

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHARLES DEWAYNE MYLES,

Defendant-Appellant.

UNPUBLISHED

March 31, 2009

No. 284595

Ingham Circuit Court

LC No. 07-000905-FH

Before: Wilder, P.J., and Meter and Servitto, JJ.

PER CURIAM.

Defendant appeals as of right from his jury convictions of inducing a minor to commit a felony, MCL 333.7416, assaulting or resisting an officer, MCL 750.81d(1), and delivery of less than 50 grams of cocaine, MCL 333.7401(2)(a)(iv). The trial court sentenced defendant as a third habitual offender, MCL 769.11, to concurrent prison terms of two to twenty years for inducing a minor to commit a felony, two to four years for assaulting or resisting an officer, and two to forty years for delivery of less than 50 grams of cocaine. We affirm. This case has been decided without oral argument pursuant to MCR 7.214(E).

Defendant argues that he should be granted a new trial because the prosecutor committed prosecutorial misconduct during rebuttal argument. Specifically, defendant claims the prosecutor's remarks impermissibly suggested that the defense intentionally tried to mislead the jury, shifted the burden of proof onto the defense, and called into question defense counsel's credibility. Because defendant did not raise these objections at the trial level, this Court reviews them to determine whether they constituted plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763, 764; 597 NW2d 130 (1999).

"A defendant's right to a fair trial may be violated when the prosecutor interjects issues broader than the guilt or innocence of the accused." *People v Rice*, 235 Mich App 429, 438; 597 NW2d 843 (1999). Further, a prosecutor may not make factual statements that are not supported by the evidence, but is free to draw "reasonable inferences" derived from the facts of the case. *People v Dobek*, 274 Mich App 58, 66; 732 NW2d 546 (2007). Otherwise improper prosecutorial conduct or remarks might not require reversal if they address issues that were raised by defense counsel. *People v Jones*, 468 Mich 345, 353; 662 NW2d 376 (2003); *People v Duncan*, 402 Mich 1, 16; 260 NW2d 58 (1977); *Dobek, supra* at 64. In determining whether an invited response merits reversal, a court should consider the conduct that prompted the prosecutorial response and the proportionality of that response. *Jones, supra* at 353. A new trial

is not required due to prosecutorial misconduct if the prejudicial effect was removed by the trial court's instructions to the jury. See *Duncan, supra* at 16-17; *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

In the case at bar, defense counsel suggested during closing argument that there was insufficient proof of defendant's guilt because the sixteen-year-old boy who participated in the drug transaction was not called to testify by the prosecutor. In his rebuttal argument, the prosecutor responded: "The thing is, he [defense counsel] knows where [the minor witness] is. We know where [the minor witness] is, and the fact that [the minor witness] isn't here isn't something that really you can consider." Contrary to what defendant claims on appeal, we do not believe the prosecutor's statement shifted the burden of proof onto the defense. The prosecutor never stated or implied that defendant bore the burden of proving his innocence by producing the witness or presenting any evidence. In any event, a prosecutor does not necessarily shift the burden of proof simply by commenting on a defendant's failure to call a witness. *People v Fields*, 450 Mich 94, 112; 538 NW2d 356 (1995). Further, the trial court cured any possible prejudice resulting from the prosecutor's remark by instructing the jury that defendant is presumed innocent at every stage of the case and that at no time does the burden shift onto him to prove his innocence. See *Duncan, supra*; *Watson, supra*. Defendant has shown no error, let alone plain error, in this regard.

Defendant next contends the prosecutor's remarks created an inference that the defense engaged in misconduct by trying to prevent the minor witness from testifying at the trial. We disagree. The prosecutor's statements were reasonable in light of their relation to defense counsel's remark that the absence of the witness should create a reasonable doubt as to defendant's guilt in the minds of the jurors. *Dobek, supra*. Accordingly, defendant has not established plain error on this basis.

Finally, the prosecutor's rebuttal argument did not impugn defense counsel's credibility by suggesting that he was intentionally misleading the jury. Cf., *People v Unger*, 278 Mich App 210, 236; 749 NW2d 272 (2008). Rather, the prosecutor was permissibly explaining, based on reasonable inferences from the evidence, why defendant used the sixteen-year-old boy to carry the drugs and money, i.e., to attempt to make successful prosecution of defendant more difficult. This did not constitute plain error affecting defendant's substantial rights. *Carines, supra*.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Patrick M. Meter
/s/ Deborah A. Servitto