

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RONALD ALBERT WINCH,

Defendant-Appellant.

UNPUBLISHED

August 26, 1997

No. 193868

Recorder's Court

LC No. 95-003398

Before: Sawyer, P.J., and Bandstra and E. A. Quinnell*, JJ.

MEMORANDUM.

Defendant appeals by right his jury conviction for felonious assault, as compared with the original charge of assault with intent to commit murder, and possession of a firearm during the commission of a felony. This case is being decided without oral argument pursuant to MCR 7.214(E).

Defendant first contends that the trial court erred in refusing to instruct the jury on the cognate misdemeanor offense of discharging a firearm pointed or aimed intentionally, but without malice, MCL 750.234; MSA 28.431. One of the elements of that offense is that the firearm be intentionally pointed at a person. Both defendant and his witness, Renee Rogers, however, testified that the gun was never aimed at the victim, but that instead it was pointed at the wall.

The victim testified that defendant pointed the gun at her head while threatening and cursing her and fired three times, and that but for the fact that she ducked she would probably have been fatally wounded. On her testimony there is no basis for finding the prerequisite lack of malice to warrant a conviction of the misdemeanor offense. *People v McCully*, 107 Mich 343; 65 NW 234 (1895). Accordingly, the misdemeanor offense lacks the appropriate relationship to the charged offense or to the facts to warrant the requested instruction. *People v Hendricks*, 446 Mich 435, 445 ff; 521 NW2d 546 (1994); *People v Stephens*, 416 Mich 252; 330 NW2d 675 (1982); *People v Steele*, 429 Mich 13; 412 NW2d 206 (1987). There was no error in this regard.

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

Defendant's remaining contention is that the prosecutor deprived him of a fair trial by remarks made during closing argument. There was no objection to any of these arguments, all of which appear to be based on the evidence or inferences reasonably to be drawn from the facts in evidence. No error requiring reversal has been shown. *People v Bahoda*, 448 Mich 261; 531 NW2d 659 (1995).

Affirmed.

/s/ David H. Sawyer

/s/ Richard A. Bandstra

/s/ Edward A. Quinnell