

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BARNEY KEVIN JAMES,

Defendant-Appellant.

UNPUBLISHED

March 20, 2001

No. 211331

Wayne Circuit Court

LC No. 97-003228

Before: Whitbeck, P.J., and White and Wilder, JJ.

WHITE, J. (*concurring in part and dissenting in part*).

I agree with the statements of controlling law in the lead and dissenting opinions. I do not, however, draw the same conclusions upon applying the law to the facts of the instant case.

While the lead opinion correctly states that defendant contended that he was wrongly accused of shooting the victim and was misidentified by those who named him as the perpetrator or placed him at the scene, this was only one theory of defense. Defendant also argued that whoever the perpetrators were, whether defendant and his brother or others, their intent at the time was to scare and terrorize, not to kill, and further argued that the fatal bullet was not shot by defendant or those with him, but, rather, was shot by the victim's uncle, who was not one of defendant's alleged companions, but one of the group at which defendant was allegedly shooting. I do not agree that the instruction clearly related to the jury that it must find defendant's conduct, either as a principal or an aider and abettor, caused the death of James White. The court stated the causation requirement as:

First, that the Defendant caused the death of James White. *That is, that James White died as a result of being shot.*

The jury was not required to find that James White was shot by defendant, one of his coconspirators, or someone he was aiding and abetting, or, if not, that there was the requisite causal connection between defendant's conduct and the shooting. Rather, the jury was instructed, in effect, that causation was established upon a finding that James White died as a result of being shot, without regard to who shot him, including Joseph White.

As to the conspiracy instruction, I agree that reversal is required. The conspiracy instruction only required that the jury find that defendant and someone else knowingly agreed to commit murder, and that defendant specifically intended to commit or help commit¹ that crime. The instruction did not require that the jury find that defendant agreed and intended to commit first-degree murder. The dissent concludes both that the jurors were informed of every piece of information about the law of conspiracy necessary to make a factual determination within the bounds of the law, and that jurors have the capacity to infer that first-degree murder is the only degree of murder that can be planned in advance and, as a result, it is the only degree of murder for which there can be an agreement that is the core of a conspiracy. I respectfully disagree. The proposition that first-degree murder is the only degree of murder that can be planned in advance and the subject of a conspiracy is a statement of the law, previously announced by this Court, that is not necessarily self-evident, especially to lay persons who have never been so informed. One of defendant's theories of the case was that the shooters did not intend to kill, but only to scare or terrorize. The jury could have found that the four men planned, agreed and intended to go to the area and shoot it up, not intending to kill, but knowingly agreeing and intending to create a very high risk of death or great bodily harm.² Logically, and following the court's instructions on the substantive offenses of first-degree and second degree murder, the jury could have concluded, based on such findings, that defendant was guilty of conspiracy to commit second-degree murder. Under the circumstances that the jury was not informed that conspiracy to commit second-degree murder is an impossible verdict, the legal proposition is not self-evident in light of the evidence and the second-degree murder and conspiracy instructions, and neither the instructions nor the verdict form restricted the jury's consideration to conspiracy to commit first-degree murder, this Court should not assume that the jury restricted itself to consideration of conspiracy to commit first-degree murder only. On this record, there is no way to know whether the jury found defendant guilty of conspiracy to commit murder because it concluded that defendant agreed with others and intended to commit or help commit premeditated murder (presumably of Joseph White or Derrick Sanders based on the verdicts),³ or because defendant agreed with others and intended to do acts that constituted second-degree murder under the court's murder instructions. Lastly, I do not agree that the court complied with the standard instruction. The standard

¹ The court erroneously used the word "helped" rather than "help."

² As observed by the lead opinion, this is consistent with the verdict of second-degree murder as to James White's death. In fact, as to James White, verdicts of guilty of conspiracy to commit first-degree murder and guilty only of second-degree murder are inconsistent based on the facts, where the jury was instructed on transferred intent.

³ The conspiracy instruction did not direct the jury's attention to a particular victim. The conspiracy verdict might have related to a finding that there was a conspiracy to commit the first degree murder of White or Sanders, but such a verdict would require a finding that there was an *agreement* to commit premeditated murder, and such a finding cannot be inferred simply from the jury's verdicts of guilty of assault with intent to murder as to White and Sanders. That verdict simply tells us that the jury found that at the time he shot at them, defendant intended to kill White and Sanders. It does not speak to premeditation or deliberation, or to an agreement involving someone else. Thus, again, it is impossible to know the basis of the jury's verdict unless we presume that it knew that conspiracy to commit second-degree murder is an impossible verdict.

instruction contemplates reference to the crime charged. Here, defendant was charged with conspiracy to commit first-degree premeditated murder. Had the trial court properly referred to that charge, there would have been no need to refer back to any elements of the offense since the instruction had already been given.

I agree that defendant's additional claims of reversible error lack merit.

I conclude that defendant must be granted a new trial on the murder and conspiracy to murder counts due to prejudicial instructional error.

/s/ Helene N. White