comment to be made to or upon such neglect." Proscribing the prosecution from "comment[ing] on a defendant's failure to take the stand . . . is an important corollary to the Fifth Amendment privilege against self-incrimination." *People v Guenther*, 188 Mich App 174, 177; 469 NW2d 59 (1991), citing *Griffin v California*, 380 US 609, 615; 85 S Ct 1229; 14 L Ed 2d 106 (1965).

Other jurisdictions frown on the use of commentary that even indirectly challenges a defendant's failure to take the stand and rebut the prosecution's evidence. See, e.g., *United States v Singer*, 732 F2d 631, 637 (CA 8, 1984) ("A prosecutor's description of the evidence as 'uncontroverted' may 'naturally and necessarily' be viewed as a reference to the defendant's silence when the defendant is the only person that could be expected to challenge the government's evidence."). In Michigan, the law is less than clear. In *People v Perry*, 218 Mich App 520, 538; 554 NW2d 362 (1996), this Court held that "a prosecutor's statement that certain inculpatory evidence is undisputed does not constitute a comment regarding the defendant's failure to testify, *particularly where someone other than the defendant could have provided contrary testimony*." (Emphasis added.) Even where the defendant is the only person "who could have provided contradictory testimony," Michigan courts have found such commentary proper. *Guenther*, 188 Mich App at 177. See also *People v Parker*, 307 Mich 372, 376; 11 NW2d 924 (1943); *People v Earl*, 299 Mich 579, 583; 300 NW 890 (1941); *People v Lasenby*, 107 Mich App 462, 463; 309 NW2d 572 (1981); *People v Jacobini*, 34 Mich App 84, 86; 190 NW2d 720 (1971). But, other cases hold to the contrary, finding that a prosecutor who asserts the evidence is uncontradicted improperly comments on the defendant's failure to testify, when the defendant is the only one who could possibly refute the state's evidence. *People v Payne*, 131 Mich 474, 480; 91 NW 739 (1902) (finding reversible error when the prosecutor argued that only the defendant, the victim, "and the all seeing eye of God" saw what occurred and no one (i.e. the defendant) denied that the offense took place); *People v Centers*, 141 Mich App 364, 377-378; 367 NW2d 397 (1985), rev in part on other grounds 453 Mich 882 (1996) ("[T]he bounds of proper argument are exceeded by a prosecutor's argument that his evidence was uncontradicted or unexplained if contradiction or explanation could only come from the defendant.").

Because a prosecutor's argument predicated on pointing out the "uncontradicted" or "unrefuted" nature of the evidence may indirectly infringe on a defendant's right to remain silent, we closely consider the context of the argument and its purpose. We find guidance for this analysis in *United States v Moore*, 917 F2d 215, 224-225 (CA 6, 1990), quoting *Spalla v Foltz*, 788 F2d 400, 403 (CA 6, 1986) (other quotation marks, citations and alterations omitted):

> "Cases involving direct comments pose little difficulty as the court must reverse unless the prosecution can demonstrate that the error was harmless beyond a reasonable doubt. Cases involving indirect comments on the failure to testify are more troublesome. We recently refused to adopt a per se rule that comments as to the uncontradicted nature of evidence violated *Griffin* even where the evidence in question could only have been contradicted by the defendant. Rather, the court must *conduct a probing analysis of the context of the comments, in order to determine whether the language used was manifestly intended to be or was of such a character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify*.
>
> Therefore, if a prosecutor's comments are 'indirect,' the court should not automatically reverse, but should determine whether the comments were intended as a comment on the defendant's failure to testify or whether the jury would naturally and necessarily take them to be comments on the failure of the accused to testify." [Emphasis added.]

The probing analysis described in *Moore* involves consideration of four factors:

> "1) Were the comments 'manifestly intended' to reflect the accused's silence or of such a character that the jury would 'naturally and necessarily' take them as such;
>
> 2) Were the remarks isolated or extensive;
>
> 3) Was the evidence of guilt otherwise overwhelming;
>
> 4) What curative instructions were given, and when." [*Moore*, 917 F2d at 225, quoting *Spalla*, 788 F2d at 404-405.]

In relation to the first "probing-analysis" factor, "[m]anifest intent will not be found if some other explanation for [the prosecutor's] remark," besides commentary on the defendant's failure to testify, "is equally possible." *Moore*, 917 F2d at 225, quoting *Steele v Taylor*, 684 F2d 1193, 1204 (CA 6, 1982) (quotation marks omitted). In relation to this factor, it is relevant to note that defendant was not the only witness who could have contradicted the prosecution's version of events. Shipp was also at the scene. However, Shipp was charged with first-degree home invasion and marijuana possession, and likely would have invoked her Fifth Amendment privilege against self-incrimination if called to the stand.

Nevertheless, we conclude that the prosecutor's comments here were not "of such a character that the jury would 'naturally and necessarily' take them" as remarking on defendant's failure to testify. Rather, the comments "merely point[ed] out the weakness in defendant's case." *Fields*, 450 Mich at 112. The defense theory was that the "complainants embellished, created or

exaggerated a story to implicate [defendant] in a more serious offense such as a home invasion after having encountered him and gotten into an altercation with him out in front of their house." Defense counsel asserted that this theory would be proven through the complainants' inconsistent statements and the incongruence between their stories and the physical evidence. Yet, defense counsel was unable to establish any fatal inconsistencies amongst the witnesses' testimony or between their trial testimony and earlier statements to the police. The lay members of the jury were more likely to take the prosecutor's comments, particularly the comments that "*they were all consistent about what they did remember . . ., [t]hey were consistent at the time of the exam . . ., they were consistent at the time they testified here,"* as highlighting defense counsel's inability to establish the promised inconsistencies in the complainants' stories. This is especially true as the prosecutor made no direct comments regarding defendant's decision not to testify.

Despite that the prosecutor's comments would not "naturally and necessarily" be viewed as implicating defendant's decision not to testify, by making this argument the prosecutor risked tipping the scale into impropriety, especially as the comments highlighting the unchallenged nature of the prosecution's case were not isolated. The prosecutor commented on six occasions that the evidence was "uncontradicted," unchallenged, and "uncontroverted," forming a large portion of his closing argument. Although the prosecutor's argument does not merit reversal, we suggest that such arguments be invoked rarely, with careful consideration of the potential prejudice that may result from calling attention to a defendant's failure to testify. See *Guenther*, 188 Mich App at 178 ("Although . . . the prosecutor's comment, in isolation, was not improper, we suggest that prosecutors should not use such expressions . . . .").

Reversal is also unwarranted because the evidence of defendant's guilt was otherwise overwhelming. Four witnesses testified that defendant appeared at the Nickerson-Green house twice on the night of August 25, 2010. The four witnesses consistently testified that during the second encounter, defendant pushed in a first-floor window at the home and tried to enter. The witnesses testified that defendant grabbed Nickerson's bra when she tried to eject him and then proceeded to try to pull her through the window opening. Everyone agreed that the fight then spilled out onto the home's front porch. The complainants all testified that defendant hit Allen in the head with a metal object. Pontiac police officers found defendant and Shipp walking nearby. Defendant was covered in blood when he was arrested.

In relation to the fourth factor, we note that while the trial court did not give an immediate curative instruction because defense counsel did not object, the prosecutor's comments were not "of such a character that the jury would 'naturally and necessarily' take them" as remarking on defendant's failure to testify. *Fields*, 450 Mich at 112. Accordingly, defendant cannot prevail on his unpreserved claim. *Williams*, 265 Mich App at 71. Furthermore, the jury *was* instructed, albeit later, that it could not consider the fact that defendant did not testify:

> A person accused of a crime is presumed to innocent [sic]. This means that you must start with the presumption that the defendant is innocent . . . .
>
> * * *

> Every defendant has the absolute right not to testify. When you decide the case you must not consider the fact that he did not testify. It must not affect your verdict in any way.
>
> When you discuss the case and decide on your verdict you may only consider the evidence that was properly admitted in this case . . . .
>
> * * *
>
> The lawyers' statements and arguments are not evidence, they're only meant to help you understand the evidence and each side's legal theories. The lawyers' questions to the witnesses are not evidence. You should only consider these questions as they give meaning to the witness's answers. You should only accept the things the lawyers say that are supported by the evidence or by your own commonsense and general knowledge.

To the extent that there was any prejudicial effect of the prosecutor's comments, these instructions were sufficient to protect defendant's rights. *Earl*, 299 Mich at 583; *Jacoboni*, 34 Mich App at 86-87.

In summation, the prosecutor's comments did not cross into the realm of error requiring reversal. Given the overwhelming strength of the evidence against defendant, the fact that any error could have been cured by a timely instruction, and the fact that the jury ultimately was instructed that it could not consider defendant's decision to not testify when it deliberated on its verdict, defendant is not entitled to any relief.

V. ASSISTANCE OF COUNSEL

Alternatively, defendant argues that defense counsel was ineffective for failing to object to the prosecutor's comments in closing argument. We review ineffective assistance claims de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). In the absence of an evidentiary hearing, our review is limited to errors on the existing record. *People v Riley*, 468 Mich 135, 139; 659 NW2d 611 (2003). To demonstrate ineffective assistance of counsel, a defendant must show that his attorney's performance fell below an objective standard of reasonableness under prevailing professional norms and this performance prejudiced him. *People v Armstrong*, 490 Mich 281, 289-290; 806 NW2d 676 (2011). To demonstrate prejudice, the defendant must show the probability that, but for counsel's errors, the result of the proceedings would have been different. *Id*. This Court is required to presume that defendant received effective assistance of counsel, and case law places a heavy burden on the defendant to prove otherwise. *People v Seals*, 285 Mich App 1, 17; 776 NW2d 314 (2009).

Whether to object to an argument presented by the prosecutor is presumed to be a matter of trial strategy. *People v Unger*, 278 Mich App 210, 235; 749 NW2 272 (2008). Historically, a defendant's counsel is given wide latitude on matters of trial strategy, and courts will abstain from reviewing such decisions with the benefit of hindsight. *Id.* at 242-243.

First, because we have concluded that the prosecutor's comments were not improper, any objection by defense counsel would have been futile, and defense counsel is not ineffective for

failing to make a futile objection. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003). We note that the purpose in objecting to a prosecutor's improper conduct at trial is to seek a curative instruction. *People v Cross*, 202 Mich App 138, 143; 508 NW2d 144 (1993). But here, because the prosecutor did not err in arguing that certain aspects of the prosecution case were uncontradicted, the trial court would not have been required to give an immediate *curative* instruction to the jury concerning defendant's right not to testify.

Second, we conclude that defense counsel's decision not to raise contemporaneous objections to these comments constituted sound trial strategy. Defense counsel could have reasonably considered that, because no one "naturally and necessarily" would have viewed the comments as being related to defendant's failure to testify, but instead were related to the consistency of the testimony of the prosecution's witnesses, any objection and subsequent instruction might have been counter-productive by highlighting in front of the jury the fact that defendant did not testify, the opposite of what counsel would have wanted to accomplish. As such, defense counsel cannot be admonished for deciding as a matter of strategy not to contemporaneously challenge the prosecutor's comments. *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999).

Moreover, as we have already concluded, the prosecutor presented overwhelming evidence of defendant's guilt. It is unlikely that the jury would have reached a different conclusion even had the court given immediate curative instructions rather than waiting until the end of closing arguments to remind the jury that defendant's failure to take the stand could not be used against him. Although we are mindful that these types of comments can in some instances become grounds for reversal, on the record before us, there is no basis to reverse defendant's convictions and sentences.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Mark T. Boonstra

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 7, 2013
v	No. 304509 Oakland Circuit Court
MICHAEL DEAN WORDEN, Defendant-Appellant.	LC No. 2010-234803-FH

Before: WILDER, P.J., and GLEICHER and BOONSTRA, JJ.

GLEICHER, J., (*concurring in part and dissenting in part*).

I concur with the majority's decision to affirm defendant's convictions. However, I believe that because the prosecutor's frequent and persistent comments concerning the "uncontradicted" nature of the evidence constituted an indirect reference to defendant's failure to testify, defense counsel performed ineffectively by failing to lodge even one objection.

From the outset of trial, defendant premised his defense on highlighting inconsistencies in the witnesses' version of events. In opening statement defense counsel suggested: "is it just possible that maybe these complainants embellished, created or exaggerated a story to implicate my client in a more serious offense such as home invasion after having encountered him and gotten into an altercation with him out in front of their house." All of the witnesses to the crime testified at defendant's trial – except defendant.

In closing argument, the prosecutor urged six times that the witnesses' testimony was "uncontradicted," "uncontroverted," or that "no testimony" supported an alternate version of events. Given that defendant was the only person who *could* have controverted the testimony, I cannot accept the majority's proposition that "trial strategy" compelled defense counsel's silence. In my view, an objection raised after the prosecutor stressed for the first or second time the "uncontradicted" nature of the evidence would have put an end to that line of improper argument. At the very least, it would have compelled the court to instruct the jury that it could not infer guilt based on defendant's failure to take the witness stand.

It is one thing to comment on the strength of the evidence. It is quite another to structure an argument around a defendant's failure to effectively challenge the evidence. The prosecutor repeatedly turned to the "uncontradicted," "uncontroverted" theme because defendant's silence made it natural and probable that the argument would be effective. Similarly, I cannot accept the majority's conclusion that an objection would have been "counter-productive by highlighting in

front of the jury the fact that defendant did not testify[.]" The jury was well-aware that defendant did not testify. The prosecutor effectively underscored that reality by repeatedly pointing to defendant's failure to supply *evidence* challenging the prosecution witnesses. Every objection to a perceived trial impropriety draws attention to the challenged evidence or statement. But that is hardly a reason to forbear when constitutional rights are at stake.

That said, the prosecutor presented overwhelming evidence of defendant's guilt, and I concur in the affirmance of his convictions.

/s/ Elizabeth L. Gleicher