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Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-002306-MR
&
NO. 2008-CA-002307-MR

KENNETH HUFFMAN — APPELLANT

v.

APPEALS FROM BULLITT CIRCUIT COURT
HONORABLE RODNEY BURRESS, JUDGE
ACTION NOS. 08-CR-00146 & 08-CR-00276

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON AND MOORE, JUDGES; BUCKINGHAM,[1] SENIOR JUDGE.

MOORE, JUDGE: Kenneth Huffman appeals the Bullitt Circuit Court's judgments convicting him of: second-degree complicity to burglary; complicity to theft by unlawful taking of property valued at $300.00 or more; second-degree

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

fleeing or evading police; and being a second-degree persistent felony offender (PFO). After a careful review of the record, we affirm because no evidence was introduced at trial to support a jury instruction for criminal facilitation, and Huffman failed to preserve his remaining claims for appellate review.

I. FACTUAL AND PROCEDURAL BACKGROUND

Huffman was arrested and charged with second-degree complicity to burglary, complicity to theft by unlawful taking over $300.00, and second-degree fleeing or evading police. In a separate indictment, he was charged with first-degree PFO. His co-defendant was Paul Dwayne York, the person who allegedly committed the burglary and theft. Bullitt County Deputy Sheriff Blaine French found York inside the residence of Jeremy and Bonnie Heffernan, carrying various items he had stolen from the Heffernans inside a red pillowcase that he had taken from the Heffernans' bed. The items inside the pillowcase included silverware, jewelry, and a clock. The watches' estimated value was $750.00 and the value of the silverware was estimated to be $500.00. Huffman was the person who had driven York to the neighborhood where the crimes were committed and who was waiting to transport York away from the neighborhood when the arrests occurred.

Following a jury trial, Huffman was convicted of second-degree complicity to burglary; complicity to theft by unlawful taking over $300.00; and second-degree fleeing or evading police. Before the penalty phase of the trial began, the prosecution moved to amend the first-degree PFO charge against Huffman to a charge of second-degree PFO. The trial court granted this motion,

and Huffman was convicted of second-degree PFO. Huffman's sentence was enhanced due to his second-degree PFO conviction and he was, therefore, sentenced to serve a total of seventeen years of imprisonment.

Huffman now appeals, contending that: (a) the trial court erred by failing to instruct the jury on criminal facilitation to burglary and criminal facilitation to theft; (b) the trial court committed palpable error when it failed to suppress Huffman's statements made during an alleged un-Mirandized custodial interrogation; and (c) the trial court committed palpable error when it failed to allot Huffman the number of peremptory challenges he was entitled to under Kentucky law.

II. STANDARD OF REVIEW

Huffman acknowledges that all of the claims he raises are unpreserved for appellate review. However, he asserts that we should review all of his claims for palpable error pursuant to RCr[2] 10.26, which provides: "A palpable error which affects the substantial rights of a party may be considered . . . by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error."

> [T]he requirement of "manifest injustice" as used in RCr 10.26 . . . mean[s] that the error must have prejudiced the substantial rights of the defendant, . . . *i.e.*, a substantial possibility exists that the result of the trial would have been different. . . .

[2] Kentucky Rule of Criminal Procedure.

> [The Kentucky Supreme Court has] stated that 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.

Castle v. Commonwealth, 44 S.W.3d 790, 793-94 (Ky. App. 2000) (internal quotation marks omitted).

III. ANALYSIS

A. CLAIM REGARDING JURY INSTRUCTIONS

Huffman first claims that the trial court erred by failing to instruct the jury on criminal facilitation to burglary and criminal facilitation to theft. He contends that the trial court was required to give instructions on the whole law of the case and, because facilitation is a lesser-included offense of complicity, the court should have instructed the jury on criminal facilitation to burglary and criminal facilitation to theft by unlawful taking over $300.00. In support of this claim, Huffman argues that although he drove "York to the neighborhood where the burglary occurred, there was some doubt as to whether Huffman intended York commit a crime there."

"In a criminal case it is the duty of the court to prepare and give instructions on the whole law and this rule requires instructions applicable to every state of case deducible or supported to any extent by the testimony." *Kelly v. Commonwealth*, 267 S.W.2d 536, 539 (Ky. 1954). Kentucky Revised Statute (KRS) 502.020 defines the crime of "complicity" as follows:

(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 an 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 the 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.

Kentucky Revised Statute 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.

In discussing the complicity and facilitation statutes, the Kentucky Supreme Court has stated that

> [u]nder 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 intent. Facilitation only requires provision of the means or opportunity to commit a crime, while complicity requires solicitation, conspiracy, or some form of assistance. . . . Facilitation reflects the mental state of one who is "wholly indifferent" to the actual completion of the crime. . . .
>
> 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.

Thompkins v. Commonwealth, 54 S.W.3d 147, 150-51 (Ky. 2001) (internal quotation marks omitted).

Criminal facilitation is a lesser-included offense of complicity. *See Webb v. Commonwealth*, 904 S.W.2d 226, 228-29 (Ky. 1995). However, "[t]he duty to instruct on any lesser included offenses supported by the evidence does not require an instruction on a theory with no evidentiary foundation." *Thompkins*, 54 S.W.3d at 151.

Huffman did not preserve this issue regarding the jury instructions in the trial court, as required by the Kentucky Rules of Criminal Procedure and,

therefore, we cannot review it on appeal. *See Piper v. Commonwealth*, 387 S.W.2d 13, 14 (Ky. 1965). Further, the Kentucky Supreme Court has stated that it was "unaware of any authority holding it to be palpable error [for a trial court] to fail to instruct on a lesser included offense of that charged in the indictment." *Clifford v. Commonwealth*, 7 S.W.3d 371, 376 (Ky. 1999). Therefore, this claim fails because Huffman failed to preserve it for appellate review.

"Regardless, an instruction on a lesser included offense is required only if, considering the totality of the evidence, the jury could have a reasonable doubt as to the defendant's guilt of the greater offense, and yet believe beyond a reasonable doubt that he is guilty of the lesser offense." *Clifford*, 7 S.W.3d at 376-77. In the present case, Huffman testified at trial that his reasons for being in the neighborhood and his actions while there were purely innocent. In fact, he testified at trial that he and York were in the neighborhood to legitimately solicit work for Huffman's construction business, and Huffman never testified that he had any knowledge York was intending to commit a crime while they were in the neighborhood. Furthermore, in his appellate brief, Huffman does not direct us to anywhere in the record where evidence supporting a facilitation instruction could be found. Thus, no evidence was introduced at trial to support a jury instruction for criminal facilitation, and the trial court had no duty to instruct on that theory for which there was no evidentiary foundation. *See Thompkins*, 54 S.W.3d at 151.

Consequently, Huffman's claim concerning the trial court's failure to instruct on criminal facilitation was not preserved for appellate review and, even if it had been preserved, it nevertheless lacks merit.

B. CLAIM REGARDING SUPPRESSION OF STATEMENTS

Huffman next alleges that the trial court committed palpable error when it failed to suppress the statements he made during an alleged un-Mirandized custodial interrogation. According to Huffman's appellate brief, while he was allegedly in custody and before he was read his rights set forth in *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), Huffman was asked by one deputy whether he knew York, and Huffman denied knowing York. Additionally, a walkie talkie was found in York's possession, and Huffman was asked if he also had a walkie talkie, which he denied possessing. A walkie talkie was subsequently found in Huffman's vehicle. Further, Huffman was asked what he was doing at the house where the burglary and theft occurred, and Huffman responded by saying he was meeting the homeowner at the residence to inspect a leaky roof.

The Kentucky Supreme Court has noted:

> It has been held by the United States Supreme Court that *Miranda* warnings are only required when the suspect being questioned is "in custody." Custodial interrogation has been defined as questioning initiated by law enforcement after a person has been taken into custody or otherwise deprived of freedom of action in any significant way. *Miranda* warnings are required only where there has been such a restriction on the freedom of an individual as to render him in custody. The inquiry

> for making a custodial determination is whether the person was under formal arrest or whether there was a restraint of his freedom or whether there was a restraint on freedom of movement to the degree associated with formal arrest. Custody does not occur until police, by some form of physical force or show of authority, have restrained the liberty of an individual. The test is whether, considering the surrounding circumstances, a reasonable person would have believed he or she was free to leave. Some of the factors that demonstrate a seizure or custody have occurred are the threatening presence of several officers, physical touching of the person, or use of a tone or language that might compel compliance with the request of the police.

Commonwealth v. Lucas, 195 S.W.3d 403, 405 (Ky. 2006) (citations omitted).

As previously mentioned, Huffman admits in his appellate brief that this issue is unpreserved. The Kentucky Supreme Court has held that a

> trial court has no duty to conduct a suppression hearing on its own motion. . . . The trial court must ensure a fair trial; the trial court is not burdened by the duty to try the case on behalf of defense counsel. Even when an objection or motion has been made, the burden continues to rest with the movant to insist that the trial court render a ruling; otherwise, the objection is waived. Hence, absent a defense motion to suppress, the trial court committed no error in admitting the evidence to which Appellant now objects.

Thompson v. Commonwealth, 147 S.W.3d 22, 40 (Ky. 2004) (footnote omitted).

Therefore, pursuant to the reasoning in *Thompson*, the trial court in the present case committed no error in admitting Huffman's statements to the deputy because Huffman failed to move to suppress his statements in the trial court.

C. CLAIM REGARDING PEREMPTORY CHALLENGES

Finally, Huffman contends that the trial court committed palpable error when it failed to allot him the number of peremptory challenges he was entitled to under Kentucky law. Huffman argues that there were two defendants who were tried jointly in this case and the trial court seated an alternate juror. Therefore, Huffman reasons that, pursuant to RCr 9.40, the defendants were entitled to thirteen peremptory challenges, but they were only given eleven.

"[T]he rules specifying the number of peremptory challenges are not mere technicalities, they are substantial rights and are to be fully enforced." *Springer v. Commonwealth*, 998 S.W.2d 439, 445 (Ky. 1999). Although "an improper allocation of peremptory challenges is reversible error if the issue is properly preserved by the adversely affected litigant," if an appellant "neither objected to the trial court's interpretation of RCr 9.40 nor offered a contrary interpretation, his claim is not preserved," and will not be reviewed on appeal. *Mills v. Commonwealth*, 95 S.W.3d 838, 843 (Ky. 2003) (internal quotation marks omitted).[3] Consequently, because Huffman did not preserve this issue, we will not review it.

Accordingly, the judgments of the Bullitt Circuit Court are affirmed.

ALL CONCUR.

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[3] We are persuaded that *Mills* remains the law even after the holding in *Shane v. Commonwealth*, 243 S.W.3d 336 (Ky. 2007) regarding peremptory calculation errors. *See Nickelberry v. Commowealth*, No. 2006-SC-000865-MR, 2008 WL 3890386 *4 (Ky. Aug. 21, 2008) ("*Shane* neither eliminated the requirement of preservation of a peremptory calculation error, nor elevated said error to automatic palpable error status."). *Nickelberry* is cited pursuant to CR 76.28(4)(c).

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