

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RANDY D. VINCENT,

Defendant-Appellant.

UNPUBLISHED

September 11, 2003

No. 241084

LC No. 01-005779-FC

Before: Meter, P.J., and Talbot and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right his convictions of first-degree premeditated murder, in violation of MCL 750.316(a); felony murder, in violation of MCL 750.316(b); and possession of a firearm during the commission of a felony, in violation of MCL 750.227b(1).¹ We affirm but remand for modification of the judgment of conviction and sentence.

Defendant argues that the prosecutor, during rebuttal closing argument, disparaged defense counsel and committed prosecutorial misconduct, which denied him a fair trial. We disagree.

Defendant did not object to the statements at trial and, therefore, we review for plain error affecting the substantial rights of the defendant. *People v Rodriguez*, 251 Mich App 10, 32; 650 NW2d 96 (2002); *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2002).

Defendant's entire argument stems from one comment during rebuttal closing argument, where the prosecutor stated: "[defense counsel] is a very nice and very skilled lawyer . . . Unfortunately, as he would probably admit in his heart of hearts, there wasn't a whole lot to work with here." Defendant argues that the prosecutor essentially accused defense counsel of

¹ Defendant had been charged originally in five counts with first-degree premeditated murder, in violation of MCL 750.316(a); felony murder, in violation of MCL 750.316(b); first-degree home invasion, in violation of MCL 750.110a(2); felony-firearm, for the murder charges, in violation of MCL 750.227b(1); and felony-firearm for the home invasion charge, also in violation of MCL 750.227b(1). However, defendant was sentenced only for first-degree murder (count I); felony murder (count II); and felony-firearm (count IV).

trying to mislead or confuse the jury. Defendant also argues that the prosecutor misused the authority of his office by shifting the focus from the evidence to defense counsel's personality; that the prosecutor plainly conveyed to the jurors that defense counsel did not believe in his client's innocence.

Defendant misconstrues the issue and fails to take into account defense counsel's statements during closing argument, whereby defense counsel all but conceded to the jury that defendant was guilty of three of the five charges. Defense counsel argued that the real issue was not whether the killings had occurred, but whether defendant's intent had been proven beyond a reasonable doubt. In the instant case, the prosecutor did not accuse defense counsel of confusing or misleading the jury. Instead, the prosecutor merely stated that defense counsel was a skilled lawyer who had a tough case on his hands.

Thus, given defense counsel's statements during closing argument, the prosecutor's statements did not improperly accuse defense counsel of trying to lie or confuse the jury, or shift the focus away from the evidence. The prosecutor was merely stating that defense counsel had a tough job in the instant case – an acknowledgement, corroborated earlier by defense counsel himself, that the evidence against defendant was significant. Therefore, because there was no plain error affecting defendant's substantial rights, no reversal is warranted.

Defendant next argues that his convictions for first-degree premeditated murder and felony murder violated his federal and state guarantees against double jeopardy. We agree and remand for modification of the judgment of conviction and sentence.

While defendant did not raise the issue at the sentencing hearing, a double jeopardy issue presents a significant constitutional question which will be considered on appeal regardless of whether the defendant raised it before the trial court. *People v Colon*, 250 Mich App 59, 62; 644 NW2d 790 (2002). We review for plain error that which affected defendant's substantial rights. *People v Wilson*, 242 Mich App 350, 360; 619 NW2d 413 (2000)..

In the instant case, the jury found defendant guilty of both first-degree premeditated murder and felony murder. The judgment of conviction and sentence reflect both of the murder convictions with a single sentence of life in prison without parole.

The United States and Michigan Constitutions prohibit placing a defendant twice in jeopardy for a single offense. US Const, Am V; Const 1963, art 1, sec 15; *People v Herron*, 464 Mich 593, 599; 628 NW2d 528 (2001). Convictions of both first-degree premeditated murder and felony murder, arising from the death of a single person, violate the constitutional guarantees against double jeopardy. *People v Goree*, 132 Mich App 693, 712; 349 NW2d 220 (1984). We have held that upon convictions for both first-degree premeditated murder and felony murder, the proper remedy is to modify the conviction to specify a single count of first-degree murder supported by two theories. *People v Bigelow*, 229 Mich App 218, 220-221; 581 NW2d 744 (1998); *People v Long*, 246 Mich App 582, 588; 633 NW2d 843 (2001).

The trial court's failure to enter a proper judgment of conviction and sentence, i.e., a single conviction for first-degree murder supported by two theories, constituted plain error which affected defendant's substantial rights. Therefore, we remand for modification of the judgment

of conviction and sentence to reflect a single conviction for first-degree murder, supported by two theories: premeditated murder and felony murder.

Affirmed in part, remanded in part for modification. We do not retain jurisdiction.

/s/ Patrick M. Meter

/s/ Michael J. Talbot

/s/ Stephen L. Borrello