

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHARLES VICTOR GRAHAM,

Defendant-Appellant.

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UNPUBLISHED

May 12, 2009

No. 284644

Wayne Circuit Court

LC No. 07-012851-FH

Before: Sawyer, P.J., and Murray and Stephens, JJ.

PER CURIAM.

Defendant was convicted by a jury of felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. The jury acquitted defendant of an additional count of possession of marijuana. MCL 333.7403(2)(d). Defendant was sentenced to a two-year prison term for the felony-firearm conviction, and two years' probation for the felon-in-possession conviction. He appeals as of right. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

While defendant was in custody on an unrelated matter involving an alleged stabbing, the police received information that led them to believe that defendant might be involved in selling drugs. They obtained defendant's consent to search his apartment. Upon entry, they found a loaded shotgun in plain view. The parties stipulated that defendant had previously been convicted of a specified felony. Defendant admitted that he had possession of the shotgun, explaining that he was holding it for a friend.

Defendant's sole claim on appeal is that he was denied a fair trial because the prosecutor elicited irrelevant evidence regarding the stabbing incident, possible drug dealing, and possession of empty pill bottles. This issue is preserved with respect to the evidence that the altercation arose out of a drug transaction, because defendant objected on this basis at trial, but is unpreserved with respect to the evidence that the altercation involved a stabbing and the discovery of the pill bottles.

"The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial (i.e., whether prejudice resulted)." *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). Where a claim of misconduct is predicated on the admission of evidence, relief is not available unless the defendant shows that the error affected the outcome of the proceedings. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). An error is

not outcome determinative unless it undermined the reliability of the verdict in light of the untainted evidence. *People v Whittaker*, 465 Mich 422, 427; 635 NW2d 687 (2001).

While a prosecutor may not knowingly offer inadmissible evidence, *People v Giacalone*, 399 Mich 642, 645; 250 NW2d 492 (1977), he is entitled to prove his case “by whatever admissible evidence he chooses.” *People v Pratt*, 254 Mich App 425, 429; 656 NW2d 866 (2002). Further, “prosecutorial misconduct cannot be predicated on good-faith efforts to admit evidence. The prosecutor is entitled to attempt to introduce evidence that he legitimately believes will be accepted by the court, as long as that attempt does not prejudice the defendant.” *People v Noble*, 238 Mich App 647, 660-661; 608 NW2d 123 (1999) (citations omitted).

The record shows that the prosecutor believed that the testimony regarding the stabbing incident was admissible as “part of the res gestae of the case” in that it was offered to explain why defendant was in custody and why the officers ended up searching defendant’s apartment, and the trial court agreed that the evidence was relevant. Further, it appears from the record that defendant did not object to the evidence of the stabbing incident for his own strategic reasons. A party may not seek appellate relief based on an evidentiary error to which he contributed by plan or negligence. *People v Gonzalez*, 256 Mich App 212, 224; 663 NW2d 499 (2003). Also, a defendant “may not . . . claim as error on appeal that evidence he purposely used in support of his defense theory was inadmissible.” *People v Potra*, 191 Mich App 503, 512; 479 NW2d 707 (1991).

The testimony regarding suspected drug dealing and possession of the empty pill bottles was not outcome determinative. Defendant testified that he knowingly possessed the gun and the parties stipulated that defendant had previously been convicted of a specified felony. This admission was tantamount to a confession. If anything, the evidence might have affected a determination of guilt regarding the possession of marijuana charge, but defendant was acquitted of that charge. The evidence was unrelated to the weapons offenses of which defendant was convicted, and defendant’s testimony that he knowingly possessed the gun and the parties’ stipulation that defendant had previously been convicted of a specified felony established defendant’s guilt of the weapons offenses.

Affirmed.

/s/ David H. Sawyer  
/s/ Christopher M. Murray  
/s/ Cynthia Diane Stephens