RENDERED: JANUARY 21, 2011; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001340-MR

CHARLES E. SMITH APPELLANT

v.

APPEAL FROM MADISON CIRCUIT COURT
HONORABLE WILLIAM T. JENNINGS, JUDGE
ACTION NO. 08-CR-00004-001

COMMONWEALTH OF KENTUCKY APPELLEE

AND

NO. 2008-CA-001374-MR

DEONTE SIMMONS APPELLANT

v.

APPEAL FROM MADISON CIRCUIT COURT
HONORABLE WILLIAM T. JENNINGS, JUDGE
ACTION NO. 08-CR-00004-002

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING APPEAL NO. 2008-CA-001340-MR
AND
AFFIRMING IN PART, VACATING IN PART,
AND REMANDING WITH DIRECTIONS
APPEAL NO. 2008-CA-001374-MR

** ** ** ** **

BEFORE: TAYLOR, CHIEF JUDGE; CLAYTON AND WINE, JUDGES.

TAYLOR, CHIEF JUDGE: Charles E. Smith brings Appeal No. 2008-CA-001340-MR from a July 2, 2008, judgment of the Madison Circuit Court upon a jury verdict finding him guilty of trafficking in a controlled substance in the first degree, possession of marijuana, and with being a persistent felony offender in the second degree. Deonte Simmons brings Appeal No. 2008-CA-001374-MR from a July 2, 2008, judgment of the Madison Circuit Court upon a jury verdict finding him guilty of complicity to commit trafficking in a controlled substance in the first degree and with being a persistent felony offender in the second degree. We affirm Appeal No. 2008-CA-001340-MR, and affirm in part, vacate in part, and remand with directions Appeal No. 2008-CA-001374-MR.

In November 2007, the Kentucky State Police, utilizing an informant who had earlier been arrested for selling drugs, set up a drug sting operation at the Days Inn in Richmond, Kentucky. Subsequently, Charles E. Smith and Deonte Simmons were arrested at the hotel while attempting to sell cocaine in the presence of an undercover police officer. The police also arrested Jamie L. Clay, who had

driven Smith and Simmons to the hotel, but remained in the car during the drug transaction.

Smith and Simmons were jointly indicted by a Madison County Grand Jury upon the offenses of first-degree trafficking in a controlled substance and with being second-degree persistent felony offenders. Smith was also charged with possession of marijuana. Smith and Simmons were jointly tried. Kentucky Rules of Criminal Procedure (RCr) 9.12. Smith was found guilty upon the offenses of first-degree trafficking in a controlled substance, possession of marijuana, and with being a second-degree persistent felony offender; Simmons was found guilty upon the offenses of complicity to commit first-degree trafficking in a controlled substance and with being a second-degree persistent felony offender. Each was sentenced to fifteen-years' imprisonment. These appeals follow.

To assist this Court in resolution of these appeals, we shall initially address an issue concomitantly raised by Smith and Simmons. Thereafter, we shall address the issues raised in each appeal separately.

Smith and Simmons both argue that Kentucky Revised Statutes (KRS) 29A.040 is unconstitutional. Specifically, Smith and Simmons assert that KRS 29A.040 is violative of the "fair cross-section" requirement of the Sixth Amendment and Fourteenth Amendment of the United States Constitution. Smith and Simmons, however, admit that they failed to notify the Attorney General of this constitutional challenge as mandated by KRS 418.075 and Kentucky Rules of Civil Procedure (CR) 24.03.

It is well-established that KRS 418.075 and CR 24.03 require a party challenging the constitutionality of a statute to serve the Attorney General with notice of such challenge. *Brashars v. Com.*, 25 S.W.3d 58 (Ky. 2000); *Benet v. Com.*, 253 S.W.3d 528 (Ky. 2008). KRS 418.075 specifically mandates that notice to the Attorney General must be given prior to entry of the trial court's judgment. *Benet*, 253 S.W.3d 528. And, the Kentucky Supreme Court recently held "[w]e have made plain that strict compliance with the notification provisions of KRS 418.075 is mandatory." *Benet*, 253 S.W.3d at 532. More particularly, a party's failure to strictly comply with the notification provision of KRS 418.075 will result in a constitutional challenge being deemed unpreserved and not subject to review upon the merits. *Brashars*, 25 S.W.3d 58; *Benet*, 253 S.W.3d 528.

In the case *sub judice*, it is uncontroverted that neither Smith nor Simmons gave notice to the Attorney General of their challenge to the constitutionality of KRS 29A.040 as required by KRS 418.075 and CR 24.03.[1] As

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[1] Charles E. Smith argues that his judgment of conviction is void because it was the duty of all parties, not just the defendant, to give the required notice to the attorney general and the trial court had to refrain from entry of judgment until the notice had been given, citing *Maney v. Mary Chiles Hospital*, 785 S.W.2d 480 (Ky. 1990). *Maney* is a medical malpractice case where the trial court upheld the constitutionality of a statute in its judgment, notwithstanding that the attorney general had not been notified of the constitutional challenge. Smith's case is clearly distinguishable and is controlled by the Kentucky Supreme Court's recent holding in *Benet v. Commonwealth,* 253 S.W.3d 528 (Ky. 2008). *Benet* involved the appeal of a criminal conviction where the defendant challenged the constitutionality of Kentucky Revised Statutes (KRS) 439.3401 on appeal. The Supreme Court declined review for failure of Benet, not any other party, to properly preserve the issue for review. The Supreme Court in *Benet* clearly states that in criminal cases, the burden for notifying the attorney general is placed upon the defendant challenging the statute and appellate courts will not address arguments that a statute is unconstitutional unless the notice provisions of KRS 418.075 are fully satisfied. In this case, Smith failed to comply with KRS 418.075 and the issue is thus not properly preserved for our review.

such, we conclude that their challenge to the constitutionality of KRS 29A.040 is unpreserved and may not be reviewed on appeal. We now address Smith's appeal.

APPEAL NO. 2008-CA-001340-MR

Smith argues that certain testimony of Detective Dustin Hon and Detective Anthony Anderson was admitted into evidence in violation of the right to confront witnesses during trial as secured under the Sixth Amendment of the United States Constitution. In particular, Smith objects to testimony of Detective Hon recounting statements made to him by Detective Anderson and to testimony of Detective Anderson that Jamie Clay admitted to Anderson "that she knew a drug deal was going on." Smith's Brief at 12.

While every defendant possesses a constitutional right to cross-examine witnesses at trial, the violation of such right has been held subject to the harmless error analysis in *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). *See Gill v. Com.*, 7 S.W.3d 365 (Ky. 1999); *Taylor v. Com.*, 175 S.W.3d 68 (Ky. 2005). Pursuant to the rule enunciated in *Chapman*, "before a federal constitutional error can be held harmless, the [reviewing] court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Gill*, 7 S.W.3d at 368 (quoting *Chapman*, 386 U.S. at 24). Simply put, if admission of the evidence amounts to harmless error this Court will not disturb the conviction. *Taylor*, 175 S.W.3d 68. To determine whether admission of particular evidence

was harmless, the reviewing court must ascertain whether exclusion of the evidence "would have changed the result." *Id.* at 72.

In this case, the evidence presented at trial against Smith was overwhelming. The record reveals that an informant arranged to purchase drugs by calling Smith's cell phone; Simmons answered the cell phone; the informant relayed that he had $275 to purchase drugs; Smith and Simmons then arrived at the hotel room with cocaine as arranged per the call; Smith pulled the cocaine from his pocket; the delivery of the cocaine was witnessed by an undercover detective; and the detective knew Smith "ran" with drug dealers. Thus, even if Detective Hon and Detective Anderson's objectionable testimony was excluded from evidence, we cannot say the jury verdict would have been different; i.e., Smith would have been acquitted. Stated differently, we believe the admission of Detective Hon and Detective Anderson's objectionable testimony constituted harmless error.

Smith next contends that the trial court erred in its instruction to the jury on first-degree trafficking in a controlled substance. Smith specifically asserts that the instruction violated the unanimity requirement of Section 7 of the Kentucky Constitution and resulted in an inconsistent verdict.

The instruction at issue reads as follows:

> **INSTRUCTION AS TO COUNT ONE - CHARLES E. SMITH**
>
> **INSTRUCTION NUMBER 1**
> **PRINCIPAL**
>
> You will find the Defendant guilty of **First Degree Trafficking in a Controlled Substance** under this Instruction if, and only if, you believe beyond a

> reasonable doubt from the evidence presented at trial all of the following:
>
> a. That in this County or about November 21, 2007, and before the finding of the Indictment herein he **sold or transferred cocaine**, a Schedule II Controlled Substance to Adrien Totty, AND
>
> b. That he knew the substance he sold or transferred was cocaine.
>
> If you find the defendant guilty under this Instruction, you will so state in your verdict; and after returning to the Courtroom you will receive further instruction regarding punishment. [Emphasis added.]

Under KRS 218A.010, "sell" means "to dispose of a controlled substance to another person for consideration or in furtherance of commercial distribution," and "transfer" means "to dispose of a controlled substance to another person without consideration and not in furtherance of commercial distribution." The primary difference between the two instructions being whether the controlled substance was disposed of for consideration or for commercial distribution. A sale is the disposal for consideration or commercial distribution, while a transfer is not.

Smith concedes there was "some evidence" that a transfer of cocaine took place but asserts there was no evidence that he sold cocaine. Smith argues that without evidence to support that a sale occurred the jury instruction was violative of the constitutional unanimity requirement of the Kentucky Constitution.

Section 7 of the Kentucky Constitution requires that a unanimous verdict must be reached by a jury of twelve persons in a criminal trial. *Burnett v.*

Com., 31 S.W.3d 878 (Ky. 2000)(citing *Wells v. Com.*, 561 S.W.2d 85 (1978)).[2] The Kentucky Supreme Court has held that a jury instruction containing "alternate theories of guilt" denies a defendant his right to a unanimous verdict if one of the alternative theories is totally unsupported by the evidence. *Hayes v. Com.*, 625 S.W.2d 583 (Ky. 1981). The Supreme Court succinctly set forth the law on "alternative theories" in *Burnett v. Com.*, 31 S.W.3d 878, 883 (Ky. 2000) as follows:

> [W]hen presented with alternate theories of guilt in an instruction, the Commonwealth does not have to show that each juror adhered to the same theory. Rather, the Commonwealth has to show that it has met its burden of proof under all of the alternate theories presented in the instruction. Once that is shown, it becomes irrelevant which theory each individual juror believed. This result ensures that a defendant is convicted on proof beyond a reasonable doubt by all twelve jurors. . . . [W]hen the Commonwealth cannot show that it has met its burden of proof on all alternate theories presented to the jury in the instructions, then the defendant's right to a unanimous verdict has been violated. This is because it cannot be ascertained from the verdict form or otherwise from the record that all of the jurors voted to convict the defendant on a theory supported by the evidence.

Under *Burnett*, the Commonwealth must produce evidence to sustain a conviction upon each alternate theory presented to the jury. *Id.* If the Commonwealth presents such evidence, the unanimity requirement is satisfied; if the Commonwealth fails to present such evidence, the unanimity requirement is not satisfied. *Id.*

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[2] *Barnett v. Commonwealth*, 31 S.W.3d 878 (Ky. 2000) was overruled on other grounds by the recent Supreme Court opinion of *Travis v. Commonwealth,*_____S.W.3d _____ (Ky. 2010).

In this case, the record reveals that evidence was presented that the informant knew Smith was a drug dealer, the informant called Smith's cell phone to arrange a purchase of drugs, the informant stated he had $275 to spend, some fifteen to thirty minutes after the call Smith and Simmons arrived at the hotel room with cocaine, and Smith presented the cocaine. Upon the above evidence, we believe sufficient evidence existed upon which a jury could find that Smith engaged in the sale of cocaine. Thus, we believe Smith's contention is without merit.

We now address Simmons' appeal.

APPEAL NO. 2008-CA-001374-MR

Simmons contends that the trial court erred by proceeding with an eleven-person jury without a knowing, voluntary, and intelligent waiver of his right to a twelve-person jury.[3] In support thereof, Simmons cites to the Sixth Amendment of the United States Constitution, Section 7 of the Kentucky Constitution, and KRS 29A.280(1).

In this case, the record reveals that Simmons' jury trial lasted two days. On the second day of trial, the court informed the jury that one juror would not return to serve because of health issues. The trial court further stated that Simmons, Smith, and the Commonwealth agreed to proceed with eleven jurors. Later, the trial court again intimated that "everyone has waived" the objection to an eleven person jury.

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[3] We note that appellant, Charles E. Smith, did not raise this error on appeal.

It is uncontroverted that Simmons' attorney consented to proceeding with eleven jurors. We, thus, are asked to review this alleged error under the palpable error rule of RCr 10.26. Thereunder, an unpreserved error is considered palpable when the substantial rights of the defendant are impaired resulting in manifest injustice. *Stone v. Com.*, 456 S.W.2d 43 (Ky. 1970); *Scott v. Com.*, 495 S.W.2d 800 (Ky. 1972).

To begin, the sacred right to trial by jury is secured by both the Sixth Amendment to the United States Constitution and Section 7 of the Kentucky Constitution. This constitutional right to trial by jury is regarded as a fundamental guarantee by the Courts. *Com. v. Green*, 194 S.W.3d 277 (Ky. 2006). A distinction has been drawn, however, between the right to a jury trial and the right to trial by a twelve-person jury. While the right to a jury trial is recognized under the United States Constitution, the right to trial by a twelve-person jury is not. *Williams v. Florida*, 399 U.S. 78, 90 S. Ct. 1893, 26 L. Ed. 2d 446 (1970).

By contrast, the Courts of this Commonwealth have for over a century interpreted Section 7 of the Kentucky Constitution as securing not only the right to a trial by jury but also the right to trial by a twelve-person jury. *Wendling v. Com.*, 143 Ky. 587, 137 S.W. 205 (1911); *Branham v. Com.*, 209 Ky. 734, 273 S.W. 489 (1925)[4]; *Short v. Com.*, 519 S.W.2d 828 (Ky. 1975); *Wells v. Com.*, 561 S.W.2d 85

[4] *Branham v. Commonwealth,* 209 Ky. 734, 273 S.W. 489 (1925) was overruled on other grounds by *Short v. Commonwealth*, 519 S.W.2d 828 (Ky. 1975).

(Ky. 1978); and *Burnett v. Com.*, 31 S.W.3d 878 (Ky. 2000).[5] Similarly, KRS 29A.280(1) also extends a statutory right to a trial by jury of twelve persons in circuit court actions.[6] Hence, in this Commonwealth, there exists both a constitutional and statutory right to trial by a twelve-person jury.

Presently, Kentucky Courts further recognize that constitutional rights may be waived and specifically recognize waiver of the right to a jury trial or to trial by a twelve-person jury. *Short v. Com.*, 519 S.W.2d 828 (Ky. 1975); *Jackson v. Com.*, 113 S.W.3d 128 (Ky. 2003). And, of course, a statutory right, such as the right to a twelve-person jury under KRS 29A.280(1), likewise, may be waived. *American General Life & Acc. Ins. Co. v. Hall,* 74 S.W.3d 688 (Ky. 2002).

A waiver is generally defined as "an intentional relinquishment or abandonment of a known right." *Moore v. Com.*, 556 S.W.2d 161, 162 (Ky. App. 1977)(citing *Barker v. Wingo*, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972)). When dealing specifically with a constitutional or statutory right, a waiver of such right must be knowing and voluntary. *Pangallo v. Kentucky Law Enforcement Council*, 106 S.W.3d 474 (Ky. App. 2003). We shall initially discuss

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[5] *Branham v. Commonwealth*, 209 Ky. 734, 273 S.W. 489 (1925) was overruled on other grounds by *Short v. Commonwealth*, 519 S.W.2d 828 (Ky. 1975). *Short v. Commonwealth*, 519 S.W.2d 828 (Ky. 1975) was superseded in part by statute as recognized by *Commonwealth v. Green*, 194 S.W.3d 277 (Ky. 2006) and *Jackson v. Commonwealth*, 113 S.W.3d 128 (Ky. 2003).

[6] Kentucky Revised Statutes 29A.280(1) reads:

> Juries for all trials in Circuit Court shall be composed of twelve (12) persons. Juries for all trials in District Court shall be composed of six (6) persons.

waiver of the constitutional right to a twelve-person jury and then discuss the statutory right.

Our case law is replete with decisions discussing the requirements to effectuate a valid waiver of the constitutional right to a jury trial *in toto*. There are, nonetheless, no cases discussing the requirements to effectuate a valid waiver of the constitutional right to a twelve-person jury in felony cases after the seminal case of *Short v. Commonwealth*, 519 S.W.2d 828 decided in 1975. Prior to *Short*, there appear sundry cases recognizing the constitutional right to a jury trial and to a twelve-person jury as inviolable and as not subject to waiver in felony cases. *Branham v. Com.*, 209 Ky. 734, 273 S.W. 489 (1925); *Jackson v. Com.*, 221 Ky. 823, 299 S.W. 983 (1927). *Short* marked a dramatic departure from precedent. *Short*, 519 S.W.2d 828.

In *Short*, it was held that both the constitutional right to a jury trial and to a twelve-person jury may be waived in felony cases. *Short*, 519 S.W.2d 828. To effectuate a valid waiver, the Court concluded the waiver must be knowing, voluntary, and intelligent and the trial court must apply the same standards as required upon acceptance of a guilty plea under *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969); *Short,* 519 S.W.2d 828. Hence, a colloquy with the defendant was required to properly waive the constitutional right to a jury trial or to a twelve-person jury. *Short*, 519 S.W.2d 828.

Subsequently, RCr 9.26(1) was promulgated in 1981 by the Supreme Court. It reads:

> Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the Commonwealth.

RCr 9.26(1). RCr 9.26(1) has been interpreted as codifying the holding of *Short*, 519 S.W.2d 828 but with an additional requirement that the waiver be in writing. *Jackson v. Com.*, 113 S.W.3d 128 (Ky. 2003). By using the phrase "jury trial," we believe RCr 9.26(1) only encompasses waiver of the right to jury trial *in toto* but does not encompass the waiver of the right to a twelve-person jury. Thus, RCr 9.26(1) only sets forth the procedure for a valid waiver of the right to a jury trial *in toto*.

To discern the proper procedure to effectuate a valid constitutional waiver to a twelve-person jury, we must look to case law and, in particular, to *Short*, 519 S.W.2d 828 and *Jackson*, 113 S.W.3d 128. As hereinbefore stated, *Short* required a waiver of the right to a twelve-person jury to be knowing, voluntary, and intelligent and also mandated the trial court to conduct a colloquy with the defendant. Short, 519 S.W.2d 828. Thereafter, the Supreme Court rendered its decision in *Jackson*, 113 S.W.3d 128. Although *Jackson* dealt with waiver of the jury trial *in toto* and proper interpretation of RCr 9.26(1), its holding also effectively modified the strict colloquy requirement previously announced in *Short,* 519 S.W.2d 828; *Jackson*, 113 S.W.3d 128.

The *Jackson* Court held that the trial court's failure to comply with the "writing" requirement of RCr 9.26(1) was not prejudicial if the trial court engaged in a colloquy with defendant. *Jackson*, 113 S.W.3d 128. This holding is not particularly helpful as RCr 9.26(1) is inapplicable to our case. However, it is important that the *Jackson* Court also concluded that the failure to engage in a colloquy was not prejudicial if the defendant's waiver, nonetheless, was knowing, intelligent, and voluntary. *Jackson,* 113 S.W.3d 128.

In *Jackson*, trial counsel for Jackson waived his right to a jury trial *in toto*, and there was no evidence in the record regarding whether such waiver represented a knowing, intelligent, and voluntary choice. *Id.* As the record was silent, the *Jackson* Court remanded to the trial court for an evidentiary hearing to determine whether Jackson's waiver of the jury trial was knowing, voluntary, and intelligent. *Id.* At this hearing, the court specified that the Commonwealth carried the burden of proof. *Id.*

From the holdings of *Short*, 519 S.W.2d 828 and *Jackson*, 113 S.W.3d 128, we believe the proper procedure to effectuate a waiver of the constitutional right to a twelve-person jury to be as follows: the trial court shall conduct a colloquy on the record with the defendant to discern whether his waiver of the right to a twelve-person jury is knowing, voluntary, and intelligent. The failure of the trial court to conduct such a colloquy is error. Nonetheless, the error is harmless if the defendant's waiver was made knowingly, voluntarily, and intelligently. To so determine, the appellate court will look to the record for

evidence to make such determination and, if none is available, may remand to the trial court for an evidentiary hearing. At the evidentiary hearing, the Commonwealth carries the burden to prove that defendant's waiver of his constitutional right to a twelve-person jury was knowing, voluntary, and intelligent.[7] If the Commonwealth fails in its burden of proof, defendant is entitled to a new trial; on the other hand, if the Commonwealth succeeds in its burden of proof, "the trial court should reinstate the judgment of conviction." *Jackson*, 113 S.W.3d at 136.

Applying the above procedure to the case at hand, it is clear that the trial court did not engage in a colloquy with defendant as to his waiver of the constitutional right to a twelve-person jury. However, there was no objection to the trial court's error below. In light thereof, the error is only reversible if found to constitute palpable error under RCr 10.26. If Simmons did not knowingly, voluntarily, and intelligently waive the constitutional right to a twelve-person jury,

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[7] In *Jackson v. Commonwealth*, 113 S.W.3d 128, 136 (Ky. 2003), we note the dissent's discussion of the evidentiary hearing to be conducted upon remand to the trial court:

> [T]he burden of proof will be on the Commonwealth; and unless the Commonwealth can find, *e.g.,* a jailhouse informant, the only persons who could testify to the critical fact would be Appellant and his attorneys. No doubt, Appellant, whose conviction is not yet final, will assert his Fifth Amendment right not to testify against himself, U.S. Const., amend. V; and, no doubt, he will assert his lawyer-client privilege to prevent his attorneys from testifying against him. [Kentucky Rules of Evidence] KRE 503. (This is not a malpractice action or an RCr 11.42-type proceeding in which Appellant is claiming ineffective assistance of counsel so as to constitute an automatic waiver. Appellant is claiming that he did not make a written waiver of his right to trial by jury as required by a rule adopted by this Court.)

we believe the error would affect a substantial right resulting in manifest injustice and, thus, constitute a palpable error.

The record is entirely void of any evidence reflecting upon whether Simmons' waiver of his constitutional right to a twelve-person jury represented a knowing, voluntary, and intelligent choice. As the record is silent, we vacate Simmons' judgment of conviction and, as previously stated, remand to the trial court for an evidentiary hearing to determine if Simmons' waiver of his constitutional right to a twelve-person jury was knowing, voluntary, and intelligent.

Simmons also possessed a statutory right under KRS 29A.280(1) to a trial by a twelve-person jury in a circuit court action. Under the circumstances of this case, we believe disposition of Simmons' waiver of his constitutional right to a twelve-person jury necessarily disposes of waiver of his statutory right. Succinctly stated, the requirements to waive a statutory right are certainly no more stringent than those required to waive a concomitant constitutional right.

Simmons additionally argues that the trial court erred by allowing the trial to continue with only eleven jurors after the jury was sworn in contravention of KRS 29A.280(2). KRS 29A.280(2) provides:

> In Circuit Court, at any time before the jury is sworn, the parties with the approval of the court may stipulate that the jury shall consist of any number less than twelve (12), except that no jury shall consist of less than six (6) persons.

The statute is clear and requires no interpretation. KRS 29A.280(2) recognizes that a defendant, with the approval of the Commonwealth and circuit court, may waive the constitutional right to a twelve-person jury, but more importantly, the statute specifies the time period in which such a waiver may occur. Thereunder, the parties may agree to a jury of less than twelve with circuit court approval "at any time before the jury is sworn." KRS 29A.280(2). Simmons correctly points out that the jury was already sworn when his trial counsel and the Commonwealth agreed to proceed with eleven jurors. However, the time period in which a defendant may waive his right to a twelve-person jury carries no constitutional import, as opposed to the waiver of the right itself to a twelve-person jury.

Considering the circumstances of this case, we believe the violation of KRS 29A.280(2) constitutes harmless error under RCr 9.24. Stated simply, Simmons has not demonstrated and we are unable to discern that this particular error was prejudicial. *See Abernathy v. Com.*, 439 S.W.2d 949 (Ky. 1969) *overruled on other grounds by Blake v. Com.*, 646 S.W.2d 718 (Ky. 1983). There may undoubtedly be cases where the violation of KRS 29A.280(2) results in prejudicial error; however, the facts of this case do not support such a conclusion. Consequently, we hold that the trial court's violation of KRS 29A.280(2) did not constitute reversible error.

Simmons further alleges that the trial court erroneously instructed the jury upon the charge of complicity to commit first-degree trafficking in a

controlled substance. Specifically, Simmons argues that the jury instruction was improper because it failed to "require the jury to find that the complicitor intended that the principal commit the crime." Simmons' Brief at 17. Simmons believes that the jury instruction fatally failed to include the element of intent in the complicity instruction, thus resulting in reversible error. Simmons cites to *Harper v. Commonwealth*, 43 S.W.3d 261 (Ky. 2001) as support.

In the case *sub judice*, the relevant jury instructions read:

INSTRUCTION NUMBER 7

COMPLICITOR

If you do not find the defendant Deonte Lamont Simmons guilty under Instruction Number 6, you will find Defendant guilty of **Complicity to Commit First[-] Degree Trafficking in a Controlled Substance** under this Instruction if, and only if, you believe beyond a reasonable doubt from the evidence presented at trial all of the following:

a. That in this County or about November 21, 2007, and before the finding of the Indictment herein he acted with complicity, as defined in the instructions, in assisting Charles E. Smith to sell or transfer cocaine to Adrien Totty, AND

b. That Deonte Lamont Simmons knew that the substance being sold or transferred was cocaine,

If you find the defendant guilty under this Instruction, you will so state in your verdict; and after returning to the Courtroom you will receive further instructions regarding punishment.

DEFINITIONS

INSTRUCTION NUMBER 12

As used in these Instructions the following definitions apply:

. . . .

c. **Complicity –**

(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

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

(2) When causing a particular result is an element of any offense, a person who acts with the kind of culpability with respect to the result that is sufficient for the commission of the offense is guilty of that offense when he:

(a) Solicits or engages in a conspiracy with another person to engage in conduct causing such result[;] or

(b) Aids, counsels, or attempts to aid another person in planning, or engaging in the conduct causing such result; or

(c) Having a legal duty to prevent the conduct causing the result, fails to make a proper effort to do so.

Upon review of the above jury instructions, we believe the jury was properly instructed. To be found guilty of complicity, the jury was specifically instructed that the defendant must have possessed "the intention of permitting or facilitating the commission of the offense." This instruction was included in the definition of the term complicity and is wholly proper. Additionally, we observe that the Supreme Court has recently indicated its approval of a very similar jury instruction upon complicity as properly setting forth the element of intent in *Crawley v. Commonwealth*, 107 S.W.3d 197 (Ky. 2003). Upon the whole, we conclude that the jury instructions for complicity were proper and adequately set forth the element of intent.

Simmons finally contends that the trial court erred by refusing to instruct the jury upon the offense of criminal facilitation. In particular, Simmons maintains:

> It was up to the jury to determine whether Mr. Simmons' [sic] was a drug trafficker or a complicitor – they found the latter. Perhaps if they had had the option of finding Mr. Simmons guilty of facilitation, that would have been their verdict. However, the trial court's failure to give the requested instruction made that impossible. Mr. Simmons was prejudiced by the trial court's refusal to so instruct as he received a much longer sentence than he would have if he was convicted of facilitation.

Simmons' Brief at 24.

KRS 506.080(1) defines facilitation as:

> 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 distinction between criminal facilitation and intentional complicity has been eruditely explained as follows:

> Knowing assistance or encouragement constitutes the offense of criminal facilitation. The offense is committed when the defendant both knows of another's intent to commit a crime and knows that his own conduct is providing the other person with the means or opportunity to commit the crime. Unlike intentional complicity where the accomplice has some personal interest in the successful commission of an offense, a criminal facilitator assists a criminal venture toward which he is indifferent. (Footnotes omitted.)

10 Leslie W. Abramson, *Kentucky Practice Substantive Criminal Law §* 3:6 (2009-2010). Succinctly stated, “[f]acilitation reflects the mental state of one who is ‘wholly indifferent’ to the actual completion of the crime.” *Perdue v. Com.*, 916 S.W.2d 148, 160 (Ky. 1995); *see also*, *Thompkins v. Com.*, 54 S.W.3d 147 (Ky. 2001).

Generally, a defendant is entitled to a jury instruction on any theory of the case supported by the evidence. *Tompkins*, 54 S.W.3d 147. Yet, Simmons does not point this Court to any specific evidence to support the facilitation instruction. Upon our review of the record, we believe the facilitation instruction is without any evidentiary foundation. *See id.* Moreover, the jury’s conviction of Simmons upon intentional complicity demonstrates that the Commonwealth proved beyond a reasonable doubt that he possessed the intent to commit the crime

and was not wholly indifferent to its commission. Hence, we hold that Simmons was not entitled to a jury instruction upon facilitation.

For the foregoing reasons, Appeal No. 2008-CA-001340-MR is affirmed and Appeal No. 2008-CA-001374-MR is affirmed in part, vacated in part, and this cause is remanded with directions to conduct an evidentiary hearing upon whether Simmons' waiver of a twelve person jury was voluntary, knowing, and intelligent.

ALL CONCUR.

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