STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 17, 2016
v	No. 326648 Kalkaska Circuit Court
CHRISTOPHER MICHAEL LADD, Defendant-Appellant.	LC No. 14-003677-FH

Before: GLEICHER, P.J., and SAWYER and M. J. KELLY, JJ.

PER CURIAM.

Defendant, Christopher Michael Ladd, appeals by right his jury conviction of assault with intent to do great bodily harm less than murder, MCL 750.84, operating a motor vehicle while intoxicated, third offense, MCL 257.625, and operating a vehicle with a suspended license, MCL 257.904. The trial court sentenced Ladd to concurrent prison terms of 16 months to 10 years for the assault charge, 11 months for OWI, and 186 days for operating a vehicle with a suspended license. Because Ladd has not shown that there were any errors warranting a new trial, we affirm.

I. BASIC FACTS

Charles Shonk testified that he met Ladd for the first time while on a golf outing; at that time, he had talked with Ladd about his business detailing automobiles. Later that same day Shonk ran into Ladd at a Kalkaska bar. They chatted outside the bar and Ladd asked Shonk to give him an estimate on auto detailing for a Jaguar in the bar's parking lot. Soon thereafter, Ladd offered to take Shonk for a ride in the car, which Shonk accepted. According to Shonk, Ladd drove to his home, which was a short distance from the bar. While the two men were standing outside the car, Ladd retrieved a golf club from the trunk and struck Shonk in the head. He continued to strike Shonk with the club. Eventually, Shonk ran back to the bar, where a bartender attempted to help him. Shonk testified that he spent several hours in the emergency room getting his "face sewn back together," and explained that one of the blows nearly separated his ear from his head.

Officers later questioned Ladd and he admitted that he did not have a valid driver's license, that he drove back from the bar, and that he was involved in an altercation with Shonk. But Ladd maintained that Shonk was the aggressor. At trial, Ladd testified that Shonk attacked him while he was reaching into his car for a bottle of alcohol. Ladd maintained that he

"elbowed" Shonk once, which caused Shonk to run away. He denied driving the Jaguar, testified that he told investigating officers that his roommate drove the Jaguar that night, and asserted that the incident took place in the bar parking lot.

The jury rejected Ladd's version of events and convicted him as already described. Ladd then appealed in this Court.

II. ANALYSIS

A. PROSECUTORIAL ERROR

Ladd argues that the prosecutor committed error warranting a new trial when he made a reference to Ladd losing weight after spending six months on a diet of jail food. He argues this denied him the presumption of innocence. To preserve a claim of prosecutorial error, the defendant must object to the conduct at issue and ask for a curative instruction. *People v Bennett*, 290 Mich App 465, 475; 802 NW2d 627 (2010). Ladd's lawyer began to address the court after the prosecutor's remark, but the prosecutor interrupted and the parties held a bench conference. After the bench conference, the prosecutor retracted the statement and the court asked jurors whether they could disregard the improper statement; the jurors apparently agreed that they could with a show of hands. Ladd's lawyer asked for a curative instruction when proceedings for the day had concluded. The court invited the parties to consider what instruction would be appropriate, and told them that it would consider the proposals when trial reconvened the following day. Ladd's lawyer did not renew his request the next day. Because Ladd's lawyer apparently accepted the trial court's handling of this matter, we conclude that this claim of error is unpreserved. Accordingly, our review "is limited to ascertaining whether plain error affected defendant's substantial rights." *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008).

This Court reviews a claim of prosecutorial error "on a case-by-case basis by examining the record and evaluating the remarks in context, and in light of defendant's arguments." *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). "Given that a prosecutor's role and responsibility is to seek justice and not merely convict," the test for prosecutorial error is whether the prosecutor's remarks denied the defendant a "fair and impartial trial." *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). A prosecutor's improper remarks will not warrant a new trial "where a curative instruction could have alleviated any prejudicial effect." *People v Ackerman*, 257 Mich App 434, 449; 669 NW2d 818 (2003).

While questioning the bartender who aided Shonk, the prosecutor asked: "Is he—what would you describe him as far as size; large man, weight, build, at the time of the incident? Obviously he spent the last six months in jail and probably lost like 50 pounds on the stuff they feed people there." After a bench conference, the prosecutor addressed the jury and acknowledged that he made a mistake:

> I just want to address the jury that I made a misstatement there. Defendant is—I—I was talking about the time lapse. This is six months from when it occurred, and I made a misstatement saying that he's a jailee or something to that effect, and that is absolutely wrong. It's incorrect. He is a free man. Obviously

> innocent until proven guilty. So that's my mistake. It's not part of the witness's issue there, so I'd like to apologize for that and just make sure it's all clear in your mind that, you know, he is innocent ['']till proven guilty, until I can present my proofs, and if there's any question about that, I'd sure like to hear about it so—

The trial court then asked the jurors to raise their hands if they could disregard the prosecutor's misstatement, and all jurors raised their hands to indicate that they could do so.

Ladd compares the prosecutor's remark to cases holding that it is improper to make a defendant appear at trial in chains or wearing prison clothing because it infringes on the presumption of innocence. See, e.g., *People v Shaw*, 381 Mich 467; 164 NW2d 7 (1969). These comparisons are inapt. Ongoing visible reminders of a defendant's status as a prisoner (and perhaps if seen in handcuffs, a dangerous one) is not like a brief and retracted reference to defendant having been in jail. Further, the court's instructions to the jury included the standard instruction that Ladd was presumed innocent. Jurors are presumed to follow their instructions. *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008). Thus, in light of the prosecutor's retraction, the court's instructions, and the jurors' commitment to disregarding the statement, we conclude that the prosecutor's ill-advised comment did not deny Ladd a fair and impartial trial.

B. SELF-DEFENSE

Ladd also contends that the prosecutor denied him his constitutional right to present a defense. The prosecutor argued to the jury that Ladd could not assert self-defense because he was engaged in criminal activity—namely, he used marijuana, drove while under the influence and with a suspended license, and committed an assault and battery. Ladd did not object to the prosecutor's mischaracterization of the law; therefore, we must review his claim for plain error. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Although Ladd frames this issue as one involving the deprivation of his right to present the defense of self-defense, he does not argue that the trial court prevented him from presenting evidence of self-defense, or that it refused to instruct or improperly instructed the jury on his theory. Rather, he argues that the prosecutor misstated the applicable law and then improperly argued that Ladd could not avail himself of that defense on the basis of his erroneous understanding. Accordingly, the appropriate test is whether the prosecutor's remarks deprived Ladd of a fair and impartial trial. *Dobek*, 274 Mich App at 63.

As the parties agree, the prosecutor's closing argument stems from language set forth in the Self-Defense Act, see MCL 780.971 et seq., which provides that an individual may use force other than deadly force in self-defense if the individual is not committing a crime at the time:

> An individual who has not or is not engaged in the commission of a crime at the time he or she uses force other than deadly force may use force other than deadly force against another individual anywhere he or she has the legal right to be with no duty to retreat if he or she honestly and reasonably believes that the use of that force is necessary to defend himself or herself or another individual from the imminent unlawful use of force by another individual. [MCL 780.972(2).]

This Court has held that the Self-Defense Act altered the common law duty to retreat by allowing a person to "stand one's ground" in certain situations in which a duty to retreat would have existed at common law. *People v Conyer*, 281 Mich App 526, 530; 762 NW2d 198 (2008). Nevertheless, the act did not otherwise alter the common law regarding self-defense because it "does not diminish an individual's right to use deadly force or force other than deadly force in self-defense or defense of another individual as provided by the common law of this state in existence on October 1, 2006." MCL 780.974. The act only defines situations wherein a defendant can exercise his or her right to self-defense without the duty to retreat that existed under common law. If the standard set forth in the act does not apply, then "the common law of this state applies except that the duty to retreat before using deadly force is not required if an individual is in his or her own dwelling or within the curtilage of that dwelling." MCL 768.21c(1). Thus, at most, the evidence that Ladd was committing various crimes during the events at issue meant that he could not rely on the Self-Defense Act's abrogation of the common law duty to retreat. He could, however, still assert common law self-defense.

Under the common law, a person who commits a wrongful act may be deemed an initial aggressor for purposes of self-defense, if the other person's response was reasonably attributable to the wrongful act. See *People v Townes*, 391 Mich 578, 592-593; 218 NW2d 136 (1974). But the mere fact that a person was committing a wrongful act does not necessarily preclude that person from asserting self-defense. If the defendant acted in defense against an attack that was not reasonably attributable to his or her wrongful conduct, he or she would still be able to assert common law self-defense. *Id.* at 593. Thus, the prosecutor clearly misstated the law of self-defense. Nevertheless, we do not agree that this error warrants relief.

The trial court made it clear to the jury that it alone instructs the jury on the law; it instructed the jury that, "if a lawyer says something different about the law, follow what I say." The trial court further instructed the jury on the elements of self-defense and Ladd has not challenged the accuracy or completeness of the trial court's instructions. Again, jurors are presumed to follow their instructions. *Unger*, 278 Mich App at 235. Moreover, Ladd has not shown that any error affected the outcome. *Carines*, 460 Mich at 763. The evidence showed that Shonk suffered from severe injuries to his head and bruising to his arm. Yet, Ladd denied hitting Shonk with any object and testified that he "elbowed" him only once. Thus, there was a significant disparity between the number and severity of Shonk's injuries and the number of times and degree of force that Ladd claimed to use in self-defense. The bartender also asserted that Ladd returned to the bar threatening to " 'finish what he started,' " and attempted to attack Shonk again before being restrained. Such actions are inconsistent with self-defense.

On this record, Ladd has not established plain error affecting his substantial rights. *Id.*

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ David H. Sawyer
/s/ Michael J. Kelly