

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ZENO CHARLES BUDD,

Defendant-Appellant.

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UNPUBLISHED

May 1, 2001

No. 217194

Clinton Circuit Court

LC No. 98-006493-FH

Before: Griffin, P.J., and Neff and White, JJ.

PER CURIAM.

Defendant appeals as of right his conviction and sentence following a jury trial for felon in possession of a firearm, MCL 750.224f; MSA 28.421(6), and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The trial court sentenced defendant to 1 to 7½ years' imprisonment for the felon-in-possession conviction, to be served consecutive to and following the mandatory two-year term for the felony-firearm conviction. This case arises from an incident where defendant assaulted with a rifle two men who came to secure property that defendant claimed was his own. We affirm.

Defendant first argues that his convictions under both the felon-in-possession statute and the felony-firearm statute constitute double jeopardy because he is being punished twice for the same conduct – the Legislature did not intend multiple punishments for felony-firearm where the underlying felony is based on the possession, not the use, of a firearm. We disagree.

We review a trial court's determination of a double jeopardy issue de novo. *People v Mackle*, 241 Mich App 583, 592; 617 NW2d 339 (2000). The double jeopardy clauses of the United States and Michigan Constitutions prohibit a person from being "twice put in jeopardy" for the same offense. US Const, Am V; Const 1963, art 1, § 15. However, if the Legislature specifically authorizes cumulative punishment under two statutes, a court's task of statutory construction is at an end. *People v Mitchell*, 456 Mich 693; 695; 575 NW2d 283 (1998).

Our Supreme Court determined that the Legislature intended to impose multiple punishments for firearm offenses unless the underlying felony was one of only four specifically excluded by the statute. *Id.* at 697-698. The excluded offenses do not include felon in possession of a firearm, MCL 750.224f; MSA 28.421(6). Moreover, the statutes have different purposes. The felon-in-possession statute is intended to protect the public from guns in the

hands of previously convicted felons, while the purpose of the felony-firearm statute is to punish anyone who possesses a firearm while committing a felony. *People v Mayfield*, 221 Mich App 656, 662; 562 NW2d 272 (1997); *Mitchell, supra* at 697. The former offense focuses on a specific category of criminal actor, while the latter offense focuses on a specific criminal act. Consequently, double-jeopardy protections are not violated here.

Second, defendant argues that the prosecutor shifted the burden to defendant to prove his case. We disagree. We review unpreserved allegations of prosecutorial misconduct for a miscarriage of justice. *People v Rivera*, 216 Mich App 648, 651-652; 550 NW2d 593 (1996). The prosecutor's comment was not a reflection of defendant's lack of testimony, but merely stated that testimony provided in defendant's affidavit had not been contradicted. Once a defendant advances evidence, the prosecutor's argument on the inferences created by that evidence does not shift the burden of proof. *People v Reid*, 233 Mich App 457, 478; 592 NW2d 767 (1999); *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995). Therefore, no miscarriage of justice occurred.

Third, defendant argues that the prosecutor's analogy of defendant's alleged actions to the Alamo unfairly prejudiced defendant. We disagree.

A prosecutor's comments during closing argument are reviewed in context to determine whether they constitute error requiring reversal. *People v Bass (On Rehearing)*, 223 Mich App 241, 251; 565 NW2d 897 (1997), vacated in part on other grounds 457 Mich 866; 577 NW2d 667 (1998). The reference to the heroism of early American patriots at the Alamo cannot be considered necessarily negative; further, in the context of the prosecutor's remarks, any negative implications did not rise to level of a miscarriage of justice.

Fourth, defendant argues that he is entitled to a remand for resentencing before a different judge because the trial court allegedly relied on defendant's refusal to admit guilt in the determination of sentence. We disagree.

A sentencing court may not consider defendant's refusal to admit his guilt in determining sentence. *People v Drayton*, 168 Mich App 174, 178-179; 423 NW2d 606 (1988). While the difference between admitting guilt and being remorseful is subtle, this Court still distinguishes between the two. *People v Calabro*, 166 Mich App 389, 395-396; 419 NW2d 791 (1988). The trial court's comments here were related to defendant's past social and criminal history, as well as his anti-authoritarian belief system, and its effect on possible rehabilitation. The court's comment addressed defendant's beliefs that his conduct was appropriate, regardless of the laws prohibiting that conduct. Moreover, the sentence was within the guidelines, and therefore, presumptively proportionate. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987).

Finally, defendant argues that his presentence investigation report should be amended because of inaccurate information. We agree. If the court finds that the challenged PSIR information is inaccurate or irrelevant, the information must be corrected or stricken from the report. MCL 771.14(6); MSA 28.1144(6), MCR 6.425(D)(3)(a); *People v Hoyt*, 185 Mich App 531, 534; 462 NW2d 793 (1990). Therefore, the case is remanded for the sole purpose of correcting the PSIR to reflect that defendant is a second offender rather than a third offender.

We affirm defendant's convictions and sentences. We remand for the ministerial purpose of correcting the PSIR. We do not retain jurisdiction.

/s/ Richard Allen Griffin

/s/ Janet T. Neff

/s/ Helene N. White