

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

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UNPUBLISHED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.

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

I concur in the lead opinion's reasoning and result concerning the trial court's refusal to instruct the jury pursuant to CJI2d 16.15 and the various evidentiary issues defendant Barney James raises in this appeal. I, too, would affirm on those grounds. However, I respectfully dissent from the lead opinion's conclusion that the trial court's conspiracy instruction mandates reversing James' conspiracy conviction.

As the lead opinion points out, Michigan's trial courts have an independent obligation to instruct the jury on the law before the jury retires to deliberate. MCL 768.29; MSA 28.1052; see also MCR 6.414(F). At their best, jury instructions are clear and concise, explaining the law in an understandable manner that helps define the difficult factual matters that the jury must decide. See *People v Woods*, 416 Mich 581, 626-629; 331 NW2d 707 (1982). The Michigan State Bar Standing Committee on Standard Criminal Jury Instructions has attempted to make this often complex instructional duty easier by drafting model instructions, a project the Michigan Supreme Court has encouraged without formal endorsement for almost twenty-five years. See Administrative Order 1977-1; *People v Vaughn*, 447 Mich 217, 235, n 13; 524 NW2d 217 (1994) (Brickley, J.), overruled on other grounds by *People v Carines*, 460 Mich 750, 766-767; 597 NW2d 130 (1999).

In general, I think it fair to say that in most instances, the standard criminal jury instructions are legally correct and likely accomplish their goal of increasing juror comprehension of the law through their plain language. There have been a few instances in which the standard criminal jury instructions have been erroneous and so the courts have disapproved of them. See, e.g., *People v Petrella*, 424 Mich 221, 227, 276; 380 NW2d 11 (1985); *People v Legg*, 197 Mich App 131, 133-134; 494 NW2d 797 (1992); *People v Moore*,

176 Mich App 555, 557-565; 440 NW2d 67 (1989) (Hammond, J. concurring); see also *People v Dykhouse*, 418 Mich 488, 511, n 15; 345 NW2d 150 (1984) (Cavanagh, J., dissenting).

In my view, however, this case does not involve an instruction that is legally erroneous or otherwise misleading, both of which are factors that would support reversing a criminal conviction. See *People v Morey*, 230 Mich App 152, 160-162, 165; 583 NW2d 907 (1998), aff'd 461 Mich 325 (1999); *People v Graham*, 219 Mich App 707, 709-711; 558 NW2d 2 (1996); see generally *People v Burden*, 141 Mich App 160, 165-166; 366 NW2d 23 (1985). Rather, CJI2d 10.1, when read with CJI2d 102. and 10.3, accurately states the law of conspiracy. See *People v Barajas*, 198 Mich App 551, 553-554; 499 NW2d 396 (1993) (relying on CJI2d 10.1 to define a conspiracy); see also *People v Atley*, 392 Mich 298, 310-311; 220 NW2d 465 (1974) (outlining the elements of conspiracy). Although the instruction relies on a separate definition of the offense the defendant allegedly conspired to commit, the jurors heard every piece of information about the law of conspiracy necessary to make a factual determination within the bounds of the law.

In my view, courts can assume that, with this proper information, the jury in fact made a decision within the legal limits. See generally *People v Burkard*, 374 Mich 430, 438; 132 NW2d 106 (1965). Perfection, even if achievable, is not the standard appellate courts apply when reviewing the instructions a trial court issued to the jury. See *People v Johnson*, 164 Mich App 634, 642; 417 NW2d 117 (1987). While there are any number of things that the trial court here could have done to improve the conspiracy instructions it issued to the jury, trial courts must issue instructions that are fair and accurate. *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994). I regard the instructions in this case as being fair and accurate. Therefore, I would hold that there was no error requiring reversal of James' conviction for conspiracy.

The lead opinion states that it does not mean to imply that juries are incapable of understanding less than perfect instructions and are correctly applying the law to the facts in a given case. Respectfully, I suggest that it is certainly possible to draw just such an implication from the balance of the opinion. Contrary to such an implication, I believe that jurors will be able to piece together disparate parts of the final instructions issued before deliberations in order to understand the law. While the job may be a difficult one in any particular case, we not only assume that jurors are up for this task, we rely on them to exercise the logic and skills that are necessary to understand the law on a routine basis. In fact, the judicial system trusts jurors to make extremely difficult decisions in even the most complex cases involving technical problems spanning diverse fields such as engineering, medicine, and commercial finance.

Further, to carry out their duties, jurors must be able to look at the evidence presented over the course of a trial and consider specific pieces of the evidence together to make a complete picture of the facts in a particular case. This requires jurors to be able to recall information presented sometimes even months before they are released to deliberate. Although criminal law can be every bit as complex as other technical fields that may challenge jurors to think and understand the facts of a case, it is a form of hubris for courts and attorneys to believe that criminal law is so much more complex than these other fields that a jury could not understand an instruction that was somewhat less than perfect. It is not beyond a reasonable juror's ability to hear criminal law instructions, think about them logically, and then apply them,

just as that juror would be able to apply an engineering expert's testimony to a product liability case. In fact, juries benefit from the fact that instructions are read as a whole, rather than being scattered across several days of a trial, as evidence is often presented. Further, instructions are quite frequently the very last thing the jurors hear before they commence deliberating. Consequently, I have every reason to believe that when a trial court issues CJI2d 10.1 in a murder case, 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.

While I do not share in the lead opinion's decision to reverse the conspiracy conviction in this case, I agree without reservation that this case presents an opportunity to urge further improvement in the standard jury instructions for criminal cases and that this Court should not ignore such an opportunity. Although I believe that CJI2d 10.1 is minimally adequate, I concur in the lead opinion's implicit conclusion that it lacks clarity. I strongly encourage the Standing Committee on Standard Criminal Jury Instructions to revisit CJI2d 10.1 to determine if it can be drafted in a clearer manner. In particular, I would support a new use note to the very first sentence in the instruction informing the trial court that it must specify the degree of *any* crime underlying the conspiracy in *every* case in which the underlying crime is divided into degrees.

/s/ William C. Whitbeck