STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 5, 2013
v	No. 306269 Oakland Circuit Court
HAYES BACALL, Defendant-Appellant.	LC No. 2010-233054-FC

Before: SHAPIRO, P.J., and SERVITTO and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of first-degree murder, MCL 750.316, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, arising out of the killing of defendant's nephew, Saif Jameel. Defendant was sentenced to life in prison for his first-degree murder conviction and to two years' imprisonment for his felony-firearm conviction. We affirm.

On July 2, 2010, police received a call about gunshots being fired at a BP gas station owned by the victim. The responding officer found defendant pacing outside, talking on his cell phone, carrying a holstered gun. The officer asked what had happened, and defendant replied that he killed his nephew because the nephew owed him $400,000. Other evidence demonstrating that defendant killed the victim, including eyewitness testimony, was admitted at trial. At trial the defense contended that defendant killed Jameel in self-defense.

Defendant argues that his right against double jeopardy was violated when the jury sent out a note during deliberations which indicated that it was unanimous on a lesser offense. A challenge regarding double jeopardy presents a question of constitutional law that we review de novo. *People v Smith*, 478 Mich 292, 298; 733 NW2d 351 (2007). We also review claims of instructional error de novo. *People v Kowalski*, 489 Mich 488, 501; 803 NW2d 200 (2011). The Double Jeopardy Clause affords individuals protection against a second prosecution for the same offense after acquittal. *Smith*, 478 Mich at 299.

During deliberations, the jury sent a note to the trial court which stated as follows:

> [C]an the jury decide on a verdict of a lesser cause when they are unanimous even though some may feel a stronger verdict is what they believe[?]

Based on the jury's note, the trial court did not believe the jury had reached a unanimous verdict. The trial court concluded that the jury was not in agreement and that was why it sent out a note rather than a verdict. The trial court ruled that it was appropriate for the jury to be instructed that it may go back to square one and consider first-degree murder, after discussing second-degree murder or voluntary manslaughter, because it was undecided. The trial court ruled that this instruction was not directing the verdict.

The trial court repeated a jury instruction and gave the jury a revised *Allen*[1] instruction which did not include the first paragraph of the instruction because the court acknowledged that the jury was not deadlocked. The trial court instructed the jury as follows:

> I know you've got all the jury instructions but I'm going to repeat one of them and then I'm going to give you a new one. Okay.
>
> When you -- this is what I told you and you already have this -- when you go to the jury room, you should first choose a foreperson. The foreperson should see to it your discussions are carried on in a businesslike way and that everyone has a fair chance to be heard. During your deliberations, please turn off your cell phones or other communications equipment until we recess.
>
> A verdict in a criminal case must be unanimous. In order to return a verdict, it is necessary that each of you agree on that verdict. In the jury room, you will discuss the case among yourselves but, ultimately, each of you will have to make up your own mind. Any verdict must represent the individual considered judgment of each juror. It's your duty as jurors to talk to each other and make every reasonable effort to reach agreement. Express your opinions and the reasons for them but keep an open mind as you listen to your fellow jurors. Rethink your opinions and do not hesitate to change your mind if you decide you were wrong. Try your best to work out your differences. However, although you should try to reach agreement, none of you should give up your honest opinion about the case just because other jurors disagree with you or just for the sake of reaching a verdict. In the end, your vote must be your own and you must vote honestly and in good conscience.
>
> * * *
>
> Remember it is your duty to consult with your fellow jurors and try to reach agreement, if you can do so without violating your own judgment. To return a verdict, you must all agree, and the verdict must represent the judgment of each of you. As you deliberate, you should carefully and seriously consider the views of your fellow jurors. Talk things over in a spirit of fairness and frankness. Naturally, there will be differences of opinion. You should each not only express

[1] *Allen v United States*, 164 US 492; 17 S Ct 154; 41 L Ed 528 (1896).

> your opinion but also give the facts and the reasons on which you base it. By reasoning the matter out, jurors can often reach agreement.
>
> I don't mean to suggest you haven't already done this but -- when you continue your deliberations, do not hesitate to rethink your own views and change your opinion if you decide it was wrong.

Based on the jury's note, which stated that some jurors felt that a stronger verdict *was appropriate*, but did not indicate it was deadlocked on first degree murder, and the fact that the jury did not mark the second degree murder box on the verdict form, we conclude that the trial court correctly determined that the jury had not reached a unanimous verdict. Thus, the jury did not acquit defendant on his first-degree murder charge. Therefore, defendant's right against double jeopardy was not violated. See *Smith*, 478 Mich at 299. Furthermore, because the jury was undecided, the trial court's instruction was appropriate.

Defendant next argues that the prosecution committed misconduct regarding several statements made during its closing argument. This Court reviews preserved issues regarding prosecutorial misconduct de novo to determine if the defendant was denied a fair and impartial trial. *People v Mann*, 288 Mich App 114, 119; 792 NW2d 53 (2010).

"Given that a prosecutor's role and responsibility is to seek justice and not merely convict, the test for prosecutorial misconduct is whether a defendant was denied a fair and impartial trial." *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). "[A] prosecutor may not argue facts not in evidence or mischaracterize the evidence presented." *People v Watson*, 245 Mich App 572, 588; 629 NW2d 411 (2001). However, the prosecution is free to argue the evidence and all reasonable inferences arising from it as they relate to the prosecution's theory of the case. *Dobek*, 274 Mich App at 66. Also, "[a] prosecutor may fairly respond to an issue raised by the defendant." *People v Brown*, 279 Mich App 116, 135; 755 NW2d 664 (2008).

During closing argument, the prosecution made the following arguments:

> Defense counsel says, oh, the defendant is a good guy for loaning his nephew the money. He's not doing this out of the goodness of his heart. He's charging interest from day one. These actions are no different than that of a loan shark.
>
> * * *
>
> This defendant who used to be Hazim Dekho moves to Michigan. He changes his name to Hayes Bacall. The defendant then applies for a Michigan concealed pistol license but the defendant fails to tell anyone that he had the unlawful discharge of . . . a firearm . . . conviction.
>
> * * *
>
> In English, the defendant says he killed his nephew for $400,000. That's the first thing out of his mouth when the officer asked him what happened. In

> Arabic, the defendant is consistent with that theme. He says I killed, he killed the victim and he's also insulting the victim by talking about he F'd his sister and things like that along the way. Defendant never says self-defense to the police officer and the officer gives him three separate chances. He talks about what happened, what happened, you know, what happened initially -- I shot my nephew, owes me $400,000. Who owes who the money, clears that up, and then he says -- is that why you shot him, because of the $400,000 -- and the defendant says yes. Then later, after the Miranda rights, the officer asks him again about shooting a nephew. He says -- well, he hasn't given me anything in about a year. He never says self-defense or even anything like self-defense. And on the witness stand, defense counsel asked the defendant -- well, why did you tell the officer, you know, you shot him because of $400,000 -- and the defendant slips up, he says -- because that was the main reason at that time. So practice though he may, the truth shines through.
>
> Now, at trial is the first time the defendant says self-defense.

During the cross-examination of the decedent's brother, Samir Bacall, defense counsel asked Bacall whether defendant had charged the decedent a 20 percent interest rate like a "loan shark." In response to defendant's line of questioning, the prosecution was permitted to argue that defendant's actions were like that of a loan shark because defendant initially brought up the issue. *Brown*, 279 Mich App at 135. Furthermore, the prosecution's argument was appropriate because it related to its theory of the evidence, which is that defendant loaned the decedent a large sum of money and when the decedent did not pay defendant back, defendant murdered the decedent. *Dobek*, 274 Mich App at 66.

Defendant admitted under cross-examination that he had pled guilty to the unlawful discharge of a firearm in Arizona in 2002. However, the Court determined that any link between the Arizona conviction and defendant's application for a Michigan CCW permit was a collateral issue, and sustained defendant's objections to the line of questioning before the prosecutor could establish a connection. Nevertheless, the prosecutor reintroduced the alleged connection in his closing statement. While defendant objected to the prosecution's comments regarding defendant's alleged misrepresentation on his application for a Michigan CCW, defendant did not request a curative instruction, which is the appropriate response to an improper remark by the prosecution. *Mann*, 288 Mich App at 121-122. Also, the trial court provided the jury with the instruction that the prosecution's statements and arguments are not evidence. Any prejudice resulting from the prosecutor's remarks was cured by the jury instructions. *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003) ("Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors."). Therefore, defendant was not denied a fair and impartial trial.

There was record evidence that defendant did not tell the police that he shot and killed the decedent in self-defense. When defendant was approached at the scene regarding this incident Troy police officer Gregory Stopczynski asked defendant what happened. Defendant responded, "I shot my nephew, he owes me $400,000." Defendant was then arrested. While defendant was in the backseat of Stopczynski's patrol car his conversation with Stopczynski was recorded. Stopczynski asked defendant, "[S]o that's why you shot him?" Defendant responded, "yes, I -- I -- I -- I." Also, while defendant was in the patrol car, defendant made an unauthorized phone

call and said over the phone in Arabic, "Hello, I killed -- I killed your brother. I f…… his sister; I killed him." Stopczynski also asked defendant how many times he shot the decedent. Defendant answered, "I shoot (sic) him six, seven times." Therefore, the prosecution was permitted to argue its theory of this evidence, which was that defendant's failure to assert self-defense to the police supports the conclusion that he did not act in self-defense. *Dobek*, 274 Mich App at 66.

However, the prosecution concedes that it possessed several recordings of phone conversations in which defendant claimed self-defense. Therefore, the prosecutor's statement that defendant "never said self-defense" before trial was clearly false. The use of a false statement to buttress the prosecution's case on the key issue was highly inappropriate. Prosecutors play a special and unique role in our system of justice. "It is the duty of the public prosecutor to see that the person charged with crime receives a fair trial, so far as it is in his power to afford him one, and . . . methods to procure conviction must be such as accord with the fair and impartial administration of justice . . . *People v Dane*, 59 Mich 550, 552; 26 NW 781 (1886). "Deliberate false statements by those privileged to represent the [government] harm the trial process and the integrity of our prosecutorial system. We do not lightly tolerate a prosecutor asserting as a fact to the jury something known to be untrue or, at the very least, that the prosecution had very strong reason to doubt. *United States v Blueford*, 312 F3d 962, 968 (CA 9, 2002).

After conclusion of the arguments and the reading of the instructions, defense counsel moved for a mistrial or a curative instruction. The prosecutor took the position that since the tapes of the phone conversations in which defendant claimed self-defense had not been played for the jury, there was nothing false about the statement that defendant had never asserted self-defense prior to trial and that the assertion was merely fair comment on the evidence. We disagree with this characterization of the prosecutor's statement. The prosecutor did not point out the lack of any admitted evidence of a claim of self-defense, but made the broader and clearly false affirmative assertion that defendant had never asserted self-defense at any time prior to trial. The prosecutor's statement did constitute misconduct and the trial court should have provided a curative instruction when it was requested even though the jury had already retired to deliberate.

Having concluded that there was prosecutorial misconduct, we must determine whether the prosecutor's improper assertion denied defendant a fair trial. *People v Blackmon*, 280 Mich App 253, 267; 761 NW2d 172 (2008). Given the overwhelming evidence which includes the testimony of an eyewitness to the shooting, defendant's statements to the police and a videotape of some of the events themselves, we conclude that the prosecutor's improper statement did not deny defendant a fair trial and so we do not reverse defendant's conviction.

Defendant next argues that the trial court committed error when it allowed the jurors to deliberate in the courtroom in the presence of others. This Court reviews unpreserved constitutional error for plain error that affected the defendant's substantial rights. *People v Carines*, 460 Mich 750, 764-766; 597 NW2d 130 (1999).

The Supreme Court of the United States recognizes the cardinal principle that "deliberations of the jury shall remain private and secret." *United States v Olano*, 507 US 725,

737; 113 S Ct 1770; 123 L Ed 2d 508 (1993) (quotation marks and citations omitted). "[T]he primary if not exclusive purpose of jury privacy and secrecy is to protect the jury's deliberations from improper influence." *Id*. at 737-738.

During deliberations, the jury requested to see a gun that had been admitted into evidence during the trial. The judge brought the jurors into the courtroom in order for them to view the gun because it was the court's policy for safety reasons that no weapons enter the jury room. The record indicates that the gun was inspected to make sure it was safe, it was then examined by counsel for each party, and that the prosecutor then handed the gun to the jurors. The trial court indicated that it preferred that the people present in the courtroom not sit and try to listen to the jurors while they were viewing the gun because the jurors were in the middle of deliberations. The jury then requested to go to a specific area in the courtroom to look at the gun and the trial court permitted this and told the jurors to "[j]ust pretend like we're not here." The record suggests that the jurors not only viewed the weapon, but spoke among themselves for about three minutes in the courtroom while doing so, although none of the conversation was recorded. Immediately after the jurors finished viewing the gun, they returned to the jury room to continue deliberations.

The record indicates that the purpose of the jurors being in the courtroom was specifically to safely view the gun in evidence. There is nothing improper about such a procedure. However, the court should clearly have instructed the jurors to remain silent during the viewing and to refrain from any deliberations or conversation until they returned to the jury room. When exhibits are published to the jury during trial, the jurors may not discuss those exhibits in the courtroom. This is as true, if not more so, once deliberations have begun. Allowing the jurors to speak to each other in the courtroom during the viewing was error. However, because there is no evidence or even reasonable inference that the verdict was prejudiced by this incident, we do not find that the error was reversible.

> [D]ue process does not require a new trial every time a juror has been placed in a potentially compromising situation. Were that the rule, few trials would be constitutionally acceptable . . . [I]t is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote. Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen. [*Olano.* at 738 (quotation marks and citation omitted).]

Lastly, defendant argues that judge's refusal to give a jury instruction on imperfect self-defense denied him the right to present a defense. However, "[u]nder Michigan law, the doctrine of imperfect self-defense does not exist as a freestanding defense that mitigates a murder to manslaughter because it was not recognized as such under the common law at the time the Legislature codified the crimes of murder and manslaughter." *People v Reese*, 491 Mich 127, 150; 815 NW2d 85 (2012). The Michigan Supreme Court elaborated on its rejection of the doctrine of imperfect self-defense as follows:

> Although we reject the doctrine of imperfect self-defense, many circumstances that involve what the Court of Appeals labeled "imperfect self-defense" can nevertheless provide grounds for a fact-finder to conclude that the prosecution has not proved the malice element that distinguishes murder from manslaughter. However, we emphasize that the operative analysis for the fact-finder is not whether the circumstances involving "imperfect self-defense" exist. Rather, the operative analysis is whether the prosecution has proved the element of malice beyond a reasonable doubt. This focus rightly turns on the *actual elements* of murder and manslaughter, rather than any label of "imperfect self-defense" as a judicially created shorthand that risks becoming unmoored from the actual element distinguishing the two crimes. [*Id*. at 150-151 (quotation marks and citations omitted).]

The trial court's decision not to give an imperfect self-defense instruction was therefore proper.

Affirmed.

/s/ Douglas B. Shapiro
/s/ Deborah A. Servitto
/s/ Amy Ronayne Krause