STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GABRIEL CECILIO LOPEZ, a/k/a GABRIEL CECILO LOPEZ,

Defendant-Appellant.

UNPUBLISHED
June 17, 1997

No. 193835
Ottawa Circuit Court
LC No. 95-019165 FC

Before: Gage, P.J., and McDonald and Fitzgerald, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279. He was sentenced as an habitual offender, fourth offense, MCL 769.12; MSA 28.1084, to three to ten years' imprisonment. Defendant appeals as of right. We affirm.

On July 6, 1995, Jaime Mata left his house with three of his friends to go to a local party store in the city of Holland. They were walking through an alleyway when they were approached by defendant and defendant's brother. Defendant asked Mata if he belonged to the gang that had jumped his brother. When Mata denied this, defendant used threatening language and then struck Mata with a beer bottle and stabbed him twice in the back, puncturing a lung as Mata tried to escape. Mata and his friends ran away when defendant told his brother to get a shotgun. Defendant chased them, throwing the beer bottle at them. Mata collapsed on a nearby lawn with life-threatening wounds. Defendant and his brother fled in a car driven by friends.

I

Defendant first argues that there was insufficient evidence to sustain the jury's verdict of assault with intent to do great bodily harm less than murder because the prosecutor failed to disprove defendant's theory of self-defense beyond a reasonable doubt. We disagree. Once evidence of self-defense is introduced, the prosecutor bears the burden of disproving it beyond a reasonable doubt. *People v Fortson*, 202 Mich App 13, 20; 507 NW2d 763 (1993). The test for determining whether a

defendant acted in lawful self-defense is whether (1) defendant honestly believed that he was in danger, (2) the danger feared was death or serious bodily harm, (3) the action taken by defendant appeared at the time to be immediately necessary, and (4) defendant was not the initial aggressor. *People v Deason*, 148 Mich App 27, 31; 384 NW2d 72 (1985). Here, the record shows that defendant attacked his victim first, without provocation, while using threatening language. The victim did not have a weapon, his friends did not join in the fight, and defendant chased after all of them. The record here is inconsistent with defendant's theory that he was in fear for his life or of serious bodily injury. *People v Heflin*, 434 Mich 482, 502-503; 456 NW2d 10 (1990).

Furthermore, for lawful self-defense, a defendant generally must retreat if retreat is safely possible. *People v Mroue*, 111 Mich App 759, 765; 315 NW2d 192 (1981). Although the duty to retreat does not apply when a defendant is in his own home, *People v Dabish*, 181 Mich App 469, 474; 450 NW2d 44 (1989), defendant's actions in this case occurred in an alleyway, defendant clearly did not retreat, and his actions were not immediately necessary. Finally, the record is replete with evidence that defendant was the initial aggressor. Accordingly, the record reflects sufficient evidence to refute defendant's theory of self-defense beyond a reasonable doubt.

II

Defendant next argues that he was denied a fair trial because the prosecutor vouched for her witnesses' truthfulness. We disagree. The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995). Here, because defendant failed to object to the prosecutor's comments, this Court's review on appeal is limited because we will not review alleged prosecutorial misconduct unless the misconduct is sufficiently egregious that no curative instruction would counteract the prejudice to defendant or unless manifest injustice would result from failure to review the alleged misconduct. *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996). Neither situation is present here. A prosecutor may argue from the facts that a witness is not worthy of belief, *id.*, or that a witness should be believed, *People v Swartz*, 171 Mich App 364, 372; 429 NW2d 905 (1988). Even if the prosecutor's remarks here had been inappropriate, a timely curative instruction could have cured any transgression. *People v Gonzalez*, 178 Mich App 526, 535; 444 NW2d 228 (1989). Also, given the overwhelming evidence of defendant's guilt, we do not believe the remarks rise to the level of error requiring reversal. *Launsburry, supra* at 361. Defendant was not denied a fair and impartial trial. *Paquette, supra* at 342.

Affirmed.

/s/ Hilda R. Gage
/s/ Gary R. McDonald
/s/ E. Thomas Fitzgerald