STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LADON LOVELL SALISBURY,

Defendant-Appellant.

UNPUBLISHED
July 24, 1998

No. 191785
Recorder's Court
LC No. 94-008763 FC

Before: Holbrook, Jr., P.J., and White and J.W. Fitzgerald*, JJ.

PER CURIAM.

Defendant was convicted by a jury of three counts of first-degree felony-murder, MCL 750.316(1)(b); MSA 28.548(1)(b), three counts of first-degree premeditated murder, MCL 750.316(1)(a); MSA 28.548(1)(a), three counts of armed robbery, MCL 750.529; MSA 28.797, and one count of possession of a firearm during the commission of a felony ("felony-firearm"), MCL 750.227b; MSA 28.424(2). Defendant was sentenced to life in prison for each of the murder and armed robbery convictions, to be served consecutive to a two-year term for felony-firearm. Defendant appeals as of right. We affirm in part, vacate in part and remand for correction of the judgment of sentence.

Defendant first argues that because his convictions for three counts each of first-degree premeditated murder and felony-murder and of felony-murder and armed robbery violate his constitutional protection against double jeopardy, his felony-murder and armed robbery convictions must be dismissed. We agree that the convictions violate double jeopardy, but we disagree that the appropriate remedy in each circumstance is the dismissal of the affected convictions. A conviction of both first-degree premeditated murder and felony-murder for the killing of a single individual violates the constitutional guarantee against double jeopardy. *People v Zeiter*, 183 Mich App 68, 71; 454 NW2d 192 (1990). Defendant's judgment of sentence indicates that he was convicted of six counts of murder, three for first-degree premeditated murder and three for felony-murder. Because defendant's six murder convictions arose from the killing of the same three individuals, they violate double jeopardy. According to this Court's holding in *People v Bigelow*, ___ Mich App ___; ___ NW2d ___ (Docket No. 188900, issued 04/10/98), in order to protect defendant's rights to be free from double jeopardy,

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

defendant's judgment of sentence must be modified to reflect that defendant was convicted of three counts of "first-degree murder on two [separate] theories: premeditated murder and felony-murder." *Id.* at ___. As for defendant's conviction of three counts of armed robbery, because we have concluded that defendant was convicted on the alternate theory of felony-murder, his three convictions for the predicate offenses necessarily violate his right against double jeopardy. Therefore, defendant's three convictions of armed robbery must be vacated. *Id.*

Defendant next argues that the trial court erred when it allowed a fellow inmate to testify about statements defendant had made to the inmate. Defendant maintains that because the fellow inmate was an agent of the State, the inmate was required to give defendant his *Miranda*[1] warnings. However, defendant failed to raise this objection at trial. Therefore, this issue has not been preserved for appeal. *People v Kilbourn*, 454 Mich 677, 685; 563 NW2d 669 (1997). Moreover, defendant has failed to establish that the inmate was, in fact, an agent of this state. We also reject defendant's argument that the trial court abused its discretion in admitting this witness's live testimony after a significant portion of his preliminary examination testimony had been read into the record. *People v Hill*, 167 Mich App 756, 764; 423 NW2d 346 (1988). The inmate's brief trial testimony simply repeated some of what had been covered in the preliminary examination testimony. Indeed, the jury was specifically told by the trial court before the inmate testified that it was possible that his live testimony would be somewhat repetitive. Accordingly, we disagree with defendant that the inmate's testimony was given undue emphasis resulting in prejudice.

Finally, defendant argues that the trial court erred in excluding testimony of a witness that the witness had warned the victim of a threatened plan to rob him. We disagree. This Court reviews the admission of evidence for an abuse of discretion. *People v Gibson*, 219 Mich App 530, 532; 557 NW2d 141 (1996). This situation is not unlike that in which one hearsay statement falls within another hearsay statement. In the "double hearsay" circumstance, this Court reviews both statements to determine if each is covered by an exception to the rule against hearsay. MRE 805. "Under MRE 805, hearsay within hearsay is excluded where no foundation has been established to bring each independent hearsay statement within a hearsay exception." *Solomon v Shuell*, 435 Mich 104, 129; 457 NW2d 669 (1990) (footnote omitted). Such a two-tiered analysis is also appropriate when a hearsay statement appears within a non-hearsay statement. See *Carden v Westinghouse Elec Corp*, 850 F2d 996, 1003 (CA 3, 1988) (observing that a statement which qualified as being non-hearsay under FRE 801[d][2][D] was nevertheless inadmissible because it contained an inadmissible hearsay statement).[2] Therefore, even though the witness' testimony that he made the statement to the victim does not present a hearsay problem, because that statement itself encompassed inadmissible hearsay -- that someone had threatened to rob the victim[3] -- the trial court properly excluded the evidence.

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

/s/ Donald E. Holbrook, Jr.
/s/ Helene N. White
/s/ John W. Fitzgerald

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

[2] Resolution of the "double hearsay" issue in *Carden* involved an application of FRE 805. *Carden, supra* at 1002-1003. We note that MRE 805 and FRE 805 are identical.

[3] Defendant argues that he wanted the witness to testify about what the witness told the victim about the threats in order to help establish that it was the individual who had made the threats who had murdered the victim. Testimony that the victim had been threatened by another individual "is a statement, other than the one made by the declarant while testifying at the trial . . . , offered in evidence to prove the truth of the matter asserted," MRE 801(c), and is therefore inadmissible under MRE 802.