

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
April 26, 2016

v

DEREK JAMES RAINBOLT,
Defendant-Appellant.

No. 325600
Muskegon Circuit Court
LC No. 14-064458-FC

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

PER CURIAM.

Defendant appeals his convictions after a jury trial of first-degree criminal sexual conduct (CSC-I), MCL 750.520b(1)(b)(i) (sexual penetration of a child between the ages of 13 and 16 who was a resident of the same household). Because defendant failed to show that the prosecutor’s comment during closing argument was improper, we affirm.

Defendant’s sole argument on appeal is that the prosecutor used an improper tactic when she argued in her closing statement that the victim’s testimony was “uncontroverted and unimpeached.” Defendant argues that these remarks were inflammatory and shifted the burden of proof to defendant or implied that defendant had some duty to testify or present evidence of his innocence.

Defendant did not contemporaneously object to the comment, so the issue is unpreserved. *People v Bennett*, 290 Mich App 465, 475; 802 NW2d 627 (2010). Generally, “[t]he test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial.” *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008). However, unpreserved claims of prosecutorial misconduct are reviewed for plain error affecting defendant’s substantial rights. *Id.* Thus, in the context of a prosecutor’s comments, reversal is not warranted where a curative instruction could have alleviated any prejudicial effect. *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008). We review a prosecutor’s remarks in context, and whether the remarks amount to misconduct “depend[s] upon the particular facts of each case.” *People v Callon*, 256 Mich App 312, 330; 662 NW2d 501 (2003).

In general, a prosecutor may not comment on a defendant’s failure to testify. *People v Perry*, 218 Mich App 520, 538; 554 NW2d 362 (1996), *aff’d* 460 Mich 55; 594 NW2d 477 (1999). A prosecutor also 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). However, a prosecutor’s statement that certain inculpatory evidence is undisputed “does not constitute a comment regarding the defendant’s failure to testify,” *Perry*, 218 Mich App at 538, nor does it improperly shift the burden of proof to the defense, *Fyda*, 288 Mich App at 464. Our Supreme Court has held that a prosecutor “may observe that the evidence against the defendant is ‘uncontroverted’ or ‘undisputed,’ even if defendant is the only one who could have contradicted the evidence.” *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995) (citations omitted); see also *People v Earl*, 299 Mich 579, 582-583; 300 NW 890 (1941) (holding that prosecutor’s comment that the evidence “has not been disputed” was proper and not a comment on defendant’s failure to testify). Accordingly, we hold that defendant has not demonstrated plain error.

Moreover, even if the comment could be deemed to be erroneous, a curative instruction would have alleviated any prejudice. As such, defendant still would not be entitled to any relief on this issue. See *Unger*, 278 Mich App at 235.

Affirmed.

/s/ Henry William Saad
/s/ Stephen L. Borrello
/s/ Michael F. Gadola