

RENDERED: MARCH 31, 2006; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth Of Kentucky**  
**Court of Appeals**

NO. 2004-CA-002677-MR

LESLIE PUMPHREY

APPELLANT

v. APPEAL FROM BOYLE CIRCUIT COURT  
HONORABLE DARREN W. PECKLER, JUDGE  
ACTION NO. 01-CR-00053

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: JOHNSON, KNOPF, AND VANMETER, JUDGES.

JOHNSON, JUDGE: Leslie Pumphrey has appealed from the final judgment and sentence of imprisonment entered by the Boyle Circuit Court on December 15, 2004, following a jury trial which convicted her of two counts of complicity to commit robbery in the first degree<sup>1</sup> and sentenced her to prison for ten years on each conviction with the sentences to run concurrently. Having concluded that the trial court did not err by refusing to

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<sup>1</sup> Kentucky Revised Statutes (KRS) 502.020 and KRS 515.020.

instruct the jury on the lesser-included charge of criminal facilitation to robbery in the first degree,<sup>2</sup> we affirm.

Pumphrey testified that on January 7, 2001, while she and Shawn Douglas were suffering from withdrawal symptoms due to their use of Oxycontin, they went to a Rite-Aid store in Danville, Kentucky. Pumphrey testified that Douglas drove to the Rite-Aid store and went into the store to purchase candy. Upon returning to the vehicle, Douglas requested that Pumphrey go back into the store and ask whether Dramamine could be used to counter the withdrawal symptoms. Pumphrey testified that when she attempted to enter the store the door was locked, but a clerk came to the door and asked how he could help her. Pumphrey stated that she needed to ask the pharmacist a question and the clerk opened the door.

Pumphrey testified that after the door was opened, Douglas appeared and walked into the store between her and the clerk and motioned for her to follow him. Pumphrey claimed that she did not know Douglas was going to enter the store. She admitted to following Douglas into an aisle leading toward the pharmacy in the back of the store. As they proceeded toward the pharmacy, Douglas stopped, pulled out a gun, and said they were going to rob the pharmacy for narcotics. Pumphrey testified that Douglas handed her a note and told her to give it to the

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<sup>2</sup> KRS 506.080 and KRS 515.020.

pharmacist and to watch the pharmacist. Pumphrey claimed that Douglas then got behind her and put the gun to her back, as they walked up to the pharmacy. Upon reaching the pharmacy counter, Douglas told Pumphrey to give the pharmacist the note. Pumphrey claims that she had not seen Douglas write the note and she did not read the note before handing it to the pharmacist.

After Pumphrey handed the note to the pharmacist, Douglas said "this is a robbery" and ordered the pharmacist to get the drugs and told Pumphrey to watch the pharmacist. As the pharmacist handed the drugs to Douglas, Pumphrey left the store and went outside to the car. She got into the driver's seat, started the vehicle, and claimed that she wanted to leave Douglas at the scene, when Douglas got into the passenger's seat and told her to drive away. Pumphrey and Douglas drove to Douglas's mother's house where Douglas hid the stolen narcotics in a duffel bag. Pumphrey denied that Douglas gave her any of the drugs to consume immediately after the robbery, but she admitted that he did share them with her later. She further denied ever having possession or control of the drugs.

Pumphrey denied that she and Douglas arranged or agreed to commit another robbery of a drug store after the January 7, 2001, robbery or that they had any discussion of such a plan. However, she testified that on January 21, 2001, Douglas and his nephew, Brandon Douglas, were at her apartment

and told her that they were going to go somewhere. She said that she told Douglas she did not want to go and that she saw Douglas had a gun. She testified that Douglas grabbed her by the arm and dragged her into the backseat of Brandon's vehicle which Brandon was driving. She said they left her apartment and began driving toward Danville, but that she did not know where they were going. She testified that after they arrived in Danville, Brandon parked the car in a parking lot behind Hall's Pharmacy, and Shawn Douglas told Brandon to go into the pharmacy and to look for surveillance cameras.

According to Pumphrey's testimony, Brandon returned to the car and advised that he did not notice any cameras and he and Shawn Douglas began to talk about robbing the pharmacy. She stated that she thought the men were going to commit the robbery and make her drive. However, since Shawn Douglas did not want Brandon to enter the store a second time, he told Pumphrey to go into the store with him to commit the robbery. Pumphrey stated she told Douglas that she would not go into the store and begged him not to go through with the robbery. She testified that Douglas then hit her in the head with the gun, pulled her from the car, and drug her into an alley next to the store.

Pumphrey claimed that after hiding behind an air conditioning unit in the alley, Douglas grabbed her arm and took her to the door of the pharmacy where he handed her a note.

They then entered the pharmacy. Pumphrey claimed that she had her hands in her pockets and that Douglas was behind her with the gun stuck to her back. After approaching the pharmacy counter, Douglas told Pumphrey to hand the note to the pharmacist, which she did. She claimed that Douglas went behind the counter to retrieve the drugs from the pharmacist and that she "took off". She stated that she went out of the store and returned to the car where Brandon was waiting because she felt like she had no where else she could go. Shawn Douglas then returned to the vehicle and the three left the parking lot and drove on back roads for a while before returning to Pumphrey's apartment. Pumphrey testified that she handed the notes to the pharmacists during the robberies only because Shawn Douglas had ordered her to do so, and that she was afraid that he would harm her or her family if she did not comply.

Shawn Douglas testified at Pumphrey's trial as a witness for the Commonwealth. He claimed Pumphrey had been involved in the planning of the robberies and had taken part in choosing the pharmacies to rob. Additionally, he testified that she had helped write the robbery notes, that he did not force her to take part in the robberies, and that Brandon Douglas was not present during the robbery of Hall's Pharmacy on January 21, 2001.

Following the close of all testimony, a conference was held in the trial judge's chambers with the Commonwealth and defense counsel to discuss the jury instructions. Pumphrey's counsel tendered instructions that included defenses based on duress and choice of evils. Additionally, defense counsel tendered an instruction on criminal facilitation as a lesser-included offense to the charges of complicity to commit robbery in the first degree. The trial court agreed to instruct the jury on the defense of duress based upon Pumphrey's testimony that she was forced to assist Shawn Douglas in committing the robberies and on the choice of evils defense based on the testimony that Pumphrey assisted in the robberies out of fear that her family or herself would be harmed if she refused to cooperate with Douglas. There was no discussion on the record of Pumphrey's tendered instruction for the lesser-included offense of criminal facilitation.

After the instructions (which did not include the charge of criminal facilitation) were read to the jury, court was recessed for a lunch break. During the recess defense counsel objected to the instructions because they did not contain an instruction on criminal facilitation. The trial court, after hearing arguments from the Commonwealth and defense counsel, overruled the objection and refused to instruct the jury on criminal facilitation. Pumphrey was convicted on both

counts of complicity to robbery in the first degree and sentenced to ten years' imprisonment. This appeal followed.

KRS 506.080(1) defines criminal facilitation 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.

The difference between facilitation and complicity is the defendant's state of mind. A facilitator is indifferent to whether the crime is committed and only provides the means or opportunity for it to be committed, whereas the complicitor intends that the crime occur.<sup>3</sup> "Facilitation reflects the mental state of one who is "wholly indifferent" to the actual completion of the crime."<sup>4</sup>

In the case before us, the trial court correctly ruled that the evidence did not support an instruction on criminal facilitation. "An instruction on a lesser-included offense should be given if the evidence is such that a reasonable juror could doubt that the defendant is guilty of the crime charged,

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<sup>3</sup> See Neal v. Commonwealth, 95 S.W.3d 843 (Ky. 2003); Thompkins v. Commonwealth, 54 S.W.3d 147 (Ky. 2001); and Gabow v. Commonwealth, 34 S.W.3d 63 (Ky. 2000).

<sup>4</sup> Thompkins, 54 S.W.3d at 150 (quoting Perdue v. Commonwealth, 916 S.W.2d 148, 160 (Ky. 1995) cert. denied 519 U.S. 855, 117 S.Ct. 151, 136 L.Ed.2d 96 (1996)).

but conclude that he is guilty of the lesser-included offense.”<sup>5</sup> However, the trial court’s duty to instruct on the “whole law of the case, including any lesser included offenses . . . does not require an instruction on a theory with no evidentiary foundation” [citations omitted].<sup>6</sup>

Pumphrey claimed that she was forced by Shawn Douglas to assist him in robbing the drug stores. She did not claim that any of her actions in assisting Douglas were done voluntarily, but rather that she only assisted him out of fear that he would harm her or her family. This testimony provided the basis for the trial court’s instruction on the defenses of duress and choice of evils. However, there was no evidence that Pumphrey acted with knowledge that Douglas was committing or going to commit the robberies and that she intentionally provided him the means or opportunity to commit the robberies but that she remained “wholly indifferent” as to the success of the robberies. Further, she admitted in her testimony that Douglas shared some of the drugs stolen from the first robbery with her. This testimony, when considered with her admission that she was addicted to Oxycontin, was sufficient to establish that she was not “wholly indifferent” to the success of the robberies.

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<sup>5</sup> Webb v. Commonwealth, 904 S.W.2d 226, 229 (Ky. 1995)(citing Luttrell v. Commonwealth, 554 S.W.2d 75, 78 (Ky. 1977)).

<sup>6</sup> Houston v. Commonwealth, 975 S.W.2d 925, 929 (Ky. 1998).

Pumphrey's testimony that she handed the notes to the pharmacists with knowledge that Douglas was going to rob the pharmacies fails to support a reasonable inference that she was a facilitator in light of her testimony that Douglas forced her to do so and that she only acted out of fear for herself and her family. Rather, this contention supports the instruction on the defenses of duress and choice of evils, which were given. Thus, the trial court correctly refused to instruct the jury on the offense of criminal facilitation to robbery in the first degree as a lesser-included offense to the charged crimes of complicity to commit first degree robbery in the first degree.

Based on the foregoing, the judgment of conviction and sentence imposed by the Boyle Circuit Court is affirmed.

ALL CONCUR.

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