

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JERMAINE JAMAL ALLEN,

Defendant-Appellant.

UNPUBLISHED

February 26, 1999

No. 203502

Kent Circuit Court

LC No. 96-01193-FC

Before: Markey, P.J., Saad and Collins, JJ.

PER CURIAM.

The People charged Jermaine Jamal Allen with assault with intent to commit murder, MCL 750.83; MSA 28.278, possession of a firearm by a convicted felon, MCL 750.224f; MSA 28.421(6), carrying a concealed weapon, MCL 750.227; MSA 28.424, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The jury acquitted defendant of the assault charge, but convicted him on the other three charges. Defendant appeals as of right. We affirm defendant's convictions, but remand for a new sentencing hearing.

This case arises from a shooting that occurred on November 22, 1995. Defendant and the victim, Everette Taylor, saw each other outside a party store. The two men had been members of rival gangs, the Cherry Street Boys and Kalamazoo Boys. Defendant shot Taylor several times. Defendant admitted the shooting, but claimed he acted in self-defense. The jury acquitted defendant of assault with intent to commit murder, but found defendant guilty of the other three offenses with which he was charged. On April 21, 1997, the court sentenced defendant to two years' imprisonment on the felony-firearm conviction and five- to 7 ½ years' imprisonment on the CCW and felon in possession convictions, with all sentences served concurrently. On May 28, 1997, the court entered an amended judgment, providing that the felon in possession and CCW sentences were to be served consecutively to the felony-firearm sentence.

Defendant contends the trial court erred in (1) instructing the jury on felony-firearm that its verdict need not be consistent with its verdict in the underlying felony, assault with intent to commit murder, and (2) failing to include a separate instruction on self-defense for felony-firearm. We disagree. Defendant failed to object to the jury instructions. The failure to object to jury instructions waives the

alleged error unless relief is necessary to avoid manifest injustice. *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993). This Court reviews jury instructions in their entirety to determine whether there is error requiring reversal. *People v Whitney*, 228 Mich App 230, 252; 578 NW2d 329 (1998). Even if jury instructions are imperfect, there is no error if they fairly presented the issues to be tried and sufficiently protected a defendant's rights. *Id.* A jury in a criminal case may reach different conclusions concerning an identical element of two different offenses. *People v Goss (After Remand)*, 446 Mich 587, 597; 521 NW2d 312 (1994). Defendant argues that the felony-firearm instruction as given authorizes a logically inconsistent verdict. However, juries are not held to any rules of logic. For example, juries have the power to acquit as a matter of leniency. *People v Lewis*, 415 Mich 443, 449; 330 NW2d 16 (1982). More specifically, a jury may decide to acquit a defendant of an underlying offense even though it believes beyond a reasonable doubt that he was guilty of that offense: The jury may decide instead to extend mercy by convicting defendant of only what the jury considered to be a lesser offense. *Id.*, 451. We cannot conclude, as defendant argues here, that the challenged instruction tells the jurors they have the right to ignore the court's instructions. Rather, the instruction only told the jury to consider the felony-firearm charge separately from the assault charge. We see no error in this charge.

Nor can we conclude that defendant was entitled to a separate instruction for self-defense for the felony-firearm count. The purpose of the felony-firearm statute is to reduce the possibility of injury to victims, passersby, and police officers in the course of a felony. *People v Williams*, 212 Mich App 607, 609; 538 NW2d 89 (1995). It would frustrate the purpose of the felony-firearm statute to allow an independent defense of self-defense. To the extent that defendant argues that the instruction as given misled the jury into believing that it could not consider self-defense in deciding whether defendant had committed assault as an element of felony-firearm, we disagree. The fairness of a jury charge cannot be assessed in a purely mechanical matter. *People v Butler*, 413 Mich 377, 388; 319 NW2d 540 (1982). This Court must examine the charge as a whole, rather than piecemeal, to determine if error exists. *People v Vaughn*, 447 Mich 217, 232; 524 NW2d 217 (1994). The instructions in this case could reasonably be understood to require the jury to consider self-defense in the assault, both as a substantive offense and as an element of the felony-firearm count. We are not convinced otherwise by the fact that defendant was acquitted of assault but convicted of felony-firearm. A jury can reach inconsistent verdicts. *Lewis, supra*, 415 Mich 449. While not a model of clarity, the instructions as given fairly presented the issues to be tried and sufficiently protected defendant's rights. *Whitney, supra*, 228 Mich App 252-253.

In a related argument, defendant claims he was denied effective assistance of counsel because defense counsel failed to object to the jury charge on the grounds discussed above. Because we find no error in the jury charge, we cannot find counsel ineffective on these grounds.

Defendant also argues that his felon in possession conviction must be vacated because it infringes on his right under the Michigan Constitution to keep and bear arms. Const 1963, art 1, § 6. This Court has found the felon in possession statute, MCL 750.224f; MSA 28.424(6), constitutional in the face of an identical challenge. *People v Swint*, 225 Mich App 353, 374-375; 571 NW2d 666 (1997). Defendant asks that we reconsider our decision in *Swint*. However, unless the Supreme Court

were to rule otherwise, *Swint* is a binding precedent on this Court. MCR 7.215(c). Furthermore, we see nothing in defendant's argument to convince us that *Swint* should be revisited.

Defendant further contends that the trial court erred in (1) entering an amended judgment when the original sentence was valid and (2) even if the original sentence was invalid, in entering the amended sentence without a sentencing hearing. We disagree with defendant's claim that the original sentence was valid on the grounds raised by defendant, but agree that a sentencing hearing was required. A court may correct an invalid sentence, but the court may not modify a valid sentence after it has been imposed except as provided by law. MCR 6.429(A). Defendant claims that the original sentence was valid because there is no authority for having a firearm possession offense serve as the underlying felony for a felony-firearm conviction. The Supreme Court has held contrary to defendant's position. *People v Mitchell*, 456 Mich 693, 697; 575 NW2d 283 (1998). As the Supreme Court has noted, there are four offenses that cannot serve as the underlying offense for a felony-firearm conviction: unlawful sale of pistols or firearms, MCL 750.223; MSA 28.420; carrying a concealed weapon, MCL 750.227; MSA 28.424; unlawful possession of a pistol by a licensee, MCL 750.227a; MSA 28.424(1); and alteration, removal, or obliteration of identification on a firearm, MCL 750.230; MSA 28.427. The legislative history of the statute reflects a commitment to reach all but the excepted felonies. *Mitchell, supra*, 697. In this case, the CCW charge cannot serve as the underlying felony for the felony-firearm charge; however, the felon in possession charge can serve as an underlying felony. Defendant's argument as to the legal theory on which the sentence was invalid is without merit.

However, we agree that the original sentence was valid. Absent statutory authority, consecutive sentences may not be imposed. *People v Sawyer*, 410 Mich 531, 534; 302 NW2d 534 (1981); *People v Alvarado*, 192 Mich App 718, 720; 481 NW2d 822 (1992). MCL 750.227b(2); MSA 28.424(2)(2) provides that a felony-firearm sentence be served consecutively to the felony or attempt to commit the felony. The statutory language makes clear that the intent behind the provision is to add to the time a defendant must serve by having the defendant serve his felony-firearm charge consecutively to the sentence in the underlying felony. Here, defendant was charged with possession of a firearm in the course of committing an assault with intent to commit murder. He was acquitted of the underlying felony. As a result, the court was correct when it originally concluded that it was required to assess concurrent sentences in all three cases.

Further, we agree with defendant that the trial court was required to conduct a sentencing hearing when it issued the new sentence. A hearing is required for resentencing pursuant to MCR 6.429(A). *People v Thomas*, 223 Mich App 9, 17; 566 NW2d 13 (1997). Plaintiff agrees that remand for a resentencing hearing is called for.

Finally, defendant contends that he is entitled to 272 days' credit for time served. Defendant was arrested on January 18, 1996 and released on bond on May 4, 1996. On July 24, 1996, he was arrested again. At the original sentencing hearing on April 21, 1997, the court directed that the sentence commence on July 24, 1996, with an additional 108 days' credit for time served. In the amended sentence, the 108 days' credit appeared; however, the language concerning commencement of sentence was removed. A defendant who is unable to post bond must be awarded credit for all time served in jail before sentencing. MCL 769.11b; MSA 28.1083(2); *People v Lyons* (After Remand), 222 Mich

App 319, 321; 564 NW2d 114 (1997). A defendant is entitled to bond only for time served as a result of being denied or unable to furnish bond for the offense of which he is convicted. *People v Adkins*, 433 Mich 732, 746; 449 NW2d 400 (1989). The amended judgment of sentence does not say why the language dealing with commencement of sentence on July 24, 1996 was deleted. We direct the trial court to recompute defendant's credit for time served.

Remanded for resentencing in accordance with this opinion. We affirm in all other respects. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ Henry William Saad
/s/ Jeffrey G. Collins