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| <b>People v Henry</b>                                                                                                                                                                                                            |
| 2012 NY Slip Op 30527(U)                                                                                                                                                                                                         |
| January 23, 2012                                                                                                                                                                                                                 |
| Supreme Court, Kings County                                                                                                                                                                                                      |
| Docket Number: 2241-2009                                                                                                                                                                                                         |
| Judge: Danny K. Chun                                                                                                                                                                                                             |
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS: CRIMINAL TERM PART 19

|                                     |   |
|-------------------------------------|---|
| -----X                              |   |
| THE PEOPLE OF THE STATE OF NEW YORK | : |
|                                     | : |
|                                     | : |
|                                     | : |
| -against-                           | : |
|                                     | : |
| Quinnetta Henry                     | : |
|                                     | : |
| Defendant.                          | : |
|                                     | : |
| -----X                              |   |
| DANNY K. CHUN, J.                   |   |

MOTION TO SET ASIDE  
VERDICT

DECISION AND ORDER

IND. NO. 2241-2009

On December 13, 2011, following a jury trial, the defendant was convicted of Conspiracy in the Fourth Degree, Criminal Facilitation in the Fourth Degree and Criminal Solicitation in the Fourth Degree. The defendant is currently awaiting sentencing.

The defendant now moves pursuant to CPL § 330.30 for an order setting aside the verdict, arguing that (1) the Court erred in instructing the jury that they may find the defendant guilty of conspiracy if she intended to cause serious physical injury to another person, rather than charging specifically the defendant had to have intended to cause serious physical injury to the deceased; and (2) the jury's verdict of acquitting the defendant of murder and manslaughter but finding her guilty for Conspiracy in the Fourth Degree is repugnant.

CPL § 330.30 provides that, after rendition of a verdict of guilty and before sentence, the court may, upon motion of the defendant, set aside the verdict when "[a]ny ground appearing in the record which, if raised upon an appeal from a prospective judgment of conviction, would require a reversal or modification of the judgment as a matter of law by an appellate court." The power granted a trial judge pursuant to CPL § 330.30 is limited to questions of law. *People v.*

*Carter*, 63 NY2d 530, 536 (1984). A question of law includes, but is not limited to, a ruling duly protested by the defendant at the time of such ruling or instruction or any subsequent time when the court had an opportunity to effectively changing the same. CPL § 470.05(2).

The court finds the defendant's contention that the court misinstructed the jury regarding Conspiracy in the Fourth Degree without merit. Penal Law § 105.10(1) states that "[a] person is guilty of Conspiracy in the Fourth Degree when, with intent that conduct constituting a class B or class C felony be performed, he or she agrees with one or more persons to engage in or cause the performance of such conduct." In this case, the underlying crime is Manslaughter in the First Degree, where the defendant with an intent to cause serious physical injury to another person, causes the death of such person or of a third person, which is a class B felony. Penal Law § 125.20(1).

Initially, when the court charged the jury on Conspiracy in the Fourth Degree, the court followed the Criminal Jury Instructions of the New York State Unified Court System. The court instructed the jury that the three elements of Conspiracy in the Fourth Degree are:

1. That on or about June 9, 2008, in the County of King, the defendant, Quinnetta Henry, agreed with one or more persons to engage in or cause the performance of conduct constituting the class B felony, Manslaughter in the First Degree;
2. That the defendant did so with the intent that such conduct be performed; and
3. That the defendant, or one of the persons with whom she agreed to engage in or cause the performance of such conduct, committed at least one alleged overt act in furtherance of the conspiracy. Namely, that defendant Henry called Darnell Walker to the location; that defendant Henry asked Darnell Walker to bring a gun; that defendant Henry stated "I'm going to go get my man"; that defendant Henry went to get Darnell Walker; or that defendant Henry stated "I don't care who he shoots."

After the jury started deliberating, one of the jury notes asked the question whether the intent element for Conspiracy in the Fourth Degree should be toward the deceased, Earl

Armstead, or could it be toward anyone. This is not specified in the defendant's indictment. However, in order to keep it consistent with the underlying crime, the court instructed that the intent object of the conspiracy was Earl Armstead. The People objected to this instruction. Subsequently, the jury sent another note asking again to clarify whether the intent element for the conspiracy count should be toward Earl Armstead or anyone. Based on the previous objection, the people made arguments and submitted cases in support of their position, and the court also heard the defendant's arguments. After hearing the arguments, the court instructed the jury that the agreement could be against another person. The defendant objected to the final instruction given by the court. Thereafter, the jury delivered a verdict, including a guilty verdict on the fourth degree conspiracy charge.

In *People v. Ballard*, where one of the defendant's charges was Conspiracy in the Second Degree, the court held that all that the People had to prove was that the defendant "agreed with one or more persons to engage in or cause the performance of [the underlying crime]," and an overt act in furtherance of the conspiracy was completed. *People v. Ballard*, 38 A.D.3d 1001, 1003 (2007); *People v. Facclo*, 33 A.D.3d 1041, 1043 (2006). Therefore, the court stated that it is not required to prove that the underlying crime was completed.

Similarly, in *People v. Wells*, the Court of Appeals held that since "actual death is not an element" of attempted murder, the identity of the person whose death was intended is not relevant in determining whether the crime has been committed. *People v. Wells*, 7 N.Y.3d 51, 56-57 (2006). Hence, the court stated that the People only had to prove that the defendant intended to kill, and not whom the intended target was. *Id.* See also *People v. Fernandez*, 88 N.Y.2d 777 (1996) (In an attempted murder case, the jury instruction that the defendant could be

convicted if found, beyond a reasonable doubt, that he intended to cause the death of the actual victim or another person was held appropriate).

In this case, the defendant is convicted of Conspiracy in the Fourth Degree, which under the Penal Law, also does not require that the underlying crime (Manslaughter in the First Degree here) be completed. In addition, the People need not prove for the conspiracy charge that the intended target was Earl Armstead. *See Ballard*. Hence, the court's final instruction that the intended target in considering the conspiracy count could be towards "another person" was appropriate.

The defendant's objection that acquitting the defendant of murder and manslaughter, but convicting her for conspiracy repugnant has not been preserved, and therefore, this court lacks the authority to set aside the verdict on that ground. *See CPL § 330.30(1), 470.05(2)*. As a general rule, alleged errors must be raised at a time when they can be corrected at trial. *People v. Alfaro*, 66 N.Y.2d 985, 987 (1985). To argue that the verdict is repugnant in a jury case, such claim must be made before the jury is discharged. *Id.* Here, the defendant neither objected to the charge nor challenged the verdict as repugnant before the jury was discharged. Therefore, regardless of the merit of the argument, this court does not have any mechanism to set aside the verdict under that ground.

However, even if the repugnancy claim was preserved, the court finds the argument without merit. A determination of whether a verdict is repugnant is based solely on a review of the trial court's charge regardless of its accuracy. *People v. Tucker*, 55 N.Y.2d 1, 6-7 (1981); *People v. Viruet*, 215 A.D.2d 417, 417 (1995). A conviction will be reversed only where

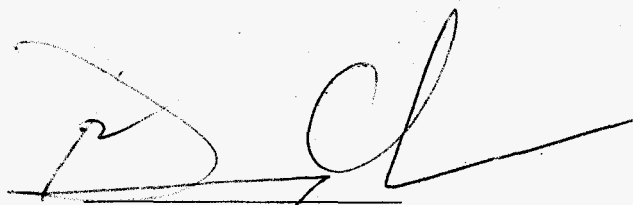
acquittal on one crime as charged to the jury is conclusive as to a necessary element of the other crime, as charged, for which the guilty verdict was rendered. *Tucker* at 7.

In this case, the defendant was acquitted of Murder in the Second Degree and Manslaughter in the First Degree, but was convicted in Conspiracy in the Fourth Degree and a number of other charges. The elements of Conspiracy in the Fourth Degree as charged to the jury do not include completing the crime of murder or manslaughter. Murder and manslaughter charges require an intent element not required for a conspiracy charge. Therefore, even if the argument was preserved, the defendant's claim on this ground would be rejected.

Wherefore, for the reasons stated above, the defendant's motion to set aside the verdict is denied in its entirety.

The foregoing constitutes the decision and order of the court.

Dated: Brooklyn, New York  
January 23, 2012



DANNY K. CHUN, J.S.C.

