

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001578-MR

GARRY ROTHFUSS

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE GREGORY M. BARTLETT, JUDGE
INDICTMENT NO. 02-CR-00780

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BARBER, JOHNSON, AND HENRY, JUDGES.

HENRY, JUDGE: Garry Rothfuss appeals from a jury verdict and judgment finding him guilty of complicity to second-degree burglary and sentencing him to eight (8) years' imprisonment. Upon review, we affirm.

On March 19, 2002, Kenton County police officer Nathan Honaker was dispatched to the home of Roselyn Coppage at 12010 Dawn Street in response to a reported burglary at the residence. After speaking to Ms. Coppage, Honaker determined that a break-

in had occurred between 10:00 p.m. the night before and 6:00 a.m. that morning. Ms. Coppage had apparently slept through the burglary after taking a sleeping pill before going to bed. Honaker also determined that a basement window was the probable point of entry for the break-in after discovering that the window was broken. Among the items reported stolen by Ms. Coppage were several credit cards and \$300 cash. A more detailed examination of the home revealed that drawers had been pulled open in a number of rooms, and that papers and other debris had been strewn on the floor. It was also discovered that the frame and screen of the basement window had been removed and placed to the side, with some fragments of glass lying outside the window and some inside the basement. However, police were unable to obtain any other physical evidence, including fingerprints, from the home or from the area around it.

Detective Brian Capps was assigned to investigate the case. He first sought to determine if Ms. Coppage's credit cards had been cancelled or used and discovered that one of the cards had been used at a Wal-Mart in Madison, Indiana at about 9:04 a.m. on March 19, 2002. Approximately \$1,046.72 in merchandise was purchased with the credit card. Capps also learned that someone had attempted to use the credit cards at a

Wal-Mart in Louisville, Kentucky at about 11:22 a.m. that same day. However, this time the transaction was denied.

Theresa Phillips, a Wal-Mart loss prevention officer, witnessed the attempted purchase at the Louisville store. She testified that she was immediately suspicious of the man and woman who attempted to use the credit cards because they had been placing a number of electronic items in their shopping cart without looking to see how much they cost. When the woman was asked to show identification after the first credit card was rejected, Phillips testified that the pair left their shopping cart and the credit cards, met up with another man who had been walking around a nearby aisle, and immediately left the store. Phillips followed the individuals to the parking lot, where the second man who had been walking around the store stepped into the front seat of an automobile, while the other man and woman went into the back seat and ducked their heads. Phillips obtained a license plate number as the car drove away.

This information was given to Detective Capps when he contacted the Louisville store. Upon running a license plate check on the vehicle, Detective Capps determined that the vehicle was registered to Appellant Rothfuss. Capps then showed a photo lineup to Phillips that included a picture of Rothfuss. Phillips testified that she "very quickly" identified Rothfuss as the second man in the Wal-Mart store who had driven away from

the scene.¹ Capps subsequently conducted a non-custodial interview with Rothfuss, who at first denied involvement in any burglary and denied being at any Wal-Mart store on the morning in question. After further questioning, Rothfuss admitted being with a man and a woman on the night of the burglary and admitted going to a Wal-Mart with them. He refused to disclose the identities of the other two individuals, however, stating that he was not a "snitch," and that he would do prison time before telling the police who the two individuals were.

According to Detective Capps, the investigation then went stagnant for several months because he did not believe that he had probable cause to arrest Rothfuss and because he did not know who the other two individuals were. Capps testified that he decided to interrogate Donald Coppage, Ms. Coppage's oldest son, to pursue the possibility that the burglary was an "inside job." Mr. Coppage vehemently denied involvement, and Capps stopped considering him as a suspect. He subsequently asked Coppage to help him find who had broken into his mother's home.

A number of weeks later, Mr. Coppage asked Detective Capps to meet him in a convenience store parking lot. Coppage gave Capps the names of two individuals—Billy Ray Carroll and Peggy Lovitt—to investigate, but he refused to disclose the reason for giving Capps these two particular names. Capps found

¹ At trial, Phillips would again identify Rothfuss as one of the men at the Wal-Mart that morning.

Lovitt being held in the Carroll County Jail. She admitted being with Rothfuss and Carroll on the night of the burglary, and, based upon other statements that she made, Capps obtained second-degree burglary warrants against Rothfuss, Carroll, and Lovitt.²

On November 22, 2002, the Kenton County Grand Jury indicted Rothfuss, Carroll, and Lovitt on charges of second-degree burglary stemming from the March 19, 2002 break-in at the Coppage residence.³ Rothfuss entered a plea of "Not guilty" at arraignment and the case was tried before a jury on June 3 and 4, 2003.

At trial, in addition to testimony given by Phillips, Ms. Coppage, and the police officers involved in the case, Lovitt testified in detail about her activities on the night of March 19, 2002.⁴ She first stated that she, Rothfuss, and Carroll left an Indiana casino somewhere between 3:30 and 4:30 in the morning. Carroll told Rothfuss that they needed to go somewhere, and the three traveled by car to Dawn Street in Kenton County. Rothfuss, who was driving, was apparently not

² Carroll denied being involved in any burglary when questioned by Capps after his arrest, but he acknowledged knowing Rothfuss and Lovitt and being with them on the night of the burglary. When shown a photo lineup featuring a picture of Carroll by Capps, Theresa Phillips identified him as being the other man in the Louisville Wal-Mart on the morning of the 19th. She also identified Carroll at trial.

³ On February 24, 2003, the indictment returned against Rothfuss was amended to a charge of complicity to second degree burglary.

⁴ Lovitt was not being tried, as she had previously pled guilty in district court to a misdemeanor charge.

told where to go. Rothfuss dropped Carroll off at the corner of Dawn Street, where he proceeded to put on a black sweat jacket and walk towards a "corner brick house." Rothfuss and Lovitt then drove to a convenience store. Some time later, Carroll contacted Rothfuss via a two-way radio and told Rothfuss to come and get him. Rothfuss drove to a wooded area somewhere near the brick house and picked up Carroll, who was waiting there.

When they picked Carroll up, Lovitt noticed that he had a little black bag. He would later comment about someone residing in a home on Dawn Street that he had "rubbed her hand." Lovitt then testified that the three drove to a Wal-Mart in Indiana and went into the store. She indicated that she used credit cards containing another woman's name to purchase items there. She then testified that the three drove to a Wal-Mart in Louisville, and that she tried to use the credit cards there. Rothfuss and Carroll did not testify.

The jury returned a verdict finding Rothfuss guilty of complicity to second-degree burglary and sentencing him to eight (8) years' imprisonment.⁵ On July 21, 2003, the trial court entered a final judgment in accordance with the jury verdict. This appeal followed.

⁵ Carroll was found guilty of second degree burglary and sentenced to ten (10) years in prison. This sentence was enhanced to twenty (20) years by a PFO count.

Rothfuss makes the following arguments on appeal: (1) he was convicted on insufficient evidence of complicity to second-degree burglary; (2) he was denied a fair trial and due process when the trial court failed to sustain his motion to bar the introduction of evidence of other acts that took place in Louisville, Kentucky and Madison, Indiana and his motion for relief following mid-trial discovery of an additional suspect; and (3) he was denied a fair trial when the trial court defined "complicity" in its jury instructions so as to include "facilitation" in a case where the jury was instructed on both offenses. We will address each contention in turn.

Rothfuss first contends that the evidence presented at trial was insufficient for a complicity to second-degree burglary conviction, and that he was entitled to a directed verdict. We are obligated to review this argument under the standard set forth in Commonwealth v. Benham, 816 S.W.2d 186 (Ky. 1991): "On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal." Id. at 187 (citation omitted). "On motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a

reasonable doubt that the defendant is guilty, a directed verdict should not be given." Id. A defendant is entitled to a directed verdict if the Commonwealth produces no more than a "mere scintilla" of evidence of guilt. Id. at 187-88.

Upon our review of the record, we cannot conclude that the jury was "clearly unreasonable" in finding Rothfuss guilty of complicity to commit second-degree burglary. A conviction under KRS⁶ 502.020(1), the complicity statute at issue here, requires that an individual: (1) specifically intend to promote or facilitate a crime committed by another person (in this case, second-degree burglary); and (2) actually solicit, command, or engage in a conspiracy with such other person to commit the crime or aid, counsel, or attempt to aid such other person in planning or committing the crime. Thompkins v. Commonwealth, 54 S.W.3d 147, 150 (Ky. 2001); Skinner v. Commonwealth, 864 S.W.2d 290, 298 (Ky. 1993).

We believe that sufficient evidence was introduced from which a jury could conclude that Rothfuss intended to aid Carroll in the commission of second-degree burglary. In particular, we note that the jury was told that Rothfuss took Carroll to a drop-off point on Dawn Street without being told where to go by Carroll, that Rothfuss stayed in communication with Carroll by two-way radio, and that Rothfuss picked up

⁶ Kentucky Revised Statutes.

Carroll at a specific location without being told where to go. From these circumstances, along with the other evidence produced at trial, a jury could certainly infer that Rothfuss intended to aid Carroll in committing a burglary. See Talbott v. Commonwealth, 968 S.W.2d 76, 86 (Ky. 1998) (citations omitted); Lambert v. Commonwealth, 835 S.W.2d 299, 301 (Ky.App. 1992) (citations omitted). Accordingly, we reject Rothfuss's argument as to this issue.

Rothfuss next contends that the trial court erred in failing to sustain his motion to bar the introduction of evidence pertaining to the use of Ms. Coppage's credit cards at the Madison, Indiana and Louisville, Kentucky Wal-Mart stores. The trial court allowed this evidence to be introduced under KRE⁷ 404(b). Rothfuss specifically complains that he was seen only in proximity to Carroll and Lovitt in the stores, and that he did not personally attempt to use any of the stolen credit cards.

KRE 404(b) provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." This evidence may be admissible, however, "[i]f offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or

⁷ Kentucky Rules of Evidence.

accident," KRE 404(b)(1), or "[i]f so inextricably intertwined with other evidence essential to the case that separation of the two (2) could not be accomplished without serious adverse effect on the offering party." KRE 404(b)(2).

"It is a well-settled principle of Kentucky law that a trial court ruling with respect to the admission of evidence will not be reversed absent an abuse of discretion."

Commonwealth v. King, 950 S.W.2d 807, 809 (Ky. 1997) (citation omitted). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." Commonwealth v. English, 993 S.W.2d 941, 945 (Ky. 1995) (citations omitted).

From our review of the record, we are satisfied that the trial judge did not abuse his discretion in admitting the evidence in question. Indeed, we believe that the evidence is admissible under either KRE 404(b)(1) or 404(b)(2). See Furnish v. Commonwealth, 95 S.W.3d 34, 46 (Ky. 2002).

Rothfuss next argues that the trial court erred in failing to find a discovery violation regarding Donald Coppage. In particular, Rothfuss contends that the Commonwealth was obligated to produce discovery relating to Detective Capps' interrogation of Donald Coppage as a possible suspect in the burglary in question, and that its failure to do so requires reversal. Rothfuss claims to have had no knowledge of this

interrogation prior to trial and apparently learned about it only when Capps testified about his questioning of Coppage while referring to a page of notes that he had taken during the questioning. The Commonwealth provided no information to Rothfuss about this interrogation prior to trial.

As an initial matter, we note that RCr⁸ 7.24(2) clearly provides that a defendant is not entitled to "memoranda, or other documents made by police officers and agents of the Commonwealth in connection with the investigation or prosecution of the case, or of statements made to them by witnesses or by prospective witnesses (other than the defendant)," with the exception of official police reports. The only record of Capps' interrogation of Donald Coppage is the page of notes referenced above. We agree with the trial judge that these notes were not required to be produced to Rothfuss pursuant to RCr 7.24(2). See also Cavender v. Miller, 984 S.W.2d 848, 849 (Ky. 1998); White v. Commonwealth, 611 S.W.2d 529, 531 (Ky.App. 1980). We can also find no rule obligating the Commonwealth to disclose any oral statements made by a non-witness during a criminal investigation.

Rothfuss's primary contention as to this issue, however, is that the interview with Coppage and its substance are exculpatory in nature and therefore should have been

⁸ Kentucky Rules of Criminal Procedure.

disclosed pursuant to Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed.2d 215 (1963). A reversal under Brady is required only where "there is a 'reasonable probability' that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A reasonable probability is the probability sufficient to undermine the confidence in the outcome." Bowling v. Commonwealth, 80 S.W.3d 405, 410 (Ky. 2002) (quoting U.S. v. Bagley, 473 U.S. 667, 682, 105 S. Ct. 3375, 3383, 87 L. Ed.2d 481, 494 (1985)). "[T]he mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome does not establish materiality in the constitutional sense." St. Clair v. Commonwealth, 140 S.W.3d 510, 541 (Ky. 2004) (citation omitted).

We agree with the trial court and the Commonwealth that nothing Donald Coppage told Detective Capps can be viewed as exculpatory, as his statements did not tend to exonerate Rothfuss or establish his innocence. See Yates v. Commonwealth, 958 S.W.2d 306, 308 (Ky. 1997). If anything, the information given to Capps actually served to inculcate Rothfuss as it connected him to Carroll and Lovitt. Accordingly, Rothfuss is not entitled to relief under Brady, and we must reject his arguments as to this issue.

Rothfuss's final argument on appeal is that the trial court erred in defining "complicity" in its jury instructions so as to include the offense of "facilitation." Rothfuss acknowledges that this issue is unpreserved. Consequently, we are not obligated to consider it on review. RCr 9.54(2);⁹ Caldwell v. Commonwealth, 133 S.W.3d 445, 451 (Ky. 2004); Chumbler v. Commonwealth, 905 S.W.2d 488, 499 (Ky. 1995).

Rothfuss asks the court, however, to review the issue for palpable error under RCr 10.26. The rule requires a showing of a "palpable error which affects the substantial rights of a party" and "a determination that manifest injustice has resulted from the error." Id. "This means, upon consideration of the whole case, the reviewing court must conclude that a substantial possibility exists that the result would have been different in order to grant relief." Partin v. Commonwealth, 918 S.W.2d 219, 224 (Ky. 1996) (citation omitted). Upon a review of the record, particularly the instructions given to the jury, we do not believe palpable error or manifest injustice has been shown here, nor do we believe that a substantial possibility exists that the result below would have been different. The definition

⁹ RCr 9.54(2) provides: "No party may assign as error the giving or the failure to give an instruction unless the party's position has been fairly and adequately presented to the trial judge by an offered instruction or by motion, or unless the party makes objection before the court instructs the jury, stating specifically the matter to which the party objects and the ground or grounds of the objection."

of "complicity" set forth in the jury instructions is in accordance with the statute on criminal complicity, KRS 502.020. Moreover, the Supreme Court of Kentucky has approved of the use of this definition in jury instructions. Crawley v. Commonwealth, 107 S.W.3d 197, 200 (Ky. 2003). We further note that the trial court fully and distinctly instructed the jury on both complicity and facilitation. Accordingly, we conclude that Rothfuss is not entitled to relief on this issue.

The judgment of the Kenton Circuit Court is hereby affirmed.

ALL CONCUR.

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