STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 21, 2000
v CYPRESS FERRY LOCKETT, Defendant-Appellant.	No. 216962 Ingham Circuit Court LC No. 98-073795-FC

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v EARL FENNOY KELLEY, Defendant-Appellant.	No. 218215 Ingham Circuit Court LC No. 98-073779-FC

Before: Kelly, P.J., and Whitbeck and Collins, JJ.

PER CURIAM.

In these consolidated cases, defendants Cypress Lockett and Earl Kelley appeal as of right from their convictions for shooting Debbie Miller and Ramone Soto to death and for shooting Kelly Ferris, who survived. After a joint trial, the jury convicted Kelley of two counts of first-degree murder,[1] one count of assault with intent to commit murder,[2] possession of a firearm during the commission of a felony,[3] and conspiracy to commit murder.[4] The jury convicted

[1] MCL 750.316; MSA 28.548.

[2] MCL 750.83; MSA 28.278.

[3] MCL 750.227b(1); MSA 28.424(2)(1).

[4] MCL 750.157a; MSA 28.354(1).

Lockett of conspiracy to commit murder.[5] The trial court sentenced Lockett and Kelley to life imprisonment without the possibility of parole. We affirm.

I. Basic Facts And Procedural History

The record reveals that, in May 1998, Lockett "fronted" Efrain Abrego with crack cocaine, allowing him to repay her later. Abrego did not pay the debt on time, however, and Lockett sent Kelley and Shawn Brown to collect the money Abrego owed. Kelley and Brown chased Abrego and beat him with a motorcycle chain, putting him into a brief coma and leaving him permanently blind. Apparently, this beating was so severe Kelley thought that they had killed Abrego.

Debbie Miller and Kelly Ferris, who had been with Abrego, witnessed the two men chase him. Miller reportedly told Betty Bates, one of Lockett's friends, that Abrego was dying and that her friends were "monsters." Bates passed Miller's comments along to Lockett and Kelley, who were concerned that Miller would tell the police about their involvement in the beating. As a result, Bates testified, she arranged a meeting between Miller, Lockett, and Kelley so that they could discuss the matter and determine whether Miller would talk to the police; evidently, this meeting was to take place in a car. When Bates approached Miller, she reportedly stated, "I'm afraid of Earl [Kelley]. I'm not going to get into the car." Nevertheless, Miller eventually allowed Lockett and Kelley to get into her car, where she told them that she had not seen the assault on Abrego. After the conversation, Lockett and Kelley told Bates that they would have to kill Miller; Bates thought, erroneously, that they were merely joking. Other witnesses who testified at trial confirmed that Lockett and Kelley continued to make remarks about killing Miller and Ferris because the women were potential witnesses to the assault on Abrego.

Lockett and Kelley followed up these threats with action. Betty Brown, Shawn Brown's mother, testified that Lockett sent her son to buy a file in order to remove the serial numbers from a gun. Bates also noted that Lockett directed her to buy garden gloves, which Lockett and Kelley wore when filing the serial numbers off the gun. Witnesses recounted that Betty Brown expressed a willingness to kill Miller and Ferris in order to protect her son from getting into trouble over the assault, but withdrew from the plan when she learned that a young child was in the apartment where the shooting was planned to take place. Betty Brown admitted that she had initially volunteered to commit the murders, but claimed that it was not to protect her son.

On May 17, 1998, a number of people searched for Miller and Ferris, including Betty and Shawn Brown, Bianca Bailey, Bates, and both defendants, in two separate cars. During this search, Betty Brown likely gave the gun to Kelley. After looking for the women in a number of different places, the search party found out that Miller was at Ferris' apartment. When the group went there, Kelley and Shawn Brown entered Ferris' apartment. The two men returned a short time later and Kelley and said something to the effect of, "It's over; let's go" or "it's been taken care of." Kelley also stated that the gun had jammed when he tried to shoot Ferris a second time. Bates reported that Brown said that it "felt good" to shoot Miller and that he was "glad that bitch

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[5] MCL 750.157a; MSA 28.354(1).

is dead." There was conflicting evidence concerning whether Lockett ever asked if anyone was dead. The next day, Lockett and Kelley learned that Ferris had survived and, not surprisingly, they went to Georgia.

Ferris testified at trial and stated that Shawn Brown and Kelley came to her door and that Brown gave her the keys to her car, which he had previously taken without permission. Kelley then walked into the bedroom, said, "What's up Ramone?" and then shot Ramone Soto. Ferris then ran toward Kelley, who shot her in the neck before he shot Miller. Ferris went into the bathroom, heard a clicking noise, then a door close, and then she called 911.

When the police arrived at the scene, they found Ferris outside the apartment, bloody and hysterical. The police also found Miller, lying on a sofa, dead from three gunshots to the head. The police found the third victim, Soto, in bed, with a close-range gunshot to the face. Soto's three-year-old son was also in the bedroom, unharmed. Ferris was able to identify both Kelley and Brown for the police from separate photo arrays and also identified Kelley in a physical lineup. She knew Brown by name and stated of Kelley, "This guy looks familiar to me because I think he shot us."

At trial, Lockett denied that she conspired to commit murder and denied knowing that a killing would occur. Kelley did not testify.

II. Jury Instructions

A. Standard Of Review

Lockett argues that the trial court erred by instructing the jury on the elements of conspiracy to commit murder without specifying whether the instruction was relevant to first-degree murder, second-degree murder, or both. As a result, she claims, there is no way to determine whether the jury rendered a unanimous verdict in her case.

Lockett failed to preserve this issue by objecting at trial.[6] We review unpreserved issues for plain error, i.e., an error that is clear or obvious.[7] To merit reversing a criminal conviction on the basis of plain error, a defendant must demonstrate actual innocence or that "the error seriously affected the fairness, integrity, or public reputation of judicial proceedings."[8]

B. Absence Of Plain Error

A criminal defendant has the right to a unanimous verdict by a jury.[9] A number of this Court's opinions have expressed concern that if a case contains evidence, multiple elements of which could independently justify a criminal conviction, the trial court must clearly instruct the

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[6] *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996).

[7] *People v Carines*, 460 Mich 750, 752-753, 763; 597 NW2d 130 (1999).

[8] *Id*. at 774.

[9] See *People v Cooks*, 446 Mich 503, 510-511; 521 NW2d 275 (1994).

jury to agree on the same set of facts to return the ultimate decision on guilt or innocence.[10] This unanimity problem often occurs in what is sometimes called a "multiple acts" or "separate acts" case, in which the prosecutor introduces evidence of more than one criminal act, but only charges that there was a single crime.[11]

This case presents a slight variation on this scenario. Rather than involving evidence of multiple acts to support a single charge, this case involves a single alleged act, the conspiracy to commit murder. Lockett claims the prosecutor attempted to prove this conspiracy by using multiple *theories* of criminal responsibility based on a single set of evidence. In other words, according to Lockett, the prosecutor used the same evidence to prove that there was a conspiracy to commit murder, but left it to the jury to determine whether that was first-degree or second-degree murder, even though the law does not recognize conspiracy to commit second-degree murder as a crime. As a result, under Lockett's logic, we should not be certain that all the jurors agreed that she conspired to commit first-degree murder.

We agree with Locket to a limited extent. The crime of conspiracy to commit second-degree murder does not exist for quite logical reasons.[12] Unlike first-degree murder, second-degree murder does not include premeditation as an element.[13] Conspiracy, however, necessarily involves a prior agreement or plan to commit the killing.[14] As the trial court instructed the jury, there must be evidence that the defendant "and someone else knowingly agreed to commit murder." Quite simply, a person cannot *plan* to commit an *unplanned* murder. Thus, the crime of conspiracy to commit second-degree murder is not only legally invalid, it is logically absurd.

If the jury convicted Lockett of conspiring to commit second-degree murder, we would agree that that error would merit reversing her conviction because it is legally impossible to be guilty of conspiracy to commit second-degree murder; Lockett would be actually innocent of this fictitious crime.[15] However, after reading the jury instructions as a whole, we are confident that the trial court conveyed the law to the jury in a way that clearly indicated that the individual jurors all had to find that she conspired to commit a single act of first-degree murder.[16]

For instance, the trial court explained the elements of first- and second-degree murder at length. The instruction for first-degree murder that the trial court read emphasized that the jury had to find that the specific intent to "kill was premeditated, and that is, thought out beforehand." Conspicuously absent from the trial court's instruction on second-degree murder was any

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[10] See, e.g., *People v Quinn*, 219 Mich App 571, 576; 557 NW2d 151 (1996); *People v Yarger*, 193 Mich App 532, 536-537; 485 NW2d 119 (1992).

[11] See *People v Lynn*, 223 Mich App 364, 367, n1; 566 NW2d 45 (1997).

[12] See *People v Hammond*, 187 Mich App 105, 107-109; 466 NW2d 335 (1991).

[13] *Id*. at 108.

[14] *Id*.

[15] *Carines*, *supra* at 774.

[16] See *People v Caulley*, 197 Mich App 177, 184; 494 NW2d 853 (1992).

language discussing premeditation or planning. A reasonable juror would have been able to listen to these instructions, including the trial court's explicit differentiation of second-degree murder as a lesser offense, and determine that only first-degree murder required planning as an element.

Only moments later, the trial court explained that, in order to convict either defendant of conspiracy to commit murder, the jury had to find that Lockett or Kelley "knowingly agreed to commit murder." The only logical inference from these instructions, in light of the immediately preceding definitions of the different degrees of murder, is that the trial court was referring to first-degree murder, the only degree of the crime involving premeditation. Certainly, had the trial court specifically stated that the conspiracy charge related only to an agreement to commit first-degree murder, it would have conveyed this information more clearly. However, the trial court's instructions as a whole adequately informed the jury about its factfinding task.[17]

Moreover, the trial court informed the jury that the verdict had to "be unanimous" and that it was "necessary that each of you [jurors] agree on the verdict." Like this case, *Lynn*, *supra*, involved multiple theories submitted to the jury to prove a single crime.[18] In *Lynn*, we held that the "general jury unanimity instruction" the trial court issued to the jury was adequate.[19] The general unanimity instruction the trial court issued in this case also adequately ensured that each member of the jury agreed that Lockett was guilty of conspiracy to commit first-degree murder of *either* Soto *or* Miller. In other words, the trial court's general unanimity instructions left no room for the jurors to disagree about the intended victim of the conspiracy. Thus, Lockett has failed to demonstrate plain error affecting her substantial rights.

III. Hearsay

A. Standard Of Review

Kelley argues that the trial court erred by allowing Bates to testify that Miller said she was afraid of him when Bates was arranging the meeting between Lockett, Kelley, and Miller. Kelley argues that Bates' testimony recounting Miller's out-of-court statement was hearsay and inadmissible. We review the trial court's decision to admit evidence for an abuse of discretion.[20]

B. State Of Mind Exception To The Rule Against Hearsay

MRE 801(c) defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Pursuant to MRE 802, hearsay is inadmissible unless specifically permitted under the rules of evidence. The prosecutor argues that the statement was not offered to prove the truth of the

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[17] *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994).

[18] See *id*. at 367, n1.

[19] *Id*. at 368.

[20] *People v Howard*, 226 Mich App 528, 551; 575 NW2d 16 (1997).

matter asserted. Rather, it was merely offered to provide the context of the events leading up to the shootings, including Miller's fear of Kelley.

Although Bates' testimony followed the classic pattern of repeating an out-of-court statement that is the hallmark of hearsay testimony, MRE 803(3) provides that "[a] statement of the declarant's then existing state of mind" may not be excluded as hearsay. We agree with Kelley's argument that hearsay statements of the declarant's state of mind are admissible only if the declarant's state of mind is relevant in a case.[21] However, relevance is a somewhat loose concept. Testimony need only have "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[22] To be relevant, a fact need not be the linchpin in the prosecutor's case, just relevant to that theory.[23]

At some level, this testimony is connected with the prosecutor's theory that Miller's information about Kelley was the motive for her murder. The problem with this evidence is that, even if Miller did accurately state that she was afraid of Kelley, it did not have even the most distant tendency to prove that Kelley conspired to kill Miller, killed her, or possessed a firearm while committing a felony. Those events all occurred after the statement. Certainly, this evidence did come from the overall "story" of this crime and was, thus, related. However, not every event during the days preceding these brutal events were relevant to Kelley's prosecution for specific violations of the criminal law. For example, testimony about what Kelley ate for dinner before killing Miller, though perhaps interesting, would be irrelevant despite occurring in this same general time frame surrounding the murder because it did not contribute to determining whether, as a factual matter, Kelley committed the crimes charged. Accordingly, we conclude that the trial court abused its discretion in admitting this evidence.

Nevertheless, according to *People v Lukity*,[24] a trial court's error in admitting evidence is subject to the harmless error rule for criminal cases announced in MCL 769.26; MSA 28.1096 and MRE 103(a). In order for a preserved nonconstitutional error to merit reversing a criminal conviction, a defendant must prove that the error resulted in a miscarriage of justice "after an examination of the whole matter," meaning that the error was so prejudicial it undermined the verdict's reliability.[25] "In other words, the effect of the error is evaluated by assessing it in the context of the untainted evidence to determine whether it is more probable than not that a different outcome would have resulted without the error."[26] In this case, there was ample untainted evidence to prove that Kelley murdered Miller, including his statements outside the apartment after the killings and Ferris' identification of Kelley as the person who "shot us,"

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[21] *People v White*, 401 Mich 482, 502-503; 257 NW2d 912 (1977); see also MRE 402.

[22] MRE 401.

[23] See *People v King*, 215 Mich App 301, 309; 544 NW2d 765 (1996).

[24] *People v Lukity*, 460 Mich 484, 491-492; 596 NW2d 607 (1999).

[25] *Id*. at 495.

[26] *Id*.

meaning shot her, Miller, and Soto. Thus, the trial court's error in admitting this evidence was harmless.

IV. Duty To Warn Instruction

A. Standard Of Review

Kelley also argues that the trial court erred by failing to issue a requested instruction. To the extent that the trial court's decision rested on its appreciation of the facts of this case, we review the decision for an abuse of discretion.[27]

B. The Trial Court's Instructions

Kelley asked the trial court to instruct the jury that, if he were aware of threats or plans made to kill the victims, he had no duty to warn the victims or inform the police of any threats to the victims. This instruction evidently related to his defense theory presented during trial, namely that Brown shot the three victims while he was merely in the apartment at the time and failed to stop the shooting or call the police. The trial court agreed with the prosecutor that this "no duty to warn" instruction was not necessary because the standard jury instructions informed the jury that merely being present at the scene of a crime is insufficient evidence to convict. The trial court's statement suggests that it merely believed that the proposed jury instruction duplicated another instruction it intended to issue, not that the facts of the case made the instruction unnecessary.[28] However, even when instructing the jury that mere presence was insufficient to convict a defendant of a crime, the trial court specifically limited the instruction to the charges against Lockett.

A trial court has the duty to "instruct the jury as to the law applicable to the case . . . ."[29] "Jury instructions must include all the elements of the charged offense and must not exclude material issues, defenses, and theories if there is evidence to support them."[30] This duty is not overly broad. The law applies to the case as the facts dictate because a "trial court need not give requested instructions that the facts do not warrant."[31] "No error results from the omission of an instruction if the charge as a whole covers the substance of the omitted instruction."[32]

We would not have found error if the trial court had extended the mere presence instruction to the charges against Kelley because it was somewhat connected to a defense

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[27] See *People v Ho*, 231 Mich App 178, 189; 585 NW2d 357 (1998).

[28] See CJI2d 8.5 ("Even if the defendant knew that the alleged crime was planned or was being committed, the mere fact that [he/she] was present when it was committed is not enough to prove that [he/she] assisted in committing it.").

[29] MCL 768.29; MSA 28.1052.

[30] *People v Harris*, 190 Mich App 652, 664; 476 NW2d 767 (1991).

[31] *People v Piper*, 223 Mich App 642, 648; 567 NW2d 483 (1997).

[32] *Harris*, *supra*.

theory.[33] We can likewise assume without deciding that Kelley's proposed instruction was legally accurate and applied to this case, regardless of whether it duplicated the mere presence instruction. Nevertheless, as the prosecutor points out, in each instruction the trial court read to the jury for the charges against Kelley, the trial court made the clear and unequivocal point that the jury had to find that Kelley committed specific conduct in order to be convicted.

For example, in the instruction on the first-degree murder charge for Soto's death, the trial court told the jury that the prosecutor had to prove beyond a reasonable doubt, meaning that the jury had to find, that "defendants caused the death of Ramone Soto. That is, that Ramone Soto died as a result of gunshot wounds inflicted by the defendants." In regard to the lesser second-degree murder charge for Soto, the trial court stated that it was a specific intent crime, which meant "that the prosecution must prove *not only that the defendants did certain acts* but that they did the acts with the intent to cause a particular result."[34] Again, when instructing the jury on first-degree murder relating to Miller's death, the trial court said that the prosecutor had to prove beyond a reasonable doubt that "defendants caused the death of Debbie Miller . . . . [and that she] died as a result of gunshot wounds inflicted by the defendants." The rest of the instructions follow this pattern of specifying what particular conduct the jury had to find Kelley committed before it could convict him. These instructions did not pose a risk that the jury could convict Kelley merely for being around others who were committing crimes. Because these other instructions "fairly presented the issues to be tried and sufficiently protected [Kelley's] rights," we see no error requiring reversal.[35]

Affirmed in both cases.

/s/ William C. Whitbeck
/s/ Jeffrey G. Collins

I concur in result only.

/s/ Michael J. Kelly

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[33] See *Harris*, *supra*.

[34] Emphasis supplied.

[35] See *Daniel*, *supra*.