

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RUBEN JULIAN FLORES,

Defendant-Appellant.

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UNPUBLISHED

September 13, 1996

No. 169912

LC No. 93-7428-FC

Before: Michael J. Kelly, P.J., and Hoekstra and E.A. Quinnell,\* JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to commit murder, MCL 750.83; MSA 28.278, carrying a concealed weapon, MCL 750.227; MSA 28.424, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to concurrent terms of fifteen to thirty years' imprisonment for the assault with intent to murder conviction and thirty-six to ninety months' imprisonment for the concealed weapon conviction. Both sentences are to be served consecutively to a mandatory two-year sentence for the felony-firearm conviction. He appeals as of right. We affirm.

Defendant was urinating in a food establishment parking lot as the victim walked by on his way into the establishment. The victim and defendant exchanged some words. When the victim continued walking toward the building, defendant pulled out a gun and fired two or three times at the victim, wounding him twice. Defendant then fled. The victim was able to enter the building and seek help.

Defendant first argues that there was insufficient evidence to support his conviction. We disagree. A conviction of assault with intent to murder requires proof of (1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder. *People v Warren (After Remand)*, 200 Mich App 586; 504 NW2d 907 (1993). Defendant only appeals the sufficiency of evidence of his intent to kill. Though an inference of actual intent to kill "may not be based upon evidence that is uncertain or speculative or that raises merely a conjecture or a possibility," *People v*

\* Circuit judge, sitting on the Court of Appeals by assignment.

*Fisher*, 193 Mich App 284, 289; 483 NW2d 452 (1992), when viewed in the light most favorable to the prosecution, there was sufficient evidence of intent to kill based upon defendant's statement made just prior to the shooting, and the fact that the victim was shot twice in the lower back as he was moving away. *People v Hurst*, 205 Mich App 634, 640; 517 NW2d 858 (1994).

Defendant next argues that the prosecutor, in his closing argument, denied him a fair trial through three separate acts of misconduct. We disagree. All of defendant's claims of prosecutorial misconduct are unpreserved. Appellate review of alleged prosecutorial misconduct is foreclosed where defendant fails to object or request a curative instruction, unless the misconduct is so egregious that no curative instruction could have removed the prejudice to the defendant, or if manifest injustice would result from our failure to review the alleged misconduct. *People v Paquette*, 214 Mich App 336, 341-342; 543 NW2d 342 (1995).

Defendant alleges misconduct based on claims that the prosecutor argued facts not in evidence and impermissibly instructed the jury regarding inferring an intent to kill from the use of a firearm and the intoxication defense. We have considered these allegations of prosecutorial misconduct and conclude that manifest injustice will not result from our failure to provide further review because the remarks with which defendant takes issue were not improper.

Lastly, defendant asserts that trial counsel rendered ineffective assistance as a result of his failure to object to the alleged prosecutorial misconduct. In order to succeed on such a claim, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *People v Stanaway*, 446 Mich 643; 521 NW2d 557 (1994). Here, because defendant's claims of prosecutorial misconduct are without merit, defendant cannot show counsel's performance was less than reasonable or that he was prejudiced by counsel's failure to object.

Affirmed.

/s/ Michael J. Kelly  
/s/ Joel P. Hoekstra  
/s/ Edward A. Quinnell