STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DONMISCE CLARK,

Defendant-Appellant.

UNPUBLISHED
December 29, 2005

No. 256190
Wayne Circuit Court
LC No. 03-012292-01

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ARTHUR SUMERLIN, III,

Defendant-Appellant.

No. 256192
Wayne Circuit Court
LC No. 03-013613-01

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HORACE TERTAR CLARK,

Defendant-Appellant.

No. 256193
Wayne Circuit Court
LC No. 03-012294-01

Before: Murphy, P.J., and Sawyer and Meter, JJ.

PER CURIAM.

In these consolidated appeals, defendants were convicted of various charges arising out of multiple shootings at a Detroit drug house. Two victims died from gunshot wounds, and a third individual survived after being shot in the head.[1] Defendants were tried jointly before a single jury. Defendants Donmisce Clark and Horace Clark were each convicted of two counts of first-degree premeditated murder, MCL 750.316(1)(a), two counts of first-degree felony murder, MCL 750.316(1)(b), and one count of assault with intent to commit murder, MCL 750.83. They were both sentenced to mandatory life imprisonment without the possibility of parole for the first-degree premeditated murder convictions, they were not sentenced for the felony-murder convictions ostensibly because of double jeopardy concerns,[2] and they received 15 to 30 years' imprisonment for their assault convictions. Defendant Sumerlin was similarly convicted and sentenced; however, he was additionally found guilty of armed robbery, MCL 750.529, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to 15 to 30 years' imprisonment for the armed robbery conviction, 1 to 5 years' imprisonment for the felon in possession conviction, and 2 years' imprisonment (consecutive) for the felony-firearm conviction. Defendants appeal as of right. We affirm.

I. Defendant Donmisce Clark

Three of the four appellate arguments presented by defendant[3] relate to the United States Supreme Court's decision in *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004), in which the high Court held that an out-of-court statement by a witness that is testimonial in nature is inadmissible under the Confrontation Clause, US Const, Am VI, where the witness is unavailable to testify and the defendant did not have a prior opportunity to cross-examine the witness, regardless of whether the statement is deemed inherently reliable.

Defendant first argues that the trial court violated his constitutional rights under the Confrontation Clause by admitting codefendant Sumerlin's out-of-court "testimonial" statement made to police that placed defendant at the murder scene, where Sumerlin was unavailable as he had exercised his Fifth Amendment right not to testify, and where defendant's counsel had no opportunity to cross-examine Sumerlin regarding the statement. Defendant contends that this

[1] The two murder victims were Pia Stanton and Corey Brown, and the surviving victim is Jovan Stanton.

[2] The judgments of sentence for all three defendants reflect that the felony murder convictions were vacated. This Court has stated, "Where dual convictions of first-degree premeditated murder and first-degree felony murder arise out of the death of a single victim, the dual convictions violate double jeopardy. The proper remedy is to modify the judgment of conviction and 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." *People v Adams*, 245 Mich App 226, 241-242; 627 NW2d 623 (2001) (citations omitted). Here, the judgments of sentence must be corrected consistent with *Adams.*

[3] Our reference to "defendant" shall pertain to the particular defendant listed in the designated heading as structured by this opinion. For example, Donmisce Clark is the current subject of our analysis, and thus the reference to defendant concerns Donmisce Clark.

was the crucial evidence placing him at the scene of the murders, and placing him there at about the time the criminal offenses were committed. Defendant's second argument is that the trial court erred in refusing to sever his trial or to seat a separate jury in light of the *Crawford* predicament. Defendant's third appellate issue is that trial counsel was ineffective for failing to independently and timely move to sever the trials or, alternatively, for failing to request a separate jury given the holding in *Crawford.*[4] Defendant's fourth appellate argument is that the trial court erred in denying his motion for directed verdict, where there was insufficient evidence to prove beyond a reasonable doubt that he was a principal or an aider and abettor in the murders and assault.

Codefendant Sumerlin spoke with police, and a written statement, containing the interrogating officer's questions and Sumerlin's responses, was read to the jury. In the statement, Sumerlin indicated that he, Horace Clark, and defendant went to the home where the crimes were committed on the day of the murders in order to purchase some drugs. According to Sumerlin, when the three defendants arrived at the home around 2:00 p.m., an African-American male was just leaving and there were two other men in the home. These two individuals were tall, with one having a light complexion and the other a medium complexion. Sumerlin stated that the three defendants bought three ounces of drugs costing between $1,900 and $2,000, and then the three left the home. Sumerlin asserted that neither he, Horace Clark, nor defendant had a gun when they went to the home, and he denied that any of the three defendants shot the victims.

We first find that *Crawford* bars admission of Sumerlin's statement in the prosecution's case against defendant; the jury should not have been permitted to hear the officer's testimony regarding the statement as to defendant. In *Crawford, supra* at 42, the Supreme Court commenced its analysis by stating:

> The Sixth Amendment's Confrontation Clause provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." We have held that this bedrock procedural guarantee applies to both federal and state prosecutions. *Pointer v Texas*, 380 US 400, 406; 85 S Ct 1065; 13 L Ed 2d 923 (1965). [Alteration and omission in original.]

The Supreme Court then undertook an extensive examination of the historical roots of the Confrontation Clause. The Court proceeded to find as follows:

> An off-hand, overheard remark might be unreliable evidence and thus a good candidate for exclusion under hearsay rules, but it bears little resemblance to the civil-law abuses the Confrontation Clause targeted. On the other hand, *ex parte* examinations might sometimes be admissible under modern hearsay rules, but the Framers certainly would not have condoned them.

[4] Defendant also claims that counsel was ineffective for failing to object to the trial court's failure to read CJI2d 3.1, which includes the direction that the jury cannot allow sympathy or prejudice to influence its decision.

> The test of the Confrontation Clause reflects this focus. It applies to "witnesses" against the accused – in other words, those who "bear testimony." "Testimony," in turn, is typically "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not. The constitutional text, like the history underlying the common-law right of confrontation, thus reflects an especially acute concern with a specific type of out-of-court statement.
>
> Various formulations of this core class of "testimonial" statements exist: "*ex parte* in-court testimony or its functional equivalent – that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially[.] . . . Statements taken by police officers in the course of interrogations are also testimonial under even a narrow standard. Police interrogations bear a striking resemblance to examinations by justices of the peace in England. The statements are not *sworn* testimony, but the absence of oath was not dispositive. [*Crawford, supra* at 51-52 (omission and emphasis in original; citations omitted).]

The *Crawford* Court also concluded that the Framers "would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Id.* at 53-54. The Court rejected case law that had carved out a "reliability" test that allowed admission of testimonial statements based on various evidentiary rules despite the lack of an opportunity to cross-examine the unavailable declarant. *Id.* at 61-68, abrogating *Ohio v Roberts*, 448 US 56; 100 S Ct 2531; 65 L Ed 2d 597 (1980).

Crawford involved damaging and incriminating statements made by the petitioner's wife to investigating detectives. The petitioner's wife did not testify at trial on the basis of the state of Washington's marital privilege, although the law did permit the wife's out-of-court statement to be used at trial if admissible under a hearsay exception. The Washington Supreme Court ruled that the statement was admissible because, although it did not fall under a firmly rooted hearsay exception, it bore guarantees of trustworthiness. The United States Supreme Court reversed, holding that use of the wife's statement against the petitioner violated the Confrontation Clause. *Crawford, supra* at 68-69. The Court concluded, "Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." *Id.*

Here, whether by severance, separate juries, or an order precluding admission of Sumerlin's statement, the jury should not have been permitted to hear the statement relative to the prosecution's case against defendant, where Sumerlin was unavailable to testify pursuant to his Fifth Amendment right against self-incrimination, and where defendant had no prior opportunity to cross-examine Sumerlin. The statement to police was clearly testimonial in nature

under *Crawford*, and use of the statement by the prosecution violated defendant's rights under the Sixth Amendment's Confrontation Clause.[5]

Having found Sumerlin's statement inadmissible against defendant, we nonetheless hold that reversal is not warranted as any error was harmless beyond a reasonable doubt. In *People v Shepherd*, 472 Mich 343, 347; 697 NW2d 144 (2005), a case also addressing *Crawford* and an assumed violation of the Confrontation Clause, our Supreme Court stated that any "alleged error was not a structural defect requiring automatic reversal." Rather, the question is whether the alleged constitutional error was harmless beyond a reasonable doubt. *Id.* The Court ruled:

> Harmless error analysis applies to claims concerning Confrontation Clause errors[.] But to safeguard the jury trial guarantee, a reviewing court must "conduct a thorough examination of the record" in order to evaluate whether it is clear, beyond a reasonable doubt, that the jury verdict would have been the same absent the error. [*Id.* at 348 (citations omitted).]

Here, Sumerlin's statement does not indicate or suggest in any fashion that defendant committed the murders and the assault, or that he aided and abetted in the crimes. Indeed, Sumerlin's statement expressly contends that defendant had nothing to do with the crimes, and it provides information implicitly suggesting that other individuals at the house may have been involved with the commission of the crimes. Defendant argues that his defense was misidentification and lack of presence at the crime scene, and thus Sumerlin's statement placing him at the scene of the crimes, and placing him there at about the time the crimes were committed, undercut his defense. There was, however, other evidence placing defendant in the house. The surviving assault victim, Jovan Stanton, identified defendant as one of the perpetrators in a photographic lineup. She also identified defendant at trial as the man who was standing next to her aunt, Pia Stanton, who was murdered shortly thereafter, and as the individual who directed that Jovan and the others be taken to the basement. And although Stanton's testimony and identifications were somewhat impeached, a young witness who was also at the crime scene, Armanda, also identified defendant at trial as one of the perpetrators. Moreover, there was evidence presented that defendant and Horace Clark were brothers, and Katrina Brown, who knew all three defendants and had once dated Horace Clark, testified that the three defendants were together at her home on the day of the crime and then left together, shortly after 1:30 p.m. or so, following a call from a woman who spoke with defendant. The 911 call to police by Jovan Stanton was placed at 2:21 p.m. Thus, there was evidence that all three

[5] We note the decision in *Bruton v United States*, 391 US 123; 88 S Ct 1620; 20 L Ed 2d 476 (1968), in which the Supreme Court held that the admission of a codefendant's confession that implicated the defendant in a joint trial violated the Confrontation Clause and required reversal where the codefendant was unavailable and not subject to cross-examination, despite the fact that the trial court gave a clear, concise, and understandable instruction that the confession could only be used against the codefendant and not the defendant. *Bruton* further supports our ruling, especially considering that the declarant here was a codefendant. But we do not view *Bruton* as precluding application of the harmless-error rule in the case at bar. *People v Harris*, 201 Mich App 147, 150; 505 NW2d 889 (1993)(*Bruton* violation does not require automatic reversal); see also discussion of *People v Shepherd*, 472 Mich 343; 697 NW2d 144 (2005), infra.

defendants were together shortly before the crimes were committed. Finally, the trial court adamantly instructed the jury that it could only consider Sumerlin's statement relative to rendering a verdict in the prosecutor's case against Sumerlin and not Horace Clark or defendant; the statement could not be used against defendant in any form or fashion. Jurors are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). In light of the evidence other than Sumerlin's statement, and considering the jury instruction, we conclude that any error was harmless beyond a reasonable doubt. We are confident that the jury verdict would have been the same absent the error.

With respect to defendant's arguments that the trial court erred in refusing to sever his trial or to seat a separate jury in light of *Crawford*, and that counsel was ineffective for failing to timely seek severance or a separate jury, we again find that the lack of prejudice precludes us from reversing the verdict.[6] A trial court's decision on a motion for severance or for dual juries is reviewed for an abuse of discretion. *People v Hana*, 447 Mich 325, 331; 524 NW2d 682 (1994). Whether a person has been denied the effective assistance of counsel is a mixed question of fact and constitutional law that is reviewed, respectively, for clear error and de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

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." In *Hana, supra* at 351-352, our Supreme Court noted that "[t]he dual-jury procedure should be scrutinized with the same concern in mind that tempers a severance motion, i.e., whether it has prejudiced the substantial rights of the defendant." In regard to a claim of ineffective assistance of counsel, a defendant must show not only a deficient performance, he must establish that the deficient performance prejudiced the defense, such that there exists a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). For the facts and reasons on which we relied above in addressing the harmless error issue, we decline to reverse defendant's convictions because prejudice was not established.[7]

---

[6] We note that defendant did not specifically move to sever or move for separate juries. Rather, counsel for Horace Clark made such requests, which were denied. In light of our analysis, it is unnecessary to determine whether the issues of severance and separate juries were properly preserved or whether they were raised in a timely fashion. Typically, it is unnecessary for one counsel to repeat an objection voiced by another counsel when the objection is sufficient to direct the trial court's attention to the matter. *People v Bradford*, 69 Mich App 583, 586; 245 NW2d 137 (1976).

[7] As indicated previously, defendant also argues that counsel was ineffective for failing to object to the trial court's failure to read CJI2d 3.1 and the language regarding juror sympathy contained therein. However, use of the Michigan Criminal Jury Instructions is not mandatory and they do not have the official sanction of our Supreme Court. *People v Stephan*, 241 Mich App 482, 496; 616 NW2d 188 (2000). Moreover, the trial court instructed the jury that its decision is to be based on the evidence. We cannot conclude that counsel's performance was deficient and, assuming it to be deficient, we find that defendant was not prejudiced.

Defendant's final appellate argument is that the trial court erred in denying his motion for directed verdict, where there was insufficient evidence to prove beyond a reasonable doubt that he was a principal or an aider and abettor in the murders and assault, in that the prosecutor failed to establish more than mere presence with knowledge that an offense was about to be committed, or, in other words, the evidence showed passive acquiescence at most.

We review claims of insufficient evidence de novo. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). When ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515-516; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). This Court will not interfere with the trier of fact's role of determining the weight of the evidence or the credibility of witnesses. *Id.* at 514-515. Circumstantial evidence and reasonable inferences that arise from such evidence can constitute satisfactory proof of the elements of the crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). All conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).[8]

Felony murder requires: (1) the killing of a human being, (2) 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 (collectively known as the "malice" element), (3) while committing, attempting to commit, or assisting in the commission of any of the enumerated felonies in the statute. MCL 750.316(1)(b); *Carines*, *supra* at 758-759. The elements of first-degree premeditated murder are that the defendant killed the victim, and that the killing was willful, deliberate, and premeditated. MCL 750.316(1)(a); *People v Bowman*, 254 Mich App 142, 151; 656 NW2d 835 (2002).

"Every person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids, or abets in its commission may hereafter be prosecuted, indicted, tried and on conviction shall be punished as if he had directly committed such offense." MCL 767.39. In general, to convict a defendant of aiding and abetting a crime, the prosecutor must establish that (1) the crime charged was committed by the defendant or some other individual; (2) the defendant performed acts or gave encouragement that assisted in the commission of the crime; and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time that the defendant gave aid and encouragement. *People v Moore*, 470 Mich 56, 67-68; 679 NW2d 41 (2004). Aiding and abetting includes any and all forms of assistance. *People v Lawton*, 196 Mich App 341, 352; 492 NW2d 810 (1992). "The quantum of aid or advice is immaterial as long as it had the effect of inducing the crime." *Id.* However, mere presence at the crime scene, even with knowledge that an offense is about to be committed, is insufficient to establish that a defendant

[8] These principles are equally applicable in the context of an argument that the court erred in denying a motion for directed verdict. *People v Kris Aldrich*, 246 Mich App 101, 122-123; 631 NW2d 67 (2001).

aided or assisted in the commission of the crime. *People v Norris*, 236 Mich App 411, 419-420; 600 NW2d 658 (1999).[9]

Here, the record contains sufficient evidence to support the convictions. Jovan Stanton testified that defendant Sumerlin at first held her, Corey Brown, and the two children at gunpoint in the upstairs of the home. Sumerlin forced Stanton and the others to put pillowcases over their heads. At gunpoint, Sumerlin then ordered everyone to go downstairs. Stanton further testified that on her way down the steps, she saw Pia Stanton lying on the floor wrestling with defendant Horace Clark, and she saw defendant standing next to Pia. Stanton stated that defendant then directed Sumerlin to take her, Brown, Armanda, and Lexus to the basement. Sumerlin took the four down to the basement as directed and forced them to sit on the floor. Stanton testified that she heard "bumping" noises going on upstairs for a couple of minutes, followed by a gunshot and silence. After the gunshot, one of the intruders joined Sumerlin and the four victims down in the basement, although Stanton could not identify whether it was Horace Clark or defendant. Sumerlin then forced Stanton, Armanda, and Lexus into a basement bathroom; Brown was left outside the bathroom door. As he was directing Stanton into the bathroom, Sumerlin took her jewelry and one of the other intruders took her money. While in the bathroom, Stanton, who had been speaking with Brown through the door, heard a gunshot within close range, and Brown was not heard from again. Soon thereafter, Stanton was led to the basement stairs, with Sumerlin in front of her and one of the other intruders behind her. Stanton was then shot in the head at close range. Armanda testified that it was Horace Clark who at first held the victims at bay upstairs and forced them to put pillowcases over their heads. Armanda stated that, as Horace Clark was leading her downstairs, she observed defendant and Sumerlin wrestling with Pia Stanton. When the victims and Horace were all down in the basement, Armanda heard bumping noises coming from upstairs and then a gunshot. Defendant then came down to the basement and directed Horace to take the four occupants into the basement bathroom. Additionally, as noted above, Katrina Brown testified that the three defendants were together at her home on the day of the crime and then left together, shortly before the crimes were committed, following a call from a woman who spoke with defendant.

Minimally, this evidence showed that defendant worked in unison with his codefendants and that he performed acts or gave encouragement, i.e., wrestling with Pia Stanton before she

[9] Conviction of first-degree premeditated murder pursuant to an aiding and abetting theory requires the prosecution to prove, in part, that the defendant (aider and abettor) either had the premeditated and deliberate intent to kill or that the defendant knew that the principal possessed this specific intent when the defendant gave aid or encouragement. *People v Youngblood*, 165 Mich App 381, 386-387; 418 NW2d 472 (1988). Conviction of first-degree felony murder pursuant to an aiding and abetting theory requires the prosecution to prove, in part, that the defendant had the intent to kill, intent to do great bodily harm, or wantonly and willfully disregarded the likelihood of the natural tendency of his behavior to cause death or great bodily harm. *People v Barrera*, 451 Mich 261, 294; 547 NW2d 280 (1996), quoting *People v Kelly*, 423 Mich 261, 278-279; 378 NW2d 365 (1985). Additionally, if the aider and abettor participates in a crime with the knowledge that the principal has the intent to kill or to cause great bodily harm, he is acting with wanton and willful disregard sufficient to support a finding of malice. *Berrera, supra* at 294, quoting *Kelly, supra* at 278-279.

was shot and directing that the victims be taken to the basement and then to the bathroom, that assisted in the commission of the crimes; he was an active participant, not an innocent, passive bystander. To the extent that there was conflicting evidence regarding the nature of his involvement and credibility issues relative to the prosecution's witnesses, such matters are left to the jury for resolution and not this Court. *Wolfe, supra* at 514-515. Furthermore, the fact that multiple victims were shot in the head at different times at close range (execution style), with two having been forced to place pillowcases over their heads, clearly provides evidence of malice, premeditation, and deliberation. Defendant's convictions are affirmed.

II. Defendant Horace Clark

Defendant first argues that he was denied the right to exercise all of his peremptory challenges. The record reflects that after the prosecutor and defendant Donmisce Clark exercised peremptory challenges, one right after the other without juror replacement, counsel for defendant and defendant Sumerlin were asked whether they had any peremptory challenges, and both passed, declining to exercise a challenge. This left a jury of 12 (no alternates). The trial court asked whether the parties were satisfied with the jury as constituted, and all expressed satisfaction, including counsel for defendant. Although defendant may still have had unexercised peremptory challenges, he explicitly declined to exercise those challenges and affirmatively expressed satisfaction with all of the members of the jury.

In *People v Carter*, 462 Mich 206, 215, 219; 612 NW2d 144 (2000), our Supreme Court discussed the principle of waiver:

> Waiver has been defined as "the 'intentional relinquishment or abandonment of a known right.'" It differs from forfeiture, which has been explained as "the failure to make the timely assertion of a right." "One who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error."
>
> * * *
>
> In the present case, counsel clearly expressed satisfaction with the trial court's decision to refuse the jury's request and its subsequent instruction. This action effected a waiver. Because defendant waived, as opposed to forfeited, his rights under the rule, there is no "error" to review. [Citations omitted.]

Here, defendant waived any claim that he was denied the right to exercise all of his peremptory challenges and any claim that the jury voir dire or selection process was legally flawed;[10] he expressed satisfaction with the jury and declined to exercise further peremptory

[10] While technically the court was required to replace a juror as soon as that juror was excused, MCR 2.511(F), the selection method remained fair and impartial, MCR 2.511(A)(4); *People v Green (On Remand)*, 241 Mich App 40, 48; 613 NW2d 744 (2000), and, under the circumstances, no harm or prejudice came to defendant, whose right to a fair trial was in no way violated.

challenges. MCR 2.511(E)(3)(b), which addresses peremptory challenges, provides that "[a] 'pass' is not counted as a challenge *but is a waiver of further challenge to the panel as constituted at that time*." (Emphasis added). Defendant mistakenly relies on *People v Schmitz*, 231 Mich App 521; 586 NW2d 766 (1998), abrogated by *People v Bell*, 473 Mich 275, 293; 702 NW2d 128 (2005) (peremptory challenges improperly denied subject to harmless-error analysis). In *Schmitz*, the trial court refused the defendant's request to exercise a peremptory challenge regarding a venireman who had been on the panel when the defendant had passed for peremptory challenges the day before. This Court ruled, "If the composition of the panel is changed after a party passes a panel (either by challenges for cause or the exercise of peremptory challenge by another party), the party is free to exercise further peremptory challenges to any member of the new panel." *Id.* at 529. Here, the issue was waived, extinguishing error, and, after defendant passed on exercising a peremptory challenge, no other challenges were made that changed the members of the jury, and the jury was seated. The fact that the trial court decided to go with 12 jurors as opposed to 13 or 14 as indicated earlier did not give rise to a right by defendant to then exercise a peremptory challenge. Reversal is unwarranted.

Defendant next argues that there was insufficient evidence to convict him of either first-degree murder or assault with intent to commit murder because specific intent was never established. Defendant contends that the evidence did not show that he had the requisite intent, or that he had knowledge aforehand of the principal's actions and intent.

The guiding principles regarding sufficiency arguments, as well as those concerning aiding and abetting and first-degree murder, are set forth above. Specific intent, like any other fact at issue in a trial, may be proven indirectly by inference from the conduct of the accused and surrounding circumstances from which it logically and reasonably follows. *Lawton, supra* at 349. Because of the difficulty in proving a defendant's state of mind, minimal circumstantial evidence is sufficient. *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999). The intent to kill may be proven by the prosecution through inferences arising from any facts admitted into evidence. *Id.*

There was evidence presented that defendant actively participated and assisted in the commission of the crimes by holding the victims at gunpoint, by directing them to place pillowcases over their heads, by forcing them to move about the house, and by wrestling with Pia Stanton, and he was quite possibly involved as the actual shooter when considering the witnesses' testimony. The victims were not permitted to interfere while Pia Stanton was struggling with two of the defendants. The fact that multiple victims were shot in the head at different times, in varying locations, and at close range (execution style), with two having been forced to place pillowcases over their heads, clearly provides circumstantial evidence of an intent to kill or knowledge of an intent to kill that can be attributed to defendant, especially considering the evidence that he marched the victims through the home and forced them to wear pillowcases over their heads and evidence that he did not leave after Pia Stanton was murdered. He continued participating in the criminal activity. To the extent that there was conflicting evidence regarding the nature of defendant's involvement and credibility issues relative to the prosecution's witnesses, such matters are left to the jury for resolution and not this Court. *Wolfe, supra* at 514-515.

Finally, defendant argues that the trial court erred in failing to instruct the jury that aiders and abettors must have the intent necessary to be guilty of the crime as a principal. We first note

that counsel for defendant expressed satisfaction with the jury instructions, except for some instructions not pertinent here, when she affirmatively communicated to the court that she did not have any objections to the instructions when directly queried by the trial court. Accordingly, the issue was waived for purposes of appellate consideration. *Carter, supra* at 215. Moreover, the trial court specifically instructed the jury as follows regarding aiding and abetting:

> To prove this, the prosecution has to prove the following elements beyond a reasonable doubt. First, that the alleged crime was actually committed either by the defendant or someone else. Second, that before or during the crime, the defendant did something to assist in the commission of the crime. *And third, [the] defendant must have intended the commission of the crime alleged or must have known that the other person intended its commission at the time of the giving of assistance.*
>
> It doesn't matter how much help, advice, or encouragement that the defendant gave, however, you must decide whether the defendant intended to help another commit the crime . . . . [Emphasis added.]

The trial court then proceeded to instruct the jury with respect to first-degree premeditated murder and felony murder, which included instructions concerning specific intent and malice. The instruction above is consistent with Supreme Court precedent, *Moore, supra* 67-68, and CJI2d 8.1. The jury was properly instructed, and there exists no basis for reversal.[11]

III. Defendant Arthur Sumerlin

Defendant first argues that there was insufficient evidence to support his conviction under either a principal theory or an aiding and abetting theory. In that same vein, defendant contends that the trial court erred in failing to grant his motion for directed verdict. In particular, defendant maintains that there was insufficient evidence to establish premeditation, deliberation, specific intent, and malice. The legal principles regarding sufficiency claims, as well as those concerning aiding and abetting and first-degree murder, are cited above. They are equally applicable in the context of an argument that the court erred in denying a motion for directed verdict. *Aldrich, supra* at 122-123 (record reviewed de novo to determine whether evidence, when viewed in light most favorable to prosecutor, could persuade rational trier of fact that elements of crime were proven beyond a reasonable doubt).

Premeditation and deliberation may be inferred from all of the facts and circumstances surrounding the killing. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993). Although there is no time requirement for establishing premeditation, sufficient time must have elapsed to allow the defendant the opportunity to take a second look. *People v Plummer*, 229 Mich App 293, 300; 581 NW2d 753 (1998). Factors that may be considered to establish premeditation include the following: (1) the previous relationship between the defendant and the victim; (2) the

[11] Defendant briefly alludes to ineffective assistance of counsel in relation to the instructional argument. Because there was no instructional error, counsel was not ineffective for waiving any claim of error. See *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998).

defendant's actions before and after the crime; and (3) the circumstances of the killing itself, including the weapon used and the location of the wounds inflicted. *Id.* at 300-301. Malice may also be inferred from the facts and circumstances surrounding the killing, including the use of a deadly weapon. *Carines, supra* at 759; *People v Kemp*, 202 Mich App 318, 322; 508 NW2d 184 (1993). Further, malice may be inferred from evidence that the defendant intentionally set in motion a force likely to cause death or great bodily harm. *People v Flowers*, 191 Mich App 169, 177; 477 NW2d 473 (1991). Specific intent is discussed above.

There was evidence that defendant held the victims, not including Pia Stanton, at bay in the upstairs of the home by gunpoint, that he ordered these victims downstairs, that he took the victims into the basement, that Pia Stanton was soon shot by one of the perpetrators, that defendant then forced the children and Jovan Stanton into a basement bathroom, that he took Jovan's jewelry, that Corey Brown was then shot, and that he was forcing Jovan to walk to the stairs when she was shot. Armanda's testimony indicated that defendant was wrestling with Pia shortly before she was shot.

Once again, the fact that multiple victims were shot in the head at different times, in varying locations, and at close range (execution style), with two having been forced to place pillowcases over their heads beforehand, all with defendant's active assistance, clearly provides circumstantial evidence of premeditation, deliberation, specific intent, and malice. Even prior to the murder of Pia Stanton, there was evidence that she was engaged in a fairly lengthy struggle with two of the defendants before a shot was fired ending her life. Regardless whether defendant was the principal or an aider and abettor, the circumstances surrounding the commission of these horrific crimes provides ample evidence that defendant acted with premeditation, deliberation, specific intent, and malice, or that he was fully cognizant that the principal was acting in such fashion when giving assistance. Defendant points to conflicting evidence and witness credibility issues, but, to the extent that there was conflicting evidence regarding the nature of his involvement and credibility issues relative to the prosecution's witnesses, such matters are left to the jury for resolution and not this Court. *Wolfe, supra* at 514-515.

Defendant next argues that the trial court erred when it refused to instruct the jury with respect to the lack of production of telephone records associated with the house where the crimes were committed. Defendant sought to have the jury instructed regarding an adverse inference pursuant to CJI2d 5.12 (Prosecutor's Failure to Produce Witness) and *People v Perez*, 469 Mich 415; 670 NW2d 655 (2003). The trial court denied the request without discussion.

The lower court record indicates that counsel for defendant Donmisce Clark raised the issue after the prosecution rested its case, noting that the prosecutor's witness list indicated that there were phone records. The prosecutor responded, without elaboration, that he did not have possession of the phone records. The trial court simply responded, "So that deals with that." During the instructional phase of the trial, the court brought up the issue of an adverse inference instruction and declined to so instruct, while at the same time mentioning that the prosecutor had not provided a reasonable explanation for not producing the records or the custodian of the records.[12] The prosecutor's witness list includes the "phone record custodian" relative to the

[12] The trial court also noted that counsel for each defendant had raised the issue in an earlier (continued…)

address of the home where the crimes were committed. The witness is checked off or marked, indicating endorsement for trial under MCL 767.40a(3).

In *Perez, supra* at 418, the Supreme Court noted that, "[b]efore 1986, the statute [MCL 767.40a] plainly imposed on a prosecutor the duty to list all res gestae witnesses on the information and to produce them at trial." With the 1986 amendment, the Legislature replaced the prosecutor's duty to produce res gestae witnesses with an obligation to provide notice of known witnesses. *Perez, supra* at 418-419. However, an instruction pursuant to CJI2d 5.12 may still be appropriate "if a prosecutor fails to secure the presence at trial of a listed witness who has not been properly excused." *Id.* at 420. In the case at bar, we cannot decipher from the limited record whether the prosecutor had a reasonable or proper excuse for not procuring the presence of the custodian and records, but the court hinted that no reasonable explanation was given.

Defendant frames this issue with more of an emphasis on missing phone records as opposed to a missing witness. With respect to missing records and an adverse inference instruction, intentional misconduct or bad faith on the part of the prosecutor is typically necessary. See *People v Davis*, 199 Mich App 502, 515; 503 NW2d 457 (1993) ("[D]efendant has not demonstrated that the prosecutor acted in bad faith in failing to produce the evidence. Rather, . . . the evidence simply did not exist or could not be located. Under the circumstances, the trial court did not err in declining to give this instruction."). We cannot conclude from the record that the prosecution acted in bad faith.

In sum, because of the limited record, we decline to conclude that the trial court erred in refusing to give an adverse inference instruction. Regardless, assuming error, defendant has not established that the error was prejudicial and affected the outcome of the trial. See MCL 769.26; *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999). Reversal is unwarranted.

Finally, in a supplemental standard 4 brief, defendant argues that he was denied his right to counsel and a fair trial when photographic lineups were conducted, where he was not yet in custody but was the focus of the investigation. As part of this argument, defendant additionally contends that his attorney was ineffective for failing to move to suppress the identifications based on lack of counsel. According to defendant, his attorney should have had the photographic identifications thrown out and then counsel should have argued that there was no independent basis for the in-court identifications.

Only cursory treatment need be given to this argument. In *People v Hickman*, 470 Mich 602, 607, 611; 684 NW2d 267 (2004), our Supreme Court held that the right to counsel attaches only to identifications conducted at or after the initiation of adversarial judicial criminal proceedings, such as by formal charge, a preliminary hearing, an indictment, an information, or an arraignment. The Court stated, "To the extent that *People v Anderson*, 389 Mich 155; 205 NW2d 461 (1973), goes beyond the constitutional text and extends the right to counsel to a time before the initiation of adversarial criminal proceedings, it is overruled." *Id.* at 603-604. The cases relied on by defendant arose out of the now-rejected *Anderson* decision. The first photographic array with Jovan Stanton in which she identified defendant was undertaken prior to

(…continued)

sidebar conference.

the initiation of adversarial judicial criminal proceedings.[13] Moreover, the police record relied on by defendant indicates that a show-up attorney was indeed present at this initial photo lineup in order to protect the rights of any suspects identified by the witnesses. The record indicates that a second and third photo lineup with other witnesses in which defendant was identified took place on September 25, 2003. Again, the record reflects that counsel was present at these lineups or arrays. There was no error, and counsel was not ineffective for failing to pursue a meritless position. *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998).

Affirmed, but with remand for correction of the judgments of sentence consistent with footnote 2 of this opinion. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ David H. Sawyer
/s/ Patrick M. Meter

[13] The lower court record indicates that the first photographic lineup with Jovan Stanton occurred on September 4, 2003, and that a felony complaint was sworn out and a warrant was issued on September 10, 2003.