STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 30, 2011
v	No. 297671 Oakland Circuit Court
KIMBERLY LYNN GRUSNICK, Defendant-Appellant.	LC No. 2009-228428-FC

Before: BORRELLO, P.J., and JANSEN and SAAD, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree home invasion, MCL 750.110a(2), and five counts of assault with intent to rob while armed, MCL 750.89. She was sentenced as a habitual offender, second offense, MCL 769.13, to concurrent prison terms of 126 months to 40 years for each assault conviction, and 126 months to 30 years for the home invasion conviction. She appeals as of right, and for the reasons set forth in this opinion, we affirm defendant's convictions and sentences.

Defendant's sole issue on appeal concerns the following emphasized remark by the prosecutor during closing argument:

> And it's not just that, she's the driver of the car. She's the person who first gains entry into the house. She's the one who leaves and comes back with the duct-tape. *No one has contradicted that*. Nobody.

Because defendant did not object to this remark at trial, our review is limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

A prosecutor may not comment on a defendant's failure to testify or decision to exercise her constitutional right to remain silent. *People v Fields*, 450 Mich 94, 108-109; 538 NW2d 356 (1995). However, our Court and the United States Supreme Court have observed a distinction between a direct statement by a prosecutor regarding a defendant's failure to testify and a prosecutor's argument that evidence has gone unchallenged. See, *United States v Robinson*, 485 US 25, 31; 108 S Ct 864; 99 L Ed2d 23 (1988). Our Supreme Court has held that a prosecutor's argument that inculpatory evidence is undisputed may be proper comment, even if the defendant is the only person who could have contradicted the evidence. *Id*. at 115. The nature and type of

comment that is allowed depends on the defense that is asserted and whether the defendant testified. *Id*. at 116.

The testimony given by various witnesses in this case varied. Some of the witnesses testified that the trailer where the robbery occurred had been used to distribute drugs, and for its inhabitants to smoke marijuana. Other witnesses offered by the prosecutor denied any drug usage either by themselves or occurring in the trailer. Our review of the record also indicates that witnesses varied in their accounts as to what specific actions were undertaken by other defendants in this case, and where each witness was when the defendants first entered the trailer. Consequently, there were discrepancies in the testimony of the witnesses offered by the prosecution which the prosecutor argued were insignificant during closing argument. Defendant argued that these discrepancies meant that the prosecutor did not establish guilt beyond a reasonable doubt. Defendant further argued that the witnesses were lying about their drug use and the fact that the trailer was a drug house.

Thus, our examination of the prosecutor's statement: "No one has contradicted that," leads us to conclude that the statement did not reference defendant's constitutional right to remain silent, but rather referred to the undisputed testimony that defendant was the driver of the car and also had duct tape to presumably restrain any of the occupants during the robbery. There is a considerable difference between the prosecutor's statement in this case and the argument presented by the prosecutor in *Griffin v California*, 380 US 609, 611; 85 S Ct 1229; 14 L Ed2d 106 (1966). In *Griffin*, the prosecutor made direct references to the defendant's right to remain silent by stating: "These things he [defendant] has not seen fit to take the stand and deny or explain." "And in the whole world, if anybody would know this defendant would know." Whereas the latter would constitute plain error affecting substantial rights, the former constituted a fair response to the defendant's arguments. See, *Robinson*, 485 US at 31; *Fields*, 450 Mich at 111. Because the prosecutor was not referring to defendant's failure to testify or failure to present evidence, there was no plain error. Therefore, defendant is not entitled to relief. See *People v Callon*, 256 Mich App 312, 329-330; 662 NW2d 501 (2003).

Affirmed.

/s/ Stephen L. Borrello
/s/ Kathleen Jansen
/s/ Henry William Saad