STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 20, 2010
v	No. 290488 Oakland Circuit Court
ROBERT LUKE MILLER, Defendant-Appellant.	LC No. 2008-219319-FH

Before: SAAD, P.J., and HOEKSTRA and SERVITTO, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree home invasion, MCL 750.110a(3). The trial court sentenced him as an habitual offender, fourth offense, MCL 769.12, to 29 months to 15 years' imprisonment. Defendant appeals as of right. Because defendant was not denied a fair and impartial trial by prosecutorial misconduct and because defendant was not denied a speedy trial, we affirm.

I. FACTS

On January 13, 2007, Barbara Turner and her ten-year-old daughter, returning from a church service, discovered that someone had broken into their Oak Park house. The intruder had taken a television with a built-in DVD player, a DVD player, a laptop computer, and a diamond tennis bracelet. The intruder had also broken the glass out of the front door.

Officer Adam Hughes, the first police officer to respond, discovered several drops of blood in Turner's house. Another officer, Michael Hodakoski, collected samples of the blood. The samples were sent to a Michigan State Police crime laboratory for testing. A DNA profile from the blood was developed and entered in the Combined DNA Index System (CODIS).

The crime lab was notified that CODIS contained a matching DNA profile. The matching profile belonged to defendant. Detective Jason Ginopolis, using a buccol swab, obtained a DNA sample from defendant. A profile of defendant's DNA was developed, and the profile matched the DNA profile obtained from the blood found in Turner's house.

Ginopolis contacted local pawnshops to learn if defendant had pawned any items. He received a response from American Jewelry and Loan. According to Rodney Riley, the manager, American Jewelry and Loan, loaned $40 to a Robert Miller on January 13, 2007, for a

20-inch television with a built-in DVD player and another $10 on January 15, 2007, for a DVD player. A print of Miller's right thumb taken by Riley when the items were pawned matched the right thumbprint on defendant's arrest card.[1]

II. PROSECUTORIAL MISCONDUCT

Defendant argues that he was denied his right to a fair trial by prosecutorial misconduct. Specifically, defendant argues that the prosecutor elicited evidence of his pretrial incarceration, commented on his decision not to testify, and shifted the burden of proof. We disagree.

The test for prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Mesik (On Reconsideration)*, 285 Mich App 535, 541; 775 NW2d 857 (2009). We review preserved claims of prosecutorial misconduct de novo, *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001), and unpreserved claims for plain error affecting the defendant's substantial rights, *Mesik*, 285 Mich App at 541.

A

Defendant first claims that the prosecutor deliberately elicited testimony of his pretrial incarceration. After Turner testified that defendant had contacted her in writing, the prosecutor asked Turner how she knew the letters were from defendant. Turner replied that the letters had defendant's name on them. The prosecutor then asked Turner if the letters contained a return address, and after Turner answered, "Yes," the prosecutor asked for the return address. Turner said that the address was "Oakland County Jail."

References to a defendant's incarceration are generally inadmissible. *People v Spencer*, 130 Mich App 527, 537; 343 NW2d 607 (1983). Turner's response that the return address of defendant's letters was Oakland County Jail was a direct response to the prosecutor's question. However, even if the prosecutor engaged in misconduct when she asked Turner for the return address on defendant's letters, the prosecutor's question and Turner's answer did not deprive defendant of a fair trial. Immediately after Turner answered, defendant objected. The trial court sustained the objection and instructed the jury to "disregard the question." Jurors are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Defendant received appropriate relief when the trial court instructed the jury to ignore the prosecutor's question. *People v Miller (After Remand)*, 211 Mich App 30, 42-43; 535 NW2d 518 (1995).

B

Defendant next claims that the prosecutor improperly commented on his right not to testify during her closing argument. During her closing argument, the prosecutor stated:

[1] The pawnshop had sold the television and the DVD player before it was contacted by Ginopolis. Thus, the pawned items could not be identified by Turner.

> You heard the testimony of Ms. Turner. She came here and she told you she didn't know this man from Adam. She never seen him before, she never heard of him before, she didn't know anything about him. So we know he had no business being in her house. His blood should not have been in his (sic) house, he was never invited in and accidentally cut himself, he should have not been there. But yet he was there, there was blood with his DNA profile in her house on the same day that her house was broken into and items were missing.
>
> That evidence is uncontroverted. No one came in and refuted that her house had been broken into. You didn't hear any evidence to the contrary.
>
> You didn't hear any evidence to the contrary that DNA belonged to somebody else or matched with a statistical probability in the quadrillions and quintillions other than that of the defendant.

Defendant did not object to the comment.

Defendant claims that, because he was the only person that could have accounted for his whereabouts on January 13, 2007, the prosecutor's statement was a comment on his right not to testify. A prosecutor's remark that evidence is uncontradicted or undisputed generally does not amount to improper comment on the defendant's decision not to testify, even if the defendant is the only person that could have provided contradictory testimony. *People v Guenther*, 188 Mich App 174, 177; 469 NW2d 59 (1991).[2] "A prosecutor's remark that evidence is undisputed is proper in urging the weight to be given the testimony." *Id.* In addition, the prosecutor's remark was not of such a nature that the jury would necessarily take it as a comment on defendant's failure to testify. See *id.* at 179. The prosecutor's comment that the evidence was uncontroverted was not clearly or obviously improper. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Even if the prosecutor's comment was improper, defendant has failed to show that a curative instruction could not have alleviated any prejudice resulting from the prosecutor's comment. *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008). Curative instructions are presumed to cure most errors. *Id.* In addition, the evidence that implicated defendant as the perpetrator of the home invasion was strong. Defendant's DNA matched the DNA of the blood found in Turner's house, and defendant pawned a television with a built-in DVD player the day of the home invasion and a DVD player two days later. Defendant has not shown that, in the face of this evidence, the prosecutor's comment affected the outcome of the trial. *Carines*, 460 Mich at 763.[3]

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[2] However, the Court suggested that prosecutors refrain from using terms like "unrebuttable" when only the defendant could have disputed or rebutted the evidence. *Guenther*, 188 Mich App at 178.

[3] We reject defendant's claim that counsel was ineffective for failing to object to the prosecutor's comment that the evidence was uncontroverted. To establish a claim for ineffective assistance of counsel, a defendant must establish that counsel's performance was deficient and that, but for

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C

Defendant also claims that the prosecutor shifted the burden of proof in her rebuttal closing argument. The prosecutor stated Hodakoski, in collecting and packaging the blood samples, followed procedures and training. The following discourse then took place:

> *Prosecutor*. . . . You heard no evidence to the contrary, you heard no witness come in here and say, Officer Hodaleski (ph) --
>
> *Defendant*. Your Honor, I'm going to object. I don't have a burden to produce any witnesses or a burden of proof as it relates to this case.
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> * * *
>
> *The Court*. Why don't you -- why don't you rephrase that.
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> * * *
>
> *Prosecutor*. You heard absolutely no evidence that Officer Hodaleski (ph) did not follow procedures. No other person contradicted him, nobody impeached him, there was not a witness called to say, you know what, he should have done, A B --
>
> * * *
>
> *The Court*. Okay, now please disregard that last comment by the Prosecutor. What she means to say basically is, the witnesses that were called, you know, said what they did. Okay.
>
> *Prosecutor*. There's nothing to contradict what he said. Okay.

A prosecutor may not comment on a defendant's failure to present evidence; such an argument tends to shift the burden of proof. *People v Abraham*, 256 Mich App 265, 273; 662 NW2d 836 (2003); *People v Green*, 131 Mich App 232, 237; 345 NW2d 676 (1983). However, a prosecutor's remarks must be considered in context of the defense counsel's arguments. *People v Watson*, 245 Mich App 572, 592-593; 629 NW2d 411 (2001). Once a defendant advances a theory, the prosecutor may comment on the improbability of the theory. *People v Fields*, 450 Mich 94, 115-116; 538 NW2d 356 (1995). Defendant, in his closing argument, challenged the manner in which Hodakoski collected, packaged, and preserved the blood samples, even stating that there was a good probability of contamination. The prosecutor's

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counsel's deficient performance, there is a reasonable probability that the result of the proceedings would have been different. *People v Payne*, 285 Mich App 181, 188-18; 774 NW2d 714 (2009). In light of the DNA evidence and the evidence that defendant pawned items similar to two of the items taken from Turner's house, there is no reasonable probability that, absent counsel's failure to object to the prosecutor's comment, the result of the proceedings would have been different.

comments responded to defendant's theory that the blood samples were not properly collected and preserved. Thus, even while the trial court instructed the jury not to consider the comment that no witness was called to contradict Hodakoski, the prosecutor's comments were not improper. *Id.* In addition, because jurors are presumed to follow their instructions, *Graves*, 458 Mich at 486, the trial court's instructions that defendant is presumed innocent, that the prosecution must prove every element beyond a reasonable doubt, and that defendant is not required to prove his innocence or to do anything cured any prejudice to defendant.

III. SPEEDY TRIAL

Defendant asserts that he was denied his Sixth Amendment right to a speedy trial when ten months lapsed between his arrest in January 2008 and the commencement of trial in November 2008. We disagree.

The determination of whether a defendant was denied a speedy trial is a mixed question of law and fact. *People v Waclawski*, 286 Mich App 634, ___; 780 NW2d 321 (2009). Factual findings are reviewed for clear error and the constitutional issue is a question of law reviewed de novo. *Id.*

The United States Constitution, US Const, Am VI, and the Michigan Constitution, Const 1963, art 1, § 20, guarantee a criminal defendant a speedy trial. *People v Walker*, 276 Mich App 528, 541; 741 NW2d 843 (2007), vacated in part on other grounds 480 Mich 1059 (2008). We apply a four-part balancing test to determine whether a defendant has been denied a speedy trial. *Id.* The four factors are "(1) the length of the delay, (2) the reasons for the delay, (3) the defendant's assertion of the right, and (4) prejudice to the defendant." *Id.* (quotation omitted). If the delay is less than 18 months, the defendant has the burden to show that he suffered prejudice. *Waclawski*, 286 Mich App at ___. If the delay is more than 18 months, prejudice is presumed, and the prosecution has the burden to rebut the presumption. *People v Williams*, 475 Mich 245, 262; 716 NW2d 208 (2006).

The delay between defendant's arrest and the commencement of trial was ten months. Defendant acknowledges that the delay falls short of the 18-month "'presumptive prejudice' trigger," but claims that, because his case was "a simple criminal case"—the case against him consisted of blood samples and thumbprint—the case did not compel a ten-month delay. Defendant, however, acknowledges that the delay was primarily to allow a defense expert to review the DNA test results. He does not contest the trial court's factual finding that the delay was "at his behest and for his benefit."

Because the delay was less than 18 months, defendant has the burden to establish prejudice. *Waclawski*, 286 Mich App at ___. There are two kinds of prejudice: prejudice to the person and prejudice to the defense. *Id.*[4] "Prejudice to the defense is the more serious concern, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." *Williams*, 475 Mich at 264 (quotations omitted). Defendant does not name any

[4] Defendant does not claim prejudice to the person.

potential defense witness that was lost or identify any exculpatory evidence that was misplaced during the delay. Moreover, the delay, which was primarily to allow a defense expert to examine the DNA test results, had the potential to benefit defendant. Defendant has not established prejudice resulting from the delay. The trial court did not err in denying defendant's motion to dismiss.[5]

Affirmed.

/s/ Henry William Saad
/s/ Joel P. Hoekstra
/s/ Deborah A. Servitto

[5] We reject defendant's request for 314 days credit for time served. The issue is not properly before us because it was not raised in the questions presented. *People v Anderson*, 284 Mich App 11, 16; 772 NW2d 792 (2009). Regardless, the record indicates that defendant, after his arrest, was jailed because he was on parole at the time of the home invasion. Under these circumstances, defendant is not entitled to jail credit. *People v Idziak*, 484 Mich 549, 562; 773 NW2d 616 (2009).