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NOT TO BE PUBLISHED

# Commonwealth of Kentucky

# Court of Appeals

NO. 2005-CA-002153-MR

BOBBIE JO VAUGHN — APPELLANT

v.

APPEAL FROM LIVINGSTON CIRCUIT COURT
HONORABLE BILL CUNNINGHAM, JUDGE
ACTION NO. 05-CR-00006

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, JUDGE; HOWARD,[1] SPECIAL JUDGE; BUCKINGHAM,[2] SENIOR JUDGE.

ACREE, JUDGE: After trial by a jury of her peers, Bobbie Jo Vaughn was convicted of Robbery in the First Degree, by Complicity. The Livingston Circuit Court entered judgment against her on September 26, 2005, and sentenced her to eleven years imprisonment. She now appeals that conviction. We affirm.

[1] Special Judge James I. Howard concurred in this opinion prior to the expiration of his Special Judge assignment effective February 9, 2007. Release of the opinion was delayed by administrative handling.

[2] Senior Judge David C. Buckingham sitting as Senior Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

On or about December 10, 2004, Bobbie Jo took up with an unsavory character by the name of Tony Springs. Four days later, Bobbie Jo drove Springs to Lake City, Kentucky, where Springs robbed the BB&T Bank. While Bobbie Jo and the Commonwealth disagree as to the characterization of the events of those few days, and the day of the robbery in particular, the following facts are not in dispute.

Law enforcement agencies, including the Federal Bureau of Investigation, suspected Springs of committing a series of bank robberies. Beginning at 12:30 P.M. on the date of the robbery, law enforcement agents staked out Bobbie Jo's residence awaiting Springs' and Bobbie Jo's return. The couple had been gone for some time and, as it turns out, would not be returning.

Spending much of that day in her Pontiac Trans Am, Bobbie Jo drove Springs around the area making at least three stops. At a clothing store, Springs stayed in the car while Bobbie Jo entered the store and purchased a ski mask for Springs. At a convenient store, Bobbie Jo again left Springs in the car, entered the store, paid for gas and purchased a soft drink. Their third stop was at BB&T Bank. This time, Bobbie Jo stayed behind the wheel in the car while Springs went inside, brandished his pistol and robbed the bank.

Bobbie Jo drove Springs toward and onto Interstate Highway 24 where the Kentucky State Police spotted and pursued them. Bobbie Jo did not try to evade the police, but, after a distance, stopped. Before she could exit the vehicle, Springs put his gun to his head and pulled the trigger. He died at the scene.

Bobbie Jo's story is that she never voluntarily assisted Springs in his criminal activity. Instead, she maintains Springs coerced her into obeying him by physical and verbal force, and by threatening to kill her, her children and anyone who might assist her in her escape from his control. However, despite several opportunities when the two were separated, she never sought help in any form.

The jury believed the Commonwealth's interpretation of these facts and concluded Bobbie Jo was complicit in Springs' last bank job.

Bobbi Jo turns to this Court for relief, presenting two arguments. First, she argues the Commonwealth failed to prove an element of the crime with which she was charged, namely, intent. Second, she argues the trial court erred when it failed to instruct the jury on "criminal facilitation," KRS 506.080, and the justification defense of "choice of evils," KRS 503.030.

The first argument must fail because it was not properly preserved for our review. Bobbie Jo asserts the Commonwealth's evidence was insufficient to establish the element of intent. She attempted to preserve this error by moving the trial court for a directed verdict at the close of the Commonwealth's case in chief. The record reflects that Bobbie Jo did not renew her directed verdict motion at the close of her case in defense. *Schoenbachler v. Commonwealth,* 95 S.W.3d 830 (Ky. 2003) completely controls this issue:

> It is black-letter law that, in order to preserve an insufficiency-of-the-evidence allegation for appellate review, "[a] defendant must renew his motion for a directed verdict, thus allowing the trial court the opportunity to pass on the

> issue in light of all the evidence[.]" [Footnote omitted]. In other words, a motion for directed verdict made after the close of the Commonwealth's case-in-chief, but not renewed at the close of all evidence-i.e., after the defense presents its evidence (if it does so) or after the Commonwealth's rebuttal evidence-is insufficient to preserve an error based upon insufficiency of the evidence.

*Id.* at 836. Because she did not properly preserve it, we need not review Bobbie Jo's first claim of error.

Nevertheless, if this supposed error had been preserved, we would have little difficulty finding sufficient evidence to support a jury's determination that Bobbie Jo intended to aid or attempt to aid Springs in robbing the bank. KRS 502.020(1)(b). We need only note that Bobbie Jo purchased a ski mask for Springs and drove him to the site of the crime. That evidence is certainly enough from which a jury could infer one state of mind – intent. Whether Bobbie Jo's actual state of mind was one of fear brought about by duress was an issue in defense. In reviewing the denial of a directed verdict motion, we are not permitted to substitute our assessment of credibility for that of the jury. Therefore, even if we were to believe the evidence of Bobbie Jo's fear outweighed evidence of the intent element of the crime, we could not rule in her favor. To do so would be to invade the province of the jury.

Bobbie Jo also argues that the trial court erred by failing to instruct the jury on "criminal facilitation," KRS 506.080, and the justification defense of "choice of evils," KRS 503.030. However, she did not propose her own instructions on these

points. Furthermore, Bobbie Jo admits she did not preserve this error but asks us to reverse because the error is palpable.

For an error to be palpable, it must be "easily perceptible, plain, obvious and readily noticeable." *Burns v. Level,* 957 S.W.2d 218, 222 (Ky. 1997). A palpable error "must involve prejudice more egregious than that occurring in reversible error[.]" *Ernst v. Commonwealth,* 160 S.W.3d 744, 758 (Ky. 2005). A palpable error must be so serious in nature that if it were uncorrected, it would seriously affect the fairness of the proceedings. *Id.* In essence, before this Court deems an error to be palpable, we must believe there is a "substantial possibility" that the result in the case would have been different without the error. *Schoenbachler,* 95 S.W.3d at 836. If not, the error cannot be palpable.

We do not believe the error to be palpable. "Though a trial judge may be required to instruct the jury as to [even] an implausible defense if requested, [citation omitted], we are unprepared to hold that an unsolicited failure to do so constitutes palpable error." *Taylor v. Commonwealth,* 955 S.W.2d 355, 362 (Ky. 1999).

The logic behind the decision in *Taylor* should be obvious. It is a perfectly acceptable trial tactic in a close case to refrain from proposing instructions of lesser-included offenses, calculating that the jury will believe the prosecutor "overcharged" the defendant and return a verdict of acquittal. If we should find palpable error in a trial judge's unsolicited failure to instruct on lesser-included offenses, we would be eliminating a proper defense tactic. We will not do so.

For the foregoing reasons, we affirm the judgment and conviction of the Livingston Circuit Court.

ALL CONCUR.

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