

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RODERICK GRIFFIN,

Defendant-Appellant.

UNPUBLISHED

April 19, 2002

No. 228167

Oakland Circuit Court

LC No. 1999-167988-FH

Before: K.F. Kelly, P.J., and Doctoroff and Cavanagh, JJ.

MEMORANDUM.

Defendant appeals by right from a jury conviction of first-degree retail fraud, MCL 750.256c(2), for which he was sentenced as an habitual offender, fourth offense, MCL 769.12, to one to twenty years in prison. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant's sole argument on appeal is that he was denied a fair trial due to prosecutorial misconduct. Claims of prosecutorial misconduct are decided on a case-by-case basis. This Court examines the record and evaluates the alleged improper remarks in context to determine whether the defendant was denied a fair and impartial trial. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995). Because defendant did not object to the remarks at trial, the issue has not been preserved for appeal and review is precluded unless defendant establishes plain error that affected the outcome of the trial. *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001).

During closing argument, the prosecutor remarked that certain evidence was unrefuted. Defendant contends that such a statement violated his right to remain silent or impermissibly shifted the burden of proof. We disagree.

A prosecutor may not suggest in closing argument that defendant must prove something or present a reasonable explanation for damaging evidence as this argument tends to shift the burden of proof. *People v Guenther*, 188 Mich App 174, 180; 469 NW2d 59 (1991). Likewise, the prosecutor may not comment upon the defendant's failure to testify as this argument infringes on the defendant's constitutional right against self-incrimination. *People v Davis*, 199 Mich App 502, 517; 503 NW2d 457 (1993); *Guenther, supra* at 177. These rules are not violated when the prosecutor argues that the evidence was uncontradicted or undisputed, even though the defendant might be the only person who could have provided contradictory

testimony. *People v Godbold*, 230 Mich App 508, 521; 585 NW2d 13 (1998); *People v Perry*, 218 Mich App 520, 538; 554 NW2d 362 (1996). “A prosecutor’s remark that evidence is undisputed is proper in urging the weight to be given the testimony.” *Guenther, supra*. Accordingly, we find that defendant has failed to establish error.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Martin M. Doctoroff
/s/ Mark J. Cavanagh