

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
February 7, 2013

v

MICHAEL DEAN WORDEN,
Defendant-Appellant.

No. 304509
Oakland Circuit Court
LC No. 2010-234803-FH

Before: WILDER, P.J., and GLEICHER and BOONSTRA, JJ.

GLEICHER, J., (*concurring in part and dissenting in part*).

I concur with the majority’s decision to affirm defendant’s convictions. However, I believe that because the prosecutor’s frequent and persistent comments concerning the “uncontradicted” nature of the evidence constituted an indirect reference to defendant’s failure to testify, defense counsel performed ineffectively by failing to lodge even one objection.

From the outset of trial, defendant premised his defense on highlighting inconsistencies in the witnesses’ version of events. In opening statement defense counsel suggested: “is it just possible that maybe these complainants embellished, created or exaggerated a story to implicate my client in a more serious offense such as home invasion after having encountered him and gotten into an altercation with him out in front of their house.” All of the witnesses to the crime testified at defendant’s trial – except defendant.

In closing argument, the prosecutor urged six times that the witnesses’ testimony was “uncontradicted,” “uncontroverted,” or that “no testimony” supported an alternate version of events. Given that defendant was the only person who *could* have controverted the testimony, I cannot accept the majority’s proposition that “trial strategy” compelled defense counsel’s silence. In my view, an objection raised after the prosecutor stressed for the first or second time the “uncontradicted” nature of the evidence would have put an end to that line of improper argument. At the very least, it would have compelled the court to instruct the jury that it could not infer guilt based on defendant’s failure to take the witness stand.

It is one thing to comment on the strength of the evidence. It is quite another to structure an argument around a defendant’s failure to effectively challenge the evidence. The prosecutor repeatedly turned to the “uncontradicted,” “uncontroverted” theme because defendant’s silence made it natural and probable that the argument would be effective. Similarly, I cannot accept the majority’s conclusion that an objection would have been “counter-productive by highlighting in

front of the jury the fact that defendant did not testify[.]” The jury was well-aware that defendant did not testify. The prosecutor effectively underscored that reality by repeatedly pointing to defendant’s failure to supply *evidence* challenging the prosecution witnesses. Every objection to a perceived trial impropriety draws attention to the challenged evidence or statement. But that is hardly a reason to forbear when constitutional rights are at stake.

That said, the prosecutor presented overwhelming evidence of defendant’s guilt, and I concur in the affirmance of his convictions.

/s/ Elizabeth L. Gleicher