

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALVIN MOORE,

Defendant-Appellant.

UNPUBLISHED

June 12, 1998

No. 196737

Recorder's Court

LC No. 95-005064

Before: Fitzgerald, P.J., and Markey and J.B. Sullivan*, JJ.

PER CURIAM.

Defendant appeals by right his jury trial convictions of first-degree murder (premeditated), MCL 750.316(1)(a); MSA 28.548(1)(a), first-degree murder (perpetration or attempted perpetration of larceny of any kind), MCL 750.316(1)(b); MSA 28.548(1)(b), assault with intent to commit murder, MCL 750.83; MSA 28.278,¹ and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to mandatory life in prison for the first-degree premeditated murder conviction, mandatory life in prison for the first-degree felony murder conviction, twenty-five to fifty years in prison for the assault with intent to commit murder conviction, and two years in prison for the felony-firearm conviction. Defendant's sentences for the first-degree premeditated murder, first-degree felony murder, and assault with intent to commit murder convictions are to run consecutively to his two-year sentence for felony-firearm conviction. We affirm in part and remand for further proceedings.

Defendant first claims that his two mandatory life sentences for the murder violate the principle of double jeopardy, and one of the two mandatory life sentences should be vacated. We agree that a double jeopardy violation exists, but disagree that one of the sentences must be vacated. *People v Bigelow*, ___ Mich App ___, ___ NW2d ___ (Docket No. 188900, issued April 10, 1998). "A double jeopardy issue constitutes a question of law that is reviewed de novo on appeal." *People v Lugo*, 214 Mich App 699, 705; 542 NW2d 921 (1995). A defendant may not be sentenced to two concurrent terms of life imprisonment for first-degree premeditated murder and first-degree felony murder for a single killing without violating the constitutional

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

prohibition against double jeopardy. *Bigelow, supra* at slip op p 1; *People v Goree*, 132 Mich App 693, 712; 349 NW2d 220 (1984). Defendant was sentenced to two concurrent mandatory life sentences for his first-degree premeditated murder and first-degree felony murder convictions for the killing of the victim, in violation of double jeopardy principles. *Bigelow, supra* at slip op pp 1-2. A special panel of this Court addressed the same issue in *Bigelow, supra* at slip op p 2, and determined that the appropriate remedy for the violation is to direct the trial court to “modify defendant’s judgment of sentence to specify that defendant’s conviction is for one count and one sentence of first-degree murder supported by two theories: premeditated murder and felony murder. The balance of defendant’s judgment of sentence and conviction shall remain unchanged.” We agree and therefore remand this case to the trial court for correction of defendant’s judgment of sentence as required by *Bigelow, supra*, in order to remedy the current double jeopardy violation.

Defendant also asserts that the trial court failed to properly exercise its discretion in allowing the prosecution to impeach defendant by use of an alias. Any error in the trial court’s failure to balance the probative value of the alias evidence against its potential unfair prejudice as required by *People v Mateo*, 453 Mich 203, 214-215; 551 NW2d 891 (1996), was harmless in light of the overwhelming evidence of defendant’s guilt as to his first-degree premeditated murder, assault with intent to commit murder, and felony-firearm convictions. *People v Thompson*, 101 Mich App 609, 614; 300 NW2d 645 (1980). Further because we are remanding for the amendment of defendant’s judgment of sentence to show that he was convicted of only one count of first-degree murder under two alternate theories, we need not review this issue in light of the felony murder conviction.

Next, defendant’s argument that the evidence of guilt in this case was not overwhelming is based on his assertion that most of the prosecution’s witnesses had been impeached. Questions of credibility are properly resolved by triers of fact, however. *In re Forfeiture of Twenty-Five Thousand Five Hundred Dollars and One 1986 Ford*, 220 Mich App 572, 581; 560 NW2d 341 (1996). This Court will not resolve credibility questions anew. *People v Vaughn*, 186 Mich App 376, 380; 465 NW2d 365 (1990).

Defendant also claims that the trial court’s failure to instruct the jury on voluntary manslaughter is reversible error under the circumstances of the present case. We disagree. This Court reviews the issue of jury instructions for error. “[T]here is no error if the instructions fairly presented the issues to be tried and sufficiently protected the defendant’s rights.” *People v Bell*, 209 Mich App 273, 276; 530 NW2d 167 (1995). An appellate court will reverse the decision of the trial court not to instruct on a cognate lesser offense and remand for a new trial if the trial court’s refusal to instruct on the cognate lesser offense was error. *People v Pouncey*, 437 Mich 382, 386; 471 NW2d 346 (1991). “To determine whether the judge erred in not instructing on voluntary manslaughter, . . . [this Court] must ascertain whether there was evidence presented at the defendant’s trial which would support a conviction of voluntary manslaughter.” *Id.* at 387.

Voluntary manslaughter is a cognate lesser included offense of murder. *People v Etheridge*, 196 Mich App 43, 55; 492 NW2d 490 (1992). Voluntary manslaughter requires that (1) the defendant must kill in the heat of passion; (2) the passion must be caused by an adequate provocation;

and (3) there cannot be a lapse of time during which a reasonable person could control his passions. *Pouncey, supra* at 388. Adequate provocation refers to a provocation “which would cause the reasonable person to lose control.” *Id.* at 389 (citation omitted).

The evidence presented at trial does not support a finding of legal, adequate provocation. An argument over money erupted between defendant and the victim. Defendant asked the victim for the twenty dollars the victim owed defendant. The victim responded that he did not have the money. Defendant refused to accept the television set as security for the debt. In turn, the victim rejected defendant’s offer to allow defendant to rent the Jeep from him or to allow defendant to retain the Jeep as a security for the debt. Lee’s testimony suggested that the victim refused to pay the money because he did not owe it. After having endured defendant’s steady beating on his face and chest, and after falling off the porch, the victim ran toward the Jeep to escape his aggressor. Lastly, as the prosecution points out, the record is bereft of any evidence showing that the victim was either verbally or physically aggressive or possessed a handgun during the violent episode.

These circumstances do not give rise to a determination that there existed adequate provocation to mitigate the intentional killing to voluntary manslaughter because a reasonable person would not have lost control under such circumstances. We therefore hold that the trial court was correct in not instructing the jury on voluntary manslaughter.

Affirmed in part and remanded for further proceedings. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald

/s/ Jane E. Markey

/s/ Joseph B. Sullivan

¹ The assault with intent to commit murder conviction relates to the complaint lodged by Freddie Lee.