

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHARLES WAYNE WATERS,

Defendant-Appellant.

UNPUBLISHED

December 15, 2000

No. 218028

Calhoun Circuit Court

LC No. 98-003035-FC

Before: Smolenski, P.J., and Wilder and Meter, JJ.

PER CURIAM.

Defendant appeals by right from his convictions by a jury of first-degree premeditated murder, MCL 750.316(1)(a); MSA 28.548(1)(a), first-degree felony murder, MCL 750.316(1)(b); MSA 28.548(1)(b), armed robbery, MCL 750.529; MSA 28.797, conspiracy to commit murder, MCL 750.157a; MSA 28.354(1), conspiracy to commit armed robbery, MCL 750.157a; MSA 28.354(1), and three counts of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The convictions arose from the shooting death and robbery of Robby Goosen at a rest area located off I-69 near Battle Creek. The trial court sentenced defendant to two concurrent terms of life imprisonment without parole for the premeditated and felony murder convictions, to be served concurrently to (1) a life sentence for the conspiracy to commit murder conviction, and (2) two terms of 10 to 30 years' imprisonment for the armed robbery and conspiracy to commit armed robbery convictions. The trial court additionally ordered that the foregoing sentences be preceded by three concurrent two-year terms for defendant's three felony-firearm convictions. We vacate the armed robbery conviction and two of the felony-firearm convictions. We affirm the remaining felony-firearm conviction, as well as the murder and conspiracy convictions, but we remand this case for correction of the judgment of sentence as it applies to the affirmed convictions.

Defendant first argues that the trial court failed to properly instruct the jurors that each of their verdicts must be unanimous. It is the duty of the trial court to properly instruct the jury regarding the unanimity requirement. *People v Cooks*, 446 Mich 503, 511; 521 NW2d 275 (1994). While acknowledging that a general instruction on unanimity was in fact given at trial, defendant argues that in light of the number of possible verdicts in this case, an instruction clarifying the need for a unanimous verdict on each of the eight individual charges was required. Because defendant neither requested modification of the instructions used by the trial court nor

objected to the instructions as given, this issue is unpreserved. See *People v Mass*, 238 Mich App 333, 341; 605 NW2d 322 (1999). Therefore, in order to avoid forfeiture of this issue, defendant must demonstrate plain error that was prejudicial, i.e., that could have affected the outcome of the trial. *Id.*; *People v Grant*, 445 Mich 535, 553; 520 NW2d 123 (1994); *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Here, a review of the verdicts announced during a poll of the jury following trial reveals that each verdict rendered in this case was unanimously agreed upon by each juror. Therefore, we find no prejudicial error.

Next, defendant contends that he has been deprived of his constitutional right to be free from double jeopardy. In doing so, defendant concedes that double jeopardy concerns are not implicated where a defendant is convicted of both conspiracy and the underlying offense on which the conspiracy conviction is premised, but argues, without further explanation, that his prosecution and convictions on the “multiple charges” in this case violated his right against double jeopardy and constituted prosecutorial overcharge.

As a general rule, this Court is not obligated to review an issue given such cursory treatment. See *People v Cain*, 238 Mich App 95, 127; 605 NW2d 453 (1999), and *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). However, where justice requires that the issue raised be addressed, review is nonetheless appropriate. *Cain, supra* at 127. Here, because we believe that certain of defendant’s convictions are constitutionally infirm, we will review the matter despite defendant’s failure to adequately address this issue.

As noted above, for his part in the death of Robby Goosen defendant was convicted on eight separate counts: first-degree premeditated murder; first-degree felony murder; armed robbery; conspiracy to commit murder; conspiracy to commit armed robbery; and three counts of felony-firearm stemming from his premeditated murder, felony murder, and armed robbery convictions.

In *People v Bigelow*, 229 Mich App 218; 581 NW2d 744 (1998), a conflict panel of this Court convened to consider the issue of the proper method of treating dual convictions of first-degree premeditated and felony murder arising out of the death of a single victim. In that case, the defendant had been convicted of both first-degree premeditated murder and first-degree felony murder, as well as breaking and entering an occupied dwelling with intent to commit larceny. The trial court sentenced the defendant to concurrent life sentences on each of the murder convictions, as well as to a term of years for the breaking and entering conviction. On appeal to an earlier panel, the defendant had argued that his convictions of both first-degree premeditated murder and first-degree felony murder violated double jeopardy prohibitions. See *People v Bigelow*, 225 Mich App 806; 571 NW2d 520 (1997). Compelled by this Court’s decision in *People v Passeno*, 195 Mich App 91, 95; 489 NW2d 152 (1992), and the first-out rule of MCR 7.215(H), that panel vacated the defendant’s felony murder conviction on the ground of double jeopardy. *Bigelow, supra*, 225 Mich App at 806. In doing so, however, the panel noted that were such a result not required under MCR 7.215(H), it would follow the rationale stated in *People v Zeitler*, 183 Mich App 68; 454 NW2d 192 (1990), and hold that the appropriate remedy in such situations is to modify the defendant’s judgment of conviction and sentence to specify that the defendant’s conviction is for one count and one sentence of first-degree murder supported by two theories: premeditated murder and felony murder. *Bigelow*,

supra, 225 Mich App at 806. In support of this alternative method of treating the dual convictions, the panel reasoned:

[T]he interests of justice are better served by *Zeitler*. Once the felony-murder basis of a defendant's first-degree murder conviction is vacated, and the order has become effective, this ground to support the conviction is gone forever. If on further appeal, another court were to find insufficient evidence of premeditated murder, the first-degree murder conviction would be reversed and vacated in total because no basis would remain to support the conviction. Such a result would be unjust and absurd, particularly for a criminal such as defendant who has clearly committed felony murder. [*Id.* at 808.]

This rationale was adopted by the conflict panel, which upheld the defendant's convictions and sentences for murder but ordered that the judgment of sentence be modified to reflect that the defendant received a single conviction and single sentence for one count of first-degree murder supported by each of the theories of premeditation and felony murder. *Bigelow, supra*, 229 Mich App at 221-222. The conflict panel further noted, however, that because double jeopardy prohibits a conviction of both felony murder and its predicate offense, the defendant's conviction of breaking and entering would need to be vacated on remand. *Id.* at 222.

In the case at bar, despite the trial court's indication that defendant was being sentenced on the "alternative theories" of premeditation and felony murder, both the court's comments during sentencing as well as the judgment of sentence indicate that, contrary to *Bigelow*, defendant received two separate convictions and life sentences as a result of the murder charges. While the court may not have intended such a result, we believe it necessary to remand this matter for a clarification of defendant's judgment of sentence in a manner consistent with the requirements set forth in *Bigelow*.

In addition, we note that as the predicate offense for defendant's felony murder conviction, the armed robbery conviction violated defendant's right against double jeopardy. *Id.* at 221-222; see also *People v Gimotty*, 216 Mich App 254, 259-260; 549 NW2d 39 (1996). Where a defendant has been erroneously convicted of both felony murder and the underlying felony, the proper remedy is to vacate the conviction and sentence for the underlying felony. *Gimotty, supra* at 259-260. Accordingly, defendant's armed robbery conviction and sentence must be vacated.

Finally, we note that defendant's three felony-firearm convictions were predicated on the three felonies of first-degree premeditated murder, first-degree felony murder, and armed robbery. Of these three felony convictions, we are allowing only one to stand: first-degree murder supported by each of the theories of premeditation and felony murder. Accordingly, we affirm one of defendant's felony-firearm convictions and its corresponding sentence but must vacate the remaining two. See *People v Harding*, 443 Mich 693, 716-717, 735; 506 NW2d 482 (1993).

Accordingly, we remand this matter so that the trial court may (1) vacate defendant's conviction and sentence for armed robbery, (2) vacate two of defendant's convictions and

corresponding sentences for felony-firearm, and (3) modify defendant's judgment of sentence to make clear that defendant's murder conviction and single sentence is for one count of first-degree murder supported by the alternative theories of premeditation and felony murder.

Affirmed in part, reversed in part, and remanded for correction of the judgment of sentence. We do not retain jurisdiction.

/s/ Michael R. Smolenski

/s/ Kurtis T. Wilder

/s/ Patrick M. Meter