

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

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In the Matter of MICHAEL J. BAYLE

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PEOPLE OF THE STATE OF MICHIGAN,

Petitioner-Appellee,

v

MICHAEL J. BAYLE,

Respondent-Appellant.

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UNPUBLISHED

June 11, 2013

No. 311323

Cass Circuit Court

Family Division

LC No. 10-000101-DL

Before: BECKERING, P.J., and SAAD and O'CONNELL, JJ.

PER CURIAM.

Following a jury trial, respondent was adjudicated as responsible for possession of marijuana, in violation of MCL 333.7403(2)(d), and delivery of marijuana, in violation of MCL 333.7401(2)(d)(iii). Respondent appeals as of right. We affirm.

The incidents that resulted in respondent's delinquency hearing and disposition took place in November 2010 in Edwardsburg, Michigan. On that date, two boys, who respondent knew from school, gave respondent about \$20 or \$30 to purchase marijuana. Respondent took the money, purchased the marijuana, and gave it to the two boys. All three boys smoked marijuana together.

On appeal respondent claims that petitioner committed several acts of prosecutorial misconduct during closing argument and that this misconduct is error requiring reversal. "We generally review de novo allegations of prosecutorial misconduct." *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001). "This Court reviews preserved claims of prosecutorial misconduct case by case, examining the remarks in context to determine whether the defendant received a fair and impartial trial." *People v McLaughlin*, 258 Mich App 635, 644; 672 NW2d 860 (2003). However, with regard to respondent's unpreserved errors, we review for plain error affecting respondent's substantial rights. *Pfaffle*, 246 Mich App at 288. There are three requirements to meet the plain error standard: the existence of an error, the error must be clear or obvious, and it must have affected the outcome of lower court proceedings. Even where the standard is met, reversal is warranted only where the plain error resulted in the conviction of an actually innocent defendant or when the error "seriously affect[ed] the fairness, integrity or

public reputation of judicial proceedings' independent of the defendant's innocence." *People v Carines*, 460 Mich 750, 763-764; 579 NW2d 130 (1999). In addition, "we will not find error requiring reversal if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction." *People v Williams*, 265 Mich App 68, 71; 692 NW2d 722 (2005).

Respondent first argues that statements made by petitioner during closing arguments were improper commentary on respondent's right to remain silent. With regard to the Fifth Amendment right asserted by respondent, "A defendant in a criminal case has a constitutional right against compelled self-incrimination and may elect to rely on the presumption of innocence." *People v Fields*, 450 Mich 94, 108-109; 538 NW2d 356 (1995) (internal quotation and citation omitted); US Const, Am V; Const 1963, art 1, § 15. Juveniles are also entitled "to a privilege against self-incrimination." *In re Whittaker*, 239 Mich App 26, 28; 607 NW2d 387 (1999). Accordingly, a prosecutor may not comment on a respondent's decision not to testify. *People v Mann*, 288 Mich App 114, 120; 792 NW2d 53, 57 (2010). Nevertheless, "A prosecutor may also argue that the evidence was uncontradicted even if the defendant is the only person who could have contradicted the evidence." *People v Fyda*, 288 Mich App 446, 464; 793 NW2d 712 (2010). Prosecutorial misconduct issues are decided "on a case-by-case basis by examining the record and evaluating the remarks in context." *Mann*, 288 Mich App at 119 (internal quotation and citation omitted).

Specifically, petitioner made the following statements during closing argument, and no objection was made:

When we started this morning, we started talking about that this is a case about a juvenile drug dealer transgre—trans—transferring up to become [sic] a-a [sic] adult drug dealer, and that's exactly what the evidence has shown you. And I told you it was a scripple [sic]—simple, straightforward case. There were three people, three people that know what happened on this occasion. And the evidence is uncontroverted by the two witnesses you heard from.

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Three people were present, only three people, and two of them testify [sic] that this is what took place. There is no other evidence and nobody else was present when this took place, only those three people, and they . . . told you what happened. They told you how they obtained the marijuana. Yeah, okay, sure if it was [sic] just one of them, yeah, there might be an argument that they were making something up. But there were two of them . . . .

Petitioner also stated during rebuttal that:

There's three people that know what happened . . . That's it. And when you boil down all the grandioseness [sic] and speculation of what may or may not have happened, they're the ones who told you what happened . . .

Applying the legal principles to the facts of this case, the comments of petitioner during closing and rebuttal were not plain error. Having reviewed the comments above with the entirety of petitioner's closing and rebuttal arguments, it is evident that petitioner neither explicitly nor

implicitly inappropriately commented on respondent's decision not to testify. Rather, the comments made, taken in context, are comments about the consistency of the two boys' testimony with regard to the facts of the case. The petitioner is permitted "to argue the evidence and all reasonable inferences arising from it." *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). Moreover, petitioner may comment that the evidence is "uncontroverted," even if respondent is the only one who could refute the testimony. *Fyda*, 288 Mich App at 464. Finally, there is no plain error because, regardless of petitioner's statements, the jury was later instructed that "[e]very defendant has an absolute right not to testify." "Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors." *People v Mesik (On Recon)*, 285 Mich App 535, 542; 775 NW2d 857 (2009) (quotation omitted).

Next, respondent challenges statements made during the petitioner's rebuttal.

The statement petitioner was "agreeing" with was one made by respondent during closing argument. Specifically, respondent stated that, in his closing argument, petitioner made "it seem that three people are [sic] involved and only two people were involved." Taken in context, the now challenged comments by petitioner were refocusing the jury's attention on the consistencies of the boys' statements, rather than respondent's silence. Petitioner was not prohibited from commenting on the improbability of respondent's theory and failure to take advantage of available opportunities to pursue matters relevant to his theory. *Fields*, 450 Mich at 115-116. Additionally, after respondent's objection, petitioner correctly stated the evidentiary burden, and the exchange as a whole is not an improper implication of respondent's right to remain silent. *Id.* Respondent was not denied a fair trial and impartial jury by the challenged argument. *McLaughlin*, 258 Mich App at 644.

We note that respondent suggests on appeal that the claimed prosecutorial misconduct, described *supra*, constituted improper burden shifting, stated facts not in evidence, and implied that the petitioner had special knowledge. To the extent he is attempting to secure a ruling on these issues, he has abandoned them by neglecting to present a cogent argument on appeal. *People v Matuszak*, 263 Mich App 42, 59; 687 NW2d 342 (2004).

Next, respondent argues that petitioner acted improperly by objecting to respondent's closing argument on the ground that respondent was mischaracterizing the evidence. Respondent's argument with regard to this issue is unpreserved. As stated above, prosecutors are generally "afforded great latitude regarding their arguments and conduct at trial" and are "free to argue the evidence and all reasonable inferences from the evidence as it relates to their theory of the case." *Mann*, 288 Mich App at 120. Nevertheless, "[a] prosecutor may not suggest that defense counsel is intentionally attempting to mislead the jury." *People v Watson*, 245 Mich App 572, 592; 629 NW2d 411 (2001). "However, the prosecutor's comments must be considered in light of defense counsel's comments." *Id.* at 592-593.

As mentioned above, respondent is challenging objections made by petitioner during respondent's closing argument. "[A]n otherwise improper remark may not rise to an error requiring reversal when the prosecutor is responding to the defense counsel's argument." *Watson*, 245 Mich App at 593. Here, petitioner's remarks were responsive to respondent's arguments, and we do not find that petitioner's objections were derogatory or degrading; rather, every time petitioner objected, he clearly stated the reason for the objection and the portion of

respondent's argument to which he was objecting. Thus, there is no plain error requiring reversal. And, we further reject respondent's claim that the trial court improperly sustained petitioner's objections. Moreover, the jury was instructed as to how it should evaluate testimony and that it could believe all or part of the testimony, so we find no error in petitioner's stated objection that he did not need corroboration.

Next, respondent asserts that petitioner made reference to the police report of the incident throughout his closing and rebuttal. Respondent argues that this was a reference to facts not in evidence and, thus, improper. We find no error requiring reversal because, although the reports were not admitted into evidence, the parties discussed the police reports at length during the trial, and the petitioner was "free to argue the evidence and all reasonable inferences from the evidence as it relates to their theory of the case," *Mann*, 288 Mich App at 120, which is precisely what petitioner did. Moreover, the jury was instructed on what could be considered as evidence in the case and that it may only consider the evidence that has been properly admitted in this case. "Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors." *Mesik (On Recon)*, 285 Mich App at 542. Thus, even if there was error, it does not require relief.

Finally, in addition to respondent's individual claims of prosecutorial misconduct, respondent argues that the cumulative effect of petitioner's comments so infected the trial that he is entitled to a mistrial with prejudice. This Court has previously stated that, "[w]here there is no allegation that prosecutorial misconduct violated a specific constitutional right, a court must determine whether the error so infected the trial with unfairness as to make the resulting conviction a denial of due process of law." *People v Blackmon*, 280 Mich App 253, 262; 761 NW2d 172 (2008). In *Blackmon*, 280 Mich App at 266-267, this Court adopted language from *Burton v Renico*, 391 F3d 764, 780-781 (CA 6, 2004), wherein "[t]he court stated standards for determining whether prosecutorial misconduct causes a deprivation of liberty without due process of law:"

Prosecutorial misconduct, in order to rise to the level of a constitutional due process violation, must be so severe that the defendant did not have a fair trial.

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[T]he misconduct must have so infected the trial with unfairness as to make the resulting conviction a denial of due process. Even if the prosecutor's conduct was improper or even universally condemned, we can provide relief only if the statements were so flagrant as to render the entire trial fundamentally unfair. Once we find that a statement is improper, four factors are considered in determining whether the impropriety is flagrant: (1) the likelihood that the remarks would mislead the jury or prejudice the accused, (2) whether the remarks were isolated or extensive, (3) whether the remarks were deliberately or accidentally presented to the jury, and (4) whether other evidence against the defendant was substantial.

We find that the application of these factors does not result in a conclusion that petitioner's comments so infected the trial as to render it fundamentally unfair on the facts of this case. Accordingly, respondent is not entitled to a mistrial.

Affirmed.

/s/ Jane M. Beckering  
/s/ Henry William Saad  
/s/ Peter D. O'Connell