

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TODD EDMUND GRAY,

Defendant-Appellant.

UNPUBLISHED

July 21, 2000

No. 220409

Ottawa Circuit Court

LC No. 98-022191-FH

Before: Smolenski, P.J., and Zahra and Collins, JJ.

COLLINS, J., concurring.

I concur in the result, but I write separately because I believe the prosecutor impermissibly commented on defendant's failure to testify.

A prosecutor is not permitted to comment on a defendant's failure to take the stand. *People v Perry*, 218 Mich App 520, 538; 554 NW2d 362 (1996); *People v Guenther*, 188 Mich App 174, 177; 469 NW2d 59 (1991). This rule applies to indirect as well as direct comments on a defendant's failure to testify. *Raper v Mintzes*, 706 F2d 161, 164 (CA 6, 1983). Here, the prosecutor's comment that only two parties involved in the incident knew what happened and the jury "heard from one of the two parties," was an indirect comment on defendant's failure to testify. The comment was not necessary to rebut defendant's argument regarding the absence of corroborating evidence but simply served to focus the jury's attention on the fact that defendant did not testify and suggest that the jury should accept the complainant's version of the incident because they did not hear from defendant.

While I find the prosecutor's comment to be improper, I do not believe it requires reversal of defendant's conviction. Under the standard for assessing preserved, nonconstitutional error articulated in *People v Lukity*, 460 Mich 484, 493-496; 596 NW2d 607 (1999), a defendant must establish that it is more probable than not that the error in question "undermine[d] the reliability of the verdict." *Id.* at 495, quoting *People v Mateo*, 453 Mich 203, 211; 551 NW2d 891 (1996). In other words, such "error is not a ground for reversal unless 'after an examination of the entire cause, it shall affirmatively appear' that it is more probable than not that the error was outcome determinative." *Lukity, supra* at 495-496. In view of the isolated nature of the comment and the court's instruction regarding a defendant's right not to testify, I am satisfied that the prosecutor's

comment did not undermine the reliability of the verdict in this case. See *People v Brownridge (On Remand)*, 237 Mich App 210, 216; 602 NW2d 584 (1999).

/s/ Jeffrey G. Collins