

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEPHONSO LEON WILSON,

Defendant-Appellant.

UNPUBLISHED

May 2, 2000

No. 212390

Saginaw Circuit Court

LC No. 97-014592-FC

Before: Bandstra, C.J., and Cavanagh and Zahra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(e); MSA 28.788(2)(1)(e), and sentenced to two concurrent terms of twenty to sixty years' imprisonment. Defendant appeals as of right. We affirm defendant's convictions but remand for determination of whether information challenged in a supplemental presentence investigation report played a role in sentencing.

Defendant argues that his Fifth Amendment right not to testify in his own behalf was violated by the prosecutor's remarks to the jury during closing arguments that the prosecution's evidence was uncontradicted and uncontroverted. Because defendant failed to object to the prosecutor's remarks at trial, we may not provide relief unless the prejudice from the alleged misconduct could not have been cured by an instruction or unless our failure to consider the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994); *People v Kelly*, 231 Mich App 627, 638; 588 NW2d 480 (1998).

The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995). Prosecutorial misconduct issues are decided on a case by case basis, and the reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. *People v Ricky Vaughn*, 200 Mich App 32, 39; 504 NW2d 2 (1993). 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 Reed*, 449 Mich 375, 399; 535 NW2d 496 (1995); *People v Lawton*, 196 Mich App 341, 353; 492 NW2d 810 (1992).

A prosecutor may not comment on a defendant's failure to testify or present evidence, but may contest evidence presented by the defendant and may argue that certain evidence is uncontradicted. *People v Perry*, 218 Mich App 520, 538; 554 NW2d 362 (1996); *People v Guenther*, 188 Mich App 174, 177-178; 469 NW2d 59 (1991). A prosecutor's statement that certain inculpatory evidence is undisputed does not constitute a comment regarding the defendant's failure to testify if someone other than the defendant could have provided contrary testimony. *Perry*, *supra* at 538. However, "[r]eversal of a conviction because of a prosecutor's comments referring to uncontradicted prosecution testimony may be required under certain circumstances, because the rule against such comments 'is an important corollary to the Fifth Amendment privilege against self-incrimination.'" *Id.* at 539, quoting *Guenther*, *supra* at 177.

The first remarks that defendant claims require reversal occurred in the prosecutor's summary of testimony by defendant's mother and brother. We conclude that, taken in context, the remarks clearly referred to the fact that defendant's witnesses did not provide him with an alibi for the evening of the alleged assaults. In that context, the remarks did not constitute commentary on defendant's failure to testify at trial.

The second set of remarks that defendant claims constituted misconduct occurred at the transition between the prosecutor's summary of the evidence and his final remarks on the case. The prosecutor stated:

The evidence is all there, ladies and gentlemen. It's uncontroverted, uncontradicted. Defendant is guilty of Count I, inserting his penis into the rectum of [the complainant] while in possession of a knife. Defendant is guilty of Count II, putting [the complainant's] penis in his mouth while he was in possession of a knife. He was armed with a dangerous weapon.

[The complainant] testified and told you he would not have readily submitted to these acts. But for that knife, he would not have gone along with anything that the defendant requested. In fact he told the defendant no four or five times until he produced the knife. Then he felt he had no choice.

Ladies and gentlemen, [defendant] is guilty of two counts of criminal sexual conduct in the first degree. The People have proved that beyond a reasonable doubt, and I ask you to return a verdict of guilty to both counts.

At trial, the prosecution presented defendant's three statements to the police, all of which contained numerous conflicts and ambiguities and also conflicted in some respects with those of his witnesses. Even if we assume that the prosecutor's statement could be interpreted as a comment on defendant's failure to testify, we conclude that any misconduct would have had no effect on the verdict. As in *Lawton*, *supra* at 354, the trial judge in this case thoroughly instructed jurors regarding the presumption of innocence and defendant's absolute right not to testify, and cautioned them that they could not consider defendant's choice not to testify in reaching their verdict. We cannot say that a single isolated reference to the evidence as "uncontroverted, uncontradicted" could not be cured by an

instruction to disregard or, as in the present case, a proper instruction to the jury admonishing them not to consider defendant's choice not to testify. Defendant has failed to show plain error that affected his substantial rights and the fairness of the trial or the public reputation of the judicial proceedings. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Accordingly, we decline to reverse on this basis.

Next, defendant argues that he is entitled to resentencing because the trial court failed to resolve his objections to facts presented in his presentence investigation report (PSIR). We agree. Defendant's claim that the trial court failed to rule on his challenge is in essence a claim that the court did not comply with the requirements of MCR 6.425 and MCL 771.14(5); MSA 28.1144(5).¹ This presents a question of law, which we review de novo. *People v Valeck*, 223 Mich App 48, 50; 566 NW2d 26 (1997).

The purpose of a PSIR is to give the sentencing court as much information as possible so that the sentence can be tailored to both the offense and the offender. *People v Miles*, 454 Mich 90, 97; 559 NW2d 299 (1997); *People v Potrafka*, 140 Mich App 749, 751; 366 NW2d 35 (1985). The information in the report is presumed to be accurate, but on assertion of a challenge to the factual accuracy of information, a court has a duty to respond to the challenge. *People v Grant*, 455 Mich 221, 233-234; 565 NW2d 389 (1997); *People v Regelin*, 178 Mich App 128, 130; 443 NW2d 436 (1989), vacated in part on other grounds, 437 Mich 897 (1991). Once a defendant effectively challenges a factual assertion, the prosecutor has the burden to prove the fact by a preponderance of the evidence. *People v Walker*, 428 Mich 261, 268; 407 NW2d 367 (1987), abrogated in part on other grounds 454 Mich 145, 176 (1997). The court may hold an evidentiary hearing to determine the report's accuracy, may accept the defendant's unsworn statement, or may ignore the alleged misinformation while sentencing. MCR 6.425(D)(3); *People v Brooks*, 169 Mich App 360, 365; 425 NW2d 555 (1988). However, the court may not make an independent finding of guilt of a crime other than that for which the defendant is being sentenced. *People v Fleming*, 428 Mich 408, 417-418; 410 NW2d 266 (1987).

Defendant challenged the accuracy of a supplemental statement to his PSIR that indicated that four young men alleged that he engaged in sex acts with or on them. His written challenge was as follows: "Defendant objects to the Supplemental Report dated May 7, 1998 for the reason that the allegations of sex offenses by defendant against other students housed at the Lutheran Family Children's Home in Bay City, Michigan, are untrue." The trial court held a hearing at which the prosecution presented testimony by the investigating police detective regarding his interviews with the four alleged victims and their statements regarding defendant's behavior. After the testimony, the court stated:

I am satisfied that I did hear those allegations as reported. Whether they are true or not is something I guess that I have to try to evaluate along with all the other things that are in the report.

I believe that the report has – at least the evidence has substantiated the fact that officer or Detective Davis made these allegations.

The judge's finding did not address defendant's challenge, which went to the truth of the allegations themselves. Further, we cannot determine from the court's reasons for the sentence it assessed whether it was relying upon or ignoring the allegations in the supplemental PSIR. Although the court referred to "sexually aggressive conduct with other[s] throughout his juvenile and into his adult years," this could have been a reference to his juvenile record and the offense in the present case. The record does not support either the conclusion that the court considered the allegations or that it ignored the allegations.

We recognize that a trial court walks a fine line between making an independent finding of guilt and considering the context of uncharged criminal behavior. *People v Welsh*, 173 Mich App 467, 470; 434 NW2d 162 (1988). However, if a defendant challenges allegations contained in a presentence report, a trial court must respond to the challenge. *People v Barnett*, 165 Mich App 311, 319; 418 NW2d 445 (1987). This does not mean, though, that the trial court must affirmatively resolve such a dispute. The court may affirmatively resolve the dispute, accept the defendant's version of events, or simply disregard the challenged information. *Fleming, supra* at 418; *People v Newcomb*, 190 Mich App 424, 427; 476 NW2d 749 (1991). Whatever the trial court's intentions in the present case, it did not sufficiently respond to the actual challenge raised by defendant. The trial court's omission was in error.

Further, we cannot consider the trial court's omission to be harmless. The challenged allegations, if considered by the trial court, could only inure to defendant's detriment. Therefore, the trial court shall determine whether the challenged material in the supplemental PSIR played a role in the sentencing decision. *People v Thompson*, 189 Mich App 85, 88; 472 NW2d 11 (1991). If the court determines that the disputed allegations played a role in the sentencing decision, defendant shall be resentenced and the court shall resolve the challenge. *Id.* If, however, the court determines that the allegations played no role in the sentencing decision, the sentence is affirmed and the trial court need only strike the disputed allegations from the supplemental PSIR. *Id.* Given our disposition of this issue, we need not address defendant's alternative argument that the prosecution did not prove the accuracy of the information contained in the supplemental PSIR.

Affirmed in part and remanded in part. We do not retain jurisdiction.

/s/ Richard A. Bandstra

/s/ Mark J. Cavanagh

/s/ Brian K. Zahra

¹ See now MCL 771.14(6); MSA 28.1144(6).