STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIS WILSON ODOM,

Defendant-Appellant.

UNPUBLISHED
December 22, 2005

No. 258566
Wayne Circuit Court
LC No. 04-005371-01

Before: Fitzgerald, P.J., and O'Connell and Kelly, JJ.

PER CURIAM.

A jury convicted defendant of two counts of assault with intent to rob while armed, MCL 750.89, two counts of assault with intent to commit murder, MCL 750.83, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced as an habitual offender, second offense, MCL 769.10, to concurrent prison terms of 562 months to 100 years for each of the assault convictions and two to seven years for the felon in possession conviction, to be served consecutive to a five-year term of imprisonment for the felony-firearm conviction. He appeals as of right. We affirm.

Defendant's convictions arise from an April 24, 2004, robbery incident in which two victims, Eddie Walker and Tamara McAdoo, were shot. At approximately 4:00 a.m. on that date, Walker, McAdoo, and a third person, Robin Wilson, exited a lounge in the area of Seven Mile Road and Forrer Avenue in Detroit. Walker and McAdoo entered Walker's black Mercury Mirada, which was parked nearby, while Wilson walked beyond Walker's car to his own black Cadillac. Walker was sitting in the driver's seat of his car with the window down when a minivan approached and stopped very close to Walker's car on the driver's side. A man, wearing a hood, jumped out of the passenger side of the minivan holding a handgun. The gunman, who had a male voice, put the gun in Walker's face through the open window and said, "give that shit up." Wilson observed Walker trying to use his hand to get the gun away from his face. The gunman then started firing shots into Walker's vehicle. Walker pushed McAdoo, who was in the front passenger seat, out of the passenger door and rolled out after her. Walker and McAdoo then ran in opposite directions. Both of them were shot. Walker was shot in the back, but the bullet was ultimately determined not to have hit any vital organs or nerves. McAdoo was shot in the abdomen and also suffered an injury to her hand. The bullet to her abdomen did not hit any vital organs. When Walker ran, the gunman gave chase before reentering the minivan, which then pursued Walker. A second round of shots were then fired. Walker was hit by another bullet that broke several bones in his hand. Wilson testified that he heard more than one

type of weapon being discharged while Walker ran. He heard shots from both a revolver and an automatic weapon. The shots came from the direction of the minivan. While Walker ran, he removed his necklace and tossed it to the ground, believing that it was the object the gunman sought. Walker estimated that a total of 10 to 15 shots were fired. Eleven casings, both .38 caliber and nine-millimeter, were later recovered, along with a separate portion of another .38 caliber bullet and Walker's necklace.

Before the minivan left the scene, a police car arrived and, upon receiving information from the victims, it pursued the minivan to a park. The minivan crashed through wood posts and stopped. Three occupants alighted the vehicle: one from the driver's side and two from the passenger side. One officer chased the man from the driver's side. Another officer chased the other two men. This officer lost sight of the two men, but another unit apprehended them. Codefendant Oliver Ferguson was observed running between two houses and was subsequently arrested in front of one of them. An officer then searched behind the house and found defendant lying on the floor in the garage. Both defendant and Ferguson were out of breath and sweaty. Defendant was identified as one of the men who exited the passenger side of the minivan. Defendant and Ferguson were determined to have gunshot residue on both of their hands and their foreheads. The minivan, which was a stolen vehicle, contained a .38 caliber revolver, which matched six spent casings recovered from the shooting scene but did not match the partial bullet that was recovered. The minivan also contained a fully automatic weapon, which did not match the five spent nine-millimeter casings recovered at the scene. There were no "readable" fingerprints on the weapons recovered in the minivan.

At trial, defendant offered an alibi defense. He claimed that he left the home of a friend on Winthrop Street at 3:30 a.m. and went to a gas station at Greenfield Avenue and Clarita Street to get blunts and orange juice. On his return trip, he saw the police and observed someone running. He then ran because he was on parole and did not want to have police contact. He was later arrested in the garage where he hid. On cross-examination, defendant could not initially provide the last name of the friend whose home he had been visiting, and he was unable to provide a specific address. He subsequently identified his friend as Andre Armstrong. At trial, defendant denied making certain statements to an officer during an interview after the shooting. He denied telling the officer that he had not been with anyone, that he had been panhandling because he was trying to get money to get to his sister's house, that he entered the garage where he was found at 2:00 a.m., and that he went in there to sleep. The officer who interviewed defendant testified on rebuttal that defendant never mentioned Andre Armstrong, that defendant indicated that he had been panhandling and had no place to stay, and that defendant indicated that he had been sleeping in the garage since 2:00 a.m. The officer testified that she wrote defendant's statements out verbatim and read them back to him before he signed his statement.

I

Defendant first raises several challenges to the prosecutor's closing argument. These claims of prosecutorial misconduct are not preserved because defendant failed to make contemporaneous objections at trial. See *People v Carines*, 460 Mich 750, 764-765; 597 NW2d 130 (1999). Unpreserved allegations of prosecutorial misconduct are reviewed for plain error affecting the defendant's substantial rights. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

Defendant first argues that the prosecutor improperly shifted the burden of proof by commenting that defendant failed to present witnesses to support his alibi defense. Defendant argues that the prosecutor improperly shifted the burden of proof. We find no error in the prosecutor's argument. In *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995), the Court held that, "where a defendant testifies at a trial or advances, either explicitly or implicitly, an alternative theory of the case that, if true, would exonerate the defendant, comment on the validity of the alternative theory cannot be said to shift the burden of proving innocence to the defendant." While a defendant does not have the burden to produce evidence, once he advances evidence or a theory, argument on the inferences created does not shift the burden of proof, and the prosecutor is not prohibited from commenting on the improbability of the theory or evidence. *Id.* at 116. It is not error to comment on a defendant's failure to produce evidence to support a defense on which he seeks to rely. *Id.* at 111 n 21. In *People v Reid*, 233 Mich App 457, 478-479; 592 NW2d 767 (1999), this Court held that the prosecutor's argument regarding the defendant's failure to produce a blood sample from his wife, given his alternative theory of the case, did not shift the burden of proof. In this case, the prosecutor's argument regarding defendant's failure to call witnesses who could have supported his alibi, specifically his sister and Armstrong, did not impermissibly shift the burden of proof but, rather, appropriately pointed out the improbability of defendant's offered defense.[1]

Defendant next argues that the prosecutor made improper civic duty arguments when he stated, "All that's necessary for evil to triumph is for good people to do nothing. We trust you're good people.". Later, in rebuttal, the prosecutor quoted a song, stating, "Ya gotta' stand for somethin', or you'll fall for anything." An improper civic duty argument plays on the fears or prejudices of the jury, *People v Cooper*, 236 Mich App 643, 651; 601 NW2d 409 (1999), injects issues broader than the defendant's guilt, or calls upon the jurors to suspend their powers of judgment, *People v Truong (After Remand)*, 218 Mich App 325, 340; 553 NW2d 692 (1996). While we agree that the prosecutor's colorful use of language in his closing and rebuttal arguments bordered on impermissible civic duty arguments, the isolated arguments were innocuous and could have been cured by an instruction upon request. *People v Crawford*, 187 Mich App 344, 354; 467 NW2d 818 (1991). In *Crawford*, the prosecutor asked the jury to return a verdict of guilty "because justice demands it, because it is the right thing to do." *Id.* No error requiring reversal was found. Similarly, we find no error requiring reversal in this case.

Finally, defendant argues that the prosecutor denigrated defense counsel during rebuttal argument when he argued:

> Counsel suggests that we have, how did he say it? Inferences? Make sure you keep your focus on what you're here for.
>
> The stretch, here [indicating], looks like a third to a quarter of a block. We heard, time and time again, that when they bent [sic] from Clarita, onto

[1] Nonetheless, we note that immediately preceding the challenged argument the prosecutor reminded the jury that the prosecutor had the burden of proof and that the burden of proof never shifted to defendant.

> Winthrop, they're a block away. That argument is inconsistent with the evidence. Does this look like a block to you? That argument is intended to change your focus.
>
> The next argument intended to just snow you. I pushed my watch from when he started until when he first mentioned gunshot residue. We were twenty minutes into that. He doesn't want you to think about gunshot residue. And he never talked about sweatin' and breathin' because he don't want you think about sweatin' and heavy breathin'. Them's nasty things from that side of the podium, from multiple sources. No, instead, he wants to snow you with whether it's a block, or not. And we know it's not.
>
> He next wants you to change the focus to "We'll try the officers, don't look at what Mr. Odom's doin' out there, " and suggests how Officer Coykendall – he explained to you, "I don't run with my gun," for obvious reasons. . . . Somehow, we're going to try him [Officer Coykendall].
>
> That's not your focus. . . .

A prosecutor may not suggest that defense counsel is intentionally attempting to mislead the jury, *Watson, supra* at 592, and he may not denigrate opposing counsel, *People v Kennebrew,* 220 Mich App 601, 607; 560 NW2d 354 (1996). However, a prosecutor may point out deficiencies in a defendant's case, *People v Howard,* 226 Mich App 528, 544-545; 575 NW2d 16 (1997), and we must review the challenged remarks in context. *Kennebrew, supra* at 608.

In *Kennebrew, supra* at 607-608, this Court rejected a claim of prosecutorial misconduct premised on a rebuttal argument that defense attorneys often attack the police investigation as a ploy to convert the case to one against the police. In *Watson, supra* at 592-593, this Court rejected a claim of prosecutorial misconduct based on the prosecutor's argument that defense counsel was trying to distract the jury from the truth. This Court found that the challenged rebuttal argument was responsive to defense counsel's closing argument, in which counsel had emphasized discrepancies in the various accounts of the event and suggested that the prosecutor was not concerned with the truth. *Id.*

Reviewing the challenged rebuttal arguments in context, we find no plain error. In closing argument, defense counsel claimed that the prosecutor's case was based on a house of cards, unsupported theories, and stacked inferences, and that the police officers' observations about the men exiting the van were suspect because they were made from a "full city block" away in the dark. The prosecutor's rebuttal statements conveyed his message that defendant's arguments were contrary to the evidence and were designed to take the jury's focus away from the relevant issues and facts. The challenged arguments are akin to the prosecutor's argument in *Watson, supra,* that defendant was trying to distract the jury. Even if the prosecutor's comments could be considered improper based on his use of the word "snow" in relation to defense counsel's argument, reversal would not be required. "A well-tried, vigorously argued case should not be overturned on the basis of a few isolated improper remarks that could have been corrected had an objection been lodged." *People v Green,* 228 Mich App 684, 693; 580 NW2d 444 (1998). Moreover, any prejudice was cured by the trial court's instructions that the attorneys' arguments were not evidence to be considered in reaching a verdict and that the jury

was responsible for determining which testimony to believe. Further, defendant has not demonstrated that the comments affected the outcome of his trial. *Carines, supra* at 763-764. There exists no plain error requiring reversal.

II

Defendant next argues that the trial court erred when it failed to instruct the jury on the crime of assault with intent to rob while unarmed as a lesser included offense of assault with intent to rob while armed, and when it failed to instruct on the crime of assault with intent to do great bodily harm as a lesser included offense of assault with intent to commit murder. Defendant failed to request these instructions at trial. In order to prevail on his unpreserved claim of error, defendant must establish plain error affecting his substantial rights. *Carines, supra*. Defendant cannot do so. A trial court is not required to instruct the jury sua sponte on lesser offenses. *People v Ramsdell*, 230 Mich App 386, 403; 585 NW2d 1 (1998). Thus, the trial court did not make a clear or obvious error. *Carines, supra*. Moreover, a defendant cannot obtain reversal of his convictions due to the absence of instructions that he did not request. *People v Hendricks*, 446 Mich 435, 440-441; 521 NW2d 546 (1994); *People v Pouncey*, 437 Mich 382, 386; 471 NW2d 346 (1991); MCL 768.29. Even if appellate relief were permitted, defendant would have to show that substantial evidence existed to support the missing instructions in order to prevail. *People v Cornell*, 466 Mich 335, 365; 646 NW2d 127 (2002). In this case, defendant has not shown that a rational view of the evidence supported the lesser offense of assault with intent to rob while *unarmed.* To the contrary, the evidence was unequivocal that the perpetrators were armed with weapons. Moreover, defendant has not demonstrated that a rational view of the evidence supported the lesser offense of assault with intent to commit great bodily harm as opposed to assault with intent to commit murder. The men in the minivan possessed at least three weapons. The first gunman thrust his weapon through the open window of Walker's parked car, in the dark, and shot several times at the two victims. He struck both of them. When the victims managed to escape the vehicle, the gunman followed Walker, and a second round of shots, involving both a revolver and an automatic weapon, was fired. Walker was struck in the hand. At least 11 shots were fired in total at the victims in the dark. In rejecting defendant's claim of instructional error, we note that his defense at trial was that he was incorrectly identified as one of the perpetrators. The intent of the gunmen was not an issue raised by the defense. Thus, the alleged missing instruction for assault with intent to commit great bodily harm was irrelevant to defendant's theory of the case. Therefore, defendant has not established a plain error affecting his substantial rights.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Peter D. O'Connell
/s/ Kirsten Frank Kelly