

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JERROD MARTINEZ HENRY,

Defendant-Appellant.

UNPUBLISHED

March 20, 2003

No. 227626

Oakland Circuit Court

LC No. 99-169738-FC

Before: Cooper, P.J., and Murphy and Kelly, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to commit murder, MCL 750.83, two counts of intentional discharge of a firearm from a motor vehicle, MCL 750.234a, carrying a concealed weapon (CCW), MCL 750.227, and three counts of possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to concurrent prison terms of seven to fifteen years for the assault conviction and eighteen months to four years for each discharge of a firearm conviction, to be served consecutively to concurrent terms of one to five years for the CCW conviction and three concurrent two-year terms for the felony-firearm convictions. Defendant appeals as of right. We affirm.

This is a case of “road rage,” occurring on a busy interstate and stemming from defendant’s conduct in firing twice at the complainant’s moving vehicle with a nine-millimeter, semi-automatic handgun while defendant was operating his own vehicle.

I

Defendant first argues that there was insufficient evidence to support a conviction of assault with intent to commit murder because there was no evidence that he had the requisite intent. We disagree.

When ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). This Court will not interfere with the trier of fact’s role of determining the weight of evidence or the credibility of witnesses. *Id.* at 514-515. Circumstantial evidence and reasonable inferences arising from the evidence can constitute

satisfactory proof of the elements of the crime. *People v Truong (After Remand)*, 218 Mich App 325, 337; 553 NW2d 692 (1996). All conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

To sustain a conviction for assault with intent to commit murder, the prosecution must establish beyond a reasonable doubt that the defendant committed: “(1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder.” *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997); see also MCL 750.83. An intent to kill may be inferred from the facts in evidence, and because the state of an actor’s mind is difficult to prove, minimal circumstantial evidence is sufficient. *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999).

The evidence in this case, viewed in a light most favorable to the prosecution, was sufficient to enable a jury to infer all the necessary elements of assault with intent to commit murder, including the requisite intent. Here, the evidence at trial clearly established that, following a disagreeable encounter on the expressway, defendant fired the nine-millimeter, semi-automatic handgun twice at the complainant’s vehicle, as the complainant was passing him. It is well established that the intent to kill may be inferred from the use of a dangerous weapon. See *People v Barclay*, 208 Mich App 670, 674; 528 NW2d 842 (1995); *People v DeLisle*, 202 Mich App 658, 672; 509 NW2d 885 (1993); *People v Daniels*, 163 Mich App 703, 706-707; 415 NW2d 282 (1987). There was also evidence that defendant shot at the complainant’s vehicle with “jacketed bullets,” which have greater penetration power. In addition, one of the two bullets went through the passenger side rear door window, past the driver’s front seat, within inches of the complainant’s face, and hit the driver’s side door pillar. This evidence, viewed in a light most favorable to the prosecution, was sufficient to sustain defendant’s conviction for assault with intent to murder.

II

Next, defendant argues that his convictions and sentences for two counts of intentional discharge of a firearm from a motor vehicle, arising from a single crime, violate his double jeopardy protections against multiple punishments for the same offense. To this end, defendant maintains that the prosecutor improperly divided one single, continuing transaction into separate and distinct crimes. We disagree.

Because defendant failed to raise this double jeopardy claim below, we review this unpreserved constitutional claim for plain error affecting defendant’s substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Both the United States and Michigan Constitutions prohibit placing a defendant twice in jeopardy for a single offense, including multiple punishments for the same offense. US Const, Am V; Const 1963, art 1, § 15; *People v Herron*, 464 Mich 593, 599; 628 NW2d 528 (2001); *People v Torres*, 452 Mich 43, 63-64; 549 NW2d 540 (1996). However, there “is no violation of double jeopardy protections if one crime is complete before the other takes place, even if the offenses share common elements or one constitutes a lesser offense of the other.” *People v Lugo*, 214 Mich App 699, 708; 542 NW2d 921 (1995). In *Lugo*, this Court explained that the defendant’s dual convictions of felonious assault and assault with intent to do great bodily harm were permissible, although they both arose from the same altercation between the defendant and

a police officer, because each conviction was predicated on a separate and distinct act occurring one after the other during the altercation. *Id.* at 709. Also, in *People v Rogers*, 142 Mich App 88, 89, 92; 368 NW2d 900 (1985), this Court upheld the defendant's convictions of three counts of first-degree criminal sexual conduct because each was based on a separate and distinct act of penetration that the defendant either committed or aided and abetted.

We conclude that there was no double jeopardy violation in this case. The crime of intentional discharge of a firearm from a motor vehicle requires proof that the defendant discharged a firearm from a motor vehicle in a manner so as to endanger another person. MCL 750.234a; CJI2d 11.37; see also *People v Cortez*, 206 Mich App 204, 205-206; 520 NW2d 693 (1994). Here, the evidence demonstrates that defendant twice discharged his firearm from his car at the complainant's vehicle during an assault upon the complainant. One bullet went through the rear passenger window of the complainant's truck, and the other hit the right, rear quarter panel. There was evidence that, in order to fire a bullet from defendant's semi-automatic handgun, the firearm had to be "cock[ed]" or "rack[ed]" between each shot. This necessarily required a momentary delay before defendant again aimed and fired the gun a second time. Additionally, the second bullet was necessarily fired from a different location further up the highway, where defendant's and the victim's vehicles were hurdling down the interstate at seventy miles per hour when the shooting took place. Taking into consideration those facts along with the clear legislative intent to protect the public from the dangers of guns being discharged from vehicles, defendant committed and completed two distinct acts during the same episode of criminal behavior, and double jeopardy provisions do not prohibit multiple punishments for these separate acts. *Lugo, supra* at 708-709. Accordingly, there was no double jeopardy violation and, thus, defendant has failed to demonstrate plain error.

III

Defendant also argues that the trial court failed to properly instruct the jury on the elements of assault with intent to murder, and failed to instruct the jury regarding his theory of the case, i.e., self-defense. We decline to review defendant's challenge to the instructions. Defense counsel indicated on the record his satisfaction with the trial court's instructions, and declined an instruction on self-defense.¹ Defendant's affirmative approval of the trial court's instructions waived any error. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000); *People v Ortiz*, 249 Mich App 297, 311; 642 NW2d 417 (2002). Consequently, reversal of defendant's convictions is not warranted on this basis. *Carter, supra* at 219-220.

In relation to this claim, defendant also argues that he is entitled to a new trial because defense counsel was ineffective for failing to object to the trial court's instructions. We disagree.

¹ The court noted on the record that the prosecutor and defense counsel went over the instructions, and each acknowledged that they received a copy of the instructions. The court then asked if either party had any objections or anything they would like to add to the instructions. Defense counsel stated, "I am satisfied Judge." The court also acknowledged on the record that the parties had "waived theories of the case," and that it was "not giving theories of the case."

Because defendant failed to make a testimonial record concerning this issue in the trial court in connection with a motion for a new trial or an evidentiary hearing, this Court's review of this issue is limited to mistakes apparent on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing norms and that the representation so prejudiced the defendant that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Id.*

Contrary to defendant's claim, the trial court's instruction on assault with intent to commit murder clearly conveyed the necessary elements of the crime, including the requisite intent. See *Hoffman, supra* at 111. Furthermore, the trial court's instruction was virtually identical to CJI2d 17.3, and this Court has approved the use of this instruction² in *People v Haggart*, 142 Mich App 330, 341, n 1; 370 NW2d 345 (1985), and *People v Lipps*, 167 Mich App 99, 106; 421 NW2d 586 (1988). In addition, the trial court instructed the jury with regard to the specific intent necessary for the crime of assault with intent to commit murder, in accordance with CJI2d 3.9.³ Because the trial court's instruction was not improper, defense counsel was not ineffective for failing to object. Counsel is not required to advocate a meritless position. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

To the extent that the court's instructions did not provide that defendant required an intent to kill that, if successful, would make the killing murder, the omission was harmless where the defense presented at trial was merely that defendant did not intend to kill the complainant, which was adequately covered by the given instructions. We decline to find that the defense raised at trial constituted ineffective assistance of counsel because defendant has failed to overcome the presumption that counsel's decisions were a matter of sound trial strategy. *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999).

We also reject defendant's claim that defense counsel was ineffective for failing to request an instruction on self-defense. Jury instructions must not exclude material defenses and theories that are supported by the evidence. *People v Crawford*, 232 Mich App 608, 619; 591 NW2d 669 (1998). However, self-defense requires that the defendant honestly and reasonably believe that his life was in imminent danger of death or serious bodily harm, that the action taken appeared at the time to be immediately necessary, that the defendant was not the initial aggressor, and that the defendant did not use any more force than is necessary to defend himself. *People v Kemp*, 202 Mich App 318, 322; 508 NW2d 184 (1993); see also *People v Heflin*, 434 Mich 482, 502; 456 NW2d 10 (1990). Proof that a defendant's belief of imminent danger was not honest or reasonable is sufficient to defeat a claim of self-defense. *People v Fortson*, 202 Mich App 13, 20; 507 NW2d 763 (1993).

² Formerly CJI 17:2:01.

³ The trial court is required to give CJI2d 3.9 if intent is disputed, *People v Beaudin*, 417 Mich 570, 574-575; 339 NW2d 461 (1983), as was the case here.

After a thorough review of the record, we conclude that a self-defense instruction was not supported by the evidence. Defendant's own testimony negates the suggestion that he held an honest and reasonable belief that he was in imminent danger of being killed or seriously injured. Specifically, defendant acknowledged during cross-examination that, when he fired the shots, the complainant's vehicle was in front of his and was still accelerating. He further testified that he made no effort to retreat by slowing down or otherwise moving away from the complainant's vehicle. In addition, although defendant believed that he saw the complainant waving an object, he did not indicate that a weapon was ever pointed toward him or his sister. Simply put, there was insufficient evidence that defendant reasonably believed that he was in imminent danger of death or serious bodily harm. Because the evidence did not support a self-defense instruction, defense counsel was not ineffective for failing to request such an instruction. *Snider, supra* at 425. Moreover, defendant has failed to overcome the presumption that trial counsel's decisions with regard to the defense presented constituted sound trial strategy. *Rockey, supra* at 76-77. Accordingly, defendant is not entitled to a new trial on this basis.

IV

Defendant next claims that he is entitled to a new trial because certain statements made to the police were inadmissible because they were taken in violation of *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966). We disagree.

Because defendant did not object to the admission of his statements below, this Court reviews this unpreserved claim for plain error affecting defendant's substantial rights. *Carines, supra* at 763-764; *People v McCrady*, 244 Mich App 27, 29; 624 NW2d 761 (2000).

Defendant claims that his statement made in response to an officer's inquiry regarding the location of the gun was inadmissible, because the officer's question was not preceded by *Miranda* warnings. We disagree.

In *New York v Quarles*, 467 US 649, 651; 104 S Ct 2626; 81 L Ed 2d 550 (1984), the United States Supreme Court established the "public safety exception." Pursuant to this exception, under circumstances in which overriding considerations of public safety exist, informing an accused of his *Miranda* rights may be excused. *Id.*; see also *People v Attebury*, 463 Mich 662, 669-670; 624 NW2d 912 (2001). To merit omission of *Miranda* rights, the circumstances must have presented an immediate threat to public or police safety, and the questions posed to the accused must have been objectively reasonably necessary to protect the public or the police from an immediate danger. *Quarles, supra* at 655-656; *Attebury, supra* at 670-672.⁴

⁴ In *Quarles, supra* at 651-652, a woman approached police officers saying that she had just been raped by a man, gave a physical description of the man, and said that she had just seen him enter a nearby supermarket carrying a gun. One of the officers entered the store and spotted the defendant, who ran upon seeing the officer. *Id.* at 652. The officer lost sight of the defendant for several seconds until he apprehended the defendant in the supermarket, by which time more than three other officers were on the scene. *Id.* While frisking the defendant, the officer noticed that the defendant was wearing an empty shoulder holster. *Id.* After handcuffing the defendant, the

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Here, the responding officer had been informed that there had been a shooting on I-75, and had been given a description of the car from which the shots were fired. When the officer saw the car matching the description, he noticed that there was a hole in the driver's side mirror. The officer effectuated a traffic stop, and asked defendant for his driver's license and registration. Through defendant's open window, the officer, who was familiar with firearms and gunpowder, smelled burnt gunpowder coming from inside the car. Also, a woman was seated in the passenger side of the car, and two children were seated in the rear. The officer advised defendant that he had been stopped because his car matched the description of a car involved in a shooting, and asked defendant where the gun was located. Defendant said that it was in the glove box. Indeed, a public safety exception existed on these facts, and the officer's question was necessary to secure his own safety and the safety of the individuals in the car. Accordingly, defendant's statement concerning the location of the gun was properly admitted.

We also reject defendant's claim that his statement made to an officer while he was being transported to the police station was inadmissible because it was also not preceded by *Miranda* warnings. During trial, the officer who transported defendant indicated that, during the drive, defendant stated that "[he] can't believe [he] fell into [the complainant's] game. [The complainant is] the one who cut [him] off." Defendant then stated, using an expletive, that he had "messed" up.

Statements of an accused made during custodial interrogation are inadmissible unless the accused voluntarily, knowingly and intelligently waived his Fifth Amendment rights. *People v Abraham*, 234 Mich App 640, 644; 599 NW2d 736 (1999). However, "[i]t is well settled that *Miranda* warnings need be given only in situations involving custodial interrogation." *People v Zahn*, 234 Mich App 438, 449; 594 NW2d 120 (1999). A custodial interrogation is a questioning initiated by law enforcement officers after the accused has been taken into custody or otherwise deprived of his freedom of action in any significant way. *Id.* Volunteered statements made by suspects in custody do not fall within the purview of *Miranda*, and are admissible. *People v Raper*, 222 Mich App 475, 479; 563 NW2d 709 (1997); *People v Giuchici*, 118 Mich App 252, 261; 324 NW2d 593 (1982).

Here, it is undisputed that defendant was not given his *Miranda* warnings before he was transported to the police station. However, defendant's statement was not the product of a custodial interrogation, but was volunteered. The transporting officer indicated that, during the

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officer asked him where the gun was located. *Id.* The defendant nodded toward some cartons and said, "the gun is over there." *Id.* The officer then retrieved the gun from one of the cartons. *Id.* The Supreme Court held that a public safety exception existed on these facts and that "the availability of that exception does not depend upon the motivation of the individual officers involved." *Id.* at 655-656. The Court also concluded that "the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination." *Id.* at 657. In so holding, the Court expressed its confidence that "police officers can and will distinguish almost instinctively between questions necessary to secure their own safety or the safety of the public and questions designed solely to elicit testimonial evidence from a suspect." *Id.* at 658-659.

drive, defendant “just started talking to [him] about the incident,” and that defendant “was upset.” The officer denied that he asked defendant any questions to induce the incriminating statement. Because the statement was voluntary, suppression was not warranted. Accordingly, there is no plain error and, therefore, defendant is not entitled to a new trial on this basis.⁵

V

Defendant next contends that the prosecutor denied him a fair trial by making improper remarks during closing and rebuttal arguments.

Because defendant did not object to the remarks below, this Court reviews this unpreserved claim for plain error affecting defendant’s substantial rights. *Carines, supra* at 763-764; *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000).

Defendant argues that the prosecutor appealed to the jury to sympathize with the complainant. During the complainant’s direct-examination, he testified that, at the time of the shooting, he was on his way from paying a medical insurance bill because he had been diagnosed with cancer and needed surgery. During closing argument, the prosecutor remarked that, “[cancer] is a terrible illness. And [the complainant’s] time and his life is [sic] precious. He should be able to savor every day of that.”

Appeals to the jury to sympathize with the victim constitute improper argument. *People v Wise*, 134 Mich App 82, 104; 351 NW2d 255 (1984). However, as previously indicated, defendant did not object to the remark and, thus, our review is limited to plain error affecting substantial rights. Viewed in context of the complete closing and rebuttal arguments, the prosecutor’s remark did not affect defendant’s substantial rights. The challenged remark occurred at the end of a lengthy discussion of the evidence, involved only a brief part of the argument, and was not so inflammatory that defendant was prejudiced. See *People v Mayhew*, 236 Mich App 112, 122-123; 600 NW2d 370 (1999). Further, during his closing argument, the prosecutor asked the jury to compare all the evidence, follow the law as the judge directs, and to use common sense when deciding the case.

Defendant also claims that the prosecutor appealed to the jury’s sympathy during rebuttal argument by drawing an analogy between defendant shooting at the complainant’s vehicle and an individual firing a gun in order to kill a deer, and stating that the complainant’s life was worth more than an animal’s life. However, viewing the prosecutor’s remark in context, it was focused on refuting defense counsel’s claim made during closing argument that, when defendant fired the gun at the complainant’s vehicle, he did not intend to kill. Otherwise improper prosecutorial remarks might not require reversal if they address issues raised by defense counsel. *People v Duncan*, 402 Mich 1, 16; 260 NW2d 58 (1977); *People v Simon*, 174 Mich App 649, 655; 436 NW2d 695 (1989). Moreover, a prosecutor may use emotional or “hard language” when it is

⁵ Within this issue, defendant suggests that defense counsel was ineffective for failing to move to suppress the challenged statements. For the reasons previously indicated, a motion to suppress would have been futile. Therefore, counsel was not ineffective for failing to advocate a meritless position. *Snider, supra*.

supported by evidence and is not required to phrase arguments and inferences in the blandest possible terms. *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996).

Defendant also claims that the prosecutor denied him a fair trial by stating during rebuttal argument that the jury owed defendant the truth and owed the complainant justice. Prosecutors should not resort to civic duty arguments that appeal to the fears and prejudices of jurors. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). However, the remark at issue occurred at the end of a lengthy discussion of the evidence and was isolated. Moreover, to the extent that any of the challenged remarks could be viewed as improper, the instructions that the jury should not be influenced by sympathy or prejudice, that the lawyers' comments are not evidence, that the case should be decided on the basis of the evidence, and that the jury should follow the law as instructed by the court were sufficient to cure any prejudice. *People v Long*, 246 Mich App 582; 588; 633 NW2d 843 (2001). Juries are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). In sum, defendant has failed to show a plain error affecting his substantial rights. Accordingly, reversal is not warranted on the basis of this unpreserved issue.

VI

Defendant's final claim is that he is entitled to resentencing because his sentence for assault with intent to commit murder is disproportionate considering the circumstances of this case and his background. We disagree.

Because the assault offense occurred in November 1999, the legislative sentencing guidelines apply. MCL 769.34(2); *People v Reynolds*, 240 Mich App 250, 254; 611 NW2d 316 (2000). Under the sentencing guidelines statute, the trial court, in most instances, must impose a minimum sentence in accordance with the calculated guidelines range, and appellate review is limited. MCL 769.34(2) and (10); *People v Hegwood*, 465 Mich 432, 439-440; 636 NW2d 127 (2001). Here, according to the sentencing information report, the applicable sentencing guidelines range was 81 to 135 months. The court sentenced defendant to a minimum term of seven years (or 84 months). "Under MCL 769.34(10), this Court may not consider challenges to a sentence based exclusively on proportionality, if the sentence falls within the guidelines." *People v Pratt*, ___ Mich App ___ (Docket No. 228081, rel'd 12/17/2002), slip op at 2-3; see also *People v Babcock*, 244 Mich App 64, 73; 624 NW2d 479 (2000). Because defendant's sentence falls within the sentencing guidelines range, and defendant's challenge is based exclusively on proportionality, we must affirm his sentence. Accordingly, defendant is not entitled to resentencing.

Affirmed.

/s/ Jessica R. Cooper
/s/ William B. Murphy
/s/ Kirsten Frank Kelly