STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 19, 2013
v	No. 312175 Saginaw Circuit Court
GURBACHAN SINGH, Defendant-Appellant.	LC No. 11-036005-FH

Before: MURRAY, P.J., and DONOFRIO and BOONSTRA, JJ.

PER CURIAM.

Defendant appeals by right from his conviction following a jury trial of felonious assault, MCL 750.82(1), and assault and battery, MCL 750.81(1). He was sentenced to 24 months' probation and ordered that he pay $266 in costs and fees. We affirm.

I. FACTS

Defendant and his brother, Mukhtiar Singh, work at their family's liquor store. The store has a large counter with ceiling-high glass, totally separating customers from employees. To purchase an item, customers slide money into a rotating opening in the glass. This case involves a fight between the Singh brothers and a customer, Vinishion Brandon Fowlkes. A surveillance videotape from the store captured the events at issue.

On April 1, 2011, Fowlkes went to the store just after dark to purchase a baby bottle. He entered with three acquaintances. The Singh brothers accused one of the men with Fowlkes of stealing and locked all of the customers inside the store with a remote switch. Eventually, the merchandise was put back, and the Singhs unlocked the doors. Fowlkes purchased the bottle and left the store. Later that evening, Fowlkes returned to the market with two others. Fowlkes approached the window with a soda bottle and to return the baby bottle. At that point, both defendant and Mukhtiar were behind the counter. After a verbal conflict with defendant's brother, Fowlkes picked up the bottle of soda and threw it against the counter glass. Fowlkes then walked to the exit, but found he was locked inside the store. Mukhtiar then came from behind the counter with a baseball bat and began striking Fowlkes in the head, wrist, arms, knees, and side. As Mukhtiar continued hitting Fowlkes with the bat, Fowlkes fought back, hitting Mukhtiar with his fists and attempting to take control of the bat. Defendant then came from behind the counter and began striking Fowlkes in the head with closed fists.

Fowlkes was able to eventually break away from the two men. To avoid being struck, he tipped over racks of merchandise. He again attempted to leave the store, but was still locked inside. At that point, defendant went back behind the counter and grabbed an axe and approached Fowlkes. Fowlkes testified that he thought defendant was going to kill him. Eventually, the Singhs walked back behind the counter and pushed a button, unlocking the front doors, and Fowlkes exited.

According to defendant, who testified at trial, he and his brother believed Fowlkes was going to steal merchandise after he threw the bottle of soda. Defendant also testified that another customer told him Fowlkes might have a gun, but he admitted that he never saw him with one. According to defendant, he eventually came from behind the counter because he believed Fowlkes was going to hurt his brother.

II. ANALYSIS

First, defendant argues that the trial court erred in refusing to instruct the jury on self-defense and defense of others and property. This Court reviews for an abuse of discretion the trial court's determination "whether a jury instruction is applicable to the facts of a case[.]" *People v Guajardo*, 300 Mich App 26, 34; 832 NW2d 409 (2013). "An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes." *Id.* (quotation marks and citations omitted).

Under the state and federal constitutions, a criminal defendant is entitled to present a defense. US Const, Ams VI, XIV; Const 1963, art 1, § 13; *People v Kurr*, 253 Mich App 317, 326-327; 654 NW2d 651 (2002). Because instructional errors can infringe on this right, the trial court "must clearly present the case and the applicable law to the jury." *People v McGhee*, 268 Mich App 600, 606; 709 NW2d 595 (2005); *Kurr*, 253 Mich App at 327. Its "instructions must include all elements of the charged offenses and any material issues, defenses, and theories" supported by the evidence. *Id.* at 606. "A defendant asserting an affirmative defense must produce some evidence on all" of its elements before the trial court is required to give an instruction. *Guajardo*, 300 Mich App at 34-35 (quotation marks and citations omitted).

Defendant requested the following jury instruction for self-defense, defense of others, and defense of property:

> (1) Each defendant separately claims that he acted in lawful self-defense/defense of others and/or defense of property. A person has the right to use force to defend himself/another person and/or property under certain circumstances. If a person acts in lawful self-defense/defense of others and/or defense of property his actions are justified and he is not guilty of any offense.
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> (2) You should consider all the evidence and use the following rules to decide whether the defendants acted in lawful self-defense/defense of others and/or property. Remember to judge the defendant's conduct according to how the circumstances appeared to them at the time they acted.
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> (3) First, at the time they acted, the defendants must not have been engaged in the commission of a crime.

(4) Second, when they acted, the defendants must have honestly and reasonably believed that they had to use force to protect themselves/the other and/or property from the imminent unlawful use of force by another. If their belief was honest and reasonable, they could act at once to defend themselves/another and/or property, even if it turns out later that they were wrong about how much danger they/the other and/or property was in.

(5) Third, a person is only justified in using the degree of force that seems necessary at the time to protect himself/the other and/or property from danger. The defendants must have used the kind of force that was appropriate to the attack made [and] the circumstances as they saw them. When you decide whether the force used was what seemed necessary, you should consider whether the defendants knew about any other ways of protecting themselves/others/and/or their property, but you may also consider how the excitement of the moment affected the choice the defendants made.

(6) Fourth, the right to defend oneself/another person/property only lasts as long as it seems necessary for the purpose of protection.

(7) Fifth, the person claiming self[-]defense must not have acted wrongfully and brought on the assault. However, if the defendants only used words, that does not prevent them from claiming self-defense if they were attacked.

The trial court held that defendant was not entitled to the instruction, because the facts did not support the defense of self-defense, a conclusion with which we agree.

To begin, neither defendant nor his brother acted in lawful self-defense. Fowlkes threw the soda bottle, but he did not attack or physically threaten defendant or Mukhtiar. Moreover, defendant and Mukhtiar were both safely enclosed behind a locked protective counter. If defendant reasonably believed that Fowlkes was a danger, he could have (as could his brother) remained in the enclosed space behind the counter. When a defendant is "in a place of perfect safety" before assaulting the victim, it suggests that the use of deadly force by the defendant was not in self-defense. See *People v Riddle*, 467 Mich 116, 127 n 19; 649 NW2d 30 (2002). Further, defendant (or his brother) would not have locked Fowlkes inside the store if either felt Fowlkes was a danger. The evidence demonstrates that Mukhtiar was the aggressor in starting the physical altercation.

Additionally, defendant's use of force was excessive and lasted longer than was reasonably necessary. No evidence suggests that Fowlkes ever physically attacked either of the Singhs, except in defending himself from their assault, and neither Singh brother ever saw him with a weapon. The evidence established that Fowlkes attempted to leave the store multiple times, but was unable to do so because the door was locked. Obviously, if Fowlkes was attempting to flee from the store, he was no longer threatening the Singhs with physical harm. Further, a person is not permitted to inflict great bodily harm in defense of property. *People v Shaffran*, 243 Mich 527, 528-529; 220 NW 716 (1928); *People v Doud*, 223 Mich 120, 131; 193 NW 884 (1923).

The evidence also did not support a finding that defendant acted in lawful defense of his brother. As noted above, Mukhtiar was the initial aggressor in attacking Fowlkes with the bat. When Fowlkes fought back by striking Mukhtiar and attempting to gain control of the bat, he was acting in self-defense. As such, defendant had no right to protect his brother from Fowlkes's lawful use of force.

Next, defendant argues that he was denied a fair trial due to prosecutorial misconduct, relating to several comments made by the prosecution. This Court reviews claims of prosecutorial misconduct de novo to determine "whether defendant was denied a fair and impartial trial." *People v Cox*, 268 Mich App 440, 450-51; 709 NW2d 152 (2005).

First, defendant claims that the prosecution denigrated defense counsel by stating the following on rebuttal:

> Both of those arguments I can say as a general concept suggest you should be thinking about these gentlemen [the Singhs] as hard[-]working immigrants doing the right things, providing a store and a service, tough neighborhood, dealing with sometimes difficult customers. Be sympathetic to them is, in effect, what that argument seemed to have as an undercurrent.
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> The Court will tell you sympathy and prejudice have nothing to do with the jury's decision. . . .
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> Those things can be looked [at] at a later time in a part of the case that you're not allowed to be involved in as far as decision making, and that's sentencing. Look at the whole person. You've been asked to focus on just what happened really on April 1st, 2011. But if it can help the defense, I'm not surprised that both counsel seem to suggest this is a pull yourselves up by your bootstraps kind of Horatio Alger story, you know, don't punish them for taking on a tough job of being [a] businessman in that area in that type of business at 11:30 at night.
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> * * *
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> Don't get distracted, just because we're attorneys and we're good at this and we do it year after year of trying to pay no attention to the man behind the curtain, like the wizard of Oz. Don't look at that, even though that's real, look at—look at what I want to talk to you about. It's your job to forget about us attorneys and go decide facts, and more of the defense arguments were [a] diversion than they were talking about facts.
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> It's not only beyond a reasonable doubt, ladies and gentleman, with your own eyes you can say when your verdict is guilty on that count, it's beyond all doubt. I'm sorry, Mr. Piazza and Mr. Kronzek, you've done a great job, you've done what lawyers are supposed to do, to come to bring these issues to a head, to attack the prosecution in its case and to try to poke holes in it. You've done all

> you can, but reasonable people cannot look at that video and say anything but that the assault on Vinishion Fowlkes with the bat over time in that sequence was with the intent to do great bodily harm.

Next, defendant argues that the prosecution misstated the law of self-defense to the trial court, stating:

> At some point Vinishion Fowlkes, because of his abilities, is able to get a hold of the bat. Gurbachan Singh's entry into that fight, is not permitted, which Mr. Piazza would suggest is a self[-]defense or defense of others, is not permitted. It's not a self[-]defense or defense of others that's permitted under the law, because he had no more right to do that than Mr. Mukhtiar Singh had.
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> Mukhtiar Singh started the fight with the bat. Vinishion Fowlkes didn't get away from him, and at that point all Gurbachan Singh [defendant] can be said to be doing is now aiding and abetting Mukhtiar Singh's effort to maintain control of the bat, and in doing so he administers physical blows, punches to the victim. . . .
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> The reason it's so critical to not give self-defense even to Gurbachan Singh is because there is no brother exception in the law, the criminal law, of this state. If the police go to apprehend a criminal, as often as unfortunate a case, it gets physical, either with their hands or bill clubs, tasers, and in the worse days [sic] a gun, and they have the right to be doing what they're doing . . . .
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> If . . . that suspect's family members [are] off to the side and [have] a gun, Your Honor can he—that family member kill the police officer? No. Because . . . the defense of others derives from the right of the person who's—who would be claiming it. . . .
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> And any effort after Mukhtiar uses that force in anger and vengeance, and not in self-defense or defense of property, but just to make a point, any effort by Gurbachan Singh [defendant] to intervene, which derives from Mukhtiar, fails. . . .

Next, defendant argues that the prosecution misstated Fowlkes's testimony in closing argument. During direct examination, Fowlkes testified that Mukhtiar laughed at him when he tried to return the baby bottle for a soda. However, during closing argument, the prosecution stated: "Clearly Vinishion Fowlkes did something that triggered anger that was already there on the part of the Singh's, at least Gurbachan Singh [defendant] who we've been told is the one he was having the discussion with."

Next, defendant argues that the prosecution made conclusions of law and fact, usurping the role of the jury. During closing argument, the prosecution stated:

> They clearly cannot think, at the beginning of this and all throughout this, that he has a gun, because if you're Vinishion Fowlkes, and you're being beaten with a baseball bat, you're going to protect yourself with whatever you got. You're not going to run and throw racks to try to block their path. I've got a gun. . . .
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> * * *
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> Gurbachan Singh is accused in this case of felonious assault, which is assault with a dangerous weapon. When you go into deliberation, you can take a preliminary vote. Is this a dangerous weapon or not? Yes. Twelve out of 12 are going to say, that could kill you. That could split your skull. That could stab you in the heart with a sharp point on the end, and he's holding it in a threatening manner.

Finally, defendant argues that the trial court itself made improper comments. After closing arguments, defendant moved for a mistrial based on the above noted comments by the prosecutor. In denying defendant's motion, the trial court stated:

> [T]he Court believes that there were four occasions that there were objections in final argument without comment, I believe, from the Court on two or three of them. The prosecutor immediately rephrased the argument.
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> I've known Mr. Dugan for many, many years. I don't believe it was intentional on his part. That is not reflected on the record in terms of the written transcript, which would be produced. If I thought it was intentional, I would so note.

Both the trial court and the prosecutor have a duty to ensure that a defendant receives a fair trial. *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996). As such, the trial court must limit closing arguments to "relevant and material matters." *Id.* at 678. Similarly, the prosecution cannot argue facts not in evidence. *People v McCain*, 84 Mich App 210, 215; 269 NW2d 528 (1978). However, the prosecution may utilize emotional language and is not limited to bland argumentative presentation. *Ullah*, 216 Mich App at 678-679. Further, prosecutors "are generally free to argue the evidence and all reasonable inferences from the evidence as it relates to their theory of the case." *People v Unger*, 278 Mich App 210, 236; 749 NW2d 272 (2008).

In this case, none of the prosecution's statements amount to misconduct. First, it should be noted that all of the comments supposedly denigrating defense counsel came on rebuttal. At that point in the proceedings, it is entirely permissible, even encouraged, for the prosecution to respond to defendant's theory of the case. As such, the prosecution properly highlighted problems with defendant's closing argument. In doing so, it simply argued for the jury to consider the facts of the case, rather than defense counsel's well-delivered emotional plea for acquittal.

Second, the prosecution did not misstate the law of self-defense. We initially note that defendant does not provide an explanation as to how the prosecution's statement of the law was incorrect, and "[a]n appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims . . . ." *People v Matuszak*, 263 Mich App 42, 59;

687 NW2d 342 (2004) (quotation marks and citation omitted). Regardless, nothing in the record suggests that the prosecution misquoted caselaw or contradicted well-established legal doctrine. Rather, the prosecution simply advocated for a favorable interpretation of the law, an act constituting the very essence of serving as an attorney. Finally, as discussed above, the prosecution was ultimately correct in arguing that defendant was not entitled to an instruction on self-defense.

Third, the prosecution did not deny defendant a fair trial by misstating Fowlkes's testimony during closing argument. The prosecution did confuse defendant with Mukhtiar when it stated that defendant laughed at Fowlkes before the assault. But this oversight was certainly harmless. Before handing down its verdict, the jury was able to view security footage showing the entire incident from multiple angles. It was able to see for itself that Mukhtiar was in fact the Singh brother speaking with Fowlkes before the assault. As a result, it is unlikely that the prosecution's mistake had any influence on the jury's decision.

Fourth, the prosecution did not make improper conclusions of law and fact. As stated above, the prosecution is generally free to argue all of the evidence presented, along with all reasonable inferences therefrom. *Unger*, 278 Mich App at 236. The evidence presented showed that defendant and his brother were behind a fully enclosed counter when Fowlkes threw the soda bottle. It is perfectly reasonable to infer that neither brother would leave the protection of the locked counter if they honestly believed that Fowlkes was a danger. Similarly, the evidence showed that defendant wielded an axe during the assault. Again, it is perfectly reasonable to infer that an axe is a dangerous weapon capable of splitting a skull or impaling a chest.

Last, the trial court did not improperly vouch for the prosecution. In addressing defendant's motion for a mistrial, the trial court simply explained that the prosecution did not intentionally make improper comments or arguments. As always, the trial court has wide discretion in conducting trials. *People v Conyers*, 194 Mich App 395, 404; 487 NW2d 787 (1992). Moreover, the jury was not present at the time.

Finally, defendant claims that he was denied due process of law due to the prosecution's failure to turn over a videotaped, pretrial statement by Fowlkes. Defendant filed a motion to dismiss based on the prosecution's failure to produce, so the issue is preserved for appeal. When reviewing preserved claims of constitutional error, this Court "must determine whether the beneficiary of the error has established that it is harmless beyond a reasonable doubt." *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

The prosecution has two important, but often competing, obligations. It must "prosecute with earnestness and vigor," yet always ensure that justice be done. See *Cone v Bell*, 556 US 449, 469; 129 S Ct 1769; 173 L Ed 2d 701 (2009); *Strickler v Greene*, 527 US 263, 281; 119 S Ct 1936; 144 L Ed 2d 286 (1999). The prosecution is not simply a party to the controversy. *Strickler*, 527 US at 281. It is a representative of "a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all[.]" *Id*. (quotation marks and citations omitted). When the prosecution fails in the search for truth, it is cast as an "architect of a proceeding that does not comport with standards of justice." *Brady v Maryland*, 373 US 83, 87-88; 83 S Ct 1194; 10 L Ed 2d 215 (1963). While this may result in the prudent prosecutor disclosing a piece of evidence favorable to the defense, "it will tend to preserve the criminal trial,

as distinct from the prosecutor's private deliberations, as the chosen forum for ascertaining the truth about criminal accusations." *Kyles v Whitley*, 514 US 419, 440; 115 S Ct 1555; 131 L Ed 2d 490 (1995).

With this in mind, the United States Supreme Court held in *Brady* that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 US at 87. This duty is reflected in the Michigan Rules of Professional Responsibility. MRPC 3.8(d).

> In order to establish a *Brady* violation, a defendant must prove: (1) that the state possessed evidence favorable to the defendant; (2) that he did not possess the evidence nor could he have obtained it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. [*People v Lester*, 232 Mich App 262, 281-282; 591 NW2d 267 (1998).]

Exculpatory evidence is material if there is a reasonable probability that the result of the proceeding would have been different had the evidence been disclosed. *Id*. at 282. "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial." *Kyles*, 514 US at 434. As such, "favorable evidence is subject to constitutionally mandated disclosure when it could reasonably . . . undermine confidence in the verdict." *Cone*, 556 US at 470 (quotation marks and citation omitted).

Here, defendant cannot establish a *Brady* violation. First, the facts establish that the loss of the videotape was inadvertent—this is not a case where the prosecution took active steps to suppress exculpatory evidence. Second, the outcome of the trial was not impacted by the absence of the videotape. Generally, impeachment evidence is material only "where the witness at issue supplied the only evidence linking the defendant to the crime or where the likely effect on the witness' credibility would have undermined a critical element of the prosecutor's case." *Lester*, 232 Mich App at 282. As discussed above, the jury was able to witness the entire assault through surveillance cameras. Thus, Fowlkes's testimony was simply used to narrate the footage, and was not a critical element of the prosecutor's case. Therefore, Fowlkes's pretrial statement under these facts would not support a *Brady* argument, and defendant's *Brady* argument fails.

Affirmed.

/s/ Christopher M. Murray
/s/ Pat M. Donofrio
/s/ Mark T. Boonstra