STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY WAYNE PERDUE,

Defendant-Appellant.

UNPUBLISHED
May 30, 1997

No. 177769
Genesee Circuit Court
LC No. 93-049692-FC

Before: O'Connell, P.J., and Smolenski and T.G. Power,* JJ.

PER CURIAM.

Defendant was convicted by a jury of felonious assault, MCL 750.82; MSA 28.277, assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279, possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2), and felon in possession of firearm, MCL 750.224f; MSA 28.421(6). Defendant thereafter pleaded guilty to second-offense habitual offender, MCL 769.10; MSA 28.1082. Defendant was sentenced to a term of two years' imprisonment for the felony-firearm conviction, such sentence to run consecutively to a sentence defendant was already serving in an unrelated case, and concurrent terms of two to four years' imprisonment for the felonious assault conviction, five to fifteen years' imprisonment for the assault with intent to do great bodily harm less than murder conviction (as enhanced by defendant's habitual offender conviction), and 2½ to five years' imprisonment for the felon-in-possession conviction, such sentences to run consecutively to the sentence imposed for the felony-firearm conviction. Defendant appeals as of right. We affirm and remand.

Defendant's convictions stem from two shootings involving the same complainant. Defendant first shot at the complainant outside a market. The vehicle in which defendant was a passenger then sped away. Three to five minutes later, the complainant encountered the same vehicle approximately fourteen blocks from the market. Defendant again shot at the complainant.

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

Defendant first argues that the trial court erred in giving the jury an instruction on flight over his objection. We disagree. The trial court is required to charge the jury concerning the law applicable to the case, and must not exclude from jury consideration material issues, defenses or theories if there is evidence to support them. *People v Moldenhaur*, 210 Mich App 158, 159; 533 NW2d 9 (1995). Michigan recognizes the equivocal nature of evidence of flight. *People v Cutchall*, 200 Mich App 396, 398; 504 NW2d 666 (1993), overruled in part on another ground as stated in *People v Edgett*, 220 Mich App 686, 691-694; 560 NW2d 360 (1996). Nevertheless, evidence of flight is relevant and admissible in Michigan because it may indicate consciousness of guilt. *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995). However, evidence of flight by itself is insufficient to sustain a conviction. *Id*. The term "flight" has been applied to such actions as fleeing the scene of the crime. *Id*. In this case, evidence was admitted without objection that the vehicle in which defendant was a passenger sped away at a high rate of speed after defendant first shot at the complainant. Other evidence was admitted that established the elements of the crimes with which defendant was charged. The trial court instructed the jury consistently with CJI2d 4.4 that evidence of flight does not prove guilt, that a person may flee either for innocent reasons or because of a consciousness of guilt, and that it was for the jury to decide whether the evidence showed that defendant had a guilty state of mind. Accordingly, we find no error. *Coleman, supra*; *Cutchall, supra*; cf. *People v Taylor*, 195 Mich App 57, 63-64; 489 NW2d 99 (1992); *People v Hall*, 174 Mich App 686, 691; 436 NW2d 446 (1989) (evidence that the defendant "merely walked away after setting the fire" was insufficient to give rise to "flight" in the legal sense).

Next, defendant contends that three instances of prosecutorial misconduct deprived him of due process of law. Specifically, defendant first contends that the prosecutor improperly informed the jury during opening statement that "[t]he evidence will further show that the Defendant was previously convicted of a felony and that he was ineligible to carry a firearm . . . ." Defendant failed to object to the prosecutor's statement at trial. Accordingly, we will reverse only if a curative instruction could not have eliminated the prejudicial effect of the remarks or our failure to review the issue would result in a miscarriage of justice. *People v Messenger*, 221 Mich App 171, 179-180; ___ NW2d ___ (1997). We find no error. Opening statement is the appropriate time to state the facts to be proven at trial. *People v Robbins*, 132 Mich App 616, 620; 347 NW2d 765 (1984). In this case, one of the elements of the offense of felon in possession of a firearm that the prosecutor was required to prove was defendant's status as a convicted felon. *People v Tice*, 220 Mich App 47, 53; 558 NW2d 245 (1996). The parties stipulated to this fact at trial. Thus, in stating during opening statement that defendant had previously been convicted of a felony, the prosecutor properly informed the jury of one of the facts to be proven at trial. Moreover, the jury was not informed of the offense that formed the basis for defendant's prior felony conviction pursuant to the parties' stipulation, and the court instructed the jury that it could not consider defendant's prior, unspecified felony conviction for any purpose except in deciding whether defendant was guilty of the charge of felon in possession of a firearm. Accordingly, adequate safeguards were taken by the parties and the court to ensure that defendant suffered no

unfair prejudice. *People v Mayfield*, ___ Mich App ___; ___ NW2d ___ (Docket No. 178956, issued 2/21/97), slip op p 2; see also *Old Chief v United States*, ___ US ___; 136 L Ed 2d 574; 117 S Ct 644 (1997).[1] Reversal on this ground is not warranted.

Second, defendant takes issue with the prosecutor's question to him on cross-examination concerning whether he had been on an ankle tether during the two or three months before the date the offenses in this case occurred. Defendant did not answer the question because defense counsel immediately objected. At the ensuing bench conference, the prosecutor indicated his belief that "[w]e can talk about the prior. We just can't talk about which one it was." The court stated that he would not allow the prosecutor to question defendant about the tether. Defense counsel moved for a mistrial, which was denied by the court. After the bench conference concluded, the prosecutor withdrew the question. We find no indication of bad faith of the prosecutor's part in posing the question to defendant. Although the question referred an ankle tether, it did not refer to any crime or otherwise indicate that it involved a penalty for a previous crime. And finally, the question was withdrawn and never answered. Accordingly, we cannot conclude that the question denied defendant a fair and impartial trial. *Messenger, supra*.

Third, defendant contends that the prosecutor impermissibly shifted the burden of proof by questioning the absence of a res gestae witness during rebuttal argument. Defendant failed to object to this remark at trial, but did raise the alleged error as a ground in support of his motion for a new trial, which was denied by the trial court. Once a defendant advances evidence or a theory, argument on the inferences created does not shift the burden of proof. *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995). In this case, defense counsel commented in his closing argument that the prosecution had failed to produce the eyewitness. The prosecutor's disputed remarks on rebuttal were a response to defense counsel's argument and did not shift the burden of proof. We conclude that the remark did not deny defendant a fair and impartial trial. *Messenger, supra*.

Next, defendant argues that the trial court erred in failing to instruct the jury on other lesser-included assault offenses. In conjunction with its duty to instruct the jury on the applicable law, a trial court must instruct on lesser-included offenses of the charged offense if requested by the defendant and if the lesser offenses are supported by the evidence. *People v Moore*, 189 Mich App 315, 319; 472 NW2d 1 (1991). However, a verdict will not be set aside because of the failure to instruct the jury on any point of law unless the defendant requests such instruction. *People v Hendricks*, 446 Mich 435, 440; 521 NW2d 546 (1994). In this case, defendant failed to request instructions on other lesser-included assault offenses. Thus, reversal is not warranted on this ground.

Next, defendant argues that his four convictions violate double jeopardy. We note that defendant raised a double jeopardy issue with respect to his felony-firearm and felon-in-possession convictions when he moved for a new trial below. However, defendant did not raise a double jeopardy issue with respect to his assault convictions below. Nevertheless, we will review the double jeopardy issue with respect to all four convictions because this issue involves a significant constitutional question.

People v Lugo, 214 Mich App 699, 705; 542 NW2d 921 (1995). A double jeopardy issue constitutes a question of law that is reviewed de novo on appeal. *Id*.

The right against double jeopardy protects a defendant from being subject both to successive prosecutions and multiple punishments for the same offense. *People v Phillips*, 219 Mich App 159, 162-163; 555 NW2d 742 (1996). In this case, defendant relies primarily on cases involving successive prosecution as authority for his double jeopardy argument. However, in this case, all the offenses with which defendant was charged were joined in a single trial. Thus, we find most of defendant's cited cases inapplicable to this case. Defendant does cite *People v Cortez*, 206 Mich App 204; 520 NW2d 693 (1994), for the proposition that the statutes under which he was convicted are aimed at identical harms. *Cortez* is a multiple punishments case. Thus, we treat defendant's double jeopardy argument as raising the issue of impermissible multiple punishments.

As explained in *Lugo*, *supra*:

> In the multiple punishment context, both the federal and state Double Jeopardy Clauses seek to ensure that the total punishment does not exceed that authorized by the Legislature. . . . Because the power to define crime and fix punishment is wholly legislative, the Double Jeopardy Clauses are not a limitation on the Legislature, and the Legislature may specifically authorize penalties for what would otherwise be the "same offense." . . . Cumulative punishment of the same conduct does not necessarily violate the prohibition against double jeopardy under either the federal system or the state system. The determinative inquiry is whether the Legislature intended to impose cumulative punishment for similar crimes. . . .
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> Determination of legislative intent involves traditional considerations of the subject, language, and history of the statutes. . . . The court should consider whether each statute prohibits conduct violative of a social norm distinct from the norm protected by the other, the amount of punishment authorized by each statute, whether the statutes are hierarchical or cumulative, and any other factors indicative of legislative intent. [*Id*. at 705-706 (citations omitted).]

In this case, both assault statutes are intended to punish crimes against persons. *Id*. at 708. 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. *Id*. In this case, the evidence indicated that defendant shot at the complainant outside a market. The vehicle in which defendant was a passenger turned at an intersection and sped away. The complainant turned his vehicle in the opposite direction and drove away. At this point the acts constituting the basis for one of defendant's assault convictions was complete. See *id*. at 709. Accordingly, we conclude that defendant's two assault convictions do not violate jeopardy. *Id*

The felon-in-possession statute is aimed at discouraging felons from possessing firearms. *Mayfield, supra*; *People v Walker*, 167 Mich App 377, 385; 422 NW2d 8 (1988). Because the assault statutes and the felon-in-possession statute protect different interests, we find no double jeopardy violation with respect to these convictions. *Lugo, supra* at 708. The felony-firearm statute is aimed at discouraging the use of a weapon during the course of a felony, regardless of who uses the weapon. *Walker, supra*; see also *Mayfield, supra*. Again, because the assault statutes and the felony-firearm statute protect different interests, we find no double jeopardy violation with respect to these convictions.

Finally, with respect to the defendant's felon-in-possession and felony-firearm convictions, we note that the respective statutes protect different interests. *Mayfield, supra*; *Walker, supra*. The sanction for a felon who possesses a firearm is greater (five years' imprisonment or $5,000) than the sanction for a first-time conviction of possessing a firearm during the commission of a felony (two years' imprisonment). We note that in enacting the felony-firearm statute, the Legislature intended to authorize punishment for both a weapon possession offense and felony-firearm growing out of the same criminal episode, provided that the weapon offense is not the predicate of the felony-firearm offense. *People v Mitchell*, 220 Mich App 439, 441; 559 NW2d 105 (1996). In this case, the assaults formed the predicate felony for defendant's felony-firearm conviction. Accordingly, we find no double jeopardy violation with respect to defendant's felony-firearm and felony-in-possession convictions.

Next, defendant raises an almost unintelligible argument concerning his sentencing as a habitual offender. To the extent that defendant attempts to raise an issue premised on *People v Preuss*, 436 Mich 714; 461 NW2d 703 (1990), we find no error. Defendant's offenses in this case were preceded by a 1992 felony conviction. To the extent that defendant attempts to argue that the trial court erred in applying the enhancement authorized by the second-offense habitual offender statute only to the conviction carrying the most lengthy penalty (assault with intent to do great bodily harm less than murder), defendant has cited no authority for this argument and we, therefore, deem it abandoned.

Next, defendant contends that his judgment of sentence should be corrected to comport with the trial court's actual sentence. As background, we note that defendant was previously convicted of attempted carrying a concealed weapon (attempted CCW) in an unrelated case and sentenced to probation. Defendant was on probation when he committed the instant offenses. After a probation violation hearing, defendant was sentenced to a term of imprisonment for the underlying attempted CCW conviction, which he was serving at the time he was sentenced in this case. Defendant correctly points out that although the trial court stated at the sentencing hearing in this case that his felony-firearm sentence would run concurrently with the attempted CCW sentence, both the original judgment of sentence and the amended judgment of sentence provide that the felony-firearm sentence is to run consecutively to the attempted CCW sentence. Thus, defendant argues that his sentence should be corrected so that his felony-firearm sentence runs concurrently with the attempted CCW sentence.

In the absence of statutory authority, sentences are to run concurrently, not consecutively. *People v Underwood*, 167 Mich App 646, 648; 423 NW2d 304 (1988). The record below provides

no indication of the authority relied on by trial court in specifying in the judgments of sentence, contrary to his statements at the sentencing hearing, that defendant's felony-firearm sentence shall run consecutively to his attempted CCW sentence. Defendant correctly points out that consecutive sentencing was not authorized in this case pursuant to MCL 768.7b; MSA 28.1030(2) because the attempted CCW offense was not "pending" for purposes of this statute where defendant had already been sentenced to probation for that offense when he committed the instant offenses. *People v Hardy*, 212 Mich App 318, 322; 537 NW2d 267 (1995). Further, our research reveals no statutory basis on which consecutive sentences may be imposed. See, e.g., MCL 333.7401(3); MSA 14.15(7401)(3) (certain drug offenses), MCL 750.183 *et seq.*; MSA 28.380 *et seq*. (the chapter of the penal code concerning breaking or escaping from prison or jail), MCL 768.7a; MSA 28.1030(1) (incarceration or parole). Accordingly, we remand to the trial court for a statement of the statutory authority relied on as a basis for ordering that defendant's felony-firearm sentence be served consecutively to the attempted CCW sentence.

We also remand to correct an error that occurred when the court amended the judgment of sentence. As background, we note that the original judgment of sentence contradictorily provided both that defendant's felony-firearm sentence would "run consecutive with sentence now serving *and prior to other counts*," but also that defendant's felony-firearm sentence would "*be served concurrent with*" the sentences imposed for defendant's assault and felon-in-possession convictions. Thereafter, defendant wrote the court a letter raising the previously discussed consecutive sentencing issue. However, rather than addressing this issue, the court simply amended the original judgment of sentence to consistently provide both that defendant's felony-firearm sentence would "run consecutive with sentence now serving *and prior to other cts*," and that defendant's assault and felon-in-possession sentences would "*be served consecutive with and after*" defendant's felony-firearm sentence.

A trial court's authority to resentence a defendant depends upon whether the original sentence was valid or invalid. *People v Hill*, ___ Mich App ___; ___ NW2d ___ (Docket No. 186689, issued 2/7/97), slip op p 1. By statute, a sentence for felony-firearm is to be served consecutively to the sentence for the underlying felony. *Cortez*, *supra* at 207*; Underwood*, *supra*. In this case, that portion of the original judgment of sentence providing that the felon-in-possession sentence would run concurrently with the felony-firearm sentence was correct where it is clear in this case that defendant's felon-in-possession conviction did not serve as the predicate or underlying felony for defendant's felony-firearm conviction. The trial court had no authority to amend defendant's judgment of sentence to order that the felon-in-possession sentence run consecutive to the felony-firearm conviction.

In summary, we affirm defendant's convictions. We remand for the following administrative proceedings. We note that both judgments contained in the lower court file indicate that defendant was convicted of two counts of assault with intent to murder. On remand, the trial court shall correct defendant's judgment of sentence to reflect that defendant was convicted of felonious assault and assault with intent to do great bodily harm less than murder. The trial court shall specify the statutory authority relied upon as the basis for ordering that the felony-firearm sentence run consecutive to the attempted

CCW sentence. If the court determines that no such statutory authority exists, the court shall correct the judgment of sentence to reflect that these sentences shall be served concurrently. The court shall further correct the judgment of sentence to reflect that the felon-in-possession sentence shall be served concurrently with the felony-firearm sentence. The court shall ensure that the corrected judgment of sentence is transmitted to the Department of Corrections. In all other respects, we affirm defendant's sentences.

Affirmed and remanded for proceedings in accordance with this opinion. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ Michael R. Smolenski
/s/ Thomas G. Power

[1] Indeed, we commend the court and the attorneys for their diligence in seeking to minimize any unfair prejudice to defendant without the benefit and guidance of either *Old Chief* or *Mayfield.*