STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 8, 2002
v	No. 231385 Kent Circuit Court
JOSEPH ANTWANE GARRISON, Defendant-Appellant.	LC No. 00-002405-OO

Before: Fitzgerald, P.J., and Holbrook, Jr. and Cavanagh, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of felony murder, MCL 750.316, and larceny from a person, MCL 750.357. He was sentenced as an habitual offender, third offense, to life imprisonment without parole for the murder conviction and to a five to twenty year prison term for the larceny conviction. Defendant appeals as of right. We affirm defendant's felony murder conviction, vacate defendant's larceny conviction and sentence, and remand for correction of the judgment of sentence.

This case arises from an incident where defendant knocked the victim off a ladder and beat him, resulting in the victim's death several weeks later. Defendant also took the victim's wallet for a short period of time. Throughout the lengthy trial, a variety of witnesses were presented, many of who gave conflicting testimony about the events of the day of the incident. Defendant's brother, Earl Lewis, testified that he observed defendant punch and kick the victim in the head. Defendant asserts that Lewis was actually the perpetrator of the crime, but admitted to police that he picked up the victim's wallet during the incident.

Following defendant's convictions for felony murder and larceny from a person, the jury foreman contacted the prosecutor to discuss the trial. The jury foreman informed the prosecutor that on the morning of the final day of trial he visited the crime scene to view it personally. A hearing was held on the matter, during which the jury foreman testified that some of the other jurors were discussing at deliberations the distance between the back yard where the beating occurred and the street. Two jurors indicated that they had a distance written in their notes. The jury foreman testified that he told the rest of the jurors that the distance indicated by the other two jurors was correct and that his knowledge was obtained from his visit to the scene that morning. Several witnesses at trial testified about the distance between the back yard and the street. Additionally, panoramic photographs of the crime scene showing the relative locations of

the back yard and the street were admitted into evidence. The jury foreman testified that there was no further discussion of his visit to the crime scene.

I

Defendant argues that the trial court failed to instruct the jury that a conviction of felony murder on an aiding and abetting theory required a finding that defendant aided and abetted both the murder and the larceny. He suggests that the jury could have convicted defendant of felony murder by finding that defendant aided and abetted the larceny without considering the necessary element of intent to commit murder. We disagree.

This issue was not preserved. However, a criminal defendant may obtain relief based upon an unpreserved error if the error is plain and affected substantial rights in that it affected the outcome of the proceedings, and it either resulted in the conviction of an innocent person or seriously affected the fairness, integrity, or public reputation of the proceedings. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); *People v Nash*, 244 Mich App 93, 97; 625 NW2d 87 (2000).

Jury instructions are to be read as a whole rather than extracted piecemeal to establish error. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). Even if somewhat imperfect, instructions do not create error if they fairly present the issues to be tried and sufficiently protect the defendant's rights. *Id.* Here, when read as a whole, the instructions required the jury to find that defendant killed the victim and committed the killing in the course of committing larceny from a person or in aiding and abetting a larceny from a person. The court specifically instructed the jury that it must find that defendant caused the victim's death while defendant had one of the three requisite states of mind. Defendant has failed to show plain error affecting his substantial rights and is not entitled to relief on this claim. *Carines, supra.*

II

Defendant asserts that the jury foreman's independent visit to the scene of the crime and the use of information obtained during that visit to assist other jurors in their deliberations denied defendant his right to a fair trial. We disagree.

There is no question that the jury foreman exposed himself to an extraneous influence by visiting the scene of the crime independently. He then related what he saw to other jurors during the course of deliberations. A two-prong test has been established to determine whether error resulted from extrinsic influences on the jury. *People v Budzyn*, 456 Mich 77, 88-90; 566 NW2d 229 (1997). The first prong of the test is the requirement that the extraneous influences existed. *Id.* at 88. This prong is clearly satisfied.

The second prong of the test requires defendant to demonstrate that the extraneous influence is substantially related to a material aspect of the case and that there is a direct connection between the extrinsic material and the adverse verdict. *Id.* at 88. Defendant notes that there was much testimony about what could be seen from various vantage points around the crime scene. Whether Lewis could have seen defendant beating the victim from his position near the back door, or whether other witnesses could have seen or heard the altercation, could have influenced the verdict. The testimony of the jury foreman indicates that during deliberations two

other jurors were attempting to estimate the distance between the back yard porch and the street. The jury foremen confirmed their estimates and told them that he knew they were correct because he had visited the crime scene earlier that day. The information could have led the jury to conclude that defendant was guilty by providing confirmation that certain witnesses were able to observe the crime as they had testified. Therefore, the second prong is also satisfied.

However, once defendant meets this initial burden, the burden then shifts to the prosecution to demonstrate that the error was harmless beyond a reasonable doubt. *Id.* The prosecution may prove this by showing that the extraneous influence was merely duplicative of evidence presented at trial. See *id.* Here, the prosecution points out that many panoramic photographs of the crime scene were admitted into evidence showing the buildings and the alley behind the houses. Further, two other jurors had written the distance from the porch to the back of the house in their notes, and the jury foreman merely confirmed that their notes were accurate after the jurors had already told other jurors what their notes said. There is no evidence that the jury foreman's visit to the crime scene was discussed at any other point in time during deliberations. The extraneous information provided to the jury by the jury foreman was duplicative of information already in evidence. Defendant was not prejudiced by the duplicative information and, therefore, the trial court did not abuse its discretion by denying defendant's motion for a new trial.

III

Defendant contends that this Court's earlier order reversing the trial court's order for an investigation of juror misconduct is erroneous. Because this Court in a prior order addressed this issue, we are bound by our earlier determination in this appeal. *Grievance Administrator v Lopatin*, 462 Mich 235, 260; 612 NW2d 120 (2000).

IV

Defendant argues that his conviction and sentence for felony murder and the underlying felony of larceny from a person violated his constitutional protection against double jeopardy. We agree. A conviction and sentence for both felony murder and the underlying felony violates the constitutional principle of double jeopardy. *People v Coomer*, 245 Mich App. 206, 224, 627 NW2d 612 (2001). Indeed, the prosecutor concedes this issue. Accordingly, we vacate defendant's conviction and sentence for larceny from a person.

V

Defendant next argues that the testimony of witness Melanie Putnam regarding a letter sent by defendant to Putnam should not have been admitted and that the prosecution allowed the original letter to be negligently lost or destroyed. Defendant argues that allowing Putnam to testify to the contents of the letter violated the MRE 1002, the so-called "best evidence rule." This issue was not preserved by objection below and, therefore, we review this issue to determine whether defendant has demonstrated plain error affecting his substantial rights. *Carines, supra.*

Defendant argues that Putnam, who corresponded with defendant by mail while both were incarcerated, should not have been allowed to testify about the contents of a letter written to

her by defendant because that letter was unavailable at trial. Putnam testified that defendant indicated in this letter that he had hit somebody the wrong way and that the person died as a result. MRE 1002 provides:

> To prove the contents of a writing, recording or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute.

An exception to this rule is found in MRE 1004, which states in relevant part:

> The original is not required, and other evidence of the contents of a writing . . . is admissible if . . . all originals are lost or have been destroyed unless the proponent lost or destroyed them in bad faith.

Defendant asserts that the prosecution was monitoring and making copies of all of defendant's incoming and outgoing mail while he was incarcerated before trial, that the prosecution should have had a copy of the letter, and that the fact that it does not have the letter is evidence of negligence. This assertion is not supported by the testimony at trial. In March 2000, while in county jail, Putnam began sending defendant letters and he began responding. It was not until late May 2000 that officials began monitoring defendant's mail.

In reviewing all of the testimony regarding the letter written by defendant to Putnam, we find that allowing Putnam to testify about the contents of the letter did not constitute plain error. There is no evidence that the prosecution was negligent or even responsible for losing or destroying the letter. Thus, testimony regarding the contents of the letter was properly admitted under MRE 1004.

VI

Defendant maintains that the prosecution knowingly allowed Putnam to testify falsely regarding the contents of the letter written by defendant to Putnam and that the failure of the prosecution to correct the false testimony deprived defendant of his substantive right to due process. Again, defendant did not preserve this issue below and we review this issue to determine whether defendant has demonstrated plain error affecting his substantial rights. *Carines*, *supra*.

Defendant argues that the prosecution monitored defendant's mail from January 2000 until June 2000, and that because the letter was never intercepted, it did not exist and the prosecution was aware that it never existed. As noted above, however, testimony was presented that monitoring of defendant's mail began in May 2000, and there is no testimony of evidence to the contrary. Additionally, there is no record support for defendant's contention that Putnam's mother and the prosecutor frightened her into lying with threats of a perjury charge. Putnam testified that her mother told her that it was a crime to lie under oath, but that she was never afraid that she would be charged with perjury.

There is no reason to conclude that Putnam testified falsely. Her testimony regarding the contents of the letter was consistent with her statements to police on the day they interviewed her

in jail. More importantly, there is no indication on the record that, even if Putnam testified falsely, that the prosecutor knew she would testify falsely.

VII

Lastly, defendant argues that he was denied his Sixth Amendment right to counsel during a critical stage when the jury foreman visited the scene of the crime independently. Defendant also asserts that he was denied his Sixth Amendment right to confront all witnesses against him when the jury foreman essentially gave testimony to other jurors during deliberations about what he had seen on his unauthorized visit to the crime scene. We disagree. As discussed earlier, the fact that the jury foreman visited the crime scene constituted error, but the error had no effect on the verdict and did not affect defendant's substantial rights.

Affirmed in part, vacated in part, and remanded for correction of the judgment of sentence. Jurisdiction is not retained.

/s/ E. Thomas Fitzgerald
/s/ Donald E. Holbrook, Jr
/s/ Mark J. Cavanagh