STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee	UNPUBLISHED April 16, 2013
v	No. 308711 Wayne Circuit Court
JOHN HENRY SIMS, Defendant-Appellant.	LC No. 11-005883-FC

Before: WILDER, P.J., and STEPHENS and RONAYNE KRAUSE , JJ.

PER CURIAM.

Defendant, John Henry Sims, was convicted by a jury of murder in the first degree, MCL 750.316; assault with intent to murder, MCL 750.83; possession of a firearm during the commission of a felony, second offense, MCL 750.227b (felony-firearm); and felon in possession of a firearm, MCL 750.224f. Defendant was sentenced to five years' imprisonment for the felony-firearm conviction, credited for 444 days. Consecutive to that sentence, defendant was also sentenced to life imprisonment for the two counts of first degree murder; to 15 to 23 years imprisonment for assault with intent to murder; and to two and a half to five years for the firearm possession conviction to be served concurrently. Defendant appeals by right. We affirm.

I. CONFRONTATION RIGHTS

First, defendant argues that the trial court abused its discretion by admitting the preliminary examination testimony of an unavailable res gestae witness, Dominic Baldwin. We disagree.

This Court reviews for an abuse of discretion a trial court's decision regarding a determination of the admissibility of evidence. *People v Feezel*, 486 Mich 184, 192; 783 NW2d 67 (2010). An abuse of discretion occurs when the trial court's decision results in an outcome falling outside the range of principled outcomes. *People v Babcock*, 469 Mich 247, 270; 666 NW2d 231 (2003).

"Both the United States and Michigan Constitutions guarantee a criminal defendant the right to confront witnesses against him or her." *People v Garland*, 286 Mich App 1, 10; 777 NW2d 732 (2009). "The Sixth Amendment bars testimonial statements by a witness who does not appear at trial unless the witness is unavailable and the defendant had a prior opportunity to

cross-examine the witness." *People v Yost*, 278 Mich App 341, 370; 749 NW2d 753 (2008). Statements made during a preliminary examination are testimonial and implicate the confrontation clause. See *Crawford v Washington*, 541 US 36, 68; 124 S Ct 1354; 158 L Ed 2d 177 (2004).

MRE 804(b)(1) provides that the hearsay rule does not exclude a defendant's former testimony if the declarant is unavailable and "the party against whom the testimony is now offered . . . had an opportunity and similar motive to develop the testimony by . . . [cross-examination.]"

> The declarant is unavailable when he is absent from the hearing and the proponent of his statement has used due diligence to procure his attendance. MRE 804(a)(5). The party wishing to have the declarant's former testimony admitted must demonstrate that it made a reasonable, good-faith effort to secure the declarant's presence at trial. The test does not require a determination that more stringent efforts would not have procured the testimony. [*Briseno*, 211 Mich App at 14 (citations omitted).]

In this case, defendant argues that the police's failure to (1) re-issue a new subpoena for the adjourned trial date; (2) request another detainment order, given Baldwin's reluctance to testify; (3) locate Baldwin once phone contact was lost; (4) maintain records of witness contact and search efforts; (5) search local hospitals; (6) identify his mailing address; (7) identify if he was receiving any social service benefits/payments; and (8) contact other state authorities in search for him indicated a lack of due diligence. We disagree. During the court's hearing regarding the admission of Baldwin's preliminary examination testimony, Sgt. Hart detailed the various measures he took to produce the witness. Indeed, the prosecution made diligent attempts to secure Baldwin's presence at trial for months prior to the trial date. Baldwin was subpoenaed for the original trial date and was instructed that he remained under subpoena for the adjournment date. Because the police were aware that Baldwin was afraid to testify against defendant, they maintained regular contact with him and his relatives. Once Baldwin broke contact in mid-November, efforts were made to re-establish contact with him. On the Friday before the adjourned trial date the witness himself assured the officer that he would appear and it was not until the day before trial that the witness' grandmother informed the officer that the witness had absconded. Significant efforts were made to find him on December 19. The court determined that the prosecution's efforts to secure Baldwin's presence were reasonable and made in good faith, and we agree. The court did not abuse its discretion when it determined the prosecution made a good faith effort to secure Baldwin's presence at trial.

Similarly, the trial court did not err by admitting Baldwin's preliminary examination testimony because, at the preliminary examination, defendant had a "prior opportunity and similar motive to develop" Baldwin's testimony by cross-examination. MRE 804(b)(1). "Whether a party had a similar motive to develop the testimony depends on the similarity of the issues for which the testimony was presented at each proceeding." *People v Farquharson*, 274 Mich App 268, 275; 731 NW2d 797 (2007). The Supreme Court has previously held that although a preliminary examination's purpose is different from that of a trial, a defendant has a similar motive to cross-examine a witness at a preliminary examination. *People v Meredith*, 459 Mich 62, 67; 586 NW2d 538 (1998). See also *People v Adams*, 233 Mich App 652, 659; 592

NW2d 794 (1999). Accordingly, defendant's confrontation rights were not violated by the admission of Baldwin's preliminary examination testimony.

II. JURY INSTRUCTIONS

Defendant next asserts that the court erred by instructing the jury on aiding and abetting, a theory of accomplice liability, with regard to all charges. We disagree.

A trial court's decision whether to issue a jury instruction is reviewed for an abuse of discretion. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006). The determination whether the requirements of aiding and abetting were met is a question of law subject to review de novo. *People v Robinson*, 475 Mich 1, 5; 715 NW2d 44 (2006).

We conclude that the trial court did not err by issuing an aiding and abetting jury instruction because the evidence supported the theory of accomplice liability. Guilt based on a theory of aiding and abetting imposes vicarious and direct liability for an underlying offense on a person who procures, counsels, aids or abets in the commission of that crime. *Robinson*, 475 Mich at 5-6. In order to establish the requisite intent of the aider and abettor, a prosecutor must prove that the defendant either intended the specific consequences or was the natural and probable consequences of the underlying crime. *Id.* at 9, 15. A person's conduct alone can have the effect of inducing the crime; making any advice, aid, or encouragement immaterial. *People v Moore*, 470 Mich 56, 71; 679 NW2d 41 (2004). "A conviction of first-degree premeditated murder requires evidence that the defendant intentionally killed the victim and that the act of killing was premeditated and deliberate." *People v Jackson*, 292 Mich App 583, 588; 808 NW2d 541 (2011) (citation and quotation marks omitted). Premeditation and deliberation require sufficient time to allow the defendant to consider his actions. *People v Anderson*, 209 Mich App 527, 537, 531 NW2d 780 (1995). The elements of assault with intent to commit murder are: "'(1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder.'" *People v Brown*, 267 Mich App 141, 147-48; 703 NW2d 230 (2005) (citation and quotation marks omitted). The intent to kill may be transferred to an unintended victim. *People v Lawton*, 196 Mich App 341, 350-351; 492 NW2d 810 (1992). In this case, the prosecution's theory was that there were two shooters during the Parkgrove shooting. One shooter, Joe Joe, had a gambling dispute with James Griggs and the other shooter, defendant, was upset with Riddle over a relationship. There was evidence that multiple weapons were discharged, a handgun and a rifle. There is also eyewitness testimony that there were two shooters on scene. The testimony was that the two men appeared at almost the same time each silently discharging weapons in the same direction. Their coordinated efforts indicate conduct sufficient to induce and aid the other person. *Id.* A jury could infer shared intent to murder from this evidence, which would support both of the homicide charges and the assault charge. Accordingly, the evidence supported a theory of aiding and abetting.

III. RE-OPENING OF PROOFS

Next, defendant asserts that the trial court abused its discretion by re-opening the prosecution's proofs before the commencement of defendant's proofs. Specifically, defendant argues that the trial court erred when it permitted the prosecution, following the close of its

proofs, to introduce documentation from the Secretary of State's Office establishing that he resided on Fordham Street. We disagree.

A trial court's decision regarding a determination of the admissibility of evidence will be reviewed for an abuse of discretion. *Feezel*, 486 Mich at 192. We conclude that the trial court did not abuse its discretion by re-opening the prosecutor's proofs prior to the beginning of the defense's proofs because there was no undue advantage, surprise, or prejudice.

> Generally, the reopening of proofs for either the prosecution or defense rests within the sound discretion of the trial judge. *People v Lay*, 336 Mich 77, 79; 57 NW2d 453 (1953); *People v Egner*, 9 Mich App 212, 214–215; 156 NW2d 605 (1967). Relevant in ruling on a motion to reopen proofs is whether any undue advantage would be taken by the moving party and whether there is any showing of surprise or prejudice to the nonmoving party. *Bonner v Ames*, 356 Mich 537, 541; 97 NW2d 87 (1959). [*People v Collier*, 168 Mich App 687, 694-95; 425 NW2d 118 (1988).]

Further, material and newly discovered evidence may require the re-opening of proofs. *People v J.C. Williams*, 118 Mich App 266, 270-271 (1982).

Defendant's arguments that establishing defendant's residency would be material and would serve to identify him as the shooter are correct; however, there were numerous additional pieces of testimony that supported his residency. For example, Sgt. Hart and two detectives testified that defendant lived at the address. Accordingly, defendant has failed to show that the documentation from the Secretary of State was prejudicial. Indeed, this evidence was not prejudicial to defendant because it merely served to confirm a fact for which there was already supporting evidence in the record. Furthermore, the initial exclusion of the documentation from the Secretary of State from the prosecution's case in chief appears to be mere oversight, not an attempt to blindside the defense. In short, defendant was aware well before the reopening of proofs that the prosecution's theory of the case included establishing that defendant lived at the Fordham address. Accordingly, defendant cannot establish surprise or prejudice from the introduction of evidence consistent with that theory.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Cynthia Diane Stephens
/s/ Amy Ronayne Krause