STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 22, 2009
v	No. 286327 Macomb Circuit Court
DAVID PRESTON ESTRADA, Defendant-Appellant.	LC No. 2007-004005-FC

Before: Donofrio, P.J., and Sawyer and Owens, JJ.

PER CURIAM.

Following a jury trial, defendant appeals as of right from his conviction of two counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, third degree fleeing and eluding, MCL 257.602a(3)(a)(collision), and possession of a firearm by a felon, MCL 750.224f(2). The trial court sentenced defendant as a fourth offense habitual offender, MCL 769.12, to prison terms of 24 months on the felony-firearm counts, to be served consecutively and preceding the terms of 76 months to 20 years on the felon in possession and fleeing and eluding counts. We affirm, but remand for the administrative task of correcting the portion of the sentence that improperly required a consecutive sentence on the felony-firearm counts.

I. Facts

Defendant's convictions arose from an incident at a carwash and a subsequent police chase. The carwash attendants testified that defendant robbed them at gunpoint. Defendant testified that he took money and cellular phones from the carwash as collateral for a drug debt one of the carwash attendants owed him. As defendant drove away from the carwash, the police signaled for him to pull over. Instead, defendant sped up, running through stoplights and driving at an excessive speed. His car ultimately collided with another car, and he fled on foot. The police apprehended him nearby, and later found a revolver along the route of the car chase.

II. Sufficiency of the Evidence

Defendant challenges the sufficiency of the evidence for his felony-firearm convictions and his felon in possession conviction. We review these challenges de novo. *People v Meshell*, 265 Mich App 616, 619; 696 NW2d 754 (2005). We examine the record to determine whether a

reasonable juror could conclude that the prosecutor proved each element of the crimes beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

We find the evidence sufficient on the felony-firearm counts. "The elements of felony-firearm are that the defendant possessed a firearm during the commission of, or the attempt to commit, a felony." *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). Significantly, the prosecutor need not prove that the defendant has been convicted of a felony; rather, the prosecutor need only prove that the defendant committed or attempted to commit the underlying felony. See *People v Bonham*, 182 Mich App 130, 135-136; 451 NW2d 530 (1989). The prosecutor met this burden. Both carwash attendants testified that defendant robbed them while pointing a gun at them. This testimony was sufficient to allow a reasonable juror to find defendant guilty on the felony-firearm counts, even though the jurors elected not to convict defendant on the armed robbery counts. A jury is permitted to render inconsistent verdicts on a multi-count indictment. *People v Vaughn*, 409 Mich 463, 465-466; 295 NW2d 354 (1980).

Similarly, the evidence was sufficient on the felon in possession count. The elements of that count are (1) that defendant possessed a firearm, (2) that defendant had been convicted of a prior specified felony, and (3) that less than five years had elapsed since defendant was discharged from parole for the prior felony. MCL 750.224f(2) (prior assault conviction); see *People v Parker*, 230 Mich App 677, 684-685; 584 NW2d 753 (1998). Defendant claims there was insufficient evidence on the possession element. However, the attendants' testimony outlined above was sufficient to allow a reasonable juror to conclude that defendant possessed a firearm.

III. Double Jeopardy

Defendant further argues that his convictions for felony-firearm and felon in possession violate the constitutional double jeopardy provisions. This argument has been rejected by our Supreme Court. *People v Calloway*, 469 Mich 448, 452; 671 NW2d 733 (2003).

IV. Sentence

Defendant challenges two aspects of his sentence. First, relying on *People v Dunbar*, 264 Mich App 240, 251-255; 690 NW2d 476 (2004), defendant argues that the trial court erred in imposing $500 in attorney fees without indicating that it had considered defendant's ability to pay. However, *Dunbar* was recently overruled on this very point. *People v Jackson*, 483 Mich 271, 290; 769 NW2d 630 (2009).

Jackson also noted that the Court had "for purposes of an ability-to-pay analysis, we have recognized a substantive difference between the imposition of a fee and the enforcement of that imposition." *Id.* at 291-292. *Jackson* noted that

> whenever a trial court attempts to enforce its imposition of a fee for a court-appointed attorney under MCL 769.1k, the defendant must be advised of this enforcement action and be given an opportunity to contest the enforcement on the basis of his indigency. Thus, trial courts should not entertain defendants' ability-to-pay-based challenges to the imposition of fees until enforcement of that imposition has begun. [*Id.* at 292 (emphasis omitted).]

Further, *Jackson* concluded that "MCL 769.1*l* inherently calculates a prisoner's general ability to pay and, in effect, creates a statutory presumption of nonindigency." *Id*. at 296. An "imprisoned defendant bears a heavy burden of establishing . . . extraordinary financial circumstances" sufficient to overcome this presumption. *Id.*

On June 18, 2008, the court ordered enforcement of the fee imposition, which includes attorney fees. In accordance with MCL 769.1*l*, the court ordered the following:

> 2. For payment toward the obligation, the Department of Corrections shall collect 50% of all funds received by the defendant over $50.00 each month.
>
> 3. If the amount withheld at any one time is $100.00 or less, the Department of Corrections shall continue collecting funds from the defendant's prisoner account until the sum of the amounts collected exceeds $100.00, at which time the Department of Corrections shall remit that amount to this court . . . .

Although defendant filed an affidavit of indigency along with his request for an appointed appellate attorney, he has not contested his ability to pay the imposed fees. Thus, we resolve this issue as did *Jackson*:

> In this case, the trial court did not err by imposing the fee for his court-appointed attorney without conducting an ability-to-pay analysis. Further, it did not err by issuing the remittance order under MCL 769.1*l* because defendant is presumed to be nonindigent if his prisoner account is only reduced by 50 percent of the amount over $50. However, if he contests his ability to pay that amount, he may ask the trial court to amend or revoke the remittance order, at which point the trial court must decide whether defendant's claim of extraordinary financial circumstances rebuts the statutory presumption of his nonindigency. [*Id.* at 298-299.]

Second, defendant challenges the trial court's order that his sentences be served consecutively. Plaintiff agrees that this aspect of the sentence was erroneous, in accordance with *People v Clark*, 463 Mich 459, 463-464; 619 NW2d 538 (2000). A felony-firearm sentences is consecutive only to the predicate felony sentence. *Id*. Here, there was no sentence on the predicate felony, so the trial court should not have ordered that the felony-firearm sentences be served consecutively.

Affirmed, but remanded for the administrative task of correcting the judgment of sentence consistent with *Clark*. Additionally, the judgment of sentence should be corrected to indicate that the 24-month sentences apply to the felony-firearm counts, and the 76-month to 20-year sentences apply to the fleeing and eluding conviction. We do not retain jurisdiction.

/s/ Pat M. Donofrio
/s/ David H. Sawyer
/s/ Donald S. Owens