

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PHILLIP KEITH DUNLAP,

Defendant-Appellant.

UNPUBLISHED

March 12, 2009

No. 281856

Livingston Circuit Court

LC No. 05-015439-FH

Before: Murphy, P.J., and Fitzgerald and Markey, JJ.

PER CURIAM.

Following a bench trial, the trial court convicted defendant of felonious assault, MCL 750.82, and sentenced him as an habitual offender, fourth offense, MCL 769.12, to 36 to 180 months' imprisonment for his conviction. He appeals as of right. We affirm defendant's conviction, but vacate the portion of the judgment of sentence ordering defendant to pay attorney fees and remand for further consideration of defendant's ability to pay.

On October 9, 2005, defendant and his wife, Laura Dunlap, engaged in a verbal and physical altercation. Laura and defendant threw items at each other and defendant bit Laura on the nose. According to the testimony of Laura and a family friend who was present during the argument, defendant grabbed Laura and then smashed a plate onto her head. As a result of this attack, Laura suffered a two-inch long head wound. Defendant testified he threw the plate at Laura from some distance and did so in defense of himself after Laura physically attacked him. According to defendant, Laura repeatedly hit, pushed and attempted to bite defendant during the course of the argument.

Defendant first contends he is entitled to a new trial because the prosecution engaged in misconduct when it impeached him with evidence of his prior convictions. We disagree. Because defendant failed to object to any of the alleged occurrences of prosecutorial misconduct, this Court's review is limited to plain error affecting a defendant's substantial rights. *People v Cox*, 268 Mich App 440, 451; 709 NW2d 152 (2005); *People v Barber*, 255 Mich App 288, 296; 659 NW2d 674 (2003). To avoid forfeiture under the plain error rule, three requirements must be met: "1) an error must have occurred, 2) the error must be plain, and 3) the error must have affected defendant's substantial rights, which generally requires defendant to show that the error affected the outcome of the lower court proceedings." *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Defendant correctly asserts that this evidence was inadmissible pursuant to MRE 609. Defendant also argues the evidence was not admissible under MRE 404(b) because the evidence was used by the prosecution to establish defendant's aggressive character and that he acted in accordance with that character. MRE 404(b) states:

(1) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

(2) The prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial and the rationale, whether or not mentioned in subparagraph (b)(1), for admitting the evidence. If necessary to a determination of the admissibility of the evidence under this rule, the defendant shall be required to state the theory or theories of defense, limited only by the defendant's privilege against self-incrimination.

In order for other acts evidence to be admissible under MRE 404(b), "the evidence must be offered for a proper purpose," which includes proof of a common scheme, intent, motive and opportunity. *People v Pesquera*, 244 Mich App 305, 318; 625 NW2d 407 (2001); MRE 404(b)(1). "If the proponent's only theory of relevance is that the other act shows defendant's inclination to wrongdoing in general to prove that the defendant committed the conduct in question, the evidence is not admissible." *People v VanderVliet*, 444 Mich 52, 63; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). The prosecutor asserts that the evidence of defendant's prior convictions was used to rebut defendant's claim that he acted in self-defense and that he did not intend to injure Laura. To prove defendant was guilty of felonious assault, the prosecution had to establish that defendant intended "to injure or place the victim in reasonable apprehension of an immediate battery." *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). At trial, defendant denied he intended to injure Laura and that he was defending himself. Thus, evidence of his prior convictions for assaultive behavior was highly relevant to prove defendant intended to injure Laura that night and that he was not acting in self-defense.

Even assuming the evidence was improperly admitted, reversal is unwarranted. Defendant cannot show that any error affected defendant's substantial rights, which "generally requires defendant to show that the error affected the outcome of the lower court proceedings." *Carines, supra* at 763-764. There was a great deal of evidence establishing defendant's guilt independent of any prior convictions or previous bad-acts evidence. The error in permitting the evidence of his prior convictions was not outcome determinative. See *People v Bartlett*, 197 Mich App 15, 20; 494 NW2d 776 (1992) ("Any error in permitting the introduction of evidence of the prior convictions was harmless given the overwhelming evidence of guilt in this case."). We also note that the prejudicial impact of this evidence was lessened further by the fact that defendant was convicted following a bench trial. "A judge, unlike a juror, possesses an understanding of the law which allows him to ignore such errors and to decide a case based

solely on the evidence properly admitted at trial.” *People v Taylor*, 245 Mich App 293, 305; 628 NW2d 55 (2001). In *Taylor, supra*, this Court concluded, “because the trial court’s decision was not affected by the disputed testimony, defendant has not shown that any error substantially affected his rights and, therefore, his claim must fail.” Similarly, in the present case, there is no evidence in the record to establish the trial court based its decision on the improperly admitted evidence. Thus, defendant is unable to establish the admittance of the evidence was outcome determinative and constituted a plain error requiring a new trial. *Carines, supra* at 763-764.

Defendant also maintains the trial court impermissibly concluded that defendant had a duty to retreat from his own home. A trial court’s conclusions of law are reviewed de novo. *People v Unger (On Remand)*, 278 Mich App 210, 243; 749 NW2d 272 (2008). In general, a person is required to attempt to retreat or to avoid the harm if possible before resorting to self-defense. *People v Riddle*, 467 Mich 116, 127; 649 NW2d 30 (2002). However, Michigan law has recognized that “a man is not obliged to retreat if assaulted *in his dwelling*.” *Id.* (emphasis in original). A person is justified in using force, even killing another person, in self-defense “if the defendant honestly and reasonably believes that his life is in imminent danger or that there is a threat of serious bodily harm.” *People v James*, 267 Mich App 675, 677; 705 NW2d 724 (2005). There is no evidence in the record to support the claim that defendant “honestly and reasonably” believed his life was in danger or that he was in danger of suffering serious bodily injury. *Id.* In fact, evidence at trial established that defendant escalated the conflict by laughing and taunting Laura. In addition, defendant testified he threw the plate from some distance as a reaction to Laura’s actions and to prove to her that being hit with household items was painful. Even though the record indicates the trial court considered defendant’s failure to retreat, there is no reason to believe the trial court’s ultimate conclusion rejecting any claim of self-defense requires reversal. Because there was no evidence to establish that defendant was justified in using force in self-defense, the trial court’s ultimate conclusion that self-defense did not excuse defendant’s actions was proper. *James, supra*. Consequently, reversal is unnecessary.

Defendant next contends the trial court inappropriately required defendant to reimburse a portion of his court-appointed attorney fees without considering whether defendant had the current or future ability to pay. We agree. In *People v Dunbar*, 264 Mich App 240, 253-254; 690 NW2d 476 (2004), this Court held when a trial court imposes a fee for reimbursing an appointed attorney, it “must take cognizance of the individual’s resources, the other demands on his own and family’s finances, and the hardships he or his family will endure if repayment is required.” *Id.* The trial court “need[s] to provide some indication of consideration, such as noting it reviewed the financial and employment sections of the defendant’s presentence investigation report or, even more generally, a statement that it considered defendant’s ability to pay.” *Dunbar, supra* at 254. In this case, the record is silent as to whether the trial court engaged in the required consideration. Thus, we vacate the portion of the judgment of sentence that ordered defendant to pay attorney fees. On remand, the trial court shall address defendant’s current and future financial circumstances and foreseeable ability to reimburse the county for attorney fees before determining whether defendant should pay those fees. At the trial court’s discretion, the decision may be made based on the record without the need for a formal evidentiary hearing. *Id.* at 252-256.

Next, defendant argues he is entitled to credit for the time served in jail before being sentenced in this case. We disagree. Issues of law are reviewed de novo. *People v Blackmon*

(*On Remand*), 280 Mich App 253, 259; ___ NW2d ___ (2008). In *People v Seiders*, 262 Mich App 702, 705; 686 NW2d 821 (2004), this Court held “when a parolee is arrested for a new criminal offense, he is held on a parole detainer until he is convicted of that offense, and he is not entitled to credit for time served in jail on the sentence for the new offense.” Because defendant was held on a parole detainer, the trial court did not abuse its discretion when it refused to give defendant credit on this new offense for the time he served in jail. In reaching our conclusion, we reject defendant’s argument that the rule of *Seiders* does not apply. *People v Filip*, 278 Mich App 635, 642-643; 754 NW2d 660 (2008). We also reject defendant’s argument that “there is no way for time in jail to be credited against the first minimum sentence, because that minimum has been served.” *Id.* at 642.

Affirmed in part, vacated in part, and remanded for proceedings consistent with this opinion. Jurisdiction is not retained.

/s/ William B. Murphy
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey