STATE OF MICHIGAN

COURT OF APPEALS

In re JOHNNY JAQUAN CUNEGIN, Minor.

PEOPLE OF THE STATE OF MICHIGAN,

Petitioner-Appellee,

v

JOHNNY JAQUAN CUNEGIN,

Respondent-Appellant.

UNPUBLISHED
May 10, 2018

No. 340684
Wayne Circuit Court
Family Division
LC No. 14-517771-DL

Before: CAVANAGH, P.J., and STEPHENS and SWARTZLE, JJ.

PER CURIAM.

Respondent appeals as of right his jury-trial juvenile adjudications of first-degree premeditated murder, MCL 750.316(1)(a); armed robbery, MCL 750.529; and possession of a firearm during the commission of a felony (felony firearm), MCL 750.227b. The trial court ordered delayed adult sentences under MCL 712A.18(1)(m) of 25 to 60 years of imprisonment for first-degree premeditated murder, 12 to 18 years of imprisonment for armed robbery, and two years of imprisonment for felony-firearm. In the meantime, respondent was committed to a highly secure juvenile detention facility and remained on probation. We affirm.

I. SUFFICIENCY OF THE EVIDENCE

Respondent argues that there was insufficient evidence to support his adjudications. We disagree.

To determine whether there was sufficient evidence, this Court reviews the evidence de novo, in the light most favorable to the prosecutor, to determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Odom*, 276 Mich App 407, 418; 740 NW2d 557 (2007). "This Court will not interfere with the trier of fact's role of determining the weight of the evidence or the credibility of witnesses." *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008). "All conflicts in the evidence must be resolved in favor of the prosecution." *Id*. "Circumstantial evidence and

reasonable inferences arising therefrom may constitute proof of the elements of the crime." *People v Bennett*, 290 Mich App 465, 472; 802 NW2d 627 (2010).

The elements of first-degree premeditated murder are that the defendant intentionally killed the victim with premeditation and deliberation. *Id*. "It is well settled that the intent to kill may be inferred from any facts in evidence. Because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient to establish a defendant's intent to kill." *People v Unger*, 278 Mich App 210, 223; 749 NW2d 272 (2008) (internal citation omitted). Although motive is not an element of the crime, evidence of motive is relevant, particularly in cases in which the proofs are circumstantial. *Id*. Evidence of opportunity to kill the victim is likewise relevant. *Id*. at 224.

> Premeditation and deliberation require sufficient time to allow the defendant to take a second look. Premeditation and deliberation may be established by evidence of (1) the prior relationship of the parties; (2) the defendant's actions before the killing; (3) the circumstances of the killing itself; and (4) the defendant's conduct after the homicide. [*People v Abraham*, 234 Mich App 640, 656; 599 NW2d 736 (1999) (internal quotation marks and citations omitted).]

"Circumstantial evidence and reasonable inferences drawn from the evidence may constitute satisfactory proof of premeditation and deliberation." *Unger*, 278 Mich App at 229. Further, identity is an element of every crime. *People v Yost*, 278 Mich App 341, 356; 749 NW2d 753 (2008).

A defendant may be held vicariously liable for a crime under an aiding-and-abetting theory. *People v Robinson*, 475 Mich 1, 6; 715 NW2d 44 (2006). The elements necessary to convict under an aiding-and-abetting theory are:

> (1) the crime charged was committed by the defendant or some other person; (2) the defendant performed acts or gave encouragement that assisted 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. [*Id*. (internal quotation marks, brackets, and citation omitted).]

"A defendant is criminally liable for the offenses the defendant specifically intends to aid or abet, or has knowledge of, as well as those crimes that are the natural and probable consequences of the offense he intends to aid or abet." *Id*. at 15. "An aider and abettor's knowledge of the principal's intent can be inferred from the facts and circumstances surrounding an event." *Bennett*, 290 Mich App at 474. Factors that may be considered in assessing whether the defendant possesses the requisite state of mind under an aiding-and-abetting theory "include a close association between the defendant and the principal, the defendant's participation in the planning or execution of the crime, and evidence of flight after the crime." *People v Carines*, 460 Mich 750, 757-758; 597 NW2d 130 (1999) (internal citation and notation omitted).

In this case, there was sufficient evidence to support respondent's adjudication of first-degree premeditated murder as either a principal or an aider and abettor. Vernon Woods testified

that while he, respondent, and a person known as "Dre" were in a van parked at respondent's residence, respondent said he was going to "rob some crackheads," and that after respondent wrestled and fought with two or three "crackheads" down the street, respondent returned to the van and said that he was going to get his money from a man walking down the street. Woods tried to get respondent to stay at the van, but respondent stated, "[F]--- that, I need my money." Respondent walked down the street and met up with a man on the street. Dre walked toward where respondent and the man were standing. Woods heard a gunshot, took off running, and heard two or three more shots as he was running. Woods did not know who was shooting; Dre had been walking toward respondent and the other person when the shooting started.

Jai Johnson, who lived in a house on the street where the shooting occurred, woke up to the sound of a gunshot; she then heard a man crying out, "[S]top playing[,]" and she heard two more gunshots. The second and third shots sounded different from the first shot. Through her kitchen window, Johnson saw respondent walking down the street with a couple of guys whom Johnson did not know. Johnson saw respondent walk toward a dead body while the other two guys stopped a distance away from the body. Respondent flipped the body over and pulled out of the body's pant pockets an item that appeared to be money and waved the item at the other guys. Respondent then walked off. A couple days later, respondent admitted to Johnson that he shot the victim twice and that the reason why respondent shot the victim was that he owed respondent $30. Respondent "said that he shot, and he thought the guy had a gun and was fittin' (ph) to shoot him, so he shot again." After being shown her police statement, Johnson also recalled that respondent said that he shot the victim first in the stomach and that respondent then "finished [him] off." Looking at the statement further, Johnson clarified that respondent stated that "they shot him in the stomach" and that respondent then "finished him off[.]"

Lamar Wright testified that he regularly bought marijuana from respondent. Wright asked respondent about who was killed, and respondent stated, "da (ph) n---- (ph) owed me money, and I kilt that n----." Later in his testimony, Wright testified that respondent "said he know n----s from last night. And I'm, like, yeah. He like, man, I kilt [sic] them n----s that owe me some money." Still later, Wright testified that respondent "said, I kilt them n----s, they owe me money." Respondent also told Wright not to tell anyone about this. According to Wright, respondent planned to kill another person that respondent said was "snitching" on him.

The medical examiner's testimony established that the victim died from two gunshot wounds, one to the head and the other to the chest. There was no stippling or soot on the victim's body, which indicated that the shots were fired from a distance of two or more feet from the victim. When a search warrant was executed at respondent's house, respondent took off running from the house; officers pursued respondent and brought him back to the house. During a police interview following the execution of the search warrant, respondent stated that he did not know anything about the victim being killed; respondent claimed that he was not present when the victim was killed and that he was at his home. Respondent denied that he had touched the victim and denied that he had gone through the victim's pockets. A forensic scientist testified that there was very strong support for the conclusion that respondent was a contributor to a DNA mixture recovered from the victim's right pant pocket.

Overall, the evidence supports a reasonable inference that respondent acted as the principal by intentionally killing the victim. Woods's testimony indicated that respondent was

attempting to get his money back from someone and that respondent then met up with a man down the street. Woods fled the scene after hearing gunshots. Johnson, who also heard the gunshots, then saw respondent walk up to the victim's body, flip the body over, and remove what appeared to be money from the victim's pant pocket. Respondent's DNA was later found in the victim's pant pocket, contradicting respondent's statement to the police that he was not at the crime scene and did not remove anything from the victim's pocket. Respondent also made incriminating statements to Johnson and Wright in which respondent admitted to shooting the victim to collect money from the victim. Respondent's flight from the police officers when they arrived to execute a search warrant at his home is probative of consciousness of guilt. See *Unger*, 278 Mich at 226. Also, the DNA evidence supported a conclusion that respondent lied to the police about whether he reached into the victim's pant pocket. "A jury may infer consciousness of guilt from evidence of lying or deception." *Id*. at 227. In addition, respondent's statement to Wright that respondent was planning to kill someone who was "snitching" on respondent for the murder suggests an effort to conceal respondent's involvement in the crime, and attempts to conceal one's involvement in a crime are probative of consciousness of guilt. See *People v Kowalski*, 489 Mich 488, 509 n 37; 803 NW2d 200 (2011).

The evidence further supports the conclusion that respondent acted with premeditation and deliberation. Respondent's statements to Woods, Johnson, and Wright reflect that respondent was attempting to collect money from the victim and that this was the motive for the killing. The facts that there were multiple gunshots and that respondent admitted to "finishing [the victim] off" after the victim had already been shot support a conclusion that respondent had ample time to take a second look. Respondent's behavior and statements after the homicide also support the conclusion that he acted with premeditation and deliberation. Respondent's flight from police is probative of premeditation and deliberation. See *People v Gonzalez*, 178 Mich App 526, 534; 444 NW2d 228 (1989). Further, respondent told Wright that respondent was planning to kill someone who was "snitching" on him for the murder, and respondent claimed to the police that he had not gone through the victim's pockets, which contradicts scientific evidence that respondent's DNA was contained in the victim's pant pocket. A defendant's concealment efforts can be evidence of premeditation and deliberation. See *People v Gonzalez*, 468 Mich 636, 641; 664 NW2d 159 (2003). When viewed in the light most favorable to the prosecutor, the evidence was sufficient to allow a rational trier of fact to find that respondent was guilty of first-degree premeditated murder as the principal.

A jury could also rationally determine that respondent was guilty of first-degree premeditated murder as an aider and abettor. Woods's testimony indicated that Dre was walking toward the area where respondent and the other person were located when the shooting occurred; Woods acknowledged that he did not see who fired shots and that Dre could have been the shooter. Johnson testified that the first shot sounded different from the second and third shots and that two people were initially walking with respondent when he approached the victim's dead body. Johnson's testimony also indicated that respondent said that "they" shot the victim in the stomach and that respondent then "finished him off[.]" The medical examiner's testimony indicated that both of the victim's gunshot wounds were fatal. Overall, the evidence could rationally support a conclusion that someone other than respondent fired one of the shots and that respondent performed acts or gave encouragement by firing the final shot as well as by flipping over the victim's body, searching the victim's pockets, and retrieving an item from a pocket.

And for the reasons discussed, there was evidence that respondent intended the commission of the crime, and he also could rationally be found to have known that any other shooter also intended its commission at the time respondent aided or encouraged the crime.

Turning to respondent's armed robbery adjudication, the elements of armed robbery are:

> (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 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 Gibbs*, 299 Mich App 473, 490-491; 830 NW2d 821 (2013) (internal citation omitted).]

" '[I]n the course of committing a larceny' includes acts that occur in an attempt to commit the larceny, or during commission of the larceny, or in flight or attempted flight after the commission of the larceny, or in an attempt to retain possession of the property." MCL 750.530(2). Regarding the larceny component of armed robbery, the elements of larceny are:

> (1) an actual or constructive taking of goods or property, (2) a carrying away or asportation, (3) the carrying away must be with a felonious intent, (4) the subject matter must be the goods or personal property of another, (5) the taking must be without the consent and against the will of the owner. [*People v Cain*, 238 Mich App 95, 120; 605 NW2d 28 (1999) (internal citation omitted).]

The felonious intent required for larceny is "the intent to steal another person's property." *Id*.

Here, there was sufficient evidence for a rational trier of fact to conclude that respondent committed armed robbery as the principal. Woods testified that respondent said that he was going to get his money from a man walking down the street. After respondent and the man were standing face to face, Woods heard a gunshot and took off running. Johnson, who also heard the gunshots, saw respondent walk toward a dead body, flip the body over, pull out of the body's pant pocket an item that appeared to be money, and wave the item at the other individuals. Respondent then walked off. Respondent later made incriminating statements to Johnson and Wright in which respondent admitted to shooting the victim because the victim owed respondent money. A forensic scientist found very strong support for the conclusion that respondent was a contributor to a DNA mixture recovered from the victim's right pant pocket. The above evidence supports an inference that respondent committed a larceny or attempted to commit a larceny by taking money or some other item from the victim's pant pocket, which respondent then carried away. The evidence likewise supports a conclusion that respondent used force or violence against the victim by shooting him while committing or attempting to commit the larceny and that respondent possessed a gun when committing or attempting to commit the larceny. Further, given the evidence summarized earlier, there was also sufficient evidence that respondent was guilty of armed robbery as an aider and abettor. That is, a rational trier of fact could have concluded from the evidence that armed robbery was committed by respondent or

some other person, that respondent encouraged or assisted the commission of the crime by firing one of the shots and taking the item from the victim's pocket, and that respondent intended the commission of the crime given his expressed intent to take some money from the victim.

"The elements of felony-firearm are that the defendant possessed a firearm during the commission of, or the attempt to commit, a felony." *People v Bass*, 317 Mich App 241, 268-269; 893 NW2d 140 (2016) (internal quotation marks and citation omitted). The evidence establishes that the victim died from a gunshot wound. After the gunshots were fired, respondent was seen walking toward the victim's dead body and taking an item out of the victim's pant pocket. Respondent later made incriminating statements to Johnson and Wright in which respondent admitted to shooting the victim. The evidence therefore was sufficient to allow a rational trier of fact to find that respondent was guilty of felony-firearm as the principal.

The evidence was also sufficient to establish that respondent committed felony-firearm under an aiding and abetting theory.

> Establishing that a defendant has aided and abetted a felony-firearm offense requires proof that a violation of the felony-firearm statute was committed by the defendant or some other person, that the defendant performed acts or gave encouragement that assisted in the commission of the felony-firearm violation, and that the defendant intended the commission of the felony-firearm violation or had knowledge that the principal intended its commission at the time that the defendant gave aid and encouragement. In determining whether a defendant assisted in the commission of the crime, the amount of advice, aid, or encouragement is not material if it had the effect of inducing the commission of the crime. [*People v Moore*, 470 Mich 56, 70-71; 679 NW2d 41 (2004) (internal citation omitted).]

"[W]hen a defendant specifically encourages another possessing a gun during the commission of a felony to use that gun, he aids and abets the carrying or possession of that gun just as surely as if he aided or abetted the principal in obtaining or retaining the gun." *Id*. at 71. Here, the victim was shot twice. Before the shooting, Woods heard respondent state that he wanted to get his money back from the victim, and Woods later saw Dre walking in the direction of respondent and another person whom respondent had approached. Johnson heard a gunshot and later heard a second and third gunshot that sounded different from the first gunshot; she then saw two individuals accompanying respondent after the shooting but before respondent approached the victim's body. Respondent flipped over the victim's body and took an item appearing to be money from the victim's pant pocket. Respondent stated after the shooting that "they" shot the victim in the stomach and that respondent then "finished him off[.]" Respondent also indicated that the motive for the shooting was that the victim owed respondent money. Overall, the evidence supports an inference that, in addition to possessing the firearm that he used in shooting the victim, respondent encouraged and assisted the use or possession of a firearm by an accomplice to assault or intimidate the victim as part of respondent's attempt to take money from the victim. See *id*. (concluding that the defendant encouraged and assisted the principal's possession of a firearm by relying on that possession to intimidate a robbery victim).

II. JURY INSTRUCTIONS

Respondent next argues that the trial court erred by instructing the jury on an aiding and abetting theory. We disagree.

Questions of law concerning jury instructions are reviewed de novo. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006). The trial court's determination regarding the applicability of a jury instruction to the facts of a case is reviewed for an abuse of discretion. *Id*. An abuse of discretion occurs when the trial court's decision falls outside the range of principled outcomes. *People v Armstrong*, 305 Mich App 230, 239; 851 NW2d 856 (2014). In determining whether an error occurred, this Court considers the instructions as a whole. *Kowalski*, 489 Mich at 501.

> A criminal defendant is entitled to have a properly instructed jury consider the evidence against him, and the jury instructions must include all the elements of the charged offenses and any material issues, defenses, and theories that are supported by the evidence. In short, the trial court may issue an instruction to the jury if a rational view of the evidence supports the instruction. Even if the instructions are somewhat imperfect, reversal is not required as long as they fairly presented the issues to be tried and sufficiently protected the defendant's rights. [*People v Pinkney*, 316 Mich App 450, 471; 891 NW2d 891 (2016) (internal quotation marks, brackets, and citations omitted).]

The issue of aiding and abetting may be put before the jury if there is evidence tending to establish that more than one person committed the crime. *Id*. at 472. Further, "there exist scenarios . . . in which an aiding-and-abetting instruction may be given despite the fact that the evidence could lend itself to a defendant's guilt as the principal *or* the aider-and-abettor." *Id*. at 473-474. For the reasons explained earlier, there was sufficient evidence in support of respondent's guilt as either a principal or an aider and abettor with respect to each of the crimes of which respondent has been adjudicated. We therefore conclude that a rational view of the evidence supported finding respondent guilty under an aiding and abetting theory, and the trial court thus did not err in providing an aiding and abetting instruction. See *id*. at 472.

Respondent further argues that the trial court erred in failing to provide a "mere presence" jury instruction, i.e., an instruction that respondent's mere presence at the crime scene was insufficient to find him guilty. This issue has been waived. Defense counsel objected to instructing the jury on an aiding and abetting theory but did not request a "mere presence" jury instruction. Moreover, respondent did not merely fail to request a "mere presence" jury instruction; his attorney affirmatively approved of the trial court's instructions other than with respect to the objections that defense counsel had previously made. After the trial court provided its final instructions to the jury, the trial court asked the attorneys if they were satisfied with the instructions other than with respect to the objections previously noted, and defense counsel responded, "Satisfied." By expressly approving the jury instructions, respondent waived review of the alleged instructional error. See *Kowalski*, 489 Mich at 503-504. Waiver extinguishes any error, meaning that there is no error to review. *Id*. Respondent asserts that he could not have consciously waived a right as a result of what respondent refers to as defense counsel's mistaken

view of the law, but respondent fails to identify any mistaken view of the law which defense counsel held that resulted in the waiver.

In a single sentence of his brief, respondent uses the phrase "ineffective assistance" in reference to defense counsel's failure to request a "mere presence" instruction, but respondent cites no case law and presents no coherent argument concerning any claim that he was deprived of the effective assistance of counsel. Respondent has therefore not properly presented any ineffective assistance of counsel claim for appellate review. See *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). "An appellant's failure to properly address the merits of his assertion of error constitutes abandonment of the issue." *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004). In short, merely using the phrase "ineffective assistance" one time in a brief, without citing pertinent authorities or providing any discernible rationale for such a claim, does not constitute a properly presented appellate argument that respondent was deprived of the effective assistance of counsel. Further, respondent has included no ineffective assistance of counsel claim in his statement of questions presented and thus, for this additional reason, has failed to present any such issue for review. See *Unger*, 278 Mich App at 262.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Cynthia Diane Stephens
/s/ Brock A. Swartzle