

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MIKAEL PATTERSON,

Defendant-Appellant.

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UNPUBLISHED  
February 18, 2003

No. 237186  
Wayne Circuit Court  
LC No. 01-000380-01

Before: O’Connell, P.J., and Fitzgerald and Murray, JJ.

PER CURIAM.

Defendant Patterson was convicted by a jury of intentionally aiming a firearm at a person without malice, MCL 750.233, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to serve three days for the misdemeanor conviction (with credit for time served) and two years for the felony-firearm conviction. He appeals as of right. We affirm but remand.

On appeal, defendant argues that he was denied a fair trial when the trial court’s instructions created jury confusion, which the court failed to adequately clarify by instructing the jury that one of the underlying offenses supporting the felony-firearm charge was the misdemeanor offense of intentionally aiming a firearm without malice. We disagree.

Jury instructions are reviewed in their entirety to determine if error requiring reversal occurred. *People v Brown*, 239 Mich App 735, 746; 610 NW2d 234 (2000). No error will be found where the instructions as a whole fairly presented the issues to be tried and adequately protected the defendant’s rights. *Id.* at 746-747. Because defendant failed to object to the instructions as given, this issue is unpreserved and subject only to review for plain error. MCR 2.516(C); *People v Carines*, 460 Mich 750, 763-768; 597 NW2d 130 (1999).

Although an element of the offense of felony-firearm is the commission or attempted commission of a felony, a defendant need not be *convicted* of a felony or the attempt to commit a felony in order to be convicted of felony-firearm. *People v Lewis*, 415 Mich 443, 454-455; 330 NW2d 16 (1982). A jury’s decision to convict a defendant of felony-firearm may be construed as an implicit finding that the defendant committed or attempted to commit the underlying felony, notwithstanding its acquittal of the defendant on the underlying felony or its conviction on a lesser misdemeanor offense. *Id.* at 452; *People v Bonham*, 182 Mich App 130, 136; 451 NW2d 530 (1989). Thus, a jury may render seemingly inconsistent verdicts.

Here, there is no dispute that the trial court misstated the law when it initially informed the jury that defendant could not be convicted of felony-firearm if he was either acquitted of felonious assault or convicted of the lesser offense of intentionally aiming a firearm without malice. However, once the jury expressed confusion, the trial court adequately and properly addressed this confusion by re-reading the felony-firearm standard instruction and instructing them to follow that instruction. Contrary to defendant's argument, the court was under no duty to inform the jury that the lesser offense of intentionally aiming a firearm without malice is a misdemeanor.<sup>1</sup> *Bonham, supra*.

Notwithstanding the lack of any basis to vacate defendant's felony-firearm conviction, we note that consecutive sentencing—which is generally mandatory with a felony-firearm conviction—was precluded because defendant was convicted only of a lesser misdemeanor offense, not the underlying felony. See *People v Clark*, 463 Mich 459, 464; 619 NW2d 538 (2000). The felony-firearm statute authorizes a consecutive sentence to a “term of imprisonment imposed for *the conviction of the felony*.” MCL 750.227b(2) (emphasis added). Thus, concurrent sentencing was applicable here.

The trial court sentenced defendant to serve three days in the county jail, with credit for time served, for the misdemeanor conviction and to serve a mandatory two-year prison term for the felony-firearm conviction. While the court did not expressly direct either consecutive or concurrent sentencing on the record or in the judgments of sentence, it appears to us that consecutive sentencing was effectively imposed because defendant was given credit for time served against his misdemeanor conviction, but not against his felony-firearm conviction. Accordingly, we remand this matter to the trial court for the ministerial task of correcting the judgment of sentence to reflect concurrent sentencing and a single credit of three days for jail time served, to be applied concurrently against defendant's felony-firearm conviction and misdemeanor conviction of intentionally aiming a firearm without malice. See MCR 6.435(A); MCR 7.216(A)(7); *People v Herndon*, 246 Mich App 371, 392; 633 NW2d 376 (2001).

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<sup>1</sup> Defendant relies heavily upon an unpublished decision of this Court, *People v Jeffrey Smith*, unpublished opinion per curiam of the Court of Appeals (No. 164989, issued 12/1/94), in which the defendant was charged with assault with intent to murder and felony firearm. The jury was instructed on various lesser offenses, and during deliberations, inquired of the court whether the lesser offenses were felonies and, if not, whether they could form the basis for a conviction of felony-firearm. The trial court refused to answer the questions, and instead instructed the jurors to rely on their collective memories concerning the previous instructions. *Id.*, slip op at 1. This Court reversed, holding that while the trial court was not required to inform the jury that the lesser offenses were misdemeanors or felonies, it was under a duty to clarify the jury's confusion by reiterating its correct instructions. This Court concluded: “A court may not presuppose inconsistent verdicts where a jury expresses actual confusion before delivering its verdict.” *Id.*, slip op at 2. Besides the fact that unpublished decisions constitute nonbinding precedent, MCR 7.215(C)(1), the *Smith* decision is not helpful to defendant. Unlike in *Smith*, where the trial court refused to assuage the jury's confusion by reiterating its correct instructions, the trial court here did properly address the jury's confusion.

Defendant Patterson's convictions are affirmed, but we remand to the trial court for correction of the judgment of sentence to reflect concurrent sentencing and a single credit for time served against both convictions. We do not retain jurisdiction.

/s/ Peter D. O'Connell

/s/ E. Thomas Fitzgerald

/s/ Christopher M. Murray