

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT RILEY,

Defendant-Appellant.

UNPUBLISHED

April 5, 2002

No. 211368

Recorder's Court

LC No. 97-005401

ON REMAND

Before: Cavanagh, P.J., and Holbrook, Jr. and White, JJ.

WHITE, J. (*concurring*).

I agree that if there was insufficient evidence of murder at the close of the prosecution's proofs, trial counsel's failure to move for a directed verdict was ineffective and prejudicial, and defendant's felony-murder conviction must be reversed. I write separately because I do not agree that there was insufficient evidence of defendant's participation in the murder without McKinney's testimony.¹

The prosecution's evidence was sufficient to withstand a motion for directed verdict. The jury was not obliged to accept defendant's statement that he did not participate in the murder, or know of Ware's plan to murder the victim. The jury could have concluded based on defendant's bringing Ware to the victim's apartment, his excluding the victim's neighbor from the apartment while Ware was strangling him, his participation in the larceny, and the victim's size and strength in comparison to defendant and co-defendant, that defendant aided and abetted Ware in the murder.

¹ I concur in the disposition despite my conclusion that the prosecution presented sufficient evidence because I conclude that the insufficiency of the evidence without McKinney's testimony has been established by the law of the case. In this Court's earlier opinion, in which I did not participate, the Court determined that there was insufficient evidence of murder without McKinney's testimony. The prosecution did not seek to challenge that ruling on appeal, but argued that defendant waived the hearsay objection by presenting McKinney's testimony. The Supreme Court agreed, and reversed and remanded on that basis. While the Supreme Court has not addressed the sufficiency of the evidence without McKinney's testimony, this Court has, and that ruling has not been disturbed.

I would affirm.

/s/ Helene N. White