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(OPINION RENDERED SEPTEMBER 17, 2004 WITHDRAWN)

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001098-MR

PATRICK MCKENZIE — APPELLANT

V.

APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE WILLIAM J. WEHR, JUDGE
INDICTMENT NO. 01-CR-00191

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: BUCKINGHAM, MINTON, AND TAYLOR, JUDGES.

MINTON, JUDGE: Patrick D. McKenzie was convicted of third-degree burglary as an accomplice, enhanced by a finding that he is a persistent felony offender in the first degree. He appeals, arguing that the Commonwealth should not have been permitted at the end of trial to amend the indictment to add a complicity theory after he was indicted only as being the principal who committed the burglary. Because we believe that the addition of complicity to burglary in the third-degree prejudiced McKenzie's substantial rights, we reverse and remand.

In the early morning of September 3, 2000, the basement of the Cold Spring Roadhouse Restaurant was burglarized. The burglary resulted in a loss of over $10,000.00. On May 31, 2001, McKenzie was indicted for the burglary by the Campbell County Grand Jury. The relevant portion of the indictment states:

> The Campbell County Grand Jury charges that on or about the 3rd day of September, 2000, in Campbell County, Commonwealth of Kentucky, the above named defendant, Patrick McKenzie, committed the offense of Burglary in the third degree by knowingly and unlawfully entering the building housing the Cold Spring Roadhouse Restaurant in Cold Spring, Campbell County, Kentucky with the intent to commit a theft[.]

Following the presentation of all the evidence at trial, the Commonwealth moved to amend the indictment to add as an alternate theory that McKenzie was complicit to another's commission of the burglary. The Commonwealth pointed to the testimony of Matt Connor and Jason Woods as demonstrating that McKenzie was not alone but was, at a minimum, an accomplice.

McKenzie objected to the addition of the complicity theory, arguing that the Commonwealth's late attempt at modification amounted to unfair surprise that prevented adequate preparation of McKenzie's defense. The Commonwealth responded only by saying that the defense had been aware of the substance of the two witnesses' testimony long before trial but candidly

admitted in response to a question from the trial court that there was no good reason for its failure to seek amendment of the indictment at an earlier time.

The circuit court granted the Commonwealth's motion and, accordingly, instructed the jury alternatively that it could find McKenzie to have burglarized the Cold Spring Roadhouse Restaurant himself, or been complicit to another's commission of the burglary. The circuit court provided separate instructions on each theory so that if the jury decided to convict, it would be easily discernable from the record under which instruction it reached its decision. McKenzie was convicted only under the complicity instruction.

On appeal, McKenzie presents three arguments. His first is that the Commonwealth should not have been permitted to amend the indictment to include complicity. His second argument is that if the jury were to be instructed on complicity, it should have included an instruction on the lesser included offense of facilitation. Finally, he argues that he was entitled to a directed verdict of acquittal with respect to the complicity count.

RCr[1] 6.16 permits the circuit court to amend an indictment, information, complaint or citation "any time before

[1] Kentucky Rules of Criminal Procedure.

verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced."[2] In this case, we believe the court erred by amending McKenzie's indictment at the close of the evidence not because an additional offense was charged, but because McKenzie's substantial rights were prejudiced.

The indictment in this case was amended to include complicity to burglary in the third degree. As this Court held in Commonwealth v. Caswell,[3] "KRS 502.020 does not create a new offense known as complicity. It simply provides that one who aids, counsels or attempts to aid another in committing an offense with the intention of facilitating or promoting the commission of the offense is himself guilty of that offense."[4]

KRS 502.020 provides in relevant part:

> (1) A person is guilty of an offense committed by another person when, with the intention of promoting or facilitating the commission of the offense, he:
>
> (a) Solicits, commands, or engages in a conspiracy with such other person to commit the offense; or
> (b) Aids, counsels, or attempts to aid such person in planning or committing the offense; or

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[2] *See also*, Yarnell v. Commonwealth, 833 S.W.2d 834 (Ky. 1992); Schambon v. Commonwealth, 821 S.W.2d 804 (Ky. 1991).

[3] 614 S.W.2d 253, 254 (Ky.App. 1981).

[4] *Id.*

> (c) Having a legal duty to prevent the commission of the offense, fails to make a proper effort to do so.[5]

Burglary in the third degree is defined in KRS 511.040, which provides in relevant part that "[a] person is guilty of burglary in the third degree when, with the intent to commit a crime, he knowingly enters or remains unlawfully in a building."[6]

Although the statutory definitions of burglary in the third degree and complicity may differ, we do not believe they constitute two separate offenses. Rather, we hold that the language in Caswell controls. Since "complicity" itself is not an offense, it obviously cannot constitute an "additional offense" under RCr 6.16. As a result, we find no initial fault with the circuit court's decision to allow McKenzie's indictment to be amended.

That said, RCr 6.16 requires a further analysis into whether the amendment of the indictment prejudiced the defendant's substantial rights. In Brown v. Commonwealth we stated, "[i]t has long been the law of this state [] that where an indictment charged one alone with the commission of a crime, it is error to instruct that he may be convicted if he aided or

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[5] KRS 502.020(2) deals with what is referred to as "complicity to the result," which is irrelevant in this case.

[6] KRS 511.040(1).

abetted another in its commission."[7] The conclusion that a defendant indicted for acting alone could not be tried for aiding another's commission of the crime was viewed as settled by Kentucky's highest Court as far back as 1914[8] and as recently as 1997.[9] Moreover, the Kentucky Supreme Court has held "that a defendant has the right to rely on the fact that he would only have to rebut the evidence of which he was given notice."[10]

We believe the decision of the circuit court to amend the indictment prejudiced McKenzie's substantial rights for two reasons. First, McKenzie was charged alone with third degree burglary; therefore, he was not prepared to defend his alleged complicity to that crime. Second, he was not given proper notice that he would have to rebut evidence of his alleged complicity. Consequently, the amendment of the indictment caused McKenzie unfair surprise and prevented adequate preparation of his defense.

Because we believe that the amendment in this case prejudiced McKenzie's rights, we hold that the circuit court erred by allowing the indictment to be amended. So we must reverse and remand.

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[7] Brown v. Commonwealth, 498 S.W.2d 119, 120 (Ky. 1973).

[8] Hollin v. Commonwealth, 158 Ky. 427, 165 S.W. 407 (1914).

[9] Wolbrecht v. Commonwealth, 955 S.W.2d 533 (Ky. 1997).

[10] *Id.* at 537.

Having decided that the circuit court committed reversible error in permitting the indictment to be amended, we must now decide what direction the case is to take on remand. Specifically, the jury's verdict convicting McKenzie under the complicity instruction presents a double jeopardy question regarding whether he may be retried for burglary in the third degree.[11]

Typically, our discussions of implied acquittal barring retrial are in the context of a greater versus lesser included offense. "[T]he conviction of a defendant of a lesser-included offense constitutes an acquittal of all higher degrees of the offense. Accordingly, if the conviction of the lesser-included offense is reversed on appeal, the defendant cannot be retried upon any other higher degrees of the offense."[12] However, this case presents a somewhat unique scenario in that per our discussion above, the complicity count upon which McKenzie was convicted was not a lesser-included offense of third-degree burglary. Therefore, the more commonly seen double jeopardy analysis is irrelevant.

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[11] The circuit court commented that it was providing the jury separate instructions and verdict forms on third-degree burglary and complicity to third-degree burglary in order to better preserve the record for appellate purposes. We commend the circuit court for its foresight and appreciate its efforts to facilitate our review.

[12] Couch v. Maricle, 998 S.W.2d 469, 471 (Ky. 1999) (citations omitted).

The United States Supreme Court addressed the precise question currently before us in Green v. United States.[13] In deciding a case involving the charges of second-degree murder and felony murder, the Court stated:

> It is immaterial whether second degree murder is a lesser offense included in a charge of felony murder or not. The vital thing is that it is a distinct and different offense. If anything, the fact that it cannot be classified as "a lesser included offense" under the charge of felony murder buttresses our conclusion that [the defendant] was unconstitutionally twice placed in jeopardy. American courts have held with uniformity that where a defendant is charged with two offenses, neither of which is a lesser offense included within the other, and has been found guilty on one but not on the second he cannot be tried again on the second even though he secures reversal of the conviction and even though the two offenses are related offenses charged in the same indictment.[14]

In this case, the jury was called on to consider two distinct offenses. By convicting McKenzie of complicity to burglary, the jury necessarily acquitted him of the other offense. So he may not be retried on the charge of burglary in the third degree.

Accordingly, McKenzie's conviction of complicity to burglary in the third degree is reversed and remanded for proceedings in accordance with this opinion. The Commonwealth

[13] 355 U.S. 184, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957).

[14] *Id.*, 355 U.S. at 194, fn.14 (citing 114 ALR 1406).

need not seek an indictment on this charge from a grand jury or a proper waiver of indictment by the defendant before McKenzie may be retried.[15] However, because McKenzie was acquitted of burglary in the third degree, he may not be retried on that charge. Because we have resolved the case in this manner, we need not reach McKenzie's other arguments.

ALL CONCUR.

BRIEF FOR APPELLANT:

Kathleen Kallaher Schmidt
Shepherdsville, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General

Brian T. Judy
Assistant Attorney General
Frankfort, Kentucky

[15] Wolbrecht v. Commonwealth, 955 S.W.2d 533 (Ky. 1997).