STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARK TWAIN GADDIS,

Defendant-Appellant.

UNPUBLISHED
January 5, 2010

No. 289363
Wayne Circuit Court
LC No. 08-008093-FH

Before: Murphy, C.J., and Jansen and Zahra, JJ.

PER CURIAM.

Defendant appeals by right his jury-trial convictions of carrying a concealed weapon (CCW), MCL 750.227, felon in possession of a firearm (felon-in-possession), MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. He was sentenced as a third habitual offender, MCL 769.11, to prison terms of two years for the felony-firearm conviction, 1½ to 5 years for the felon-in-possession conviction, and 1½ to 5 years for the CCW conviction. The felony-firearm sentence is consecutive to the felon-in-possession sentence; the sentences for CCW and felon-in-possession are concurrent with each other. The judgment of sentence includes the notation, "THIS CASE TO BE SERVED CONCURRENT TO CASES DEFENDANT PREVIOUSLY SERVING" (capitals in the original). The trial court also ordered defendant to pay certain costs and fees upon being paroled. We affirm. This appeal has been decided without oral argument. MCR 7.214(E).

The prosecuting attorney's theory of the case was that, on the morning of March 12, 2008, the police stopped a car for lack of proper tags. Defendant, who was a passenger in that car, hid a gun under his seat and then ran away. The police searched the car and found the gun.

On appeal, defendant argues that his convictions of various gun-related crimes, all stemming from a single possession, violate double jeopardy principles. He further argues that that he was denied a fair trial by certain prosecutorial argument and that the trial court erred by ordering him to pay costs and fees. In a supplemental brief filed *in propria persona*, defendant also asserts that he was denied the effective assistance of trial counsel.

I. Double Jeopardy

The Double Jeopardy Clauses of the federal and state constitutions prohibit a criminal defendant from being placed twice in jeopardy for a single offense. *People v Booker (After*

Remand), 208 Mich App 163, 172; 527 NW2d 42 (1994); see also US Const, Ams V, XIV; Const 1963, art 1, § 15. Double jeopardy issues present questions of law, calling for review de novo. *People v Calloway*, 469 Mich 448, 450; 671 NW2d 733 (2003). However, the defense did not raise this double jeopardy challenge before the trial court, leaving this issue unpreserved. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Appellate review is thus limited to ascertaining whether there was a plain error affecting defendant's substantial rights. In such situations, reversal is appropriate only when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Id.*

Defendant argues that his privilege against double jeopardy was violated because only a single possession of a single firearm resulted in three separate convictions and sentences. We disagree.

The Legislature has the choice of punishing a crime through provisions for a single conviction and sentence, or through creating the possibility of multiple convictions and sentences stemming from a single course of criminal conduct. See *People v Mitchell*, 456 Mich 693, 695-696; 575 NW2d 283 (1998). The crime of felony-firearm illustrates the latter approach, where the Legislature prescribed fixed additional, and consecutive, sentences for felonies committed while possessing a firearm; the Legislature's listing of only some of the other felonies that involve firearms as exempt from this scheme indicates that the Legislature thereby intended to impose multiple punishments for those not included. *Id.* at 695-698. Because felon-in-possession is not among the enumerated offenses upon which felony-firearm may not be predicated, a defendant may be convicted of, and sentenced for, both felony-firearm and felon-in-possession without violating double jeopardy principles. *Calloway*, *supra* at 452.

CCW is among the offenses upon which felony-firearm may not be predicated. MCL 750.227b(1). But conviction of both CCW and felony-firearm does not offend the privilege against double jeopardy if the felony-firearm conviction is predicated on a felony other than CCW. *People v Sturgis*, 427 Mich 392, 409-410; 397 NW2d 783 (1986); *People v Dillard*, 246 Mich App 163, 171 n 5; 631 NW2d 755 (2001).

Our Supreme Court has thus squarely rejected appellate counsel's arguments concerning double jeopardy in connection with felon-in-possession and felony-firearm. *Calloway*, *supra* at 452. And defendant's argument concerning CCW and felony-firearm must fail under the rationale of *Sturgis*. Lastly, this Court's own precedent establishes that double jeopardy is no bar to separate convictions of, and sentences for, CCW and felon-in-possession. *Dillard*, *supra* at 171 n 5; see also *People v Mayfield*, 221 Mich App 656, 662; 562 NW2d 272 (1997). For these reasons, we reject defendant's arguments concerning double jeopardy.

II. Prosecutorial Misconduct

Defendant makes issue of the following statement from the prosecuting attorney's closing argument:

> When you look at this case and you look at the evidence that was presented in this case, it's clear that the defendant was the one that was in possession of the handgun. It is clear that the defendant is the one who had the guilty conscience, running shows his consciousness of guilt. He ran from them.

Defendant argues that this argument was improper and unfair, on the ground that its probative value was slight, but its potential for serious prejudice was great.

The defense raised no objections at trial regarding this argument, thus leaving the issue unpreserved. Our review is limited to ascertaining if there was plain error affecting defendant's substantial rights. *Carines*, *supra* at 763. This Court has held that "'[r]eview of alleged prosecutorial misconduct is precluded unless the defendant timely and specifically objects, except when an objection could not have cured the error, or failure to review the issue would result in a miscarriage of justice.'" *People v Unger*, 278 Mich App 210, 234-235; 749 NW2d 272 (2008), quoting *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003).

"It is well established that evidence of flight is admissible to show consciousness of guilt." *People v Compeau*, 244 Mich App 595, 598; 625 NW2d 120 (2001). The prosecutorial argument to which defendant objects did indeed relate to matters in evidence and the prosecutor's theory of the case. Moreover, the prosecutor's suggestion that defendant's flight from the police showed a consciousness of guilt was consistent with sound legal principles. "Prosecutors . . . are free to argue the evidence and all reasonable inferences arising from it as they relate to the theory of the case." *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). We find no outcome-determinative plain error in this regard. *Carines*, *supra* at 763.

Furthermore, the trial court's instructions concerning flight should well have avoided any unfair prejudice:

> There has been some evidence that the defendant tried to run away before he was accused of a crime. This evidence does not prove guilt. A person may run or hide for innocent reasons, such as panic, mistake or fear.
>
> However, a person may also run or hide because of a consciousness of guilt. You must decide whether the evidence is true and, if true, whether it shows that the defendant had a guilty state of mind.

"It is well established that jurors are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). We presume that the jury in this case deliberated with an intelligent understanding of how to consider the evidence of flight. Any prejudicial effect of the prosecutor's remarks was cured by the trial court's proper jury instruction.

III. Costs and Fees

The trial court ordered defendant, as part of his sentence, to pay assessments of $60 for the Crime Victims' Rights Fund, $600 in attorney fees, $600 in court costs, and $60 in state costs. The judgment of sentence includes the statement, "COSTS AND FEES ARE TO BE PAID UPON PAROLE."

Defendant now challenges the trial court's assessment of attorney fees and court costs. However, it does not appear that defense counsel objected to these assessments below. We consequently review this issue for plain error affecting defendant's substantial rights. *Carines*, *supra* at 763.

Defendant first asserts that costs should not have been assessed on the ground that none of the criminal statutes under which defendant was convicted authorized any such assessment. However, this Court has held that recent statutory enactments authorize a sentencing court to include, as part of any criminal sentence, an assessment of court costs. *People v Lloyd*, 284 Mich App 703, 709 n 3, 709-710; 774 NW2d 347 (2009); see also MCL 769.1k and MCL 769.34(6).

Defendant also protests that the costs assessed must bear a reasonable relationship to the actual costs of prosecution, but does not explain why we should regard the nominal $600 assessed in this instance as exceeding such an amount. The lack of additional argument and substantiation waives further review of this issue. See *People v Mackle*, 241 Mich App 583, 604 n 4; 617 NW2d 339 (2000) (observing that "[a] party may not merely state a position and then leave it to this Court to discover and rationalize the basis for the claim").

Defendant next challenges the assessments of both costs and attorney fees on the ground that the trial court made no inquiry into defendant's ability to pay. However, he fails to distinguish between these respective types of assessments. The constitutional right to the assistance of counsel potentially relieves an indigent person from having to cover any of the costs of defense counsel personally. See *People v Jackson*, 483 Mich 271, 286-287; 769 NW2d 630 (2009). Conversely, an order to pay court costs implicates no such fundamental right. *Lloyd*, *supra* at 710 n 4. Accordingly, we cannot conclude that the trial court erred by ordering the reimbursement of court costs without inquiring into defendant's ability to pay.

Nor did the trial court err by ordering reimbursement of attorney fees without making a determination of defendant's ability to pay. A trial court need not make such a determination at sentencing, because the "ability-to-pay assessment is only necessary when that imposition is enforced and the defendant contests his ability to pay." *Jackson*, *supra* at 298. In this case, the trial court relieved defendant of any obligation to begin paying attorney fees until he is paroled. Because the issue is thus premature at this time, we need not address it further. See *id.*

IV. Assistance of Counsel

Defendant, in his supplemental brief filed *in propria persona*, argues that trial counsel was ineffective for failing to advise him of the consequences of not accepting a plea bargain and the risks of going to trial. Defendant requests a remand to the trial court for an evidentiary hearing on this matter. See *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

"In reviewing a defendant's claim of ineffective assistance of counsel, the reviewing court is to determine (1) whether counsel's performance was objectively unreasonable and (2) whether the defendant was prejudiced by counsel's defective performance." *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Regarding the second prong of this inquiry, the defendant must show that the result of the proceeding was fundamentally unfair or unreliable, and that but for counsel's poor performance the result would have been different. *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997).

Defendant claims that he was invited to plead guilty to felony-firearm in exchange for the dropping of the other firearms charges, but that he declined the offer because defense counsel informed him that the resulting felony-firearm sentence would run consecutively to a sentence

that he had already received arising out of unrelated criminal proceedings in Oakland County. Defendant now contends that counsel's advice in this regard was erroneous and deprived him of the effective assistance of counsel.

It is true that if trial counsel actually advised defendant as defendant now alleges, counsel's advice concerning consecutive sentencing was likely erroneous. Indeed, the trial court ordered the instant sentences to run, as a whole, concurrently with the sentence arising out of the Oakland County prosecution. Concurrent sentencing is the norm; consecutive sentences may be imposed only when specifically authorized by statute. *People v Brown*, 220 Mich App 680, 682; 560 NW2d 80 (1996). A sentence for felony-firearm must run consecutively to a sentence, if any, for the felony upon which it was predicated, MCL 750.227b(2), but the norms of concurrent sentencing otherwise apply. Moreover, defendant was not on parole from the Oakland County sentence. Thus, the requirement that a parole violator's new sentences run consecutively to the sentences from which he was on parole does not come into play here. See, generally, *People v Idziak*, 484 Mich 549, 562-563; 773 NW2d 616 (2009).

Defendant asks for an evidentiary hearing to develop this issue further, and for the opportunity to belatedly accept the plea bargain. However, even assuming arguendo that the plea bargain defendant describes was in fact offered and that defense counsel actually misinformed him concerning the interplay between concurrent and consecutive sentencing, this Court lacks authority to compel the prosecutor, after trial and conviction, to revive a plea offer that was never accepted, let alone approved by the trial court. See *People v Heiler*, 79 Mich App 714, 720-722; 262 NW2d 890 (1977). Indeed, respect for the separation of powers militates against the judiciary's attempting to force the hand of the executive branch of government in this way. *Id.* at 721; see also Const 1963, art 3, § 2. We note that there is no allegation of an abuse of prosecutorial discretion in the matter, or that defendant suffered prejudice from any reliance on the offer. See *Heiler*, *supra* at 722.

For these reasons, we decline defendant's invitation to remand the case to the trial court for further development of his claim of ineffective assistance of counsel.

Affirmed.

/s/ William B. Murphy
/s/ Kathleen Jansen
/s/ Brian K. Zahra