STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 20, 2008
v	No. 276150 Muskegon Circuit Court
DOUGLAS LANCE WEISSERT, Defendant-Appellant.	LC No. 06-053181-FC

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v	No. 282322 Muskegon Circuit Court
DOUGLAS LANCE WEISSERT, Defendant-Appellant.	LC No. 06-053181-FC

Before: Judges O'Connell, P.J., and Bandstra and Gleicher, JJ.

PER CURIAM.

After a jury trial, defendant Douglas Lance Weissert was convicted of one count of felony murder, MCL 750.316(b), one count of conspiracy to commit armed robbery, MCL 750.157a; MCL 750.529, one count of assault with intent to rob while armed, MCL 750.89, one count of first-degree home invasion, MCL 750.110a(2), and three counts of possession of a firearm during the commission of a felony ("felony-firearm"), MCL 750.227b. He was sentenced to life imprisonment for the felony murder conviction and 17 to 35 years' imprisonment for the conspiracy to commit armed robbery conviction. Defendant also received three consecutive sentences of two years' imprisonment for his felony-firearm convictions. Defendant now appeals as of right. We affirm, but remand for correction of the judgment of sentence.

Frank Sibson, the victim, was a middleman in the drug trade in Muskegon County. He periodically went to Chicago to get marijuana from suppliers. Usually, Sibson was "fronted" the marijuana, meaning that he received the marijuana on credit and then paid off the debt with proceeds from the sale of the drugs. Sibson packaged and sold the drugs from a pole barn

located on his property, often by fronting the drugs to local street dealers. When Sibson needed another supply of marijuana, he would call in the debts that street dealers owed him in order to pay off the debt he had incurred in acquiring his previous supply of marijuana. Although Sibson stored drugs in his pole barn, he kept the drug money in his house.

Sibson planned to return to Chicago on February 1, 2006, to pick up another supply of marijuana. Sibson called in his debts in preparation for the trip. On the evening of January 31, he had $71,000 in cash in a duffel bag in his bedroom, presumably to take to Chicago to pay his suppliers.

Defendant was one of the street dealers who used Sibson as a drug supplier. Sibson and defendant were also friends and socialized periodically. Defendant was familiar with Sibson's drug trade and, apparently, Sibson maintained a level of trust toward defendant. In particular, defendant got Sibson to tell him that he was planning to go to Chicago on February 1 to get another supply of marijuana.

For years, defendant had maintained friendships with Danwood Durst and Eddie Lewis, the co-conspirators in this case. In late January 2006, Durst mentioned to defendant that he needed approximately $500 to pay a bill to his attorney. In response, defendant asked Durst to help Lewis with a "job." Durst was not told much about the "job" except that he would receive approximately $500 in proceeds, but he agreed to help. Initially, the "job" was apparently to steal an ATV and sell it. On January 30, 2006, defendant, Durst, and Lewis drove around Muskegon Township for several hours looking for an ATV to steal, but they could not find one.

The following evening, still in need of money, Durst again contacted defendant and asked to borrow $500. Instead of responding to his inquiry, defendant said that he would come to Durst's home. Defendant arrived with Lewis shortly thereafter, and the three men met in Durst's basement. There, defendant suggested robbing Sibson, noting that "this punk was making too much money." Defendant then promised that if Durst helped Lewis, he would get the $500 that he needed the following day. The three men then left Durst's home. Durst and Lewis drove defendant home, dropped him off, and returned to Durst's house.

In the early morning hours of February 1, Lewis and Durst left Durst's home to prepare for the robbery. The two men drove to a gas station, where Lewis talked with defendant on Durst's cellular telephone. After Lewis got off the phone with defendant, he told Durst to drive to defendant's house, approximately 15 minutes away. When they arrived, Lewis left the car, walked behind defendant's house, returned to the car a few minutes later, and threw something in the trunk. Lewis later admitted that defendant had given him a revolver.

Durst and Lewis then drove to the Sibson house, arriving at about 3:30 a.m. The men parked nearby and Lewis retrieved the revolver, two masks, two sets of gloves, and a pickax from the trunk of the car. Lewis also pulled out a BB pistol from the trunk and gave it to Durst to carry. Lewis loaded his revolver, the two men put on their masks and gloves, and they walked through a wooded area to the back of the Sibson home. They entered through a sliding-glass door at the back of the house, and Durst followed Lewis to Sibson's bedroom.

Sibson and his wife, Danielle, were sleeping in their bed in the master bedroom. As Durst entered the room, he saw Lewis draw his revolver and yell at Sibson. Danielle woke and

immediately slapped Sibson to wake him. Sibson woke, looked up, saw the men standing there, screamed "no, no, no," jumped from the bed, and attacked Lewis. Danielle then felt something hit her, and she jumped from the bed and attacked Durst.

Lewis and Sibson continued to struggle, moving their fight into the breezeway and kitchen, while Danielle and Durst fought. During their fight, Danielle and Durst heard two gunshots, and Danielle lost consciousness soon thereafter. When Danielle blacked out, she and Durst stopped struggling. Durst got up, went to Lewis, saw him struggle with Sibson, and heard Lewis ask for help. Durst picked up a metal container and hit Sibson on the head with it. When Danielle regained consciousness, she saw Sibson lying in the kitchen, got up, ran to Sibson, jumped on top of him, and yelled at the men to leave. The men kept yelling at her to tell them where the money was, and she told them that there was no money. The men then fled as Danielle called the police. Sibson died at the scene.

Lewis and Durst ran back to the car and drove off. In the car, Lewis was distraught and told Durst that he shot Sibson during the attack. The men returned to Durst's house at about 5:00 a.m., Durst left the car, and Lewis returned to his home.

When Lewis returned home, his wife, Anjanette, noticed that his clothes and face were bloody. Lewis told Anjanette that "something bad happened" and then stated that "he shot a man five times and he was worried that he had killed him." Lewis also told Anjanette that "he went to some guys' [sic] house to rob him of his drug money and that the guy had jumped and attacked him and he had shot him." According to Anjanette, Lewis said that Durst was with him and that defendant had set up the robbery. After telling Anjanette about the robbery, Lewis changed and gathered together the clothes he had been wearing. He and Anjanette drove to his parents' cabin and buried the clothes and the revolver that Lewis had used to kill Sibson. During the drive, Lewis described to Anjanette the details of the robbery. He told Anjanette that he shot Sibson in the leg, belly, shoulder, and chest in order to stop Sibson from attacking him. Finally, Lewis noted that Sibson was defendant's drug supplier. Lewis said that defendant got Sibson to tell him when his next trip to Chicago would be, and then set up the robbery in order to steal Sibson's drug money.

The following morning, defendant came to Lewis's home and talked with Lewis outside. Anjanette saw the men have a conversation, but she did not know what they were discussing. Lewis later confided to Anjanette that defendant had told him to rob Sibson and that although they had originally planned to rob Sibson in January, defendant moved the date of the planned robbery to the evening of January 31 after learning that Sibson planned to go to Chicago the following day.

On the morning of February 1, defendant came to Durst's house and told him that Sibson had died. Defendant then told Durst to keep quiet regarding the incident and to either burn or bury the mask and gloves that he had worn during the robbery. Defendant also briefly talked with his neighbor, Ralph Meyers, on February 1. Meyers testified, "[Defendant] came over to the house all upset, said that he thought he just screwed up and screwed up royal. And I asked him what and he wouldn't tell me."

On February 28, 2006, Officer Kendall Jeppesen of the Muskegon County Sheriff's Department responded to a domestic violence dispute between Lewis and Anjanette. When

Jeppesen arrived, Anjanette told him that Lewis had killed Sibson. At that point, Jeppesen and another officer arrested Lewis and contacted the officers in charge of the Sibson homicide investigation. Durst and defendant were arrested soon thereafter. When police interviewed defendant, he admitted that he was with Lewis and Durst as they discussed breaking into Sibson's pole barn to steal his drug money, but he denied knowing that they planned to break into Sibson's home or that they would be armed. He blamed Lewis for unilaterally deciding to break into Sibson's home.

I. Right of Confrontation: Lewis Preliminary Examination

The trial court did not deny defendant his Sixth Amendment right of confrontation when it admitted the preliminary examination testimony of Eddie Lewis.[1] If there is an adequate opportunity to cross-examine a witness at the preliminary examination, the requirements of the Confrontation Clause are satisfied, even if the witness is later unavailable at trial. *Crawford v Washington*, 541 US 36, 57; 124 S Ct 1354; 158 L Ed 2d 177 (2004). The Confrontation Clause does not confer on a defendant "an unlimited right to cross-examine on any subject." *People v Canter*, 197 Mich App 550, 564; 496 NW2d 336 (1992).

Defendant claims that at an in-chambers discussion during the preliminary examination, the district court judge expressed a desire to end the proceedings and go fishing, and as a result, his counsel felt pressured to end his cross-examination of co-conspirator Eddie Lewis. Yet nothing in the record indicates that the judge told defendant to stop questioning Lewis. In fact, defendant's trial counsel admitted that he voluntarily ceased questioning Lewis, and defendant acknowledged that his trial counsel voluntarily ended the cross-examination by indicating that he had no more questions.[2] Further, defense counsel did not address on the record the in-chambers conversation with the district court judge. Defendant fails to acknowledge or identify any on-the-record statements by the judge or defense counsel at the preliminary examination that indicate that defense counsel was forced to stop his cross-examination of Lewis. Further, defense counsel had the opportunity to question Lewis regarding both his interaction with defendant, the circumstances surrounding the Sibson robbery, and other issues central to the establishment of the charged offenses; the judge primarily limited defense counsel's cross-examination of peripheral matters or matters about which defendant claimed to lack knowledge, concluding that defense counsel was using the preliminary examination as an opportunity to essentially conduct discovery and raise doubts regarding Lewis's credibility in order to prepare a transcript for trial.[3] The Confrontation Clause only guarantees defendant an *opportunity* for

[1] The parties do not dispute that defendant failed to raise at trial the constitutional questions set forth in this issue. Therefore, these issues are reviewed for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

[2] Specifically, our review of the preliminary examination reveals that defendant's trial counsel ended his cross-examination voluntarily by stating that he had no more questions, and on two occasions after the prosecutor conducted redirect examinations, he noted that he had no further questions.

[3] For example, the trial court told defense counsel to move on with his examination after defense counsel spent a significant amount of time questioning Lewis regarding his first interview with

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effective cross-examination, "'not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.'" *People v Chavies*, 234 Mich App 274, 283; 593 NW2d 655 (1999), overruled in part on other grounds *People v Williams*, 475 Mich 245 (2006), quoting *United States v Owens*, 484 US 554, 559; 108 S Ct 838; 98 L Ed 2d 951 (1988). Because defense counsel had an adequate opportunity to cross-examine Lewis, defendant's right of confrontation was not violated when the trial court later admitted Lewis's preliminary examination testimony.

Although defendant also claims that Lewis's preliminary examination testimony was inadmissible pursuant to MRE 804(b)(1), he merely restates his earlier argument that the admission of this testimony violated the Confrontation Clause. Because defendant fails to specifically argue why Lewis's testimony was not admissible pursuant to MRE 804(b)(1), we will not address this issue. See *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959).

II. Right of Confrontation: Anjanette Lewis Testimony

The trial court did not abuse its discretion when it admitted Anjanette's testimony regarding Lewis's statements to her after the robbery and murder as statements against interest pursuant to MRE 804(b)(3), nor does this testimony violate defendant's right of confrontation.[4] The prosecution sought to admit under MRE 804(b)(3) non-custodial, out-of-court, unsworn-to statements that Lewis voluntarily made to Anjanette at his initiation, in which Lewis inculpated both himself and defendant in Sibson's robbery and murder. Lewis's statements, including his inculpation of defendant, are admissible as a statement against interest because the statements are "made in the context of a narrative of events, at the declarant's initiative without any prompting or inquiry, [and] that as a whole [are] clearly against the declarant's penal interest and as such [are] reliable . . . ." *People v Dhue*, 444 Mich 151, 161; 506 NW2d 505 (1993). Furthermore, we note that Anjanette's statements are not testimonial in nature, so defendant's right of confrontation was not violated.[5] See *Crawford*, *supra* at 60-68.

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police, although Lewis repeatedly admitted that he was inebriated at the time and could not remember the interview. The judge also limited defense counsel's questioning of Lewis regarding subjects such as Lewis's financial difficulties and the specific path that Lewis and Durst took when driving to Sibson's home to rob him.

[4] We review the trial court's decisions on evidentiary issues for an abuse of discretion. *People v Farquharson*, 274 Mich App 268, 271; 731 NW2d 797 (2007). The parties again do not dispute that defendant failed to raise a violation of the confrontation clause at trial, so we review this issue for plain error affecting defendant's substantial rights. *Carines*, *supra* at 763-764.

[5] Nevertheless, these statements, considered in light of the circumstances in which they were made, present sufficient indicia of reliability to satisfy the Confrontation Clause. *Dhue*, *supra* at 164-165. Lewis's claims that he and Durst robbed Sibson and that he shot Sibson were clearly against his interest, he was not prompted to make the statements, and he discussed defendant's role in the robbery and murder in the context of a narrative description of the event. In particular, Lewis described defendant's involvement when explaining the circumstances leading to the robbery, especially how he came to rob Sibson, who he did not know well, and how he became aware that Sibson had a lot of money in his house that evening. Lewis made these statements to his wife, not a law-enforcement officer, and there is no indication that he

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III. Fifth Amendment Right to Counsel

The trial court did not violate defendant's Fifth Amendment right to counsel when it admitted into evidence recordings of defendant's statements to the police taken while he was in custody. Although statements by the accused "made during custodial interrogation are inadmissible unless the accused voluntarily, knowingly, and intelligently waived his Fifth Amendment rights," *People v Harris*, 261 Mich App 44, 55; 680 NW2d 17 (2004), the defendant's invocation of his right to counsel must be unequivocal. *People v Tierney*, 266 Mich App 687, 711; 703 NW2d 204 (2005). To determine if a defendant's statement was freely and voluntarily made, a court must consider the totality of the circumstances.[6] *People v Shipley*, 256 Mich App 367, 374; 662 NW2d 856 (2003).

The record evidence demonstrates that defendant understood his *Miranda*[7] rights and waived them in a knowing and intelligent manner. Defendant's age and experiences indicate that he understood his right to an attorney and voluntarily talked to the police twice while in custody. Defendant was in his early 40s, and the police thought that he was more intelligent than his co-conspirators. Defendant had been arrested before for assault and battery and had been questioned by police in that incident. Defendant was read his *Miranda* rights before the February 28 interview and was reminded of his *Miranda* rights before the March 2 interview. There is no indication that defendant was intoxicated or drugged during either interview, nor has he indicated that he received improper treatment while in custody.

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minimized his involvement in the robbery and murder, made the statements to elicit favor with his wife, or had a motive to lie to his wife.

In addition, because Anjanette's testimony regarding Lewis's statements to her was properly admitted as a statement against penal interest, we need not consider whether these statements were properly admitted as an excited utterance pursuant to MRE 803(2), nor need we consider whether the trial court erred when it failed to admit these statements pursuant to MRE 801(d)(1)(B) or MRE 801(d)(2)(E).

[6] A court may consider the following factors when determining if a statement was freely and voluntarily made:

> [T]he age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse. [*People v Sexton* (*After Remand*), 461 Mich 746, 753; 609 NW2d 822 (2000), quoting *People v Sexton*, 236 Mich App 525, 543–544; 601 NW2d 399 (1999) (MURPHY, J., dissenting).]

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

No error arose from the admission of a recording of the February 28 interview. Defendant was read his *Miranda* rights, but he did not immediately request an attorney. However, the officers stopped the interview when defendant requested an attorney. His statements to the officers were voluntary, and his right to counsel was not violated.

Similarly, the trial court did not err when it admitted a recording of defendant's March 2 interview with police. Defendant requested the interview, was reminded of his *Miranda* rights at the beginning of the interview, and acknowledged that he wanted to talk to the police regarding information that he had on Sibson's murder. The officers had ended the February 28 interview with defendant once he requested an attorney, so defendant was aware that he could again request an attorney and stop the interview.

During the interview, defendant indicated that he wanted to have an attorney present when he revealed all the information he had regarding Sibson's murder, but he also wanted to give the officers some information that evening. Defendant then agreed to the officers' suggestion that he discuss Lewis and Durst's roles in the Sibson murder that evening, and then wait to discuss his role in the robbery and murder once he had an attorney present. Although defendant provided some information regarding Lewis and Durst's roles in the Sibson murder, he did not acknowledge any wrongdoing or provide details regarding his own involvement, and the officers honored defendant's request not to question him directly regarding his involvement in the murder that evening. Finally, defendant did not make an unequivocal statement that he wanted an attorney to be present; instead, the officers made the first unequivocal suggestion, near the end of the interview, that defendant should get an attorney. Considering that defendant never made an unequivocal, unambiguous invocation of his right to counsel during the interview, the officers did not violate defendant's right to counsel when they continued to question him despite his inquiries regarding an attorney. See *Tierney*, *supra* at 711.

IV. MRE 404(b) Evidence

The trial court did not abuse its discretion when it admitted MRE 404(b) evidence concerning defendant's involvement in recruiting Lewis and Durst and participating with them in an attempt to steal an ATV vehicle the day before Sibson's murder.[8] This evidence was offered for a non-character reason, namely, to show that defendant exhibited a common plan or scheme to use his knowledge that Durst needed $500 to recruit him to participate in both the attempted larceny of an ATV and the Sibson robbery. See *People v Katt*, 248 Mich App 282, 304-305; 639 NW2d 815 (2001), aff'd 468 Mich 272 (2003) (introduction of other-acts evidence does not violate MRE 404(b) unless only offered to show the criminal propensity of an individual and to establish that he acted in conformity therewith). This evidence, in turn, is relevant under MRE 402 to explain defendant's involvement in recruiting Durst to participate in the robbery—evidence that defendant recruited Durst on January 30 to steal an ATV with the promise that he would then pay Durst $500 adds credibility to the prosecution's claim that defendant again

[8] Again, we review the trial court's decision to admit evidence for an abuse of discretion. *Farquarson*, *supra* at 31. "[A] trial court's decision on a close evidentiary question ordinarily cannot be an abuse of discretion." *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002).

recruited Durst the following day with the same promise of $500 payment in order to encourage him to help Lewis rob Sibson.

Finally, the probative value of this evidence is not substantially outweighed by the danger of unfair prejudice. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). Although we acknowledge that evidence that defendant attempted to steal an ATV would be prejudicial, "all evidence is somewhat prejudicial to a defendant—it must be so to be relevant." *People v Magyar*, 250 Mich App 408, 416; 648 NW2d 215 (2002). However, MRE 403 only states that relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Again, the evidence of defendant's involvement in recruiting Durst in an attempt to steal an ATV is probative to support Durst's testimony concerning defendant's involvement in recruiting him and, in light of the fact that the men failed to find an ATV to steal, it explains how defendant used the same promise of $500 to persuade Durst to participate in the robbery. Considering that the failed attempt at larceny was relatively innocuous in comparison to the crimes for which defendant was charged and that other evidence presented at trial indicated that defendant was involved in illegal activity (namely, selling drugs), and in light of the fact that the trial court instructed the jury not to convict defendant based on his commission of other bad acts,[9] we conclude that the danger of unfair prejudice arising from the admission of this evidence did not substantially outweigh its probative value.

V. Sufficiency of the Evidence

Defendant claims that the evidence merely established that he had assisted and encouraged Lewis and Durst to break into Sibson's pole barn, and that Lewis unilaterally decided to break into Sibson's house instead. Defendant argues that, because the home invasion and assault offenses underlying his felony-murder conviction were not "natural and probable consequences" of the plot to break into Sibson's pole barn, he was not culpable for Lewis's actions.

However, both circumstantial and direct evidence presented at trial indicates that defendant intended for Lewis and Durst to break into Sibson's home, not his pole barn.[10] Although Sibson kept his drugs in his pole barn, he kept his drug money in his house. Sibson also called in debts that his buyers owed him just before going to Chicago for more drugs. Not only were defendant and Sibson friends, but Sibson was also defendant's drug supplier, so defendant was familiar with Sibson's drug trade. Further, defendant told Lewis that Sibson would have a lot of money in his house on the evening of January 31 because he had been collecting all his money from drug deals and planned to go to Chicago to get more marijuana the following day. According to Durst, when defendant, Lewis, and Durst met on January 31, defendant did not mention stealing drugs from Sibson; instead, he mentioned that Sibson "was

[9] We presume that the jury properly followed these instructions. *People v Hana*, 447 Mich 325, 351; 524 NW2d 682 (1994).

[10] "Circumstantial evidence and reasonable inferences drawn from it may be sufficient to establish the elements of a crime." *People v Fennell*, 260 Mich App 261, 270; 677 NW2d 66 (2004).

making too much money" and that if Durst helped Lewis, he "would get the money [he] needed." Lewis admitted that defendant told him to break into Sibson's home to take his drug money and gave Lewis a gun for his protection because he would be carrying a lot of money.[11]

This evidence, taken together, is sufficient to permit a reasonable juror to conclude that defendant helped Lewis and Durst break into the Sibson home, not the pole barn. If defendant and Lewis merely planned to break into Sibson's unoccupied pole barn, they would not need masks to obscure their identities or a weapon with which to threaten a victim. Further, not only was defendant familiar with Sibson's drug trade, but he told Lewis that he knew that Sibson would have a lot of cash in his house on the evening of January 31, and his comments to both Durst and Lewis indicate that he intended for those men to break into Sibson's house to steal it. Accordingly, defendant's claim that the prosecution presented insufficient evidence to establish that defendant did not intend for Lewis and Durst to break into the pole barn lacks merit.

Defendant also argues that the prosecution presented insufficient evidence to convict him of felony-firearm under an aiding and abetting theory, because "there was no admissible evidence that Defendant knew about or planned any sort of crime utilizing a gun." Defendant admits that Lewis testified that defendant gave him a gun, but he asks us to disregard this testimony on the ground that Lewis's statements were inadmissible for the reasons discussed earlier. Because we have concluded that Lewis's statements are admissible, we hold that defendant's claim that the prosecution presented insufficient evidence to establish defendant's felony-firearm convictions lacks merit.

We also conclude that the evidence presented at trial was sufficient to support defendant's conviction for conspiracy to commit armed robbery. To establish a charge of conspiracy to commit armed robbery, the prosecution must establish that the defendant intended to combine with others to accomplish an illegal objective, namely, armed robbery. MCL 750.157a; *People v Mass*, 464 Mich 615, 629; 628 NW2d 540 (2001). In particular, the prosecution must establish that the parties "specifically intended to further, promote, advance, or pursue" this unlawful objective. *People v Justice* (*After Remand*), 454 Mich 334, 347; 562 NW2d 652 (1997).

Lewis, Durst, and defendant met on the evening of Sibson's murder and planned to rob him. As Lewis later admitted to Anjanette and at the preliminary examination, defendant had the idea to rob Sibson, learned from Sibson when he would go to Chicago to purchase more drugs, and met with Durst and Lewis to plan the robbery for the night of January 31. Defendant also gave Lewis a gun to use for the robbery. This evidence indicates that defendant, Lewis, and Durst united to accomplish an illegal objective, namely armed robbery. Further, the evidence indicates that an armed robbery occurred.[12] Defendant, Lewis, and Durst agreed to commit a

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[11] Lewis also had a BB rifle and identity-obscuring masks for himself and Durst when they arrived at the Sibson home.

[12] An armed robbery occurs if the following elements are met:

> (1) the defendant, in the course of committing a larceny of any money or other property that may be the subject of a larceny, used force or violence against any

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larceny by taking money from Sibson. By providing Lewis with a gun, defendant conspired with Lewis to commit this larceny by using a dangerous weapon, presumably to scare Sibson into complying.

VI. Non-Standard Jury Instructions

The trial court did not err when it presented to the jury a definition of "malice" that was different from the definition found in CJI2d 16.5(3). The trial court is not required to use the Michigan Criminal Jury Instructions when instructing the jury. See *People v Vaughn*, 447 Mich 217, 235 n 13; 524 NW2d 217 (1994), overruled on other grounds *Carines*, *supra* at 750. Instead, a trial court has discretion regarding whether to use these standardized instructions, as long as it does not give an erroneous or misleading instruction on an essential element of the offense. *Id.*; *People v Petrella*, 424 Mich 221, 277; 380 NW2d 11 (1985).

This explanation of the "malice" element found in CJI2d 16.5(3) reflects our Supreme Court's statement in *People v Dykhouse*, 418 Mich 488, 495; 345 NW2d 150 (1984), defining the "third form" of malice as "the intent to create a very high risk of death or great bodily harm with the knowledge that death or great bodily harm is the probable result." The instructions regarding the "malice" element given by the trial court in this case reflect the definition of "malice" found in *People v Aaron*, 409 Mich 672, 728; 299 NW2d 304 (1980), in which our Supreme Court explained that "malice" includes the "wanton and wilful disregard of the likelihood that the natural tendency of defendant's behavior is to cause death or great bodily harm."

This Court has noted that our Supreme Court's explanations in *Aaron* and *Dykhouse* regarding the circumstances under which the element of "malice" has been established are not necessarily consistent.[13] However, the trial court's instructions, although different from those found in CJI2d 16.5(3), still accurately described this element of the offense. The trial court

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> person who was present or assaulted or put the person in fear, and (2) the defendant, in the course of committing the larceny, either possessed a dangerous weapon, possessed an article used or fashioned in a manner to lead any person present to reasonably believe that the article was a dangerous weapon, or represented orally or otherwise that he or she was in possession of a dangerous weapon. [*People v Chambers*, 277 Mich App 1, 7; 742 NW2d 610 (2007).]

[13] In *People v Bulls*, 262 Mich App 618, 626 n 5; 687 NW2d 159 (2004), this Court stated,

> [A]n individual who "wantonly and willfully disregard[s] the likelihood that the natural tendency of his behavior was to cause death or great bodily harm" does not necessarily possess "the knowledge that death or great bodily harm is the probable result" of his actions. However, because our Supreme Court has used these definitions interchangeably and the facts herein do not require us to resolve whether the differences between the two definitions have any jurisprudential significance, we leave this question for our Supreme Court to grapple with at an appropriate time.

instructed the jury using an explanation of the malice element taken from a Supreme Court case that has not been overturned. The instruction was not misleading or erroneous, but accurately reflected an understanding of the malice element first set forth by our Supreme Court in *Aaron, supra*. Accordingly, the trial court did not abuse its discretion in giving this instruction.

VII. Evidentiary Hearing Regarding In-Chambers Discussion

Defendant argues that the trial court abused its discretion when it failed to order an evidentiary hearing regarding an alleged conversation between the district court judge and the parties' attorneys in chambers during the preliminary examination regarding the district court judge's desire to go fishing that afternoon. Defendant claims that the district court judge's desire to go fishing that afternoon led to his irritability during the preliminary examination and his interference with defense counsel's cross-examination of Lewis, preventing his counsel from conducting a full-scale cross-examination of Lewis.[14]

Although defendant acknowledges that the district court judge made statements indicating that his counsel should not conduct a full-scale cross-examination of Lewis during the preliminary examination, defendant fails to identify any on-the-record testimony or statement in support of his claim that the district court stopped the questioning and prevented his counsel from completing his cross-examination.[15] In fact, defendant acknowledges that his trial counsel ended the cross-examination of Lewis by indicating that he had no more questions and declined two additional opportunities to question Lewis regarding additional points raised after his cross-examination was finished. Defendant does not present any binding authority to establish that the district court judge's statements at the preliminary examination encouraging defense counsel to cross-examine Lewis in a timely and efficient manner or his alleged statements in chambers indicating his desire to go fishing could be used to establish that the district court judge was unwilling to provide a full opportunity for defendant's attorney to fully cross-examine Lewis, nor does he provide authority to support his apparent contention that failure to provide a full opportunity for cross-examination would automatically preclude the admission of Lewis's preliminary examination testimony at trial. Because defendant fails to establish his argument that the trial court erred when it failed to order an evidentiary hearing, we will not address the issue further.[16] See *Mitcham, supra* at 203.

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[14] Because the trial court later admitted Lewis's preliminary examination testimony in lieu of his testimony at trial, defendant claims that he was harmed by the district court judge's denial of an opportunity for his counsel to fully cross-examine Lewis during the preliminary examination.

[15] Further, our review of the preliminary examination transcript indicates that such a statement was not made.

[16] The only support that defendant provides from this position comes from our Supreme Court's order in *People v Leonard*, 638 NW2d 415 (2002). In *Leonard*, our Supreme Court ordered the trial judge to provide a sworn statement concerning the "nature, content and particulars of any off-the-record and in-chambers discussions between the court, [the prosecutor], and defense counsel . . . ." However, our Supreme Court requested this sworn statement in order to determine whether to grant leave to appeal in the case. The Supreme Court order does not support defendant's claim that this Court should remand the case for a factual determination

(continued…)

VIII. Double Jeopardy Violation

Finally, defendant argues that his sentences for both assault with intent to rob while armed and first-degree home invasion violated his right to be free from double jeopardy. The trial court recognized at the sentencing hearing that defendant could not be sentenced for both felony-murder and the underlying offenses of assault with intent to rob while armed and with first-degree home invasion. Consequently, although defendant was convicted of these underlying offenses, he was not sentenced for either offense. Regardless, the judgment of sentence noted defendant's convictions for these offenses, although the spaces listing the minimum and maximum sentences for each offense were left blank. The trial court's inclusion of defendant's convictions for these predicate offenses of felony-murder was erroneous. Pursuant to the double jeopardy clause, not only is the trial court precluded from sentencing defendant for the predicate offenses of felony murder, but the trial court must also vacate the convictions for these predicate offenses. See *People v Bigelow*, 229 Mich App 218, 221-222; 581 NW2d 744 (1998). The trial court's failure to do so violates defendant's double jeopardy protections.[17]

Affirmed. We remand for correction of the judgment of sentence to reflect that the predicate offenses have been vacated. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ Richard A. Bandstra
/s/ Elizabeth L. Gleicher

(…continued)

regarding the reasons for the district court judge's behavior during the preliminary examination. Further, although Supreme Court peremptory orders are binding precedent when the reasoning can be understood, this order was not the final order in this case and it did not contain either a concise statement of applicable facts or a reason for the Court's decision. See *People v Crall*, 444 Mich 463, 464 n 8; 510 NW2d 182 (1993).

[17] Defendant also argues that resentencing is necessary because the trial court relied on facts not found by the jury when imposing its sentence, in violation of *Blakey v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). However, in *People v Drohan*, 475 Mich 140; 715 NW2d 778 (2006), our Supreme Court determined that *Blakey* does not apply to Michigan's indeterminate sentencing scheme.