

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,  
  
Plaintiff-Appellee,

UNPUBLISHED  
October 19, 2017

v

BRUCE EMBRY,

No. 334521  
Kalamazoo Circuit Court  
LC No. 2016-000036-FC

Defendant-Appellant.

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Before: MURRAY, P.J., and SAWYER and MARKEY, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree premeditated murder, MCL 750.316; felon in possession of a firearm (felon-in-possession), MCL 750.224f; and two counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant as a third-offense habitual offender, MCL 769.11, to life imprisonment without the possibility of parole for the murder conviction, 4 to 10 years' imprisonment for the felon-in-possession conviction, and two years' imprisonment for each felony-firearm conviction. We affirm.

Defendant was convicted for the January 6, 2016 fatal shooting of the 17-year-old grandson of defendant's wife, Iquilla Hegler. Hegler had raised her grandson as if he were her own son. According to Hegler, defendant was sometimes mean to the victim and there had been conflicts between them in the past. Hegler had decided around the time of the incident that she was going to leave defendant because defendant had been unfaithful.

On the afternoon of January 6, defendant told Hegler that the victim had skipped school that day, which she confirmed with the school. When the victim arrived home and learned that defendant had told Hegler about his absence from school, he informed Hegler about a telephone call between defendant and another woman that the victim had overheard. This caused an argument between defendant and the victim. Hegler told the victim to go to his room, while defendant went into the bedroom that he shared with Hegler. Hegler told defendant that she believed the victim.

After Hegler sat at the kitchen table for five minutes, she went to check on the victim, who she found sitting on his bed in his room. The victim stood up to meet Hegler near the doorway to his room. Defendant came out of his bedroom and shot the victim in the head. Hegler, who was standing in the hallway, witnessed the shooting. The victim died at the scene.

Defendant told police at the scene that he had shot the victim. Police officers who responded to the scene described defendant's emotional state as "calm" and "cool." Defendant agreed to an interview with police, which was video recorded and played for the jury during his trial. Defendant did not testify at trial.

Defendant argues that prosecutorial misconduct during closing argument deprived him of his due process right to a fair trial. Defendant further argues that trial counsel was ineffective in failing to object. Unpreserved claims of prosecutorial misconduct are reviewed for plain error affecting substantial rights. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). In order for the plain error standard to be met, "1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights. The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings." *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999) (citation omitted). "Where a curative instruction could have alleviated any prejudicial effect we will not find error requiring reversal." *Ackerman*, 257 Mich App at 449.

The test for prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). Issues of prosecutorial misconduct are evaluated on a case-by-case basis, and this Court must examine the prosecutor's remarks in context. *Id.* at 64. "Prosecutors are generally accorded great latitude regarding their arguments and conduct." *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Prosecutors are "free to argue the evidence and all reasonable inferences from the evidence as it relates to [their] theory of the case." *Id.* A prosecutor may also argue that the defendant or another witness is not worthy of belief or is lying. *People v Bass (On Rehearing)*, 223 Mich App 241, 247; 565 NW2d 897 (1997), vacated in part on other grounds 456 Mich 851 (1997). Prosecutors may argue for the credibility of their witnesses, even to the point of saying that either a government witness or the defendant is lying. *Id.* at 250.

However, "a prosecutor may not imply in closing argument that the defendant must prove something or present a reasonable explanation for damaging evidence because such an argument tends to shift the burden of proof." *People v Fyda*, 288 Mich App 446, 463-464; 793 NW2d 712 (2010). "Also, a prosecutor may not comment on the defendant's failure to present evidence because it is an attempt to shift the burden of proof." *Id.* at 464. A prosecutor may not state that a verdict for the defendant would require a finding that all the government witnesses were lying, because such arguments "distort the burden of proof" by telling the jury what it must find to reach a verdict. *Bass*, 223 Mich App at 250. "Credibility determinations are but one factor in determining whether evidence was sufficient," and although a prosecutor may focus on credibility and note that certain testimony "could not be reconciled," he or she may not "inform the jurors of what they must find to convict or acquit." *Id.*

In the present case, the prosecutor stated the following when he argued for Hegler's credibility in his closing argument:

My point is, if you don't believe her, then you are basically saying that she is lying, right. I mean, she is not mistaken. Sometimes people can be mistaken, right, and not lying. But that is no mistake when you say [summary of Hegler's testimony]. That is not a mistake. That is per—some kind of perceptive

disability. That is what she says happened. *So she is lying if you don't say that is what happened.*

If you don't say that is exactly what happened, those are the facts that I am going to use to decide which level of murder he is guilty of, *you are saying she is lying.* [Emphasis added.]

The prosecutor went on to argue:

Because when someone lies about something, you have to think to yourself, why would she say that if it did not occur – *you have to have a reasonable explanation for it.* Remember, it has to be something based on the evidence, folks. It has to be based on something you've heard here in court. [Emphasis added.]

Then, during his rebuttal closing argument, the prosecutor returned to the issue of Hegler's credibility:

But the point of the matter is, you've got to get past this first. You've got to get past Hegler's testimony first. You've got to get past the fact that why would she change her – why would she lie about this. *Mr. Champion gave you nothing, he gave you no reason for why she would have lied* about this and said that she was standing the way she was standing when the boy was shot. Grief – none of that stuff is going to make a difference. There is no reason for it. *You have to have some reason.* [Emphasis added.]

Defendant argues that during closing argument the prosecutor misstated the law by giving the jury the “stark choice” of adopting Hegler's testimony or saying she is lying. Defendant argues that this misstatement shifted the burden of proof by discounting the possibility that Hegler may have misperceived or misremembered the events, or that the evidence was insufficient independent of Hegler's testimony. Defendant argues that the prosecutor continued to distort the burden of proof in his rebuttal argument, when he implied that the burden was on defendant to explain why Hegler might be lying.

This Court must first establish the context for the prosecutor's remarks. The main issue at trial was defendant's intent; there was no dispute that defendant fired the gunshot that killed the victim. Hegler's testimony about the circumstances immediately preceding the shooting was central to the prosecution's argument for a first-degree murder conviction. Defense counsel questioned the credibility of Hegler during opening statements, stating, “[L]isten to the inconsistencies by the grandmother . . . she's also not telling the truth.” During cross-examination of Hegler, defense counsel asked Hegler whether her testimony was consistent with what she had said to the detectives on the day of the shooting.

In his closing argument, the prosecutor stated: “So the first thing you want to do then is say, well alright, we heard Iquilla Hegler testify. Do we believe her? Do we believe what she said? . . . And if you remember her testimony, she basically sat down and told you what happened.” The prosecutor encouraged the jury to evaluate “how truthful her demeanor, her composure – the way she presented herself.” The prosecutor then went on to describe how the physical evidence supported Hegler's testimony. The prosecutor then said, “[W]hen we talk

about credibility, there are other things to look at besides the demeanor that she presented on the stand and [the physical evidence].” The prosecutor next argued that “when someone lies about something, you have to think to yourself, why would she say that if it did not occur – you have to have a reasonable explanation for it.”

In his closing arguments, the prosecutor argued for Hegler’s credibility in three ways: discussing her demeanor in the courtroom, pointing out ways in which her testimony was consistent with the physical evidence, and arguing that there is no reasonable explanation for why Hegler would lie. These remarks occurred within the context of defense counsel challenging Hegler’s credibility both in his opening statement and during Hegler’s cross-examination. These statements by the prosecutor highlight the irreconcilability between Hegler’s testimony and defense counsel’s argument that the shooting was accidental. Highlighting this irreconcilability is permissible. See *Bass*, 223 Mich App at 250. The prosecutor did not expressly tell the jury that the only way to find defendant not guilty was to find that Hegler was lying. In other words, the prosecutor did not state that doubts about Hegler’s credibility were the only way to reach a not-guilty verdict. Thus, the prosecutor’s remarks during his closing argument were not impermissible and did not constitute a clear and obvious error that denied defendant a fair and impartial trial. See *Carines*, 460 Mich at 763.

Next, defendant argues that the prosecutor improperly shifted the burden of proof during his rebuttal to defense counsel’s closing argument. During his closing argument, defense counsel argued that “this was an accident.” Defense counsel argued: “It was an accident. He didn’t mean to pull the trigger. He didn’t mean to kill this man. . . . There was no premeditation. There wasn’t even time for premeditation.” Returning to questions about Hegler’s credibility, defense counsel closed by saying, “When you look at all the physical evidence . . . think about the grandmother’s testimony and how it fits or doesn’t fit with the physical evidence . . . you will find my client not guilty.”

In his rebuttal, the prosecutor argued that five minutes was “plenty of time for premeditation and deliberation.” The prosecutor reminded the jury that, although defense counsel had argued that the shooting was an accident, defendant had never claimed it was an accident during his police interview. The prosecutor also emphasized inconsistencies during defendant’s police interview; at one point in the interview, defendant denied speaking with a woman on the telephone that afternoon, at another point in the interview defendant denied moving toward the victim before the shooting, then later defendant says that he did move toward the victim. The prosecutor described defendant’s statement as “a lie there that he is clearly caught in.” The prosecutor then revisited the issue of Hegler’s credibility:

But the point of the matter is, you’ve got to get past this first. You’ve got to get past Hegler’s testimony first. You’ve got to get past the fact that why would she change her – why would she lie about this. Mr. Champion gave you nothing, he gave you no reason for why she would have lied about this and said that she was standing the way she was standing when the boy was shot. Grief – none of that stuff is going to make a difference. There is no reason for it. You have to have some reason.

Defendant argues that when the prosecutor stated, “Mr. Champion gave you nothing” and “[y]ou have to have some reason,” he improperly shifted the burden of proof from the prosecution to the defense.

Viewed in isolation, the prosecutor’s statements in rebuttal do come close to impermissibly asserting that the jury must find some evidence to support an acquittal. Such an argument would shift the burden of proof. *Fyda*, 288 Mich App at 464. However, in this specific instance, the prosecutor was attacking a theory presented by defense counsel: that some “inconsistencies” with Hegler’s testimony warranted an acquittal. By arguing that defense counsel had provided no motive for why Hegler would give false testimony, the prosecutor was commenting on a weakness of defense counsel’s theory. Such commentary does not constitute prosecutorial misconduct. *Id.* Thus, in the context of the prosecutor’s whole closing argument and rebuttal as well as defense counsel’s argument, the prosecutor’s statement did not impermissibly shift the burden of proof. Moreover, the trial court properly instructed the jury that the burden was on the prosecution to prove each element beyond a reasonable doubt and that “defendant is not required to prove his innocence or do anything.” The trial judge stated, “It is my duty to instruct you on the law. You must take the law as I give it to you. If a lawyer says something different about the law, you must follow what I say.” Such instructions are “sufficient to cure the prejudicial effect of most inappropriate prosecutorial statements” and “jurors are presumed to follow their instructions.” *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008). Thus, statements by the prosecutor did not constitute a plain error that affected the outcome of the lower court proceedings and thereby did not deprive defendant of a fair and impartial trial. See *Carines*, 460 Mich at 763.

Defendant also argues that he was deprived of effective assistance of counsel because defense counsel did not object to the prosecutor’s allegedly improper remarks. But defense counsel “cannot be faulted for failing to raise an objection or motion that would have been futile.” *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998). Because defendant has not shown that the prosecutor’s statements during closing argument and rebuttal deprived him of a fair and impartial trial, he has not shown that such an objection would not have been futile.

Affirmed.

/s/ Christopher M. Murray

/s/ David H. Sawyer

/s/ Jane E. Markey