STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 3, 2004
v JEFFREY HOLMES, Defendant-Appellant.	No. 244123 Wayne Circuit Court LC No. 01-003959-01

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v JUNIOUS HALL, Defendant-Appellant.	No. 244517 Wayne Circuit Court LC No. 01-003959-03

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v MICHAEL T. MONFORD, Defendant-Appellant.	No. 247159 Wayne Circuit Court LC No. 01-003959-02

Before: Owens, P.J., and Schuette and Borrello, JJ.

PER CURIAM.

Following a joint trial before separate juries, defendant Holmes was convicted of first-degree premeditated murder and first-degree felony murder, MCL 750.316, defendant Hall was convicted of first-degree felony murder, felon in possession of a firearm, MCL 750.224f, and

possession of a firearm during the commission of a felony, MCL 750.227b, and defendant Monford was convicted of second-degree murder, MCL 750.317. Defendant Holmes was sentenced to a single term of life imprisonment for the first-degree murder conviction, defendant Hall was sentenced to concurrent terms of life imprisonment for the first-degree murder conviction and forty to sixty years' imprisonment for the felon in possession conviction, and a consecutive two-year term for the felony-firearm conviction, and defendant Monford was sentenced to a term of twenty to forty years' imprisonment for the second-degree murder conviction. Each defendants appeals as of right. Their appeals have been consolidated for this Court's consideration. We affirm in all three cases.

I. FACTS

In this case, the victim employed defendants to renovate a house. On one occasion, he went to the home and they shot and beat him. They restrained him and made a recording of his voice in which he instructed his wife to pay them $150,000. Some or all of the defendants disposed of his body in a dumpster, which was emptied with Hall's other trash during trash pickup the following day. Each of the defendants made statements to the police, in which they admitted being present when the victim was first attacked, but providing conflicting accounts of their roles in the killing. Defendants Monford and Holmes also discussed the killing with other individuals.

II. MOTION FOR DIRECTED VERDICT

Holmes argues that the trial court erred in denying his motion for a directed verdict as to the premeditated murder charge. We disagree.

A. Standard of Review

The standard of review for a ruling on a motion for a directed verdict is as follows:

> When reviewing a trial court's decision on a motion for a directed verdict, this Court reviews the record de novo to determine whether the evidence presented by the prosecutor, viewed in the light most favorable to the prosecutor, could persuade a rational trier of fact that the essential elements of the crime charged were proved beyond a reasonable doubt. [*People v Aldrich*, 246 Mich App 101, 122-123; 631 NW2d 67 (2001)].

When reviewing the sufficiency of the evidence in a criminal case, this Court must view the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *Wolfe*, *supra*, 440 Mich 515; *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). This Court has also explained that a challenge to the sufficiency of the evidence invokes the constitutional right to due process of law and, therefore, this Court's review is de novo. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001). The standard of review for the sufficiency of evidence is deferential, and requires a reviewing court to draw all reasonable inferences and resolve credibility conflicts in support of the jury's verdict. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

B. Analysis

Holmes asserts that there was no proof of premeditation or his intent to kill the victim and that his mere presence was inadequate to establish his guilt under an aiding and abetting theory. He claims that although he was aware of a plan to beat the victim, codefendant Hall exceeded the plan by killing him.

The elements of first-degree murder are that the defendant killed the victim and that the killing was "'willful, deliberate, and premeditated.'" *People v Bowman*, 254 Mich App 142, 151; 656 NW2d 835 (2002), quoting MCL 750.316(1)(a). "'To premeditate means to think about beforehand; to deliberate is to measure and evaluate the major facets of a choice or problem.'" *People v Plummer*, 229 Mich App 293, 300; 581 NW2d 753 (1998), citing *People v Morrin*, 31 Mich App 301, 329-331; 187 NW2d 434 (1971). Factors that may be considered in determining premeditation and deliberation include: "(1) previous relationship between the defendant and the victim; (2) the defendant's actions before and after the crime itself; and (3) the circumstances of the killing itself, including the weapon used and the location of the wounds inflicted." *Plummer, supra*, 300-301 (citations omitted). Circumstantial evidence may constitute sufficient proof of premeditation and deliberation. *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001). Inferences of premeditation and deliberation "must have support in the record and cannot be arrived at by mere speculation." *Plummer, supra*, 301 (citations omitted).

The prosecution relied, in part, on an aiding and abetting theory and suggested to the jury that any conflict concerning the precise roles the defendants had in the killing was irrelevant in light of the law of aiding and abetting.

> To establish that a defendant aided and abetted a crime, the prosecution must prove that (1) the crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement that assisted the principal in committing the crime, and (3) the defendant intended the commission of the crime or knew the principal intended its commission at the time he gave aid or encouragement. [*People v Norris*, 236 Mich App 411, 419; 600 NW2d 658 (1999).]

"Aiding and abetting describes all forms of assistance rendered to the perpetrator of a crime and comprehends all words or deeds that might support, encourage, or incite the commission of a crime." *People v Carines*, 460 Mich 750, 757-758; 597 NW2d 130 (1999) (citation and internal quotation marks omitted).

The trial court did not err in denying Holmes' motion for a directed verdict on the charge of first-degree premeditated murder. In Holmes' statement to the police, he claimed that the attack was supposed to have been a "normal beat him down." But the evidence amply supports an inference that Holmes knew of, and participated in, a plan to kill the victim. One witness testified that Holmes and Hall talked about a plan to "do something" to the victim "a lot of times" and it was "[d]iscussed in many ways." Holmes admitted that he knew that Hall had purchased a potato to be used to muffle the gunshots and a knife to be used during the attack. Holmes also knew that Hall brought a rifle to the house and had tested it to see how loud it was. Holmes admitted that Hall "was supposed to shoot him once in the penis . . . ," which further shows that Holmes was aware that Hall was going to shoot the victim. Holmes admitted that

after Hall shot the victim twice, Holmes hit him twice with a shovel. Holmes told another witness that he hit the victim in the ribs with a two by four. After the victim was subdued, Holmes brought a tape recorder to Hall and moved the victim's vehicle. The jury could reasonably infer that Holmes planned to kill the victim hours before the attack began. Any claim that Holmes did not intend to kill or know that Hall intended to kill the victim after Hall had shot him twice and Holmes had beaten him is not credible, particularly since the victim knew his attackers and would have been able to identify them if he had lived.

Holmes also argues that the trial court erred in denying his motion for a directed verdict with respect to the felony murder charge, because there was no evidence of an underlying felony. Specifically, Holmes claims that the evidence of larceny was inadequate.

Contrary to Holmes' assertions, the underlying felony for the felony murder charge submitted to the jury was kidnapping, not larceny.[1] Because Holmes does not address the sufficiency of the evidence with respect to kidnapping, he has inadequately briefed this issue. However, we will address the sufficiency of the evidence of kidnapping to the extent necessary to resolve Hall's challenge to the sufficiency of the evidence on this ground.

Hall contends that the evidence of kidnapping was insufficient because the form of kidnapping presented to the jury required secret confinement, which was not established here because the victim was held at his own property and other people knew of his location. We disagree.

Although there are several different forms of kidnapping, see *People v Wesley*, 421 Mich 375, 383-384, 391; 365 NW2d 692 (1984), the court here instructed the jury concerning the "secret confinement" form. In *People v Jaffray*, 445 Mich 287, 305; 519 NW2d 108 (1994), the Court explained that secret confinement kidnapping does not necessarily require absolute secrecy. *Id*., 307. "[A] proper focus is on the channels of communication available to the victim . . . it is enough that secrecy, or the attempt to maintain secrecy, denied the victim the opportunity to avail himself of outside help." *Id.*

> As we read Michigan's kidnapping statute in light of the authorities, we conclude that the essence of "secret confinement" as contemplated by the statute is deprivation of the assistance of others by virtue of the victim's inability to communicate his predicament. "Secret confinement" is not predicated solely on the existence or nonexistence of a single factor. Rather, consideration of the totality of circumstances is required when determining whether the confinement itself or the location of confinement was secret, thereby depriving the victim of the assistance of others. That others may be suspicious or aware of the confinement is relevant to the determination, but is not always dispositive. [*Id*., 309.]

[1] The trial court directed a verdict in favor of defendants on the count of felony murder based on larceny.

Hall emphasizes that the place of confinement was the victim's own property. But that fact is not dispositive. The *Jaffray* Court recognized that secret confinement kidnapping may occur when a victim is confined to his home. *Jaffray, supra,* 312 n 37. Therefore, the fact that the victim owned the property is not critical to the analysis of whether secret confinement was established.

Hall also argues that the confinement was not secret because other people knew that the victim was at the Calvert property and the defendants either knew, or had reason to suspect that other people knew of the victim's location. However, even if those individuals suspected that he was at the house on Calvert, they were not aware that he was being confined there. *People v Warren*, 228 Mich App 336, 343-345; 578 NW2d 692 (1998), rev'd in part on other grounds 462 Mich 415 (2000); *People v Johnson*, 171 Mich App 801; 430 NW2d 828 (1988). Contrary to Hall's argument, the fact that others knew to look for the victim at that location is not dispositive. Here, Hall admitted that he and Monford used tape to restrain the victim. Hall's statement and another witness' testimony established that Hall pushed and threatened to shoot the witness in order to keep him away from where the victim was being held captive. Viewed in a light most favorable to the prosecution, the totality of circumstances showed that Hall deprived the victim of the assistance of others by virtue of his inability to communicate his predicament to others, which is "the essence of 'secret confinement.'" *Jaffray, supra,* 309.

Holmes additionally argues that the evidence of intent was insufficient to support his conviction of felony murder. Felony murder requires proof of intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result. *People v Nowack*, 462 Mich 392, 401; 614 NW2d 78 (2000). As previously discussed in the context of Holmes' challenge to the trial court's denial of his motion for directed verdict as to the first-degree premeditated murder charge, there was sufficient evidence to establish that Holmes intended to kill the victim. Moreover, Holmes' admission that he participated in the beating of the victim after he had been shot clearly established Holmes' intent to do great bodily harm or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result.

III. ADMISSION OF HALL'S STATEMENT

Hall next argues that the trial court erred by admitting his statement into evidence because he testified that the police failed to honor his request for counsel. We disagree.

A. Standard of Review

In general, a challenge to a trial court's ruling on a motion to suppress evidence of a confession on the ground that it was obtained in violation of a defendant's right to counsel is reviewed de novo, yet this Court will not disturb the court's factual findings unless they are clearly erroneous. *People v Kowalski*, 230 Mich App 464, 472-484; 584 NW2d 613 (1998).

B. Analysis

Here, several police officers testified that Hall never requested counsel. The trial court stated that it believed the police officers rather than Hall. Having reviewed the testimony at the

evidentiary hearing, we are not persuaded that the trial court's assessment of credibility was clearly erroneous.

Hall also argues that the trial court violated his right to confront his accusers by limiting his cross-examination of a witness as follows:

Q. [W]ere you using drugs back at that time?

A. No.

THE COURT: You don't have to answer that.

THE WITNESS: Okay. Thanks, your Honor.

[Defendant Hall's counsel]: That's all.

The right to cross-examine witnesses is a primary interest secured by the Confrontation Clause. US Const, Am VI; Const 1963, art 1, § 20; *People v Adamski*, 198 Mich App 133, 138; 497 NW2d 546 (1993). But the right does not include a right to cross-examine on irrelevant issues. *Id*. Trial judges may reasonably limit cross-examination to accommodate concerns about harassment, prejudice, confusion of the issues, among others. *Id.* "Cross-examination may be denied with respect to collateral matters bearing only on general credibility, as well as on irrelevant issues." *People v Canter*, 197 Mich App 550, 564; 496 NW2d 336 (1992) (citations omitted). However, "[a] limitation on cross-examination that prevents a defendant from placing before the jury facts from which bias, prejudice or lack of credibility of a prosecution witness may be inferred constitutes a denial of the constitutional right of confrontation." *People v Kelly*, 231 Mich App 627, 644; 588 NW2d 480 (1998).

In the present case, the record does not establish that the trial court violated Hall's right of confrontation. Hall's counsel's question was not whether the witness was under the influence of drugs at the time of the events that were the subject of his testimony. Rather, the question was more general, "were you using drugs back at that time?" To the extent that Hall's counsel was attempting to discredit the witness by showing that he was a drug user, the evidence was collateral and immaterial, and the court properly restricted the inquiry. To the extent that Hall's counsel was attempting to show that the witness' observations might have been affected because he was under the influence of drugs, that evidence would have been relevant to the witness' credibility. However, if this was the subject counsel wanted to pursue, counsel was required to make an offer of proof. MRE 103(a)(2); *People v Hackett*, 421 Mich 338, 352; 365 NW2d 120 (1984). "Absent some evidentiary support, the error, if any, in excluding the evidence was harmless." *People v Witherspoon (After Remand)*, 257 Mich App 329, 331; 670 NW2d 434 (2003) (citation omitted). Moreover, the witness' testimony was an insignificant part of the prosecution's case, and was cumulative and corroborated by other witnesses, which further supports our conclusion that any error here was harmless. *People v Kelly*, 231 Mich App 627, 644-645; 588 NW2d 480 (1998).

IV. JURY RE-INSTRUCTION

Monford argues that the trial court erred when, in response to the jury's request for re-instruction concerning the elements of the crimes, the court omitted instructions concerning aiding and abetting. We disagree.

Monford waived any error in this regard by expressly agreeing that the court had satisfied the jury's request with regard to re-reading the elements of the charges. *People v Carter*, 462 Mich 206; 612 NW2d 144 (2000). The record does not support Monford's claim that he objected to the omission of the aiding and abetting instructions after the jury retired. Although he claims that the transcript is inaccurate, he has not overcome the presumption of its accuracy. See *People v Abdella*, 200 Mich App 473, 476; 505 NW2d 18 (1993). To the extent that Monford claims that the trial court prevented counsel from objecting by interrupting counsel, we note that the court subsequently gave counsel the opportunity to explain his objection when the court asked him, "Do you want it [the objection] to be vehement, continuing and strenuous?" Therefore, the record does not show that counsel attempted to preserve this issue after having waived it.

Monford also argues that the trial court erred by instructing that duress is not a defense to murder when he did not rely on duress as a defense and there was no evidence to support it. Monford claims that the instruction placed him in the difficult position of having to explain that Monford was not relying on duress.

This issue is not included in the statement of questions presented and is not preserved for appellate review. MCR 7.212(C)(5); *People v Yarbrough*, 183 Mich App 163, 165; 454 NW2d 419 (1990). Moreover, the alleged error was waived by counsel's expression of satisfaction with the charge as given. *People v Ortiz*, 249 Mich App 297, 311; 642 NW2d 417 (2002). Furthermore, the instruction was appropriate in light of Monford's theory of the case, which emphasized his fear of Hall and Holmes, and his statements that Hall and Holmes made him tie the victim up, that he could not get away from them, and that Hall threatened him.

V. CHALLENGES FOR CAUSE

Monford also argues that the trial court improperly denied his challenges for cause as to seven venire persons who indicated they could not be impartial because of their moral or religious views. We disagree.

A. Standard of Review

This Court reviews a trial court's rulings on challenges for cause for an abuse of discretion. *People v Williams*, 241 Mich App 519, 521; 616 NW2d 710 (2000).

B. Analysis

This Court uses a four-part test to determine if a party is entitled to relief based on a trial court's denial of a challenge for cause:

> There must be a clear and independent showing on the record that (1) the court improperly denied a challenge for cause, (2) the aggrieved party exhausted all peremptory challenges, (3) the party demonstrated the desire to excuse another

> subsequently summoned juror, and (4) the juror whom the party wished to later excuse was objectionable. [*People v Lee*, 212 Mich App 228, 248-249; 537 NW2d 233 (1995), citing *People v Legrone*, 205 Mich App 77, 81; 517 NW2d 270 (1994).]

Monford has not demonstrated that the third factor was satisfied. He did not indicate at the time of voir dire that he wanted to excuse another juror. His assertions that Juror "N" was objectionable, first made in the context of his motion for new trial, were inadequate to satisfy the test. Therefore, he is not entitled to relief on this basis.

Affirmed.

/s/ Donald S. Owens
/s/ Bill Schuette
/s/ Stephen L. Borrello