STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v JOEZELL WILLIAMS II, Defendant-Appellant.	FOR PUBLICATION January 27, 2005 9:10 a.m. No. 246706 Wayne Circuit Court LC No. 02-004374 Official Reported Version

Before: Schuette, P.J., and Sawyer and O'Connell, JJ.

SAWYER, J.

Defendant was convicted by a jury of first-degree premeditated murder, MCL 750.316(1)(a); first-degree felony murder, MCL 750.316(1)(b); larceny from the person of another, MCL 750.357; mutilation of a dead body, MCL 750.160; felon in possession of a firearm, MCL 750.224f; and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to life in prison on alternative theories of first-degree premeditated murder and first-degree felony murder. He was sentenced as a third-offense habitual offender, MCL 769.12, to 76 to 240 months in prison for the larceny conviction, 76 to 240 months for mutilation of a dead body, 3 to 10 years for felon in possession of a firearm, and a consecutive sentence of 2 years for his felony-firearm conviction. Defendant appeals as of right. We affirm in part and vacate in part.

A witness at trial testified that he was driving while defendant and the victim sat in the backseat of his car when he heard a "boom and the whole car lit up." The driver looked around and saw defendant shooting the victim. Defendant directed the driver to keep going. Defendant told the victim to lie down and pushed the victim's head into the car seat. He then shot the victim two more times. After directing the driver to an alley, defendant pulled the victim's body out of the car, looked through the victim's pockets, and took the victim's wallet, shoes, and marijuana. Defendant got back in the car and told the driver to take him to a gas station. After purchasing a gas can and some gas, defendant returned to the alley, poured the gas on the victim's body, and lit the victim's body afire. Later that night, defendant told his girlfriend, another witness at trial, that he had shot the victim in the face about six times. Holding his gun in his hand, defendant demonstrated how he shot the victim. The driver immediately told the police about the incident and directed them to the alley where defendant dumped the victim's body. The police found

defendant sleeping near a firearm whose slugs matched those found in the driver's car and whose shells matched those found in the car and the alley.

Defendant's first issue on appeal is whether prosecutorial misconduct deprived him of a fair trial. We disagree. Defendant did not object to the alleged instances of prosecutorial misconduct at trial. Therefore, we will not find error requiring reversal if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction. *People v Ackerman*, 257 Mich App 434, 449; 669 NW2d 818 (2003).

While the prosecutor vividly described defendant as "cold blooded" and the crime as "evil," she did not unfairly depict the evidence of the crime or defendant's state of mind. A prosecutor need not limit her arguments to "the blandest possible terms." *People v Matuszak*, 263 Mich App 42, 56; 687 NW2d 342 (2004). Defendant's argument that the prosecutor appealed to the jury's civic duty and emotion also fails. The prosecutor correctly defined the jury's role as a finder of fact. Her brief rhetorical reference to justice was a sobering reminder that nothing the jury could do would remedy the harm done, so the reference persuasively emphasized the gravity of the crime more than it urged a result based on civic duty. While possibly objectionable, a limiting instruction certainly would have purged the statement of any potential prejudice. *Ackerman, supra*. Regarding improper sympathy, the prosecutor did not deviate from the facts, and those facts suggested a degree of malice relevantly indicative of premeditation. Finally, the prosecutor did not improperly belittle defense counsel when she referred to him as an "expert," because the term, in context, merely drew the jury's attention to the fact that defense counsel acted as his own expert when he postulated that certain facts clearly demonstrated a scenario contrary to the testimony of the prosecution's witnesses. Therefore, defendant failed to support his claim of misconduct, and we will not reverse his conviction on that ground.

Defendant's second issue on appeal is whether his convictions and sentences violated principles of double jeopardy. Defendant argues that his convictions and sentences for premeditated murder and felony murder, as well as his convictions and sentences for felony murder and the underlying felony, violated his double jeopardy protections. We disagree that defendant's convictions and sentences for premeditated murder and felony murder as alternative theories violated double jeopardy protections. However, we vacate his conviction and sentence for the predicate felony of larceny.

Defendant failed to object below. Therefore, we review his unpreserved claims of double jeopardy violations for plain error. *Matuszak, supra* at 47. While double jeopardy protections are violated when a defendant is convicted of both first-degree premeditated murder and first-degree felony murder arising out of the death of a single victim, we will uphold a single conviction for murder based on two alternative theories. *People v Bigelow (Amended Opinion)*, 229 Mich App 218, 220-221; 581 NW2d 744 (1998). In the case at bar, the sentencing order clearly reflects that the trial court complied with *Bigelow* by indicating one conviction and sentence supported by the two theories of premeditated murder and felony murder.

We must, however, vacate his conviction and sentence on the underlying larceny offense. This case is presented in essentially the same procedural posture as *Bigelow:* the jury convicted on both the premeditation theory and the felony-murder theory. *Bigelow, supra* at 221-222, clearly concluded that, in such a case, the conviction for the underlying felony must be vacated. As our dissenting colleague, who was a member of the *Bigelow* panel, admits, *Bigelow* blindly extended the double jeopardy analysis from a case involving a conviction only under a felony-murder theory to one where the jury explicitly found both the premeditation theory and the felony-murder theory to apply. We do not necessarily disagree with the dissent that he and his colleagues in *Bigelow* rushed to judgment on this point and that a more thoughtful analysis might lead to the conclusion that the conviction for the underlying felony need not be vacated where, as here (and in *Bigelow*), it can be determined with certainty that the jury accepted the premeditation theory (either in addition to or instead of the felony-murder theory).

But there is no authority for us to disagree with the decision of a special panel. A special panel's decision "is binding on all panels of the Court of Appeals unless reversed or modified by the Supreme Court." MCR 7.215(J)(6). Perhaps the Supreme Court will and should modify *Bigelow* in this regard. But until it does, we must follow *Bigelow* and vacate the conviction and sentence for the underlying felony.

Affirmed in part and vacated in part.

Schuette, P.J., concurred.

/s/ David H. Sawyer
/s/ Bill Schuette