STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 30, 2004
v CRAIG CURTIS COKER, JR., Defendant-Appellant.	No. 238738 St. Joseph Circuit Court LC No. 01-010490-FC

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v MATTHEW BALLOW HOBBS, Defendant-Appellant.	No. 238739 St. Joseph Circuit Court LC No. 01-010491-FC

Before: Jansen, PJ, and Markey and Gage, JJ.

PER CURIAM.

In these consolidated cases, defendants appeal by right their convictions and sentences for first-degree murder and felony-firearm following a joint jury trial. We affirm.

Defendant Coker was found guilty as charged of premeditated murder, MCL 750.316(1)(a), felony murder, MCL 750.316(1)(b), armed robbery, MCL 750.529, and possession of a firearm in the commission of another felony, MCL 750.227b. Defendant Hobbs, prosecuted on the theory of aiding and abetting Coker, was found guilty of felony murder, the lesser-included offense of second-degree murder, MCL 750.317, armed robbery, and felony-firearm. As to both defendants, the trial court initially imposed sentence for all convictions but

immediately vacated the sentences and entered amended judgments of sentence.[1] The trial court sentenced defendant Coker to life imprisonment for one count of first-degree murder predicated on two theories and a consecutive two-year prison term for felony-firearm. The trial court sentenced defendant Hobbs to life imprisonment for one count of first-degree felony murder and a consecutive two-year prison term for felony-firearm. On appeal, each defendant argues the trial court abused its discretion admitting certain evidence. Defendant Hobbs also challenges the trial court's denial of his motion to sever and the sufficiency of the evidence supporting his convictions. We find none of defendants' issues merit reversal, and therefore, we affirm.

I. Issues raised in both Docket No. 238738 and Docket No. 238739

First, each defendant argues the trial court abused its discretion by admitting photographs of the victim's body. We disagree.

Defendants preserved this issue by objecting to the admission of the photographs below on the same ground asserted on appeal. MRE 103(a)(1); *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). We review for a clear abuse of discretion the trial court's decision to admit or exclude evidence. *People v Layher*, 464 Mich 756, 761; 631 NW2d 281 (2001). An abuse of discretion exists only if an unprejudiced person, considering the facts on which the trial court acted, would say that there is no justification or excuse for the trial court's decision. *People v Rice (On Remand)*, 235 Mich App 429, 439; 597 NW2d 843 (1999).

This Court stated the principles applicable to our review in *Aldrich*, *supra* at 114:

> Generally, all relevant evidence is admissible at trial. Evidence is relevant if it has any tendency to make the existence of a fact that is of consequence to the action more probable or less probable than it would be without the evidence. Under this broad definition, evidence is admissible if it is helpful in throwing light on any material point. However, even if relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair

[1] The prohibition against multiple punishments for the same offense found in the Double Jeopardy Clauses of the federal and Michigan constitutions preclude multiple murder convictions for the death of single victim. US Const, Ams V and XIV; Const 1963, art 1, § 15. See *People v Clark*, 243 Mich App 424, 429; 622 NW2d 344 (2000), and *People v Bigelow*, 229 Mich App 218, 220; 581 NW2d 744 (1998). When a murder conviction rests on multiple theories the judgment of sentence should reflect a single conviction and sentence for first-degree murder, supported by the two separate theories. *Id.* at 220-221.

Also, double jeopardy principles require that a felony murder conviction and its predicate felony be merged into one conviction. *People v Harding*, 443 Mich 693, 714 (Brickley, J.), 735 (Cavanagh, C.J.); 506 NW2d 482 (1993); *People v Wilder*, 411 Mich 328, 347; 308 NW2d 112 (1981). Thus, when a defendant is convicted of both felony murder and the predicate felony, the remedy is to vacate the conviction of the predicate felony. *People v Minor*, 213 Mich App 682, 690; 541 NW2d 576 (1995).

> prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or needless presentation of cumulative evidence. [Citations omitted.]

Defendants argue that the photograph exhibits five, six, and seven, tended to inflame the jury and should have been excluded because unfair prejudice outweighed the evidence's probative value. Evidence is unfairly prejudicial when it is marginally probative and it is likely a jury would give it more weight then it merits. *People v Crawford*, 458 Mich 376, 398, 582 NW2d 785 (1998). With respect to exhibit five, which showed the position of the victim's body, the prosecutor argued that it was relevant because it corroborated witness Hurley's testimony that the victim fell on the edge of the porch. The prosecutor further argued that exhibits six and seven, which depicted the victim's wounds, were relevant in that they helped to link defendants to the crime because other evidence showed that defendant Coker had threatened to shoot the victim in the back of the head. Although the victim was shot in the back, the photographs showed how the victim was shot "pretty much, but not quite in the back of the head." Without the photographs, it would have been difficult for the pathologist to explain this to the jury.

The trial court admitted exhibit five because it was "not particularly inflammatory or gruesome" and agreed with the prosecution's theory as to why the picture was probative. Photographs may properly be used to corroborate a witness' testimony and gruesomeness alone will not cause their exclusion. *People v Mills*, 450 Mich 61, 76; 537 NW2d 909, remanded on other grounds 450 Mich 1212; 539 NW2d 504 (1995). Similarly, the trial court found exhibit seven, depicting the small entrance wounds, was not gruesome. As already noted, this photograph was relevant to the prosecutor's theory of the case and assisted the jury in assessing the pathologist's testimony. The trial court only found exhibit six to be gruesome because it depicted exit wounds. But the trial court found exhibit six was also relevant to help the jury understand the testimony of the pathologist. Further, the trial court noted the public had become less sensitive to graphic material over the past forty years and the jury would be unlikely to use it for an improper purpose. See, e.g., *People v Turner*, 17 Mich App 123, 132; 169 NW2d 330 (1969) observing that "today's jurors, inured as they are to the carnage of war, television and motion pictures, are capable of rationally viewing, when necessary, a photograph showing the scene of a crime or the body of a victim in the condition or the place in which found." Accordingly, the trial court ruled that the probative value of the evidence was not outweighed by the danger of unfair prejudice.

We conclude the trial court did not abuse its discretion by declining to exclude the photographs because their probative value was not substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or needless presentation of cumulative evidence. MRE 403; *Aldrich*, *supra* at 115. Defendants' only claim prejudice based on the gruesome nature of the photographs. But the gruesome nature of a photograph is insufficient by itself to exclude relevant evidence. *Mills, supra* at 76; *People v Eddington*, 387 Mich 551, 562-563; 198 NW2d 297 (1972). "Relevant evidence is inherently prejudicial; but it is only unfair prejudice, substantially outweighing probative value, which permits exclusion of relevant matter under Rule 403." *Mills, supra* at 75. Because the trial court is in the best position to contemporaneously assess whether the danger of unfair prejudice substantially outweighs the relevancy of evidence, the record here simply does not establish that the trial court abused its discretion finding the evidence relevant and not excluding the evidence under the balancing test of MRE 403. *People v Bahoda*, 448 Mich 261, 291; 531 NW2d 659

(1995). Moreover, even if admitting the photographs at issue was a close question, no abuse is demonstrated. "The trial court's decision on close evidentiary questions cannot 'by definition' be an abuse of discretion." *Layher, supra* at 761.

II. Issues raised only in Docket No. 238738

Defendant Coker argues that the trial court abused its discretion by admitting irrelevant evidence that he had threatened the victim's boyfriend before the murder. We disagree.

Defendant preserved this issue by objecting below to the testimony of witnesses Knight, Swift, and Gillies. MRE 103(a)(1). But defendant failed to object on these grounds to similar testimony given by witnesses Rowe, Janes, and Hurley. Thus, as to the testimony of the first group, if error occurred, this Court will not reverse unless the preserved nonconstitutional evidentiary error involves a substantial right, and after an examination of the entire cause, it affirmatively appears that it is more probable than not that the error was outcome determinative. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). We review admission of the testimony of the later group for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763, 774; 597 NW2d 130 (1999). Reversal is warranted only when plain error results in the conviction of an actually innocent defendant or seriously affected the fairness, integrity or public reputation of judicial proceedings, independent of defendant's guilt or innocence. *Id.*; *People v Coy*, 243 Mich App 283, 312-313; 620 NW2d 888 (2000).

Evidence that is not relevant is not admissible. MRE 402. To be relevant, evidence must have some tendency to prove a fact in issue. MRE 401; *Mills*, *supra* at 66; *Aldrich*, *supra* at 114. Under this broad definition, evidence is admissible if it is helpful in throwing light on any material point. *Id.* Our Supreme Court has observed that,

> . . . *all* elements of a criminal offense are "in issue" when a defendant enters a plea of not guilty. The prosecution must carry the burden of proving every element beyond a reasonable doubt, regardless of whether the defendant specifically disputes or offers to stipulate any of the elements. The elements of the offense are always at issue. Thus, the prosecution may offer all relevant evidence, subject to MRE 403, on every element. The claim that evidence that goes to an undisputed point is inadmissible has also been rejected in criminal cases. [*Mills*, *supra* at 69-71 (emphasis in the original, footnotes and citations omitted).]

Defendant advances three arguments as to why the trial court should have excluded evidence that he threatened the victim's boyfriend. First, the threats were not probative of whether he was present at the time of the offense. Because he presented an alibi defense, defendant argues his intent was not at issue, and even if it had been, the threats had no bearing on his intent at the time of the offense.

Defendant's first argument fails under the "any tendency" test. The shooting occurred at the boyfriend's residence, and the evidence tended to establish a reason for defendant to be at the residence on the night of the shooting.

Even if it were not relevant to defendant's presence at the crime scene, the testimony tends to prove the material issue of his intent. To establish first-degree premeditated murder, MCL 750.316(1)(a), "the prosecution must prove that the defendant intentionally killed the victim and the act of killing was deliberate and premeditated." *People v Haywood*, 209 Mich App 217, 229; 530 NW2d 497 (1995). Because intent constitutes an element of the crime, any evidence that tends to prove intent is relevant. MRE 401; *Aldrich*, *supra* at 114.

Evidence of defendant's threatening the victim's boyfriend has some tendency to prove that defendant intended to kill the victim. Both Gillies and Rowe testified that defendant made the threats because the victim's boyfriend had caused Coker to be arrested, requiring him to pay $700 to get out of jail. Porter testified that Coker was angry with the victim because of the same incident.[2] Hurley also testified that before Coker shot the victim, she admitted that it was she who called the police and caused his arrest. Hurley further testified that Coker said killing the victim would hurt the victim's boyfriend more than actually killing him. "Evidence of the defendant's motive to commit the charged crime lends itself to three theories of logical relevance: (1) identity; (2) actus reus, and (3) mens rea." *People v Sabin (After Remand)*, 463 Mich 43, 68; 614 NW2d 888 (2000), citing Imwinkelried, *Uncharged Misconduct Evidence*, §§ 3:15, 4:19, and 5:35. Thus, motive is always relevant in a murder case. *Rice*, *supra* at 440.

Defendant failed to preserve his objections to the admission of the testimony given by Rowe, Janes, and Hurley. Because the challenged evidence was relevant, the trial court did not commit plain error. Defendant has forfeited this issue. *Carines*, *supra* at 763, 768. But even if defendant had properly preserved an objection to this testimony, as he did with that of Knight and Gillies, the result would not change. Because the threats against the victim's boyfriend are probative of intent, they are relevant and the trial court did not abuse its discretion in admitting testimony regarding them.

Defendant also argues that the trial court abused its discretion by permitting Swift to testify that she had originally lied to investigators at the behest of Sue Lockhart, defendant's girlfriend. Defendant argues that the record contains no evidence that he asked Lockhart to convince Swift to lie. Because of this, defendant argues, Lockhart's actions were not relevant and should have been excluded under MRE 402.

We conclude the trial court did not abuse its discretion in admitting this evidence. The credibility of a witness is always relevant. *Mills*, *supra* at 72. "If a witness is offering relevant testimony, whether that witness is truthfully and accurately testifying is itself relevant because it affects the probability of a consequential fact." *Id*.

[2] The prosecutor presented testimony that several months before the shooting the victim's boyfriend had telephoned Coker and accused him of breaking into his home. Shortly thereafter, Coker, Hobbs and a third person arrived at the trailer of the victim and her boyfriend. The three pounded on the doors and threatened to beat the victim's boyfriend but left after the victim telephoned the police. Later, the police arrested Coker for drunk driving and Hobbs for possession of marijuana. Sue Lockhart, Coker's girlfriend, received a ticket for possession of an open alcohol container in a vehicle. The bond set for these offenses totaled $700.

Finally, defendant argues the trial court erred by permitting Michelle Janes to testify that defendant told Janes and her boyfriend, Chris Edgington, that they "shouldn't be hanging out [at the home of the victim and her boyfriend] because [defendant] wouldn't want [Janes or Edgington] to get hit with a stray bullet." Further, defendant argues the trial court abused its discretion by permitting Janes to testify to a telephone conversation Edgington had with Coker on the night of the shooting. Edgington was in the hospital at the time of the trial and unable to testify.[3] Janes testified that Edgington told her Coker said, "I told you I'd be getting a hold of you. I'm going to stop over. Stay home."

Defendant argues the admission of this testimony denied him a fair trial because it was inadmissible hearsay. He argues no categorical exception to the rule against hearsay applied, and the hearsay did not bear sufficient indicia of reliability to be admitted under a "catch-all" exception.[4] We disagree. The admission or exclusion of evidence by the trial court is reviewed for a clear abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). Whether a rule of evidence, statute or constitutional provision precludes admission of evidence presents a question of law reviewed de novo, and the trial court abuses its discretion when it admits evidence that is inadmissible as a matter of law. *Id.*

We address first Janes' testimony that Coker warned her and Edgington against "hanging out" at the home of the victim and her boyfriend. The testimony indicated this statement was made sometime between the night Coker, Hobbs and Lockhart were stopped by the police and the night of the shooting. The statement was not part of the telephone conversation between Edgington and Coker on the night of the murder. Further, the record reflects that witness Janes was present when defendant purportedly made the statement.

At trial, defense counsel objected to Janes' testimony on the grounds that the statement constituted hearsay. The court responded that Coker had made the statement. Although the record is not clear whether the defense objection was withdrawn, it is clear the evidence was not admitted under the residual exception to the hearsay rule. We conclude the trial court did not abuse its discretion in admitting Janes' testimony concerning Coker's statement. Under MRE 801(d)(2)(A) a statement is not hearsay if it is offered against a party and it is the party's own statement.

Next, we consider Janes' testimony as to what Edgington told her Coker said. MRE 801(c) defines hearsay as a declarant's out of court statement offered to prove the truth of the

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[3] Edgington, a friend of defendant Coker, attempted to commit suicide the day before trial began in an apparent attempt to keep from having to testify.

[4] Michigan's "residual" or "catch-all" exceptions to the hearsay rule, MRE 803(23) and MRE 804(b)(6), were adopted January 19, 1996, effective April 1, 1996. 450 Mich cixviii. MRE 804(b)(6) was renumbered 804(b)(7) when the current 804(b)(6) was added effective September 1, 2001 (MRE 804, note to 2001 amendment). The substantive provision of the two catch-all exceptions are identical except that the availability of the declarant is immaterial under MRE 803(24) while the declarant must be unavailable under MRE 804(b)(7). See *People v Welch*, 226 Mich App 461, 464 n 2; 574 NW2d 682 (1997).

matter asserted. Hearsay is inadmissible as substantive evidence unless one of the exceptions in the rules of evidence applies. MRE 802; *People v Poole*, 444 Mich 151, 159; 506 NW2d 505 (1993). Here, the trial court applied MRE 803(24) to admit the challenged statements, relying on *People v Lee*, 243 Mich App 163, 178; 622 NW2d 71 (2000).

MRE 803(24) provides:

> A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact, (B) the statement is more probative on the point for which it is offered than any other evidence that the proponent can procure through reasonable efforts, and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of the statement makes known to the adverse party, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

By its plain terms, the residual exception may only apply where one of the categorical hearsay exceptions does not. *Katt*, *supra* at 289. Further, because the residual exception is not firmly rooted, hearsay admitted under this rule must not only comply with the terms of rule but also satisfy the Confrontation Clause. See *Idaho v Wright*, 497 US 805, 814-815; 110 S Ct 3139; 111 L Ed 2d 638 (1990). Thus, hearsay to be admitted under MRE 803(24) must "possess equivalent circumstantial guarantees of trustworthiness" that traditional exceptions enjoy, and also satisfy the Confrontation Clause by bearing adequate "indicia of reliability," which must be determined by reviewing the totality of the circumstances surrounding the making of the statements at issue.[5] *Poole*, *supra* at 164; *Lee*, *supra* at 178. Under this test, the factors to be considered may include:

[5] We recognize that the United States Supreme Court recently limited the "indicia of reliability" test adopted in *Ohio v Roberts*, 448 US 56, 66; 100 S Ct 2531; 65 L Ed 2d 597 (1980), and applied in *Wright*, *Poole*, and *Lee* to determine whether an accused's Confrontation Clause rights were violated by the admission of hearsay. *Crawford v Washington*, 541 US ___; ___ S Ct ___; ___ L Ed 2d ___ (2004). Specifically, the *Crawford* Court held that "[w]here testimonial evidence is at issue . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." *Id*., slip op at 33. But, "[w]here nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law, as does *Roberts*, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether." *Id*. Although *Crawford* does not provide a comprehensive definition of "testimonial," we are convinced that the hearsay to which Coker objects is nontestimonial, and therefore, we apply the *Roberts* reliability rule.

> (1) the spontaneity of the statements; (2) the consistency of the statements; (3) lack of motive to fabricate or lack of bias; (4) the reason the declarant cannot testify; (5) the voluntariness of the statements, i.e., whether they were made in response to leading questions or made under undue influence; (6) personal knowledge of the declarant about the matter on which he spoke; (7) to whom the statements were made, e.g., a police officer who was likely to investigate further; and (8) the time frame within which the statements were made. The court may not consider whether evidence produced at trial corroborates the statement. [*Lee, supra* at 178 (citations omitted).]

Our Supreme Court recently set forth the criteria for admissibility under MRE 803(24):

> [E]vidence offered under MRE 803(24) must satisfy four elements to be admissible: (1) it must have circumstantial guarantees of trustworthiness equal to the categorical exceptions, (2) it must tend to establish a material fact, (3) it must be the most probative evidence on that fact that the offering party could produce through reasonable efforts, and (4) its admission must serve the interests of justice. Also, the offering party must give advance notice of intent to introduce the evidence. [*Katt, supra* at 279, 290.]

We have already rejected defendant's argument that because he presented an alibi defense, his intent was not a material issue in the case. Intent is always a material issue where the charge is willful, deliberate, premeditated murder. Although there was other evidence of defendant's intent on the night of the shooting, because of the declarant's hospitalization, the hearsay was best evidence the prosecutor could produce that defendant had warned Edgington to stay away from the victim on the night of the shooting. This was a material fact from which premeditation and deliberation could be inferred. Because of this, an unprejudiced person could not find that there was no justification for the trial court's finding that the hearsay statement was admissible under MRE 803(23). *Katt, supra* at 279, 290; *Lee*, *supra* at 178-179.

In addition to stating that it did not meet the standards set forth in the residual exception, defendant contends that the statement lacked sufficient indicia of reliability because it did not satisfy requirements of any of the other hearsay exceptions. We reject this argument as well because it would defeat the purpose of having a residual exception. Indeed, the rule specifically requires that hearsay admitted under the residual exception "not [be] specifically covered by any of the [other hearsay] exceptions." See *Katt, supra* at 289. We conclude the trial court properly determined under the totality of the circumstances that the hearsay statement possessed sufficient circumstantial guarantees of trustworthiness to be reliable and therefore admitted under the residual exception. *Katt*, *supra* at 290-292; *Lee*, *supra* at 178. The trial court found that the declarant consistently made the same statement. The statement was voluntarily made and concerned a phone call about which he had personal knowledge. Edgington, the declarant, had no motive to lie because he and defendant were friends. Edgington also made the statement contemporaneously and spontaneously to a loved one. These findings provide sufficient justification for the court's determination that the statement was reliable. We find that the trial court did not abuse its discretion.

Defendant's final argument is that the prosecution failed to provide proper notice that it intended to offer evidence under the residual exception. Although defendant did not know in advance that that the prosecutor would offer Edgington's statement under the residual hearsay exception, defendant had the advance notice contemplated by the rule of the substance of Edgington's statement. The prosecutor had intended to call Edgington as a witness and named him on the prosecution's first amended witness list. The prosecutor only presented Janes' hearsay testimony as an alternative because Edgington apparent distraught over the prospect of testifying, attempted suicide the day before. Because defendant had notice of the evidence equivalent to that required by MRE 803(24) and had a fair opportunity to meet it, the trial court did not abuse its discretion by admitting Edgington's statement.

Accordingly, the trial court did not abuse its discretion by admitting the evidence defendant Coker challenges. We therefore affirm defendant Coker's convictions and sentences.

III. Issues raised only in Docket No. 238739

Defendant Hobbs asserts two reasons why the prosecutor failed to present sufficient evidence to sustain his felony murder conviction. First, he argues that the prosecutor presented insufficient evidence of malice as required by *People v Aaron*, 409 Mich 672, 733; 299 NW2d 304 (1980). Second, he argues the murder occurred after the robbery had been completed. We disagree.

We review de novo defendant's claim that evidence at trial was insufficient to support his conviction as a question of law. *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001). Viewing the evidence in a light most favorable to the prosecution, we must determine whether a rational trier of fact could have found all of the elements of the offense were proved beyond a reasonable doubt. *Jackson v Virginia*, 443 US 307, 319; 99 S Ct 2781; 61 L Ed 2d 560 (1979); *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), mod 441 Mich 1201 (1992). Circumstantial evidence and their reasonable inferences may constitute sufficient evidence to find all the elements of an offense beyond a reasonable doubt. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002)*; Carines*, *supra* at 757. Furthermore, we must review the sufficiency of the evidence with deference by making all reasonable inferences and resolving credibility conflicts in favor of the jury verdict. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000); *Wolfe*, *supra* at 514-515.

The elements of felony murder are: (1) the killing of a human being, (2) with malice, meaning, with the 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, (3) while committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated in MCL 750.316(1)(b), including the charged underlying offense here of robbery. *Carines*, *supra* at 759.

The prosecutor theorized defendant was culpable as an aider and abettor. In order to prove felony murder on an aiding and abetting theory, the prosecutor must show that the accused:

> (1) performed acts or gave encouragement that assisted the commission of the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result, (3) while committing, attempting to commit, or assisting in the commission of the predicate felony. [*People v Riley (After Remand)*, 468 Mich 135, 140; 659 NW2d 611 (2003).]

To establish the element of malice required by *Aaron*, the prosecutor must show that the accused "either intended to kill, intended to cause great bodily harm, or wantonly and willfully disregarded the likelihood that the natural tendency of his behavior was to cause death or great bodily harm." *Riley, supra* at 140-141. The malice necessary for a felony murder conviction cannot "be inferred merely from the intent to commit the underlying felony," but the facts and circumstances involved in the perpetration of a felony may provide sufficient evidence from which the jury may infer the necessary element of malice. *People v Kelly*, 423 Mich 261, 273; 378 NW2d 365 (1985), citing *Aaron*, supra at 728. Such circumstantial evidence may include a close association between the defendant and the principal, the defendant's participation in the planning or execution of the crime, the use of a deadly weapon, and evidence of flight after the crime. *Carines*, *supra* 758-759. Thus, "if an aider and abettor participates in a crime with knowledge of the principal's intent to kill or to cause great bodily harm, the aider and abettor is acting with 'wanton and willful disregard' sufficient to support a finding of malice." *Riley, supra* at 141.

Viewing the evidence in a light most favorable to the prosecutor, we conclude that a rational jury could find beyond a reasonable doubt that defendant acted with the malice necessary to sustain his felony murder conviction. Witness Hurley testified he accompanied Hobbs and Coker to the victim's residence on the day of the murder. Hurley testified that both Coker and Hobbs entered the residence, with Coker carrying a rifle. Minutes later Coker returned without the rifle, and Hurley heard Hobbs make statements from which the jury could infer Hobbs was then holding the victim at gunpoint. In addition to malice that could be inferred from his use of a deadly weapon, the evidence supports an inference that Hobbs knew Coker intended to kill or cause great bodily harm. Hurley testified that Hobbs was present when Coker said someone might be shot. Hurley also testified that on the way to the victim's residence, Hobbs steered the car while Coker test-fired the weapon. A rational jury could have found that Hobbs acted with malice because he knew Coker's intent. Further, the prosecutor presented evidence that Hobbs fled the state with Coker after the crime and that Hobbs told Coker's father that he (Hobbs) shot the victim. Viewed in the light most favorable to the prosecution, the evidence was sufficient for a rational jury to have found Hobbs guilty of felony murder beyond a reasonable doubt.

Next, defendant Hobbs argues the evidence was insufficient to convict him of felony murder because it was not "committed in the perpetration of, or attempt to perpetrate" a robbery. MCL 750.316(1)(b). Defendant contends that codefendant Coker killed the victim after the robbery; therefore, the robbery cannot support a felony murder conviction. We disagree.

As noted *supra*, the prosecutor must prove that the murder occurred while the defendant was committing, attempting to commit, or assisting in the commission of a predicate felony to establish felony murder. *Riley*, *supra* at 140. When the evidence here is viewed in a light

favorable to the prosecution, it established that Coker had carried stolen property from the victim's residence while Hobbs, armed with a rifle stayed inside with the victim. The victim was shot after Coker again entered the residence and told Hurley to leave with more stolen property. Coker shot the victim as Hobbs and Hurley, carrying stolen property, walked from the residence to their waiting automobile. We conclude this evidence was sufficient for a rational trier of fact to find beyond a reasonable doubt that the murder occurred during the commission of a robbery.

The elements of robbery are: (1) a felonious taking of property from the person of another or in his presence, (2) by force and violence or by assault or by putting in fear, and (3) being armed, MCL 750.529, or being unarmed, MCL 750.530. See *People v Rodgers*, 248 Mich App 702, 707; 645 NW2d 294 (2001) (armed robbery), and *People v Himmelein*, 177 Mich App 365, 378; 442 NW2d 667 (1989) (unarmed robbery). Defendant apparently bases his argument on the requirement that to establish robbery, the use or threat of force must contemporaneous with the taking of property. *People v Randolph*, 466 Mich 532, 546; 648 NW2d 164 (2002). Based on a review of the common law of robbery and Michigan's unarmed robbery statute,[6] the *Randolph* Court held that a theft of property accomplished without using force or violence cannot be converted to a robbery by the subsequent use of force or violence to escape or retain possession of the stolen property. *Randolph, supra* at 536, 539. Thus, the Court overruled the so-called "transactional approach"[7] and held that "the force, violence, assault or putting in fear underlying the robbery must occur before or contemporaneously with the felonious taking." *Id*. at 551. But the Court made clear that "contemporaneous" included use of force or violence immediately before or immediately after the taking of the property. *Id*. at 538 n 6.

Randolph has no application to the case at bar for two reasons. First, viewing the evidence in the light most favorable to the prosecution, there is no question that the taking of property here was accomplished through the use of force or violence, which established that a robbery occurred. The only question is whether the robbery was completed when the killing occurred so as to invoke felony murder. The evidence supports a rational inference that the victim was alive and being held at gunpoint at the same time Hobbs and Hurley were carrying property away from her residence and when she was killed. In sum, a rational jury could find beyond a reasonable doubt that the victim was killed *during* the robbery because the victim was continuously assaulted between the time defendants entered her home and began taking property and when the victim was killed.

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[6] It is clear the Court's analysis applies equally to both armed robbery and unarmed robbery. *Randolph, supra* at 536, citing *People v LeFlore*, 96 Mich App 557, 562; 293 NW2d 628 (1980). The *Randolph* Court overruled the so-called "transactional approach" to robbery, first developed in *People v Sanders*, 28 Mich App 274, 184 NW2d 269 (1970). *Randolph, supra* at 546. Under the "transactional approach," which this Court explicitly adopted in *LeFlore*, robbery is a continuous offense that is not complete until the perpetrator reaches a place of temporary safety. *Randolph, supra* at 536, 540-541.

[7] See n 5, *supra*.

Second, the *Randolph* Court distinguished the situation it addressed from the question of whether a homicide in connection with a robbery was felony murder. *Id*. at 549-550, citing *People v Podolski*, 332 Mich 508, 515-516; 52 NW2d 201 (1952). In *Podolski*, the Court reviewed whether felony murder applied where a police officer was killed by friendly fire in a gun battle with armed robbers. The Court considered the question as one of whether the homicide was contemplated within the scope of the initial criminal enterprise, adopting the approach of the Pennsylvania supreme court. *Id*. at 515-516. Thus, "'when a felon's attempt to commit robbery or burglary sets in motion a chain of events which were or should have been within his contemplation when the motion was initiated, he should be held responsible for any death which by direct and almost inevitable sequence results from the initial criminal act.'" *Id*., quoting *Commonwealth v Moyer*, 357 Pa 181, 190-191; 53 A2d 736 (1947).

This Court in *People v Thew*, 201 Mich App 78; 506 NW2d 547 (1993) upheld the felony murder conviction of the defendant who killed an eleven-year-old rape victim by running over her with his car while leaving the scene of the crime. The *Thew* Court quoted *People v Smith*, 55 Mich App 184, 189; 222 NW2d 172 (1974), which relied on *Podolski*, as follows:

> [I]f a murder is committed while attempting to escape from or prevent detection of the felony, it is felony murder, but only if it is committed as a part of a continuous transaction with, or is otherwise "immediately connected" with, the underlying felony.. [*Thew, supra* at 85-86, quoting *Smith, supra* at 189.]

The *Thew* Court upheld the defendant's plea of guilty to felony murder because "inculpatory inferences can be drawn that he killed the victim to prevent detection of the act of sexual intercourse with her, and that the killing was 'immediately connected' with the act of sexual intercourse." *Id*. at 88. Thus, a murder committed while attempting to escape from or prevent detection of the predicate felony, or is otherwise "immediately connected" with the underlying felony, is felony murder.

Applying reasonable inferences and resolving credibility conflicts in favor of the jury verdict as we must, *Nowack, supra* at 400, we find the murder in this case was within the scope of the criminal enterprise embarked on by Coker and Hobbs and was within Hobbs' knowledge, as already discussed, *supra*. Moreover, testimony at trial indicated that Hobbs told Coker's father after the murder that the robbery "went bad," and "they didn't want nobody witnessing them trying to strong arm for money." It is reasonable to infer from this testimony that the victim was murdered to prevent detection of the robbery and was "immediately connected" with it. *Thew, supra*. Thus, viewed in the light most favorable to the prosecution, sufficient evidence existed for the jury to have found Hobbs guilty of felony murder beyond a reasonable doubt.

Last, defendant Hobbs argues the trial court abused its discretion denying his pretrial motion for severance. Again, we disagree. We review a trial court's decision to grant or deny a motion to sever for an abuse of discretion. *People v Hana*, 447 Mich 325, 346; 524 NW2d 682 (1994), amended 447 Mich 1203 (1994).

MCR 6.121(C) provides: "On a defendant's motion, the court must sever the trial of defendants on related offenses on a showing that severance is necessary to avoid prejudice to substantial rights of the defendant." Offenses are "related" if they are "based on the (1) the same

conduct, or (2) a series of connected acts or acts constituting part of a single scheme or plan." MCR 6.120(B). Thus, charges in the instant case against defendant Hobbs were clearly "related" to charges against defendant Coker. But our Supreme Court in *Hana, supra* at 346-347, stated as follows:

> Severance is mandated under MCR 6.121(C) only when a defendant provides the court with a supporting affidavit, or makes an offer of proof, that clearly, affirmatively, and fully demonstrates that his substantial rights will be prejudiced and that severance is the necessary means of rectifying the potential prejudice. The failure to make this showing in the trial court, absent any significant indication on appeal that the requisite prejudice in fact occurred at trial, will preclude reversal of a joinder decision.

No lesser standard applies even where codefendants intend to present antagonistic defenses. *Hana, supra* at 347-348. The *Hana* Court explained:

> Inconsistency of defenses is not enough to mandate severance; rather, the defenses must be "mutually exclusive" or "irreconcilable." Moreover, incidental spillover prejudice, which is almost inevitable in a multi-defendant trial, does not suffice. The tension between defenses must be so great that a jury would have to believe one defendant at the expense of the other. [*Id*. at 349 (citations and internal punctuation omitted).]

Defense counsel argued at the motion to sever that Hobbs would present a defense of "mere presence" while Coker would present an alibi defense. We agree with the trial court that these defenses were not "mutually exclusive" or "irreconcilable," as discussed in *Hana*. Further, defendant Hobbs has not otherwise established that severance was necessary to avoid prejudice to his substantial rights. Although Coker testified he was elsewhere at the time of the shooting, he did not accuse Hobbs. Hobbs never testified or directly accused Coker. Based on the evidence at trial, the jury could have believed both that Coker was not at the scene of the shooting and that Hobbs was, but did not participate in killing the victim. Additionally, Hobbs has not established actual prejudice occurred at trial. Like the trial court in *Hana*, the trial court here instructed the jury that it must determine guilt on an individualized basis.

Nevertheless, Hobbs argues that prejudice requiring reversal occurred because witnesses testified at trial concerning admissions Coker made, and because Coker did not testify on his own behalf, Hobbs was denied the opportunity to cross-examine him regarding these admissions in violation of his rights under the Confrontation Clause. We find the record does not support this argument. The prosecutor called two sheriff's deputies to testify concerning Coker's admissions while he was incarcerated awaiting trial. But Coker also testified that although he talked to the deputies, he denied confessing to the crime. Further, Hobbs' trial counsel cross-examined Coker, albeit not regarding the alleged admissions. Regardless of whether the denial of the right to cross-examine a codefendant would create prejudice mandating severance, no such denial occurred in the instant case. "[W]hen the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements." *Crawford v Washington*, 541 US ___; ___ S Ct ___; ___ L Ed 2d ___ (2004), slip op at 23 n 9, citing *California v Green*, 399 US 149, 162; 90 S Ct 1930; 26 L Ed 2d 489 (1970).

Moreover, Coker's admissions did not prejudice Hobbs because he argued that Coker was solely responsible for the murder, and because the trial court instructed the jury that the admissions were admitted only against Coker and could not be considered as evidence of Hobbs' guilt. Thus, error warranting reversal did not occur.

For the above reasons, we conclude the trial court did not abuse its discretion by denying Hobbs' motion for a separate trial.

IV. Conclusion

In Docket No. 238738, we affirm defendant Coker's convictions and sentences. In Docket No. 238739, we affirm defendant Hobbs' convictions and sentences.

/s/ Kathleen Jansen
/s/ Jane E. Markey
/s/ Hilda R. Gage