

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARCUS E. THIGPEN,

Defendant-Appellant.

UNPUBLISHED

December 22, 2005

No. 254793

Wayne Circuit Court

LC No. 01-007460-01

Before: Owens, P.J., and Saad and Fort Hood, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of carrying a concealed weapon, MCL 750.227, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to concurrent terms of one to five years' imprisonment each for the carrying a concealed weapon and felon in possession of a firearm convictions and to a consecutive sentence of two years' imprisonment for the felony-firearm conviction. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant contends on appeal that the prosecutor improperly impugned the integrity of defense counsel during cross-examination and impermissibly shifted the burden of proof during closing argument. Defendant failed to object to either prosecutorial act. Appellate review of allegedly improper prosecutorial remarks during closing arguments is precluded absent an objection unless a curative instruction would not have eliminated the prejudicial effect or where 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 Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). Other unpreserved claims of prosecutorial misconduct are reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Our review of the record leads us to conclude that no error occurred. The record clearly demonstrates that the prosecutor was not impugning the integrity of defense counsel during the cross-examination but was merely challenging the credibility of defendant. On direct examination, defendant denied committing a prior offense to which he had pleaded guilty at the time, claiming that he complied with the directions of his counsel in the previous case so that he would get probation. Through cross-examination, the prosecutor was able to craft a picture of defendant as a person willing to say anything that would be to his benefit. The prosecutor was not attempting to impugn the testimony of present defense counsel who also rebutted any

perceived inference that defendant was currently not telling the truth at the direction of defense counsel through redirect examination of defendant.

Defendant also contends that the prosecutor impermissibly shifted the burden of proof by questioning why defendant's friend Linda, who was the driver of the vehicle in which defendant was a passenger when he was arrested, did not testify. Defendant did present the testimony of Tiffany, another occupant of the vehicle, who suggested that events did not occur as police witnesses testified. It was permissible for the prosecutor to comment on the absence of a witness whose testimony would corroborate defendant's theory of the case. *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995). Moreover, the trial court instructed the jury that defendant had no burden of presenting evidence. Had defendant timely objected to the prosecutor's closing arguments, the court could have provided additional instructions to the jury if desired to alleviate any perceived prejudice. By failing to object, the trial court was denied the opportunity to cure any alleged error.

Affirmed.

/s/ Donald S. Owens
/s/ Henry William Saad
/s/ Karen M. Fort Hood