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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2001-CA-002144-MR

CHRISTOPHER LEE BENNETT — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JOHN R. ADAMS, JUDGE
ACTION NO. 01-CR-00122-2

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION

REVERSING AND REMANDING

** ** ** ** ** ** ** **

BEFORE: DYCHE AND McANULTY, JUDGES; AND POTTER, SPECIAL JUDGE.[1]

POTTER, SPECIAL JUDGE: Christopher Lee Bennett appeals from a jury verdict convicting him of first-degree robbery. Bennett contends that the prosecution made an improper reference to his prior criminal record during voir dire; that the trial court erred by not giving an instruction on criminal facilitation; and that the trial court abused its discretion when it answered a

[1] Senior Status Judge John Woods Potter sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

written jury question instead of requiring the jury to figure the answer from the instructions. Because the trial court's response to one of the written jury questions, in combination with the complicity jury instruction, encouraged the jury to speculate regarding what was required to convict Bennett, we reverse and remand for a new trial.

On January 29, 2001, Bennett was indicted for first-degree robbery, Kentucky Revised Statutes (KRS) 515.020, and Terroristic Threatening, KRS 508.080. The indictment resulted from the allegation that on November 20, 2000, Bennett and his codefendant, Randy Ruff, in the course of committing a theft upon Abraham Santos, used or threatened the use of physical force while armed with a deadly weapon, and from the further allegation that, in the course of the robbery, the codefendants threatened to kill Santos.

Following a jury trial Bennett was convicted of first-degree robbery and sentenced to ten years imprisonment. This appeal followed.

We first address Bennett's contention that the trial court abused its discretion when it answered a written jury question rather than requiring the jury to figure out the answer to the question from the instructions.

While the jury was deliberating Bennett's guilt it sent out six written questions.[2] Among the jury's questions were these:

> Question: Can you be the accomplice to a 2nd degree robbery (in a robbery in which a gun was used, but you had no knowledge a gun was to be used)?
> Answer: I cannot answer this sorry /JA/

[2] The record would suggest that the judge responded to these questions in writing without the defendant present and without notice to his attorney. The bare record discloses that, after being informed that the jury had reached a verdict the following took place with all parties present:

> Court: "[Bailiff], have [the jury] send in the questions so I can discuss them with the attorneys before I have them come in."
>
> Court (after a short delay and after being handed several slips of paper): "For the record there were several questions the jury sent out during deliberations and because of the nature of the questions the court answered them and will at this time read [the questions and answers] for counsel and see if there are any objections to the answers that were given. And if there are I'll take them up at this time."

If this record reflects, which it seems to, that the court communicated with the jury without informing either the defendant or his counsel then the case must be reversed. RCr. 9.74. It is the trial judge's fine reputation that causes this court to question the record. Further, appellate counsel could not confirm the true state of affairs. Because we find the court's answer to one question, which was objected to, when viewed against the instructions, requires reversal, we do not deem it necessary to determine whether the above quoted statements reflect the true state of affairs.

> Question; Does the use of a gun by an accomplice always invoke complicity? (Emphasis in the original)
> Answer: Yes – if you believe the one was an accomplice to the other. /JA/
>
> Question: Can absence of pre-existing knowledge of the gun, in any way alter the instructions?
> Answer: Sorry- I cannot answer this question /JA/

The trial court's responses to the questions must be considered in light of the jury instructions. The first-degree robbery instruction, which was prepared by the court and submitted to the jury without objection, stated as follows:

> FIRST DEGREE ROBBERY
> (PRINCIPAL OR ACCOMPLICE)
>
> You will find [Bennett] guilty of First-Degree Robbery under this instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:
>
> A. [Bennett], along with [Ruff], stole money and property from [Santos];
>
> B. That in the course of so doing and with the intent to accomplish the theft, he or [Ruff] used or threatened the immediate use of physical force upon [Santos];
>
> AND
>
> C. That when he or [Ruff] did so, he or [Ruff] was armed with a gun.

The instructions did not define "accomplice" or otherwise require that Bennett act in complicity with Ruff to

commit the theft, issues crucial to Bennett's defense. Although unpreserved, it was error to omit from the instructions a requirement that Bennett act in complicity with Ruff to commit a theft. Ray v. Commonwealth, Ky., 550 S.W.2d 482 (1977); Commonwealth v. Yeager, Ky., 599 S.W.2d 458 (1980).

The prosecution capitalized on the flawed instructions in closing arguments by stating "[he] admitted he took the money . . . he was there and he is guilty . . . it doesn't matter [who you believe]. . ." A simple example illustrates the flaw in the instructions and the Commonwealth's argument: A robber shoots his victim and leaves him injured and unconscious on the sidewalk. A passerby helps himself to an overlooked item of jewelry. Under the wording of the court's instructions the passerby would be guilty of first-degree robbery. While it is true that under Kentucky law one accomplice can be liable for the unintended acts of the other, they must first, using the principals of complicity, be accomplices in the initial theft.

The Oxford English Dictionary defines accomplice as "a partner or helper" and complicity as "partnership in a crime or wrongdoing." Since the instructions did not define "accomplice" or "complicity" and actually misstated what the law required, the trial court's answer to the jury question encouraged the jury to speculate on what was required to convict Bennett. The trial court's response to the written jury question only

highlighted and reinforced the omission of the definitions from the instructions. Therefore, giving the answer over the defendant's objection was error.

A formal definition is not required to be included in jury instructions where the jury can understand the term without such a definition. Commonwealth v. Hager, Ky. App., 35 S.W.3d 377, 379 (2000). Here, the jury evidenced a lack of understanding of the terms "accomplice" and "complicity." As the trial court's response to the jury question exacerbated the deficiency in the instructions, we are persuaded that the trial court's response was not harmless error. For this reason, we reverse the judgment of conviction and remand for a new trial.

Bennett also contends that the trial court erred by not giving an instruction on criminal facilitation. Because this claim of error is likely to recur upon retrial, we address the issue on the merits.

The facilitation instruction would have been advantageous to Bennett because a facilitation conviction results in a lower criminal offense classification, and thus a lower sentencing range, than a complicity conviction for the same crime. KRS 506.080(2); KRS 502.020.

The court's duty in a criminal prosecution is to instruct the jury on the whole law of the case. Lawson v. Commonwealth, 309 Ky. 458, 218 S.W.2d 41 (1949). The jury is to

be instructed on every state of the case deducible from and supported by the evidence presented. Commonwealth v. Duke, Ky., 750 S.W.2d 432 (1988). The instructions, however, must follow the evidence actually presented and no theory of the case unsupported by the evidence is entitled to an instruction. Barbour v. Commonwealth, Ky., 824 S.W.2d 861, 863 (1992).

At trial Santos, Ruff, and Bennett provided the relevant evidence concerning the robbery. The three agreed that Santos was robbed and that Bennett and Ruff were present when the robbery took place; however, there were discrepancies among the testimony regarding the details surrounding the incident.

Prosecution witness Santos testified that he opened his door and Bennett, whom he knew, immediately put a gun to his head, ordered him to the floor and demanded money.

Defense witness Ruff, who had previously pled guilty to first-degree robbery, testified that Bennett was looking for his girlfriend and asked Ruff for a ride to Santos' house to see if the girlfriend was there. Ruff testified that he had heard Santos had money, and, unbeknownst to Bennett, he formulated a plan to rob Santos using Bennett to gain entrance to the home. According to Ruff, after Santos opened the door, he – not Bennett - put a cell phone battery pack (not a gun) to Santos' head and demanded the money.

Bennett provided his view of events through a recorded statement he gave to the police the day of the robbery and which was played by the Commonwealth at trial. According to the statement, Bennett asked his friend Ruff for a ride to the Santos' house to look for his girlfriend. Once they arrived and Santos had opened the door, to Bennett's total surprise Ruff pulled a gun, put it to Santos' head, and demanded money. Santos surrendered $51 to Bennett. Ruff took some jewelry. Bennett explained his participation in the crime with phrases such as "I was scared to death. I didn't know what was happening. I just said to hell with it. I went along with it. It was already happening. What could I do about it? If I try to run he's going to shoot me . . .. I didn't know what was going on. I just wanted to get out of there . . .."

KRS 506.080(1), provides as follows:

> A person is guilty of criminal facilitation when, acting with knowledge that another person is committing or intends to commit a crime, he engages in conduct which knowingly provides such person with means or opportunity for the commission of the crime and which in fact aids such person to commit the crime.

Thus, criminal facilitation occurs when a defendant, with no intent to promote or commit the crime himself, provides the means or opportunity for another to do so. KRS 506.080; Commonwealth v. Day, Ky., 983 S.W.2d 505, 509 (1999); Gabow v.

Commonwealth, Ky., 34 S.W.3d 63, 72 (2000). The main difference between facilitation and complicity is the state of mind; complicity requires the complicitor to "intend" that the crime take place. Webb v. Commonwealth, Ky., 904 S.W.2d 226, 228 (1995).

In this case, the trial testimony did not support a facilitation instruction. Santos testified that Bennett himself was the one who brandished the gun and demanded his money and jewelry. This level of direct participation exceeds the “means or opportunity” element required for facilitation and, instead, evidences an intent to commit or promote the crime.

The testimony of Ruff likewise does not support a facilitation instruction. Ruff testified that Bennett went with him to Santos’ apartment for the sole purpose of seeing if Bennett’s girlfriend was there and that Bennett did not know before hand of his intention to rob Santos. KRS 506.080 requires the facilitator to have knowledge of the principal’s intent to commit the crime. Smith v. Commonwealth, Ky., 722 S.W.2d 892, 896 – 897 (1987). Ruff’s testimony was that Bennett did not have knowledge of his intent to commit the crime.

Similarly, in his police statement Bennett disclaimed knowledge of Ruff’s intent to rob Santos. According to the statement, however, once Ruff initiated the robbery, to the extent Bennett participated in the events, he aided in the

actual commission of the robbery, and did not merely provide the means or opportunity to commit the crime.

If the evidence is the same or substantially the same upon retrial, facilitation should not be presented to the jury.

Bennett also alleges that the prosecution made an improper reference to his prior criminal record during voir dire and, as a result, the trial court should have granted a mistrial. Since we have reversed this case for the reasons previously given, we will not discuss this issue on the merits as it is unlikely to recur upon retrial of this case.

For the foregoing reasons the judgment of the Fayette Circuit Court is reversed and the case is remanded for a new trial.

ALL CONCUR.

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