

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT LEAL,

Defendant-Appellant.

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UNPUBLISHED

April 25, 2000

No. 202521

Lenawee Circuit Court

LC No. 96-007044-FC

Before: Kelly, P.J., and Holbrook, Jr., and Griffin, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of two counts of assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279, intentional discharge of a firearm from a motor vehicle, MCL 750.234a; MSA 28.431a, and carrying a firearm with unlawful intent, MCL 750.226; MSA 28.423. Defendant was sentenced to six to ten years for each assault with intent to do great bodily harm less than murder conviction, one to four years for the intentional discharge of a firearm from a motor vehicle conviction, and two to five years for the carrying a firearm with unlawful intent conviction. We affirm.

Defendant first contends that the prosecution did not prove its case beyond a reasonable doubt. We disagree. When reviewing a sufficiency claim, this Court must view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could have found that the elements of the crimes were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 722-723; 597 NW2d 73 (1999).

Assault with intent to commit great bodily harm less than murder requires proof of (1) an attempt or threat with force or violence to do corporal harm to another (an assault), and (2) intent to do great bodily harm less than murder. *People v Parcha*, 227 Mich App 236, 239; 575 NW2d 316 (1997). Intentional discharge of a firearm from a motor vehicle requires that the prosecutor prove each of the following elements beyond a reasonable doubt: (1) that the defendant intentionally discharged a firearm; (2) from a vehicle; (3) in a manner so as to endanger another person. CJI2d 11.37. See *People v Cortez*, 206 Mich App 204, 205-206; 520 NW2d 693 (1994). Conviction of the crime of carrying a firearm with unlawful intent requires only that the defendant possessed a firearm or a

dangerous weapon with the intent to use it illegally against another person. See *People v Jones*, 443 Mich 88, 101; 504 NW2d 158 (1993).

In the instant case, a 911 tape was played for the jury. On the tape, Manuel Vallejo stated defendant was the individual who shot at the people gathered at the intersection of Center Street and Erie Street. Eric Michael Newsom testified that a maroon, older model Ford pickup with a long bed drove by the intersection and fired five to six shots, one of which hit him in the right leg. Daniel Lee Wallace testified that a dark, glossy pickup truck drove by and fired five to six shots and he believed that one of the bullets struck him in the finger. Wallace stated the driver had a mustache and he might have been Hispanic.

William Sager witnessed four to six shots emanate from the driver's side window of a dark red pickup. Sager described the driver as a Hispanic male in his late thirties to early forties with a mustache. Chester Barker testified he lived three houses east of the intersection and heard approximately six shots and witnessed a Chevy 10 pickup accelerate past his house. Barker later identified defendant's truck as the same truck that drove past his house.

William Wayne Dechamps, a police officer for the City of Adrian, heard the sound of several gunshots and saw an older model pickup truck accelerate eastbound on Erie Street. At the intersection, Officer Dechamps found five shell casings beginning on Center Street and continuing in an arching pattern to Erie Street. Adolio Navarro, a trooper with the Michigan State Police, and his partner heard a radio report that shots had been fired from an older model red pickup truck, and within thirty seconds, they spotted a vehicle that matched the description given in the report.

Jeffrey Labar, a detective with the Adrian Police Department, administered a gun residue test to the hands of defendant. Hayden Dannug, a forensic chemist employed by the Detroit Police Crime Laboratory, analyzed the gun residue test kit and discovered several unique particles found only in gunshot residue. Dannug stated the particles will only stay on a person's hand for two to six hours after the person fires a weapon or handles a recently fired gun.

Addressing the convictions of assault with intent to do great bodily harm less than murder, the evidence established that defendant fired a weapon with the requisite intent to do great bodily harm less than murder. Defendant fired a weapon numerous times into a crowd hitting two individuals. Such an action clearly evidences an attempt or threat with force or violence to do corporal harm to another with the intent to do great bodily harm less than murder. *Parcha, supra* at 239.

Addressing the conviction of intentional discharge of a firearm from a motor vehicle, the prosecution presented evidence to satisfy the applicable elements. First, defendant intentionally discharged a firearm. Several witnesses stated five to six shots emanated from the driver's side window of the speeding pickup truck; five shell casings were discovered at the scene; and the gun residue test demonstrated that defendant recently discharged a firearm. Second, as noted above, the shots came from the vehicle. Third, the shots clearly endangered others as two individuals were injured. The prosecution provided sufficient evidence to satisfy the elements of intentional discharge of a firearm from a motor vehicle. *Cortez, supra* at 205-206.

Addressing the conviction for carrying a firearm with unlawful intent, the evidence demonstrated that defendant possessed a firearm and used it illegally against another person. *Jones, supra* at 101. Accordingly, sufficient evidence was presented to the jury such that a reasonable jury could hold that the essential elements of all three crimes were proven beyond a reasonable doubt. *Johnson, supra* at 722-723.

Defendant next contends that his dual convictions for assault with intent to do great bodily harm less than murder and intentionally discharging a weapon from a motor vehicle violate the constitutional provisions against double jeopardy. Although defendant did not raise the question of double jeopardy before the trial court, this Court will review the issue because it involves a significant constitutional issue. *People v Lugo*, 214 Mich App 699, 705; 542 NW2d 921 (1995). A double jeopardy issue constitutes a question of law which this Court reviews de novo on appeal. *Id.*

Both the United States and the Michigan Constitutions protect a person from twice being placed in jeopardy for the same offense. US Const, Am V; Const 1963, art 1, § 15; *People v Torres*, 452 Mich 43, 63; 549 NW2d 540 (1996). In the context of multiple punishments for the same offense, as in the instant case, the purpose of the double jeopardy protection is to ensure the defendant is not punished more severely than intended by the Legislature. *People v Griffis*, 218 Mich App 95, 100; 553 NW2d 642 (1996). Accordingly, “this Court’s inquiry when determining whether the Legislature intended to authorize cumulative punishment for certain criminal conduct necessarily focuses on the intent of the Legislature.” *Id.* at 101.

In analyzing the intent of the Legislature, it must be noted that the Legislature is not limited by the double jeopardy clause. Rather, the Legislature is free to determine what activity constitutes a criminal offense subject to criminal penalty. *People v Denio*, 454 Mich 691, 709; 564 NW2d 13 (1997). “Thus, if the Legislature desires, it may specifically authorize penalties for what would otherwise be the ‘same offense.’” *Id.* “Cumulative punishment of the same conduct under two different statutes in a single trial does not run afoul of the Double Jeopardy Clause in either the federal or state system.” *Id.*, citing *People v Sturgis*, 427 Mich 392, 403; 397 NW2d 783 (1986). When attempting to ascertain the intent of the Legislature in enacting criminal statutes, this Court has traditionally considered several factors including: “whether each statute prohibits conduct violative of a social norm distinct from that protected by the other; the amount of punishment authorized by each statute; whether the statutes are hierarchical or cumulative; and the elements of each offense.” *People v Rivera*, 216 Mich App 648, 650-651; 550 NW2d 593 (1996) (holding that convictions for both assault with intent to commit murder and intentional discharge of firearm from a vehicle do not violate the double jeopardy clauses).

Defendant contends that the dual convictions for assault with intent to do great bodily harm less than murder and intentionally discharging a weapon from a motor vehicle violate the constitutional prohibitions against double jeopardy because they both serve to punish the same offense. As noted *supra*, assault with intent to commit great bodily harm less than murder requires proof of (1) an attempt or threat with force or violence to do corporal harm to another (an assault), and (2) intent to do great bodily harm less than murder. *Parcha, supra* at 239. Intentional discharge of a firearm from a motor vehicle requires the prosecutor prove each of the following elements beyond a reasonable doubt: (1)

that the defendant intentionally discharged a firearm; (2) from a vehicle; (3) in a manner so as to endanger another person. CJI2d 11.37. See *Cortez*, *supra* at 205-206.

Addressing the factors outlined in *Rivera*, defendant contends that both criminal statutes serve to prohibit conduct violative of the same social norm, i.e., the deterrence and punishment of physical harm. The prosecution argues that the statutes prohibit conduct violative of a distinctly differing social norms. We agree with the prosecution.

In *People v Harrington*, 194 Mich App 424, 428; 487 NW2d 479 (1992), this Court evaluated the purpose of the assault with intent to do great bodily harm less than murder statute and held “the emphasis is on punishing crimes injurious to other people, regardless of whether a weapon is used to effect the injury.” The offense of intentional discharge of a weapon from a motor vehicle does prohibit conduct that endangers other individuals. However, in *Cortez*, *supra* at 206, this Court held that the “statute is directed against the firing of a weapon from the vehicle. It addressed the particular danger posed by shootings in which rapid flight is possible for the shooter.” Accordingly, the societal norm protected by the assault statute is to protect individuals from injury. The intentional discharge statute, on the other hand, protects against the manner in which an injury is inflicted on an individual. Thus, the statutes prohibit conduct geared to protecting separate and distinct societal norms.

Addressing the punishment factor, the assault statute authorizes imprisonment in the state prison for not more than ten years and a fine of not more than \$5,000. MCL 750.84; MSA 28.279. The intentional discharge statute authorizes imprisonment in the state prison for not more than four years and a fine of not more than \$2,000. MCL 750.234a; MSA 28.431a. While the prescribed punishments are disparate, we do not find the difference determinative. Addressing the question whether the statutes are hierarchical or cumulative, this Court has held that if the statutes are contained in separate chapters of the penal code, as in the case at bar, they are not hierarchical or cumulative. *Rivera*, *supra* at 651.

Addressing the elements factor, each statute contains elements that the other does not. The assault statute requires an actual assault take place with the defendant intending that the victim suffer great bodily harm. A weapon is not required. The intentional discharge statute, on the other hand, requires the discharge of a firearm, from a motor vehicle, but does not require that an assault actually occur. We find the intentional discharge statute was intended by the Legislature to specifically punish the type of drive-by shooting that occurred in the instant case. Therefore, we hold that defendant’s dual convictions for assault with intent to do great bodily harm less than murder and intentionally discharging a weapon from a motor vehicle do not violate the constitutional provisions against double jeopardy. *Rivera*, *supra* at 651.

Finally, defendant contends that he was denied effective assistance of counsel based on two errors made by defense counsel. We disagree. Because defendant’s claim of ineffective assistance of counsel was not preceded by an evidentiary hearing or a motion for a new trial, this Court may only consider this issue to the extent the claimed mistakes are apparent on the record. *People v Johnson*, 144 Mich App 125, 129-130; 373 NW2d 263 (1985).

To establish ineffective assistance of counsel, a defendant must show (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms, (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, and (3) that the result of the proceeding was fundamentally unfair or unreliable. *Strickland v Washington*, 466 US 668, 688-689; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *United States v Cronin*, 466 US 648; 104 S Ct 2039; 80 L Ed 2d 657 (1984); *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). Moreover, "the defendant must overcome a strong presumption that counsel's assistance constituted sound trial strategy." *Id.* at 687.

Defendant first contends defense counsel was ineffective for failing to file a motion in limine to suppress the gunpowder residue test. Defendant states that Detective Labar's admitted inexperience in gun residue cases and the fact the residue was the only hard evidence of defendant's use of a weapon mandated a filing of a motion in limine to suppress the results. However, there is nothing in the record that suggests a valid reason for the gun residue test to be suppressed. Although Detective Labar testified he only performed the test on one previous occasion, he thoroughly described the procedure which he used to perform the test. The test results were clearly relevant pursuant to MRE 401. Moreover, nothing in the record indicates the test's probative value was substantially outweighed by any unfair prejudice. MRE 403. Defense counsel is not required to make a frivolous or meritless motion. *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998).

Defendant's assertion that the gun residue test was the only hard evidence linking defendant to the crimes is a misstatement. Several witness described the assailant as an individual that looked like defendant. Vallejo made a 911 call wherein he stated defendant was the assailant. Five shell casings were found in an arching pattern that matched the route taken by the pickup truck. Barker identified defendant's truck as the pickup that accelerated past his house seconds after the shooting. Moreover, Trooper Navaho testified they observed the suspect vehicle within thirty seconds of hearing the radio report. The evidence clearly demonstrates that the results of the gun residue test were merely a small part of the overwhelming evidence against defendant. Defendant was not denied effective assistance of counsel with respect to the gun residue test.

Defendant next contends that defense counsel's introduction of defendant's arrest and conviction for a weapons offense on the day before the instant offense constituted ineffective assistance of counsel. Defense counsel clearly introduced the evidence to give the jury a plausible reason for the gun residue discovered on defendant's hands. Here, defendant cannot overcome the strong presumption that counsel's assistance constituted a sound and reasonable trial strategy. *Stanaway*, *supra* at 687.

Affirmed.

/s/ Donald E. Holbrook, Jr.  
/s/ Richard Allen Griffin

I concur in result only.

/s/ Michael J. Kelly