

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HECTOR L. MARTINEZ,

Defendant-Appellant.

UNPUBLISHED

June 17, 1997

No. 196250

Oakland Circuit Court

LC No. 95-142979

Before: Corrigan, C.J., and Kelly and Hoekstra, JJ.

PER CURIAM.

Defendant appeals by right his conviction by jury of assault with intent to commit murder, MCL 750.83; MSA 28.278, and sentence to a 12^{1/2} to 30 year term of imprisonment. We affirm.

On October 29, 1995, the complainant became very intoxicated at a party, which defendant also attended. Defendant and complainant had not met before that evening. Defendant was asked to take complainant home. After complainant exited defendant's car and began walking to a friend's home, defendant fired three shots at complainant, critically wounding him. Defendant admitted that he fired at the complainant, but argued that he did not intend to kill complainant.

Defendant first contends that there was insufficient evidence to prove he assaulted complainant with the intent to kill. When reviewing a claim of insufficient evidence, this Court views the evidence in the light most favorable to the prosecution to determine whether a reasonable jury could find that the elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 amended 441 Mich 1201 (1992). The elements of assault with intent to commit murder are: (1) an assault, (2) with an actual intent to kill, (3) which if successful, would make the killing murder. *People v Lawton*, 196 Mich App 341, 350; 492 NW2d 810 (1992). Intent may be inferred from all the facts in evidence. *Id.* The seriousness of the injury and the number of shots fired are relevant to proving an intent to kill. *People v Curry*, 175 Mich App 33, 45; 437 NW2d 310 (1989); *People v Ray*, 56 Mich App 610, 615; 224 NW2d 735 (1974).

Defendant argues that the facts do not prove that he acted with an actual intent to kill, but rather that he acted recklessly. The location and severity of the wounds are sufficient evidence that defendant

acted with the intent to kill. The evidence shows that defendant fired three shots at the complainant, hitting complainant in the chest and stomach. One of the exit wounds was located about one inch from complainant's heart. Complainant's injuries resulted in a lengthy hospital stay. Viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could conclude that the elements of assault with intent to commit murder, including the element of actual intent to kill, were proven beyond a reasonable doubt.

Defendant next contends that the sentence of 12½to 30 years violates the principle of proportionality. The sentencing guidelines' recommended range for the minimum sentence was 7 to 15 years. While a sentence within the guidelines range is presumptively proportionate, *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987), "the key test is whether the sentence is proportionate to the seriousness of the matter, not whether it departs from or adheres to the guidelines' recommended range," *People v Milbourn*, 435 Mich 630, 661; 461 NW2d 1 (1990). In unusual circumstances, a sentence within the guidelines may be disproportionate. *Id.*

Defendant has not overcome the presumption of proportionality. Defendant argues that the fact he turned himself in and his cooperation with police are mitigating factors that make his sentence disproportionate. While cooperation with police may be factor to consider in determining sentence, cooperation alone is not a sufficient basis for departing from the guidelines. See *People v Fields*, 448 Mich 58, 79; 528 NW2d 176 (1995). Defendant has not presented unusual circumstances that justify a downward departure from the sentencing guidelines. Given defendant's assaultive, life-threatening behavior, the sentence imposed was proportionate to the crime for which he was convicted and was not an abuse of discretion.

Affirmed.

/s/ Maura D. Corrigan

/s/ Michael J. Kelly

/s/ Joel P. Hoekstra