

¹ Appellant is also referred to as Joey Eljio Adames.

two or more felonies.² The Honorable Paul Hesse, District Judge, presided over Adames' jury trial and sentenced him, in accordance with the jury's verdict, to thirty-five years imprisonment on Count 1 and ten years imprisonment on Count 3. Judge Hesse ordered the sentences to be served consecutively.

Adames also appeals his order of revocation from the District Court of Canadian County, Case No. CF-2015-112, on two counts of Domestic Assault and Battery with a Dangerous Weapon, After Former Conviction of Two or More Felonies (Counts 1 & 2), in violation of 21 O.S.Supp.2014, § 644(D)(1), and one count of Possession of a Controlled Dangerous Substance (misdemeanor), in violation of 63 O.S.Supp.2012, § 2-402. Following the entry of a negotiated plea of guilty to the charges, the district court sentenced Adames to six years imprisonment on each of Counts 1 and 2 and to one year imprisonment on Count 3, with all of the sentences suspended. The State sought to revoke the suspended sentences based upon Adames' commission of the crimes alleged in Case No. CF-2017-256. At the formal sentencing hearing in Case No. CF-2017-

² Adames' jury acquitted him of Count 2-Trafficking in Illegal Drugs.

256, Judge Hesse revoked in full the suspended sentences imposed in CF-2015-112 and ordered the revoked sentences to be served concurrently with the sentences in CF-2017-256. Adames raises the following issues on appeal:

- (1) whether he was denied a fair trial because of prosecutorial misconduct throughout closing argument;
- (2) whether he was denied a fair sentencing proceeding because of prosecutorial misconduct; and
- (3) whether the Order revoking his suspended sentences is valid.

We find relief is not required and affirm the Judgment and Sentence of the district court as well as the district court's revocation order.

1.

Adames contends he was denied a fair trial because of prosecutorial misconduct throughout closing argument. He argues the prosecutor made a series of arguments that, when examined collectively, impermissibly commented on his right to remain silent and called attention to the fact that he did not testify. He maintains that the remarks cannot be considered harmless because they were neither isolated nor inadvertent and were a focal point of the

prosecutor's overall theme advanced during closing argument. The record shows the basis for the remarks met with only general objections was impermissible burden shifting rather than impermissible comments on the privilege against self-incrimination. Hence, Adames has waived review of this claim for all but plain error only. *See Grissom v. State*, 2011 OK CR 3, ¶ 64, 253 P.3d 969, 991 (reviewing claim for plain error only because appellant did not raise particular ground advanced on appeal at trial). Adames must therefore show that the commission of a plain or obvious error affected the outcome of the trial. *Nicholson v. State*, 2018 OK CR 10, ¶ 9, 421 P.3d 890, 895. If he does so, this Court will correct plain error only where it seriously affected the fairness, integrity or public reputation of the proceedings. *Id.*

Prosecutorial error claims are evaluated "within the context of the entire trial, considering not only the propriety of the prosecutor's actions, but also the strength of the evidence against the defendant and the corresponding arguments of defense counsel." *Lee v. State*, 2018 OK CR 14, ¶ 6, 422 P.3d 782, 785. We have long recognized that both parties enjoy a "wide latitude in closing argument to argue the

evidence and reasonable inferences from it.” *Lamar v. State*, 2018 OK CR 8, ¶ 54, 419 P.3d 283, 297. It will be the rare instance when a prosecutor’s misconduct during closing argument will require relief. *Bramlett v. State*, 2018 OK CR 19, ¶ 36, 422 P.3d 788, 800. Nevertheless, some topics are off limits for argument and a defendant’s decision to exercise the privilege against self-incrimination is one of them. Consequently, our decisions hold it is error for a prosecutor to comment, either directly or indirectly, upon an accused’s right to remain silent. See e.g. *Hogan v. State*, 1994 OK CR 41, ¶ 20, 877 P.2d 1157, 1161 (“The law is clear that counsel cannot comment on a person’s silence.”) Before a purported comment at trial on a defendant’s failure to testify will constitute reversible error, however, the comment must directly and unequivocally call attention to that fact. *Martinez v. State*, 1999 OK CR 33, ¶ 49, 984 P.2d 813, 826. Comments referring to a defendant’s failure to present evidence to refute the State’s case do not constitute impermissible comments on a defendant’s failure to testify. *Gilbert v. State*, 1997 OK CR 71, ¶ 87, 951 P.2d 98, 120. On appellate review, we consider whether the challenged remarks are such that the jury would

naturally and necessarily understand that the statements could only be rebutted by testimony from the defendant personally, thereby calling attention to the fact the accused exercised his or her privilege against self-incrimination. *Robedeaux v. State*, 1993 OK CR 57, ¶ 68, 866 P.2d 417, 433.

None of the remarks challenged by Adames were such that the jury would naturally and necessarily understand that the statements could only be rebutted by testimony from Adames personally. The challenged remarks, read in context, fall within the wide latitude of acceptable argument and fall on the side of permissible comments that the prosecution's evidence was unrefuted rather than on Adames' failure to testify. Moreover, the district court instructed the jury that the fact Adames did not testify could not be used against him and we presume the jury followed its instructions. Adames has failed to show that the prosecutor unfairly called attention to the fact he exercised his privilege against self-incrimination. *Id.* Thus we find no error and deny this claim.

2.

Adames contends he was denied a fair sentencing proceeding because of the prosecutor's remarks imploring the jury to return harsh sentences to prevent him from committing future crimes. *Brewer v. State*, 1982 OK CR 128, ¶ 8, 650 P.2d 54, 58 ("It is error to comment on the possibility that a defendant may commit crimes in the future.") Because Adames did not object, review is for plain error only under the test set forth in the preceding proposition.

Contrary to his claim, this is not a case where the prosecutor argued that the jury must convict Adames to prevent him from committing future crime. The focus of the prosecutor's argument asked the jury to consider Adames' criminal behavior and record in fixing an appropriate punishment. Moreover, the record does not support a finding that the argument unfairly influenced the jury's sentencing verdicts. Adames faced sentences of fifteen years to life on Count 1 based upon six prior convictions and three years to life on Count 3 based upon five prior convictions. The jury fixed punishment well below the maximum on each conviction, thirty-five years and ten

years respectively. We find, based on this record, Adames has failed to show that error, much less plain error, occurred. This claim is denied.

3.

Adames argues the order revoking his suspended sentences in Case No. CF-2015-112 must be reversed because of a violation of the 20-day rule. He maintains that he did not waive his right to a revocation hearing within 20 days after entry of his plea of not guilty.

Title 22 O.S.Supp.2016, § 991b(A) states:

Whenever a sentence has been suspended by the court after conviction of a person for any crime, the suspended sentence of the person may not be revoked, in whole or part, for any cause unless a petition setting forth the grounds for such revocation is filed by the district attorney with the clerk of the sentencing court and competent evidence justifying the revocation of the suspended sentence is presented to the court at a hearing to be held for that purpose *within twenty (20) days after the entry of the plea of not guilty to the petition, unless waived by both the state and the defendant.*

Emphasis added.

The record shows that, at arraignment on the application to revoke, Adames entered a plea of not guilty, moved for a continuance, and waived his right under Section 991b(A) to a hearing on the matter within 20 days. Adames' claim asserting a violation of the 20-day rule

is simply not supported by the record. Because Adames waived the 20-day rule, there was no error and the revocation order is valid. This claim is denied.

DECISION

The Judgment and Sentence of the district court in Case No. CF-2017-256 is **AFFIRMED**. The Revocation Order in Case No. CF2015-112 is also **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2019), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF CANADIAN COUNTY THE HONORABLE PAUL HESSE, DISTRICT JUDGE

APPEARANCES AT TRIAL

CRAIG CORGAN
ATTORNEY AT LAW
P.O. BOX 2956
OKLAHOMA CITY, OK 73101
COUNSEL FOR DEFENDANT

APPEARANCES ON APPEAL

ROBERT W. JACKSON
APPELLATE DEFENSE
COUNSEL
P.O. BOX 926
NORMAN, OK 73070
COUNSEL FOR APPELLANT

AUSTIN T. MURREY
ASSISTANT DISTRICT
ATTORNEY
303 N. CHOCTAW
EL RENO, OK 73036
COUNSEL FOR STATE

MIKE HUNTER
ATTORNEY GENERAL
OF OKLAHOMA
KATHERINE R. MORELLI
ASSISTANT ATTORNEY
GENERAL
313 N.E. 21ST STREET
OKLAHOMA CITY, OK 73105
COUNSEL FOR APPELLEE

OPINION BY: ROWLAND, J.

LEWIS, P.J.: Concur
KUEHN, V.P.J.: Concur
LUMPKIN, J.: Concur in Results
HUDSON, J.: Concur