

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LEON E. MCKINNEY,

Defendant-Appellant.

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UNPUBLISHED

May 12, 2000

No. 208783

Wayne Circuit Court

LC No. 97-001549

Before: White, P.J., and Sawyer and Griffin, JJ.

PER CURIAM

Defendant was charged with assault with intent to commit murder, MCL 750.83;MSA 28.278, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Following a jury trial, he was convicted of felonious assault, MCL 750.82; MSA 28.277, and the felony-firearm offense. Defendant was sentenced to one to four years for the felonious assault conviction, and the mandatory two-year term for the felony-firearm conviction. Defendant appeals as of right, and we affirm.

Defendant's convictions stem from a shooting in a restaurant that occurred after defendant spent the evening out with acquaintances, including complainant and complainant's girlfriend. A rather heated and unpleasant argument ensued between defendant and complainant's girlfriend as the result of defendant spilling the girlfriend's drink. At some point, complainant intervened and punched defendant in the face. At some point after that, defendant shot complainant in the stomach. Defendant maintained that he pulled the gun out of his pocket because he believed that complainant, who was attacking him, was about to kill him, and that as defendant was pulling his gun out of his pocket, the gun went off twice, the second shot hitting complainant.

Defendant first contends that the prosecutor committed reversible error by making a statement in closing argument that was not supported by the record. Specifically, the prosecutor erroneously told the jury that, in his opening statement, defense counsel had relied solely on a theory of self-defense. In fact, the trial transcript reveals that defense counsel told the jury in opening statement that the case involved self-defense and "some accidental firing." However, while defense counsel objected to the prosecutor's comment that he heard no objection, and indeed objected in response, defense counsel

never objected on the basis, or asserted to the court, that the prosecutor had inaccurately characterized defense counsel's opening statement. Had an objection been made on that basis, the jury would have been reminded of the fact that defense counsel had referred both to self-defense and "some accidental firing," and the court could have corrected any misunderstanding caused by the prosecutor's statement. We thus conclude that the claim of error is unpreserved. Further, whether analyzed as preserved or forfeited, defendant has not met the requisite standards for reversal as set forth in *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999). The jury apparently accepted the defense of accident in the actual discharge of the firearm because defendant was convicted only of felonious assault, rather than assault with intent to commit murder or with intent to do great bodily harm. We are not persuaded that the prosecutor's statement affected the outcome of the trial.

Defendant cites further prosecutorial misconduct in the form of deliberate interjection of evidence beyond the issues relevant to those at trial. Defendant claims that he was denied a fair trial when the prosecutor interjected the irrelevant and highly prejudicial issue of defendant's attitude toward women. We agree that much of the prosecutor's questioning on the subject was irrelevant, however we are not persuaded that it is more probable than not that the questioning was outcome determinative. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). The prosecutor was entitled to provide the jury with the context of the events that led to defendant's pulling the gun from his pocket. The additional questioning regarding defendant's attitude towards women generally, and as related to his service as a marine was irrelevant, but did not add significantly to the testimony that was properly admitted. Defendant has not established error requiring reversal.

Affirmed.

/s/ Helene N. White  
/s/ David H. Sawyer  
/s/ Richard Allen Griffin