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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-001571-MR

TIMOTHY EARL WHEELER

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE SHEILA R. ISAAC, JUDGE
INDICTMENT NO. 02-CR-00022

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

REVERSING AND REMANDING

** ** * * *

BEFORE: EMBERTON, Chief Judge; McANULTY, Judge; and HUDDLESTON,
Senior Judge.¹

HUDDLESTON, Senior Judge: Timothy Earl Wheeler appeals from a
judgment convicting him of one count of robbery in the first

¹ Senior Judge Joseph R. Huddleston sitting as Special Judge
by assignment of the Chief Justice pursuant to Section 110(5)(b)
of the Kentucky Constitution and Ky. Rev. Stat. (KRS) 21.580.

degree stemming from the armed robbery of a T. J. Maxx store in Lexington, Kentucky, on December 19, 1999, for which he was sentenced to ten years' imprisonment. Wheeler was found guilty under an accomplice theory based on his alleged participation in planning the robbery which was actually committed by Ebery Murphy.² On appeal, Wheeler argues that the jury should have been instructed on criminal facilitation in addition to complicity. The Commonwealth contends, as it did at trial, that the evidence only supports an instruction on complicity to robbery in the first degree.

According to his trial testimony, Murphy agreed to rob the T. J. Maxx store only after several solicitations from Tonya Wheeler (Tim's wife) and Alvin Franklin (Tonya's brother). Murphy and Franklin had grown up together, and had been friends for a long period of time. Murphy testified that his involvement was desired because he was from out of town, and therefore no one would recognize him.

After arriving at the Lexington airport on the evening of December 18, Murphy was taken by Tonya to Franklin's house. After dropping off Murphy's belongings, the two went to Tonya

² Murphy, the armed robber, reached an agreement with the Commonwealth. He pled guilty to a charge of theft by unlawful taking over \$300.00 and received a five-year sentence. At the time of trial, neither Tonya Wheeler nor Alvin Franklin had been charged with any criminal offense stemming from the robbery.

and Tim's home. While there, Murphy discussed the details of the next day's robbery with Tim. At this time, Tim provided information regarding the layout of the store, who would be present and what should happen. Tim also provided Murphy with a baseball cap and gun³ to use during the commission of the robbery.

The next morning, Murphy and Franklin were waiting in the parking lot of the T. J. Maxx for Tim and the store manager, Jeff Evans, to arrive and open the store. Murphy tried to accost the men on their way into the store, but was too slow in his approach and had to devise an alternate plan. The testimony is unclear precisely how it was accomplished, but Murphy was able to lure Evans outside by telling Evans that he had left his vehicle's headlights on.⁴

Once Evans was outside, Murphy drew his weapon and forced Evans back into the store. He led Evans and Tim into the store's office, where a large amount of cash was being held in a safe. Murphy directed Evans to empty the safe, including an

³ The gun belonged to Tonya.

⁴ In one version of the story, Murphy telephoned Tonya from a pay phone to have her call Tim, who was then to tell Evans about his lights. Another version has Murphy knocking on the door of the store and telling Evans in person that he had left his lights on.

additional \$15,000.00 contained in a white cardboard box.⁵ There was testimony that the amount taken was between \$32,000.00 and over \$40,000.00 in cash and approximately \$800.00 in jewelry.

At the close of the Commonwealth's case, the defense elected not to present any evidence. Tim's counsel objected to the court's refusal to instruct the jury on criminal facilitation. The court stated that it would not instruct on facilitation because "the offense did occur," erroneously believing facilitation to be an inchoate offense only. This reasoning, however, misapplies the law of facilitation.

Facilitation is statutorily governed by Kentucky Revised Statute (KRS) 506.080, which provides in subsection (1) that:

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.

⁵ The store would not ordinarily keep this much cash on hand, but because it was the Christmas season, the store had additional money on hand.

Based on the statutory language, facilitation remains viable following the principal's commission of the underlying crime. The circuit court erred when it held otherwise.

However, the Commonwealth argues on appeal that the evidence only supported a complicity institution. According to this argument, the only statute to be applied is KRS 502.020(1), which provides that:

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

The Supreme Court has recently dealt with the relationship of the statutes regarding facilitation and complicity. In Thompkins v. Commonwealth⁶ the Court said that:

⁶ 54 S.W.2d 147, 150 (2001).

Under either statute, the defendant acts with knowledge that the principal actor is committing or intends to commit a crime. Under the complicity statute, the defendant must intend that the crime be committed; under the facilitation statute, the defendant acts without such intention. Facilitation only requires provision of the means or opportunity to commit a crime, while complicity requires solicitation, conspiracy, or some form of assistance.^[7] "Facilitation reflects the mental state of one who is 'wholly indifferent' to the actual completion of the crime."^[8]

"An instruction on a lesser-included offense is appropriate if and only if on the given evidence a reasonable juror could entertain reasonable doubt of the defendant's guilt of the greater charge, but believe beyond a reasonable doubt that the defendant is guilty of the lesser offense."^[9] In Webb v. Commonwealth,^[10] [the Supreme Court] held it was error not to instruct on facilitation where the defendant

⁷ Skinner v. Commonwealth, Ky., 864 S.W.2d 290, 298 (1993).

⁸ Perdue v. Commonwealth, Ky., 916 S.W.2d 148, 160 (1995).

⁹ Skinner v. Commonwealth, supra, n. 7, at 298.

¹⁰ Ky., 904 S.W.2d 226 (1995).

testified that he gave his girlfriend a ride in his car knowing that she was in the process of a drug transaction, but that he did not intend that she commit the crime.

The question thus becomes one of Tim's state of mind. The jury should have been instructed on facilitation if from the evidence a reasonable juror could have concluded that Tim merely had knowledge that Murphy intended to commit the crime and provided him with the means or opportunity to do so. While the Commonwealth contends that the evidence only supports an inference that Tim intended for the crime to occur, a review of the testimony presented at trial refutes that assertion. While the evidence presented could support a conclusion that Tim intended that the robbery be completed, it does not require it.

The only testimony from which any inference regarding Tim's state of mind can be drawn is that of Elery Murphy. In fact, of the four alleged participants, he was the only one to testify.

Murphy testified that in the days preceding the robbery, he was continually in contact with Tonya and Franklin. The propositions to undertake the robbery came from Franklin. Murphy only conversed with Tim "a couple of times," and at that, only to ask for Tonya when Tim answered the telephone. Murphy

testified that Tonya purchased his airplane ticket to Louisville, albeit with Tim's debit card. Murphy's first conversation with Tim regarding the robbery was on the night before the robbery occurred, when Tim discussed the details of the store layout and gave Murphy the gun and hat.

While there was testimony that Tim was involved in the robbery by participating in the ruse to draw Evans out of the store, that testimony was directly contradicted by that of Evans himself. Evans testified that Tim received no phone call on the morning of the robbery, and that the robber attracted his attention by coming to the door himself. Under Evans' version of the events, Tim took no active role in the actual commission of the robbery.

Further, Murphy testified that he had been concerned about protecting Tonya from negative repercussions. He stated that he was concerned as to what would happen to her three children if she were to be incarcerated, and for that reason had not mentioned Tonya's involvement while speaking with police.

From the above testimony, a reasonable jury could conclude that Alvin Franklin and Tonya Wheeler were the motivating persons of the conspiracy. Furthermore, by Murphy's own admissions, his testimony could be viewed as having been motivated by the favorable bargain reached with the Commonwealth in exchange for his testimony. His admitted desire to protect

Tonya Wheeler may have motivated him to characterize her as having been less involved while emphasizing her husband's role.

Under the above inferences, it would be reasonable to conclude that while Tim Wheeler knew of the crime that his wife and her brother were planning, he had no intention that it be completed. In this scenario, Tim would be like the defendant in Webb v. Commonwealth who had knowledge of his girlfriend's drug purchase but was indifferent toward its completion. Viewing the case in this manner, Tim merely knew of and facilitated his wife's plan while remaining indifferent to its completion.

Viewing the evidence as a whole, a reasonable jury could have found Tim Wheeler guilty of either facilitation of or complicity to first-degree robbery. It was error for the circuit court to refuse to instruct on criminal facilitation. Accordingly, the judgment is reversed and this case is remanded to Fayette Circuit Court with directions to grant Wheeler a new trial at which the jury shall be instructed on criminal facilitation as well as complicity to criminal first-degree robbery.

EMBERTON, Chief Judge, CONCURS.

McANULTY, Judge, DISSENTS.

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