

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UNPUBLISHED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.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317; MSA 28.548, two counts of assault with intent to commit murder, MCL 750.83; MSA 28.278, two counts of assault with intent to commit great bodily harm, MCL 750.84; MSA 28.279, conspiracy to commit murder, MCL 750.157(a); MSA 28.354(1), and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to concurrent terms of thirty to eighty years on the murder conviction, twenty to sixty years for each assault with intent to commit murder conviction, six to ten years for each assault with intent to commit great bodily harm conviction, and life imprisonment for the conspiracy to commit murder conviction, to be served consecutive to the mandatory two-year sentence for the felony-firearm conviction. Defendant now appeals as of right. We affirm in part, reverse in part, and remand for further action consistent with this opinion.

I

Defendant first argues that the trial court's conspiracy to commit murder instruction was erroneous because it failed to advise the jury that it must find defendant guilty of conspiracy to commit first-degree murder, and failed to define the requisite intent necessary for the offense. We agree.

A trial court must instruct the jury concerning the law applicable to the case and must fully and fairly present the case to the jury in an understandable manner. MCL 768.29; MSA 28.1052; *People v Mills*, 450 Mich 61, 80; 537 NW2d 909, modified on other grounds 450 Mich 1212; 539 NW2d 504 (1995); *People v Daoust*, 228 Mich App 1, 14; 577 NW2d 179 (1998). Jury instructions should be considered in their entirety, rather than extracted piecemeal, to

determine whether there was error requiring reversal. *People v Dumas*, 454 Mich 390, 396; 563 NW2d 31 (1997). Even if somewhat imperfect, error will not be found if the instructions fairly present the issues to be tried and sufficiently protect the defendant's rights. *Daoust, supra*.

At the conclusion of presentation of the proofs, the trial court instructed the jury on both first-degree murder and the lesser included offense of second-degree murder under count one. Thereafter, the trial court instructed the jury on conspiracy to commit murder as follows:

The Defendant is charged with the crime of conspiracy to commit murder in count six. Anyone who knowingly agrees with someone else to commit murder is guilty of conspiracy.

To prove the Defendant's guilt, the Prosecutor must prove each of the following elements beyond a reasonable doubt:

First, that the Defendant and someone else knowingly agreed to commit murder.

Second, that the Defendant specifically intended to commit or helped commit that crime.

Third, that this agreement took place on or about August 19, 1996.

If there was a conspiracy, you must decide whether the Defendant was a member of it. You may only consider what the Defendant did and said during the time the conspiracy took place. A finding that the Defendant was merely with other people who were members of a conspiracy is not enough by itself to prove that the Defendant was a member.

In addition, the facts [sic] that a person did an act that furthered the purpose of an alleged conspiracy is not enough by itself to prove that that person was a member of the conspiracy. It is not necessary for all the members to know each other, or know all the details of how the crime will be committed, but it must be shown beyond a reasonable doubt that the Defendant agreed to commit the crime and intended to commit or helped commit it.

The Defendant is not responsible for the acts of other members of the conspiracy, unless those acts are a part of the agreement or further the purposes of the agreement. If the Defendant agreed to commit a completely different crime, he is not guilty of conspiracy to commit murder. A person who joins a conspiracy after it has already been formed is only responsible for what he agreed to when joining, not for any agreement made by the conspiracy before he joined.

Members of a conspiracy are not responsible for what other members do or say after the conspiracy ends.

Defendant claims that the foregoing instruction was misleading because it failed to distinguish for the jury between conspiracy to commit first- and second-degree murder and, in light of the misleading instruction, there was no way to determine whether the jury found defendant guilty of conspiracy to commit first- or second-degree murder. Defendant argues that because the trial court did not instruct the jury that conspiracy to commit murder requires the prosecution to show that defendant had a specific intent to commit premeditated murder at the time the agreement was made, and that conspiracy to commit second-degree murder is not an existing offense, the jury likely did not consider the requisite element of intent in reaching its verdict.

A conspiracy has been defined as “a particular partnership in criminal purposes.” *People v Justice (After Remand)*, 454 Mich 334, 345; 562 NW2d 652 (1997), quoting *People v Atley*, 392 Mich 298, 310; 220 NW2d 465 (1974).¹ Under such a partnership, “two or more individuals must have voluntarily agreed to effectuate the commission of a criminal offense.” *Justice, supra* at 345. The gist of the offense of conspiracy lies in the unlawful agreement and, thus, it is critical to establish that the individuals specifically intended to combine to pursue the criminal objective of their agreement. *Id.* The conspiracy statute is a general one and makes no reference to specific underlying offenses. See MCL 750.157a; MSA 28.354(1). Thus, as part of the conspiracy instruction, the trial court must instruct the jury on the underlying offense the accused is alleged to have conspired to commit unless it was previously defined in the instructions. See CJI2d 10.1(6).

This Court has previously ruled that the offense of conspiracy to commit second-degree murder does not logically exist:

Criminal conspiracy is a specific intent crime which arises from a mutual agreement between two or more persons to do or accomplish a crime or unlawful act. The gist of a criminal conspiracy is the specific, mutual agreement to perform the crime in question; the conspiracy statute provides punishment for the actual advance planning and agreement to perform the substantive criminal acts. However, second-degree murder is distinguishable from first-degree murder in that it does not require premeditation and in fact may not require a specific intent to kill.

¹ The statutory provision proscribing conspiracy simply states the punishment for conspiring to commit the substantive offense:

Any person who conspires together with 1 or more persons to commit an offense prohibited by law, or to commit a legal act in an illegal manner is guilty of the crime of conspiracy punishable as provided herein:

. . . [T]he person convicted under this section shall be punished by a penalty equal to that which could be imposed if he had been convicted of committing the crime he conspired to commit and in the discretion of the court an additional penalty of a fine of \$10,000.00 may be imposed. [MCL 750.157a; MSA 28.354(1).]

In *Hamp*, *supra*, p 103, the Court reasoned:

“Since prior ‘planning’ and ‘agreement’ are necessary, mandatory requisite elements of the crime of conspiracy, we find it analytically consistent to ‘plan’ to commit first-degree murder but logically inconsistent to ‘plan’ to commit second-degree murder. To prove a conspiracy to commit murder, it must be established that each of the conspirators have [sic] the intent required for murder and, to establish that intent, there must be foreknowledge of that intent. Foreknowledge and plan are compatible with the substantive crime of first-degree murder as both the crime of conspiracy and the crime of first-degree murder share elements of deliberation and premeditation. Prior planning denotes premeditation and deliberation. The elements of conspiracy, conversely, are incompatible and inconsistent with second-degree murder. One does not ‘plan’ to commit an ‘unplanned’ substantive crime. It is not ‘absence’ of the elements but the ‘inconsistency’ of the elements which lead [sic] us to conclude that one conspires to commit first-degree murder but not second-degree murder.”

Because of this logical inconsistency, we conclude as a matter of law that there is no crime of conspiracy to commit second-degree murder. [*People v Hammond*, 187 Mich App 105, 107; 466 NW2d 335 (1991), citing *People v Gilbert*, 183 Mich App 741, 749-750; 455 NW2d 731 (1990).]

See also *People v Buck*, 197 Mich App 404, 409; 496 NW2d 321 (1992), rev’d in part on other grounds 444 Mich 853; 508 NW2d 502 (1993).

Thus, because conspiracy to commit second-degree murder is not an offense under Michigan law, for the following reasons we find that the conspiracy to commit murder instruction provided to the jury was not an accurate statement of the law.

First, although the trial court’s conspiracy instruction essentially mirrored the language provided in CJI2d 10.1-10.3, the trial court did not reiterate the substantive offense to which the conspiracy related (first-degree murder) and, instead, simply noted that it had previously instructed the jury on the elements of first- and second-degree murder. Because conspiracy to commit second-degree murder does not exist under Michigan law, the trial court should have but did not make it clear to the jury that in order to find the defendant guilty of conspiracy to commit murder they must find that the conspiracy was to commit first-degree murder, i.e., that the conspiracy involved premeditation and deliberation.

In this unique circumstance, the use note to CJI2d 10.1, advising the trial court to define the underlying crime in conjunction with the conspiracy instruction only when the crime charged has not been previously defined, does not apply. Since the jury was instructed on the elements of both first- and second-degree murder and because conspiracy to commit second-degree murder is not an existing offense, the trial court should have advised the jury in some fashion that only the elements of first-degree murder applied to the conspiracy charge. The trial court’s failure to distinguish between the degrees of murder in relation to the conspiracy charge resulted in a misleading and inadequate instruction.

Second, we are mindful that any doubts regarding the particular offense of which a defendant has been convicted should be resolved in favor of the accused. See *Dumas*, *supra* at 402; *People v McNary*, 43 Mich App 134, 142-143; 203 NW2d 919 (1974), rev'd in part on other grounds 388 Mich 799; 201 NW2d 845 (1972); *People v Smith*, 14 Mich App 502, 505; 165 NW2d 640 (1968), aff'd 383 Mich 576; 177 NW2d 164 (1970). Here, defendant was convicted of both conspiracy to commit first degree murder and the lesser offense of second-degree murder. By convicting defendant of second-degree murder, the jury ostensibly found that defendant did not possess the requisite premeditation and deliberation necessary for first-degree murder, a finding inconsistent with the jury's verdict of guilty on the conspiracy charge. On the existing record, then, we are led to the conclusion that the verdict itself suggests that the jury did not clearly understand that the instruction on conspiracy to commit murder was the equivalent of an instruction on conspiracy to commit first-degree murder.

By this finding, we do not mean to imply that juries are incapable of understanding less than perfect instructions and correctly applying the law to the facts in a given case. Rather, we emphasize that in this case the jury's findings, that defendant had a premeditated intent for purposes of the conspiracy charge (the only intent possible) but lacked a premeditated intent in the commission of the murder, are inconsistent and irreconcilable, and can only be the product of insufficient understanding of the conspiracy instruction.

We further find that the preserved, instructional error in this case was not harmless. This Court will not set aside a verdict on the basis of instructional error or misdirection of the jury unless such error resulted in a miscarriage of justice. MCL 769.26; MSA 28.1096; *Dumas*, *supra* at 408-409. The only question properly before the jury on the conspiracy charge was whether defendant conspired with his co-defendants to commit first-degree murder. Assuming the jury obeyed the instructions to follow the law as it was given by the trial court, see *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998), it is both possible and plausible, particularly in view of its second-degree murder verdict, that the jury convicted defendant of conspiracy to commit second-degree murder. Because the determination whether defendant possessed the requisite mental state for conspiracy to commit murder was a factual question for the jury, and on this point the jury was misguided and insufficiently instructed, we are unable to conclude that the instructional error was harmless. Accordingly, defendant's conspiracy to commit murder conviction is reversed.

II

Defendant next argues that the trial court erred in refusing to instruct the jury on CJI2d 16.15. We disagree.

At trial, defendant requested that the trial court instruct the jury in accordance with CJI2d 16.15 which instructs that the act of the defendant must be the cause of death.² The trial court

² CJI2d 16.15 states as follows:

[There may be more than one cause of death.] It is not enough that the defendant's act made it possible for the death to occur. In order to find that the death of [name deceased] was caused by the defendant, you must find beyond a

denied the request, noting that the instruction was not intended for use in cases involving aiding and abetting, concert of action, or conspiracy. Thereafter, the trial court instructed the jury on the murder charge as follows:

The Defendant in count one is charged with the offense of first[-]degree premeditated murder. The statute defining that offense, insofar as the same is material, reads: A person who commits any of the following is guilty of first[-]degree murder: Murder perpetrated by means of poison, lying in wait, or any other willful, deliberate, and premeditated killing.

In count one the Defendant is charged with the offense of first[-]degree premeditated murder. To prove this charge, the prosecution must prove each of the following elements beyond a reasonable doubt:

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

Second, that the Defendant intended to kill James White.

Third, that this intent to kill was premeditated. That is, thought out before hand.

Fourth, that the killing was deliberate, which means that the Defendant considered the pros and cons of the killing, and thought about and chose his actions before he did it. There must have been real and substantial reflection for along enough to give a reasonable person a chance to think twice about the intent to kill. The law does not say how much time is needed. It is for you to decide if enough time passed under the circumstances of this case. The killing cannot be the result of a sudden impulse without thought or reflection.

Fifth, that the killing was not justified, excused or done under circumstances that reduce it to a lesser crime.

Under the law of the State of Michigan, where the offense of first[-]degree murder is charged, the Court must charge the jury on the offense of common law murder, statutorily classified as murder in the second degree. The second[-]degree murder statute, insofar as the same is material, reads: All other kinds of murder shall be murder of the second degree.

You may also consider the lesser charge of second[-]degree murder, murder in the second degree. To prove this charge, the Prosecutor must prove each of the following elements beyond a reasonable doubt:

reasonable doubt that the death was the natural or necessary result of the defendant's act.

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

Second, that the Defendant had one of these three states of mind: He intended to kill, or he intended to do great bodily harm to James White, or he knowingly created a very high risk of death or great bodily harm, knowing that death or such harm would be the likely result of his actions.

Third, that the killing was not justified, excused, or done under circumstances that reduce it to a lesser crime.

The difference between first[-]degree premeditated murder and second[-]degree murder is that for first[-]degree premeditated murder, the Defendant must have actually intended to kill, and have premeditated the victim's death, and have deliberated or substantially reflected upon the killing beforehand.

Such premeditation and deliberation is not required for second[-]degree murder. For second[-]degree murder the Defendant must have actually intended to kill, or have intended to do great bodily harm, or have created a very high risk of death or great bodily harm, with knowledge that death or great bodily harm was the probable result.

Defendant argues that the italicized language in the first element of the first- and second-degree murder instruction was improper because by instructing the jury that defendant could be found guilty of murder if the jury found that James White died as a result of a gunshot, without further instructing that it must find defendant actually fired the fatal shot, the trial court relieved the prosecution of proving an essential element of the offense, that defendant caused James White's death. Defendant claims that the trial court's instruction effectively shifted the burden to defendant to prove that someone other than defendant fired the shot that killed James White. Defendant contends that an instruction in accordance with CJI2d 16.15 would have clarified that the jury was required to find that defendant's actions were the actual cause of James White's death in order to find him guilty of murder.

After a thorough review of the record, we agree with the trial court that CJI2d 16.15 was not an appropriate instruction under the circumstances. The jury was adequately informed that it must find defendant caused the death of James White in the first element of the murder instruction. Defendant's theory of the case was that he was wrongly accused of shooting James White, that he was misidentified by those witnesses who named him as the perpetrator or placed him at the scene of the crime, and that James White was shot by his uncle, Joseph White.

Defendant did not claim that there was an intervening cause of White's death and, in fact, it was undisputed that James White died as a result of a gunshot wound to the head. Furthermore, there was no evidence introduced at trial to support defendant's theory that Joseph White or someone other than defendant or his co-defendants shot the decedent. While Officer McDowell

of the Detroit Police Department testified that Joseph White disclosed the location of a previously hidden assault rifle, McDowell also testified that Joseph denied shooting the rifle that evening. In addition, though Officer McDowell testified that he believed Joseph White was in possession of the rifle at the time of the shooting and might have shot the rifle on the night in question, he acknowledged there was no evidence to this effect and that his belief was speculative. For this reason, he never placed his opinion in this regard in the incident report. Further, Joseph White testified that he was not in possession of a gun at the time James White was shot.

Finally, Detroit Police Officer Pauch, an expert in firearms identification, testified that none of the sixteen shell casings found at the scene of the shooting matched the rifles in evidence, including the rifle discovered with the help of Joseph White. The defense declined to cross-examine Officer Pauch or offer any evidence to rebut his expert opinion. Thus, the trial court properly denied the request for CJI2d 16:15, since the only evidentiary issue before the jury was whether the fatal shot was fired by defendant or one of his co-defendants, not whether James White died as a result of a gunshot fired by Joseph White, or another, intervening form of homicide.

Moreover, the prosecutor's theory at trial was two-fold: (1) that defendant fired the fatal gunshot killing James White, or (2) if defendant did not fire the fatal shot, he participated in the offense as an aider and abettor. The trial court's 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. On these facts, the trial court was not required to instruct the jury that to find defendant guilty of murder, it must find defendant fired the fatal shot because he could be found guilty of the charged offense as an aider and abettor in the shoot-out even if one of his co-defendants fired the shot that killed James. *People v Brown*, 184 Mich App 567, 571; 459 NW2d 19 (1990); *People v Daniels*, 172 Mich App 374, 381-382; 431 NW2d 846 (1988); *People v Dykes*, 37 Mich App 555, 559; 195 NW2d 14 (1972). We are not convinced that the trial court's murder instruction, particularly on the element of causation, was misleading or inaccurate. See *People v Warren*, 228 Mich App 336, 348; 578 NW2d 692 (1998), lv granted 460 Mich 851; 595 NW2d 858 (1999). When viewed in its entirety, the murder instruction adequately related the issues to the jury and sufficiently protected defendant's rights. *Dumas, supra* at 396; *Daoust, supra* at 14.

III

Lastly, defendant argues that the trial court made a number of erroneous evidentiary rulings. We review a trial court's ruling to admit or exclude evidence for an abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998); *People v Rice (On Remand)*, 235 Mich App 429, 439; 597 NW2d 843 (1999). Upon review of the record, we find no abuse of discretion in the trial court's rulings.

First, we find that evidence pertaining to the alleged firebombing of Reginald Vines' mother's house was irrelevant to the charged offenses against defendant. MRE 402. The alleged firebombing occurred more than one year after the shooting that killed James White and had no bearing on defendant's state of mind at the time of the shooting. Moreover, the alleged perpetrators of the firebombing were not identified or otherwise connected to the shooting in this

case and their conduct over a year after the charged offense was of no relevance to any material issue in this case. Further, defendant was allowed to introduce evidence concerning previous disputes or “bad blood” between himself and his accusers for the purpose of showing bias and motive. Accordingly, we find no abuse of discretion in the trial court’s ruling.

We likewise reject defendant’s argument that the trial court erred in excluding evidence of pending charges against prosecution witnesses arising out of their involvement in the alleged firebombing. Defendant argued for the first time on appeal that the evidence was admissible to show that the witnesses may be susceptible to pressures from the prosecution and may have a personal motive for testifying in a certain manner. Defendant did not argue this basis for admission of the evidence at trial, and did not otherwise demonstrate that the witnesses charged with the firebombing were indeed susceptible to prosecutorial pressures or testifying pursuant to an agreement. An objection based on one ground at trial is insufficient to preserve an appellate attack based on a different ground. *People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778 (1993). Therefore, we deem this argument abandoned. *People v Parcha*, 227 Mich App 236, 248; 575 NW2d 316 (1997).

Defendant next argues that the trial court abused its discretion in excluding evidence that Tyrone Knowles pleaded guilty to firebombing defendant’s mother’s house the day after the shooting and that he was sentenced to five to twenty years in prison for that conviction. However, we agree with the trial court’s ruling that the evidence was inadmissible because the offense did not involve an element of theft, dishonesty, or false statement as required by MRE 609. *Parcha*, *supra* at 241. Accordingly, we find no abuse of discretion.

Lastly, defendant claims that he was “prejudiced by the manner in which the judge responded to the proffered evidence.” However, defendant did not object to any of the alleged improper remarks by the trial court and, thus, has not preserved this issue for appellate review. *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995). In the absence of a timely objection, this Court will only review claims of trial court misconduct to avoid manifest injustice. *Id.*

A trial court has wide discretion and power in the matter of trial conduct. *Id.* Portions of the record should not be taken out of context in order to show trial court bias; rather, the record should be reviewed as a whole. *Id.* A trial court’s conduct pierces the veil of judicial impartiality where its conduct or comments unduly influence the jury and thereby deprive the defendant of a fair and impartial trial. *Id.* After reviewing the challenged comments in the context of the entire record, we conclude that the jury was not unduly influenced and defendant did not suffer manifest injustice by any of the trial court’s remarks. Accordingly, we decline to further review this unpreserved claim. *Paquette*, *supra*.

Affirmed in part, reversed in part, and remanded for further action consistent with this opinion.

We do not retain jurisdiction.

/s/ Kurtis T. Wilder