MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Fitolay Demesmin,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

June 27, 2022

Court of Appeals Case No. 21A-CR-2569

Appeal from the Vanderburgh Superior Court

The Honorable Robert J. Pigman, Judge

Trial Court Cause No. 82D03-1905-MR-3707

Bailey, Judge.

Case Summary

[1] Fitolay Demesmin ("Demesmin") challenges his conviction, following a jury trial, of murder, a felony.[1]

[2] We affirm.

Issues

[3] Demesmin raises two issues, which we restate as follows:

I. Whether Demesmin waived his appeal of the trial court's refusal of his request for a jury instruction on Assisting a Criminal as a lesser-included offense of Murder.

II. Whether evidence obtained from a residence that was searched pursuant to a warrant was admitted into evidence in violation of the Fourth Amendment to the United States Constitution and/or Article 1, Section 11, of the Indiana Constitution.

Facts and Procedural History

[4] On May 23, 2019, Asia Marion ("Marion") drove to Diamond Sheppard-Rankin's ("Sheppard-Rankin") house on Taylor Avenue to pick her up for a 4:00 p.m. meeting. Before Marion arrived at Sheppard-Rankin's house, Marion texted Sheppard-Rankin to let her know she was on her way. Sheppard-Rankin

[1] Ind. Code § 35-42-1-1(1).

responded, "okay." Tr. v. II at 27.[2] As Marion pulled up to the side of the Taylor Avenue house at approximately 3:46 p.m., her car windows were down and she heard what sounded like a baby loudly screaming. Marion did not see anyone outside the home. Marion honked her car's horn when she arrived, but Sheppard-Rankin did not come out of the house. When Sheppard-Rankin did not appear, Marion called her, texted her to let her know she had arrived, and honked her car horn again. Sheppard-Rankin responded to Marion's text that she was on her way, but she did not respond to any of the rest of Marion's subsequent attempted communications. Because Sheppard-Rankin did not come out of the house, Marion approached the house and knocked on the door. Marion heard Sheppard-Rankin say, "Asia[,] help me." *Id.* at 29. Marion recognized Sheppard-Rankin's voice and called 9-1-1 at 3:56 p.m.

[5] Based on Marion's 9-1-1 call, Evansville Police Department ("EPD") officers arrived at the Taylor Avenue house and opened the unlocked side door. They found Sheppard-Rankin laying on the floor just inside the door. Sheppard-Rankin was transported by ambulance to a hospital where she was immediately treated for multiple stab wounds to her neck, chest, and abdomen. Because the medical providers could not control Sheppard-Rankin's bleeding, she continued to hemorrhage and went into cardiac arrest. Sheppard-Rankin arrived at the hospital around 5:00 p.m. and was pronounced dead at approximately 9:00

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[2] What the appellate court record identifies as "Transcript Volume 2" was labeled as volume 3 by the trial court. Our volume number references in this decision are to those in the appellate court record.

p.m. The results of a toxicology report revealed that Sheppard-Rankin had marijuana and methamphetamine in her system. The results of an autopsy revealed Sheppard-Rankin had twenty stab wounds on her body, including one stab wound to her liver that would have caused her to bleed into her abdomen and likely die within an hour or two if she had not had medical intervention.

[6] After Sheppard-Rankin was transported to the hospital, EPD obtained a search warrant for the Taylor Avenue house and conducted a search. In the search of the Taylor Avenue house, officers located a taser in the area by the side door where Sheppard-Rankin had been found. They also observed that the majority of the blood splatter was within eighteen inches of the floor. Officers also found three knives in the kitchen sink and noted that the water was running when they first arrived.

[7] First responders at the scene of the Taylor Avenue house spoke with Marion and interviewed Mr. and Mrs. Stallings, whose house was across the alley from the back of the Taylor Avenue house. Marion reported that she had arrived at the house at approximately 3:46 p.m. to pick up Sheppard-Rankin. The Stallings reported seeing a black woman with a child and a black man leaving from the back porch of the Taylor Avenue home that day at approximately 3:43 p.m. They reported that they recognized the black man as someone who they saw "routinely" at the Taylor Avenue house. Tr. v. I at 43.

[8] Terica Monroe ("Monroe") arrived on the scene and informed the officers that she lived in the Taylor Avenue home with Demesmin, his girlfriend, Kalei

Obasa ("Obasa"), and Obasa's minor daughter. Monroe stated that she had spoken with Sheppard-Rankin by telephone at approximately 3:18 p.m. that day and could hear Demesmin and Obasa over the speakerphone, talking in the background.

[9] Daniel Booth ("Booth") also arrived on the scene and spoke with EPD officers. Booth reported that he had been at the Taylor Avenue home earlier that day and had left at approximately 2:00 p.m. When he left the house at that time, the only people in the house were Sheppard-Rankin, Demesmin, and Obasa. Booth also reported to EPD officers that he had gotten a text message from Demesmin that evening at 11:00 p.m. stating that Demesmin was at the home of Gloria Head ("Head") on Covert Avenue. Head is Obasa's grandmother.

[10] Through a search of Bureau of Motor Vehicle records, EPD officers confirmed that Obasa had listed 527 Covert Avenue as her address. EPD officers went to the Covert Avenue address to find out if Demesmin and Obasa were there. The officers knocked on the door and, when Obasa opened it, they could see Demesmin sleeping on a couch just inside the house. The officers stepped into the house, woke Demesmin, placed him in handcuffs, and took him outside the house. Having confirmed that Demesmin and Obasa were at the Covert Avenue house, the officers determined that they would apply for a search warrant for the house. The officers removed all occupants from the house, at which point Head informed them that Demesmin and Obasa had arrived at her house that day at approximately 4:20 p.m. She informed the officers that Demesmin had gone straight into the house without speaking to her and then

had immediately gone down to the basement to shower and change his clothes. Obasa did not change her clothes. Demesmin and Obasa had lived with Head until March 1, 2019, and Demesmin had not showered at Head's house at all between March 1 and May 23, 2019.

[11] Based on their investigation up to that point, EPD officers applied for and obtained a search warrant for Head's house located at 527 Covert Avenue. In their subsequent search, they found an empty container of bleach outside the house by the trash containers. In the crawl space of the house, which was located next to the basement, officers located a brown plastic bag that had an "extremely strong smell of bleach." Tr. v. II at 119. On the outside of the bag, there was a red substance that was consistent with the appearance of blood. Later forensic testing confirmed the presence of human blood and the presence of Demesmin's DNA. Inside the bag, officers found a pair of tennis shoes, sweatpants, and a shirt. The sweatpants and shirt had a strong odor of bleach and were "very, very wet." *Id.* at 123. Forensic testing of the tennis shoes confirmed the presence of Sheppard-Rankin's blood and Demesmin's DNA.

[12] Demesmin was transported to the police department, and officers noted that he had a cut on his right palm that came around the side of his hand. After being advised of his *Miranda* rights, he agreed to speak with police. At first, he denied knowing anything and told police that he left the Taylor Avenue house at around 3:00 p.m. After the police conducted the search of Head's house at 527 Covert Avenue, they returned to the interview room and confronted Demesmin with the photographs of the clothing they found. At that point, Demesmin told

police that all he was supposed to do was clean up the scene of the crime. Demesmin denied that the bloody clothes and shoes were his. He claimed that Obasa murdered Sheppard-Rankin because she thought that he and Sheppard-Rankin had engaged in sexual activity without Obasa. Demesmin said that the two women began fighting and, when Obasa rushed past him, there was already blood. He stated that, after he and Obasa got to Head's house, it was agreed that he would go back to the Taylor Avenue house to clean up the scene of the crime. Demesmin stated that he put on the bloody clothes over his own clothes that he had been wearing all day and put on someone else's shoes, then went back to Taylor Avenue to clean up the crime scene. Demesmin initially stated that he never took a shower at Head's house but later claimed that he took a shower after he got back from cleaning up the crime scene and, while he showered, Obasa hid the bag with the bloody clothes and shoes in the crawl space at Head's house.

[13] The State charged Demesmin with murder; the charging information stated, in pertinent part, "[O]n or about May 23, 2019, Fitolay Demesmin did knowingly or intentionally kill another human being, to wit: Diamond Sheppard-Rankin." App. v. II at 38. On July 1, 2019, Demesmin filed, pro se, a motion to dismiss and a motion to suppress statements made by Obasa[3] following her detainment, alleging that law enforcement lacked probable cause for his and/or Obasa's arrest. On August 28, 2019, Demesmin filed an "Amended Motion to

[3] Obasa did not testify at trial and her statements were not admitted into evidence.

Suppress/Dismiss Case." *Id.* at 82. On October 10, 2019, Demesmin filed a document entitled "Oral Argument in Support of Amended Motion to Suppress/Dismiss Case" in which he argued, in part, that there was not probable cause for the search warrant for the Covert Avenue house and, therefore, evidence obtained pursuant to that search should be suppressed. *Id.* at 125, 147-58. Demesmin made similar arguments in his October 17 document entitled, "Case Summary of Suppression Oral Argument on 10/07/19," *id.* at 167, and his October 21 document entitled, "Motion to Dismiss," *id.* at 172.

[14] The trial court conducted a suppression hearing/hearing on the motion to dismiss on October 7 and October 21 of 2019, at which Demesmin proceeded pro se. On December 9, 2019, the court denied Demesmin's motions to suppress and dismiss.

[15] Demesmin's jury trial—at which he was represented by legal counsel—was conducted on September 20 through 22 of 2021. At trial and outside the presence of the jury, Demesmin's counsel reasserted Demesmin's motion and amended motion to suppress "all evidence found in the interior of 527 Covert" Avenue, reincorporated "all of the arguments" Demesmin had made in support of those motions, and asked the court to reconsider its ruling denying those motions. Tr. v. II at 108. The trial court denied the motion to reconsider.

[16] In its final jury instructions, the trial court instructed the jury on the elements of murder. It also provided the following instruction on accomplice liability:

> A person who knowingly aids[,] induces[,] or causes another person to commit an offense commits that offense even if the other person: 1) has not been prosecuted for the offense; 2) has not been convicted of the offense or 3) has been acquitted of the offense. In order to commit an offense by aiding, inducing[,] or causing another to commit the offense a person must have knowledge that he is aiding, inducing, or causing the commission of the offense. To be guilty the defendant does not have to personally participate in the crime nor does he have to be present when the crime is committed. The jury may consider the defendant's relationship to or companionship with the one engaged in the crime and the defendant's actions before, during, and after the crime in establishing whether the defendant is guilty of aiding, inducing[,] or causing an offense.

App. v. V at 86.

[17] During a "conference concerning jury instructions," Demesmin's attorney had requested an instruction "that there's a lesser included offense of assisting a criminal in this matter," and the court had denied that request. Tr. v. III at 45. Following the reading of the final jury instructions and recess of the jury, Demesmin's attorney asserted he was "mak[ing] a record" of his prior requested instruction and argued the court had erred in refusing to give it. Demesmin provided the trial court with citations to several cases in which he asserted Indiana courts had permitted an instruction on the lesser-included offense of assisting a criminal in a murder case. The State objected to the requested instruction, and the trial court then noted that it had refused the instruction because "the State did not include any additional facts that would

encompass or that would make [assisting a criminal a] lesser included" offense of the murder charge.

[18] The jury found Demesmin guilty of murder. This appeal ensued.

Discussion and Decision

Jury Instruction

[19] Demesmin challenges the trial court's refusal to give a jury instruction that Demesmin orally requested. We review a trial court's decision to give or refuse a jury instruction for an abuse of discretion. *Hernandez v. State*, 45 N.E.3d 373, 376 (Ind. 2015). We consider "(1) whether the instruction correctly states the law; (2) whether there is evidence in the record to support the giving of the instruction; and (3) whether the substance of the tendered instruction is covered by other instructions which are given." *Id.* (internal quotation and citation omitted).

[20] Where

> the claimed error is failure to give an instruction, as distinguished from the giving of an erroneous one, a tendered instruction is necessary to preserve error because, without the substance of an instruction upon which to rule, the trial court has not been given a reasonable opportunity to consider and implement the request.

Vigus v. Dinner Theater of Ind., 153 N.E.3d 1150, 1160 (Ind. Ct. App. 2020) (citing *Scisney v. State*, 701 N.E.2d 847, 848 n.3 (Ind. 1998)), *trans. denied*. Thus, as long held by our Supreme Court and articulated in the Indiana Code and

court rules, a requested jury instruction must be "tendered" in writing. *See, e.g.*, *Anderson v. State*, 469 N.E.2d 1166, 1168 (Ind. 1984) ("It is well settled that the failure to tender instructions in writing on lesser included offenses constitutes a waiver of the right to challenge a trial court's refusal to instruct a jury on lesser included offenses."); I.C. § 35-37-2-2(6) (providing special jury instructions desired by a party must be "reduced to writing"); Ind. Crim. Rule 8(D) ("Requested instructions must be reduced to writing …"); Ind. Trial Rule 51(C) (providing that, at the close of evidence and before argument, "each party may file written requests that the court instruct the jury on the law as set forth in the request"). Therefore, we have held that a defendant waived alleged error where he "merely requested that a lesser-included offense instruction be provided … without tendering proposed jury instructions or identifying a number from the Indiana Pattern Jury Instructions." *Coy v. State*, 999 N.E.2d 937, 943 (Ind. Ct. App. 2013) (citing Crim. R. 8(D) and T.R. 51(E)).

[21] Here, Demesmin's counsel verbally requested a jury instruction on Assisting a Criminal as a lesser included offense of Murder but did not tender a written proposed instruction nor identify a number from the Indiana Pattern Jury Instructions. Therefore, Demesmin has waived the issue on appeal.

[22] Moreover, Demesmin has failed to raise a fundamental error argument on appeal. When a claim of error based on a trial court's failure to give a jury instruction is waived for failure of the defendant to tender that instruction, "the defendant [on appeal] must establish that the failure to give an instruction constituted fundamental error." *Russell v. State*, 981 N.E.2d 1280, 1286 (Ind.

Ct. App. 2013) (vacated in part on other grounds, 997 N.E.2d 351 (Ind. 2013)). However, if an appellant fails to raise the issue of fundamental error in his initial brief, he has waived fundamental error review of his claim regarding the lack of a jury instruction. *Bowman v. State*, 51 N.E.3d 1174, 1179-80 (Ind. 2016). Because Demesmin has failed to allege fundamental error in his appellate brief, he has waived fundamental error review.

Constitutionality of Search

[23] Demesmin contends that the trial court erred in admitting the evidence obtained from the search of Head's residence on Covert Avenue because the search was conducted in violation of his constitutional rights. As an initial matter, we note that the State argues for the first time on appeal that Demesmin lacks standing to challenge the admission of the evidence found in Head's home on Covert Avenue. However, the State has waived that argument by failing to raise it in the trial court.[4] *See, e.g.*, *Whitley v. State*, 47 N.E.3d 640, 644-45 (Ind. Ct. App. 2015) (holding the State waived the issue of the defendant's standing to challenge a search where the State did not object to standing in the trial court, nor argue that the defendant lacked a reasonable expectation of privacy in relation to the search), *trans. denied*. Moreover, we may not raise the issue of

[4] The State asserts that it may raise the issue of standing for the first time on appeal because Demesmin has "shifted his claim" raised on appeal "from that raised in the trial court." State's Br. at 26 n.4. That is, the State asserts that Demesmin only challenged probable cause for his arrest below, not probable cause for the search of the home. However, that is incorrect; in the trial court, Demesmin clearly moved to suppress the evidence found in Head's home on the grounds that the search was unconstitutional. The State did not challenge his standing to do so until this appeal. Therefore, that challenge is waived.

defendant's standing sua sponte. *See, e.g.*, *Lewis v. State*, 125 N.E.3d 655, 658 (Ind. Ct. App. 2019) (citing *Everroad v. State*, 590 N.E.2d 567, 569 (Ind. 1992)).

[24] The State also asserts Demesmin waived his constitutional challenges to the search of the Covert Avenue address by not raising them in the trial court. The State is correct regarding Demesmin's state constitutional claim; Demesmin never mentioned or provided a separate analysis for an Article 1, Section 11, claim in the trial court. Therefore, he has waived that claim. *See, e.g.*, *Redfield v. State*, 78 N.E.3d 1104, 1108 (Ind. Ct. App. 2017) (finding the defendant waived an Article 1, Section 11, claim where his arguments in the trial court mentioned the state constitutional claim but did not provide any independent analysis for it) (citing *Wilkins v. State*, 946 N.E.2d 1144, 1147 (Ind. 2011)), *trans. denied*. However, Demesmin clearly did raise Fourth Amendment claims related to the search of the Covert Avenue home and the use of evidence discovered therefrom in his motions to dismiss and to suppress evidence and his documents filed in support thereof. And he renewed those assertions at the jury trial. Therefore, Demesmin has not waived his federal constitutional claim.

[25] Because Demesmin appeals following a completed trial, his appeal "is best framed as challenging the admission of evidence at trial," rather than a denial of a motion to suppress. *Clark v. State*, 994 N.E.2d 252, 259 (Ind. 2013). We review the admission of evidence for an abuse of discretion, which occurs only when the admission is clearly against the logic and effect of the facts and circumstances and the error affects a party's substantial rights. *Id.* at 260. "We neither reweigh the evidence nor reevaluate the witnesses' credibility; rather, we

view the evidence in the light most favorable to the [judgment], and we will affirm that [judgment] unless we cannot find substantial evidence of probative value to support it." *Pierce v. State*, 29 N.E.3d 1258, 1265 (Ind. 2015). However, whether the facts establish a constitutional violation is a question of law that we review de novo. *See, e.g.*, *Pinner v. State*, 74 N.E.3d 226, 229 (Ind. 2017).

[26] Demesmin asserts that there was no probable cause for the search warrant that was issued for the Covert Avenue residence and, therefore, the subsequent search violated his right to be free from unreasonable searches under the Fourth Amendment to the United States Constitution. The Fourth Amendment[5] requires probable cause for the issuance of a search warrant and prohibits the admission of evidence seized in unconstitutional searches. *See Albrecht v. State*, 185 N.E.3d 412, 419 (Ind. Ct. App. 2022). As this Court recently stated,

> [i]n determining whether to issue a search warrant, "'[t]he task of the issuing magistrate is simply to make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit ... there is a fair probability that contraband or evidence of a crime will be found in a particular place.'" *Jaggers v. State*, 687 N.E.2d 180, 181 (Ind. 1997) (quoting *Illinois v. Gates*, 462 U.S. 213, 238, 103 S. Ct. 2317, 76 L.Ed.2d 527 (1983)) (brackets and ellipsis in *Jaggers*). "The duty of the reviewing court is to determine whether the magistrate had a

[5] The Fourth Amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend IV.

> 'substantial basis' for concluding that probable cause existed." *Id*. (quoting *Gates*, 462 U.S. at 238-39, 103 S. Ct. 2317). "Probable cause is a fluid concept incapable of precise definition and must be decided based on the facts of each case." *Smith* [*v. State*], 982 N.E.2d [393,] 404 [(Ind. Ct. App. 2014), *trans. denied*]. "The level of proof necessary to establish probable cause is less than that necessary to establish guilt beyond a reasonable doubt." *Jellison v. State*, 656 N.E.2d 532, 534 (Ind. Ct. App. 1995). "Probable cause means a probability of criminal activity, not a prima facie showing." *Fry v. State*, 25 N.E.3d 237, 244 (Ind. Ct. App. 2015), *trans. denied*. It "may be established by evidence that would not be admissible at trial." *Jellison*, 656 N.E.2d at 534. Such evidence may include hearsay, which is an out-of-court statement offered to prove the truth of the matter asserted. Ind. Evidence Rule 801(c).
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> When we review whether probable cause supported the issuance of a search warrant, we "afford 'significant deference to the magistrate's determination'" and "focus on whether reasonable inferences drawn from the totality of the evidence support that determination." [*State v.*] *Spillers*, 847 N.E.2d [949,] 953 [(Ind. 2006),] (quoting *Houser v. State*, 678 N.E.2d 95, 98-99 (Ind. 1997)). We consider only the evidence presented to the issuing judge and not post hoc justifications for the search. *Jaggers*, 687 N.E.2d at 182. "'A presumption of validity of the search warrant exists, and the burden is upon the defendant to overturn that presumption.'" *Rios v. State*, 762 N.E.2d 153, 156-57 (Ind. Ct. App. 2002) (quoting *Snyder v. State*, 460 N.E.2d 522, 529 (Ind. Ct. App. 1984)). "In determining whether an affidavit provided probable cause for the issuance of a search warrant, doubtful cases should be resolved in favor of upholding the warrant." *State v. Shipman*, 987 N.E.2d 1122, 1126 (Ind. Ct. App. 2013).

Albrecht, 185 N.E.3d at 419-20.

[27] Demesmin asserts that there was no probable cause to issue a search warrant for the Covert Avenue home because (1) the affidavit for the search warrant "was based on nothing more than a suspicion" and "bare bones assertion that Demesmin was a prime suspect," Appellant's Br. at 31, and (2) the affidavit was based on observations of his wounds and statements by Head that were obtained after the officers illegally entered the Covert Avenue home to detain Demesmin and remove individuals from the residence while a search warrant was obtained. We address each contention in turn.

Substantial Basis for Finding Probable Cause

[28] Far from being "bare bones," the affidavit in support of the request for a search warrant for the Covert Avenue home stated facts indicating a fair probability that evidence of the murder of Sheppard-Rankin would be found in the home. After describing in detail the residence at 527 Covert Avenue and listing the evidence of murder believed to be located there, the affidavit stated that:

- Booth informed police that the victim, Demesmin, and Obasa had all been alone together in the Taylor Avenue home when Booth left the home earlier that day at approximately 2:00 p.m.;

- Marion informed police that the victim, Demesmin, and Obasa had all been together in the Taylor Avenue home at approximately 3:15 p.m. when Marion heard them all over speakerphone during her call with the victim;

- neighbors informed police that they witnessed people matching Demesmin's and Obasa's descriptions leaving

the back of the Taylor Avenue home that day "prior to officers arriving" at the scene, App. v. II at 165;

- Marion informed police that, at approximately 3:39, she was outside the Taylor Avenue home, heard moaning and the victim asking her for help, and called in a medical emergency to 9-1-1;

- Police responded, forced entry to the Taylor Avenue residence, and discovered the victim there, unresponsive and with multiple stab wounds;

- The hospital pronounced victim dead from her wounds at approximately 9:45 p.m.;

- Monroe informed officers that Obasa's grandmother, Head, lived on Covert Avenue, and a BMV search conducted by police disclosed Obasa had listed her address as 527 Covert Avenue;

- When police knocked at the door of the Covert Avenue residence, Obasa answered the door and police observed Demesmin asleep on the couch;

- Police cleared the residence to secure it for a potential subsequent search pursuant to a warrant for which they intended to apply;

- Head informed police that Demesmin and Obasa arrived at the Covert Avenue residence earlier that day at approximately 4:20 p.m., and Demesmin immediately entered the residence and took a shower and changed his clothes.

- Police observed "a substantial cut" on Demesmin's right palm, *id.* at 166.

[29] These detailed circumstances in the affidavit are based on witness statements and a timeline that gave the magistrate a substantial basis for concluding that probable cause existed to search the Covert Avenue residence for evidence of Sheppard-Rankin's murder. *See, e.g., Albrecht*, 185 N.E.3d at 420; *see also Frasier v. State*, 794 N.E.2d 449, 457 (Ind. Ct. App. 2003) ("Information gleaned from cooperative citizens who are either eyewitnesses or victims of a crime may be relied upon in determining whether probable cause exists for a search where there are no circumstances which call the informant's motives into question."), *trans. denied*. And Demesmin has pointed to no circumstances that call into question the motives of the eyewitnesses whose statements are cited in the probable cause affidavit.

Evidence Obtained During Temporary Detention

[30] Demesmin asserts that Head's statement regarding Demesmin's actions on the day of the murder and the observation of the wound on Demesmin's hand were obtained pursuant to an unconstitutional detention of him and removal of others from the Covert Avenue home and, therefore, could not supply probable cause for the subsequent search of the home. However, the Fourth Amendment permits a temporary seizure of occupants of a home when the temporary seizure is supported by probable cause and "designed to prevent the loss of evidence while the police diligently obtain a warrant in a reasonable period of time." *Illinois v. McArthur*, 531 U.S. 326, 334 (2001); *see also Segura v.*

United States, 486 U.S. 796, 810 (1984) ("[S]ecuring a dwelling, on the basis of probable cause, to prevent the destruction or removal of evidence while a search warrant is being sought is not itself an unreasonable seizure of either the dwelling or its contents.").

[31] As noted above, when the police arrived at the Covert Avenue home, there was probable cause to believe Demesmin had engaged in criminal activity and then gone into that home. That is, even aside from Head's statements and Demesmin's wound, there were other extensive, detailed, and legally obtained allegations in the affidavit that established probable cause for the search of the home: the affidavit cited evidence that Demesmin was at the scene of the crime on the day the crime was committed, was seen leaving the scene of the crime with a woman who matched Obasa's description at around the time the crime happened, and could be located at the Covert Avenue residence because Obasa had listed that address as her residence. Given that there was probable cause for a search of the home, the temporary seizure of the home and its occupants while the search warrant was obtained did not violate the Fourth Amendment. *See McArthur*, 531 U.S. at 334. Thus, Head's statements and the observation of Demesmin's wound—which were discovered pursuant to the legal temporary detention—could be used as additional evidence in the subsequently filed probable cause affidavit seeking a warrant for a search of the home.

[32] Moreover, even if we assume that the trial court erred in relying on Head's statements and Demesmin's wound when finding probable cause to search the home, such error would be harmless given the other allegations in the affidavit

that established probable cause for the search. *See* T.R. 61 (regarding harmless error). That is, any erroneous reliance on Head's statements to police and/or the evidence of Demesmin's wound would not have affected Demesmin's substantial rights and was, therefore, harmless. *Id.*

[33] Demesmin has failed to overcome the presumption that the search warrant for the Covert Avenue residence was valid. Therefore, the evidence obtained as a result of that search was not tainted and the trial court did not abuse its discretion in admitting the challenged evidence.

Conclusion

[34] Demesmin has waived his claim challenging the trial court's refusal to give Demesmin's requested jury instruction on Assisting a Criminal as a lesser included offense of Murder by failing to tender a written proposed instruction or identify a number from the Indiana Pattern Jury Instructions. And the circumstances cited in the probable cause affidavit provided a substantial basis for the trial court's conclusion that probable cause existed to search the Covert Avenue residence.

[35] Affirmed.

Najam, J., and Bradford, C.J., concur.