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Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000471-MR

REBECCA STANTON HILES — APPELLANT

v.

APPEAL FROM BRACKEN CIRCUIT COURT
HONORABLE STOCKTON B. WOOD, JUDGE
ACTION NO. 17-CR-00016

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, GOODWINE, AND TAYLOR, JUDGES.

GOODWINE, JUDGE: Rebecca Hiles ("Appellant") appeals, as a matter of right, her judgment of conviction in the Bracken Circuit Court for criminal facilitation to incest and being a second-degree persistent felony offender. Appellant argues the: (1) Commonwealth failed to meet its burden in proving, beyond a reasonable doubt, she knew and aided in the crime committed; (2) Commonwealth introduced

irrelevant, and unduly prejudicial, evidence; and (3) jury instruction presented, failed to adequately state the law of facilitation. Finding no error, we affirm.

BACKGROUND

On September 9, 2014, Daniel Hiles and Appellant married. At that time, Appellant had an eleven-year-old daughter, Mary.[1] Daniel, Appellant, and Mary lived together in a trailer for three years. And at some unknown date, Daniel and Mary began having a sexual relationship. Sexual activity usually occurred on nights that Appellant was asleep on a couch in her living room. During this time, Mary would exit her room, motion Daniel to walk to the back of the trailer with her, and the two engaged in sexual intercourse.

In February 2016, Donna Hurst, a case worker for the Cabinet for Health and Family Services ("Cabinet"), received information regarding possible sexual abuse between Daniel and Mary that occurred the previous month. Due to these allegations, the Cabinet opened an investigation.[2] On February 10, Ms. Hurst arrived at Appellant's trailer with a Kentucky State Police trooper and interviewed Appellant and Daniel. During the interview, Daniel denied any sexual abuse and explained to Ms. Hurst that Mary could be "clingy." Further, Appellant stated she

[1] Mary is the pseudonym used for the minor victim. She was born on December 6, 2002.

[2] The Cabinet conducted two investigations over the course of two years, and Mary was thirteen at the time of the first investigation.

had no concerns with Daniel and Mary. But Appellant also mentioned she would get angry at Daniel for constantly taking up for Mary when she and her daughter would get into fights.

In a subsequent interview, with only the Appellant, Ms. Hurst informed her that she received information about Mary's sexual abuse in the home. The information included a statement Daniel made to a police officer, stating "What's a guy to do if a girl is putting her hand down his pants?" Appellant made no response to the statement. Once again, Appellant denied all allegations of sexual abuse, and the Cabinet closed the investigation.

Four months later, Mary was removed from the home—on matters not directly related to this case—and placed in the Cabinet's custody. The Cabinet placed her in the Holly Hill Rehabilitation Facility in Campbell County, Kentucky. While Mary was at Holly Hill, the Cabinet undertook an unrelated investigation, placing limitations on Appellant's and Daniel's visitation with Mary. Initially, Holly Hill restricted family contact, so Mary could acclimate to the new environment. She started home visits, without restrictions, in September. Holly Hill revoked the visits shortly after in November, after receiving a report alleging sex between Daniel and Mary.

In November 2016, the Cabinet opened its second investigation regarding Daniel's sexual abuse of Mary. The second investigation began after

Ms. Hurst received another report of sexual contact between Daniel and Mary. Once again, Ms. Hurst and a state trooper went to the Hiles's trailer to speak with the couple. At that time, Ms. Hurst told Appellant the Cabinet had—once again—received allegations of Daniel's sexual misconduct with Mary. As before, Appellant and Daniel denied knowledge of any sexual abuse of Mary.

After the second interview, Ms. Hurst discussed implementing a "prevention plan" with Appellant. This plan entailed the following conditions: (1) barred Daniel from having contact with Mary, while she was in the State's custody at Holly Hill; (2) neither Appellant nor Daniel would have any unsupervised contact with Mary until further notice; and (3) prevented Daniel from being the sole caretaker of Mary. After Appellant and Ms. Hurst discussed the prevention plan, she and Daniel acknowledged and signed it. Ms. Hurst also informed Appellant that Mary would undergo a forensic interview at the Child Advocacy Center ("CAC"). In response to this, Appellant asked if Mary was "blaming Daniel *for things that happened in the past*?"

During the second investigation, Meagon Patton, a supervisor at the Cabinet, met with Appellant and told her she "had concerns in regard to sexual abuse, with Daniel as the perpetrator and [Mary] as the victim." She further told Appellant that neither she nor Daniel could have contact with Mary until further investigation was completed. Appellant assured Ms. Patton that when Mary was

released, the two of them would live in Appellant's Mother's house—and not with Daniel.

In February 2017, Mary returned home to Appellant, and the two began living in Appellant's Mother's house.[3] At the time of Mary's return, Ms. Hurst told Appellant she believed Mary was being sexually abused by Daniel. She told Appellant that in her own experience, observations, and interviews, she felt there were "too many red flags." Appellant continued expressing her disbelief that anything was happening and told Ms. Hurst that Mary was reporting something that happened in the past.

Appellant and Mary lived in the house—but not for long. Shortly after Mary's return home, Appellant received a letter, which stated the investigation was determined to be unsubstantiated[4] and Mary could live with Appellant and Daniel once again. At some point, Daniel moved back into the trailer with Appellant and Mary, stating "[The Cabinet] dropped the case on me or something."

[3] We note the house was directly across the street from Appellant's trailer, Daniel was living in the trailer at that time, and the house and trailer were on the same property.

[4] Under Cabinet standards, an investigation is "substantiated" when the Cabinet believes the allegations are true by a preponderance of the evidence. On the other hand, an "unsubstantiated" investigation means, generally, that either (1) evidence found did not rise to the level of abuse or neglect; or (2) evidence does not indicate the abuse occurred.

In late February or early March, Appellant sent photographs to her friend, Melinda Phillips, by phone. The photographs showed Mary and Daniel sleeping together on a couch, with Mary lying on top of Daniel. Appellant told Ms. Phillips to send the photos to a social worker—but not until after the 3rd of the month because she needed to "pay her bills and not lose [her other children]."

In March 2017, Ms. Patton went to the Hileses' trailer because the Cabinet received a third allegation of sexual abuse. Appellant heatedly responded that she "could not believe this was happening," that it was "B.S.," and "nothing was going on." Ms. Patton informed Appellant that she had photographs. She also noticed Appellant had a black eye, which she told Ms. Patton Mary gave her.[5]

The next morning, Appellant sent a text message to Deputy Bob Scott,[6] stating "[Daniel] admitted it and wants to turn himself in." Before turning himself in, Daniel had sex with the Appellant. After Daniel went to the police station, Deputy Scott interviewed him. During his interviews, Daniel first denied Appellant had knowledge of the sexual misconduct, but later said she did know.[7]

[5] Subsequent interviews discovered that it was, in fact, Daniel that gave Appellant the black eye.

[6] Deputy Scott is a mutual acquaintance of the Hiles. He would often give Daniel work to do for grocery money but was not involved in the Cabinet's investigations but knew they were underway.

[7] He, once again, changed his statement—this time at trial—and said Appellant did not know about his sexual relationship with Mary.

The Commonwealth charged Appellant with three counts of facilitation to incest. The indictment charged that she "knowingly provided Daniel Hiles the means and opportunity" to commit incest against Mary. At the close of the Commonwealth's case-in-chief, Appellant moved for a directed verdict. The trial court denied her motion and declined making findings of fact on the record.[8] Appellant renewed her motion for directed verdict after announcing she would not put on a case. The trial court, once again, denied the motion. A Bracken County jury convicted Appellant on one count of facilitation to incest and one count of persistent felony offender, second degree. It recommended a five-year sentence for facilitation, enhanced to seven years by the persistent felony offense, second degree. On February 23, 2018, the trial court sentenced Appellant, in accordance with the jury's recommendation, and entered its judgment of conviction. This appeal followed.

ANALYSIS

"We review the issues raised by the parties using . . . different standards. Therefore, as we analyze each issue, we set forth the appropriate standards as necessary." *Banker v. Univ. of Louisville Athletic Ass'n, Inc*., 466 S.W.3d 456, 460 (Ky. 2015).

[8] In its ruling, the trial court stated "I'm not going to grant a directed verdict at this time. I'm not going to put on the record the reasons because I don't want to give anyone hints on what to argue or what not to argue, but I may at the appropriate time." VR, 1/30/18, 11:49:33.

This is an appeal of a criminal conviction. In our review, we are charged with addressing three issues: (1) whether the Commonwealth introduced sufficient proof of Appellant's knowledge and providing means and opportunity for the crime committed; (2) whether the trial court abused its discretion by allowing certain statements to be introduced at trial; and (3) whether the trial court correctly instructed the jury on the crime of facilitation.

I. The Commonwealth's Burden of Proof

Appellant's first argument is the trial court erred by denying her motion for a directed verdict. Generally, the standard of review for motions for directed verdict is as follows:

> 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. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony.
>
> 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.

Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991). This standard is deferential to the trial court, and reversal is only appropriate if it could be "clearly

unreasonable" for the jury to find the defendant guilty. *Id.* at 186-87. Finally, we base our review on the proof introduced at trial and the elements of the statute defining the offense. *Lawton v. Commonwealth*, 354 S.W.3d 565, 575 (Ky. 2011).

For a defendant to be convicted of a crime, the Commonwealth must prove, beyond a reasonable doubt, each element of the crime the defendant allegedly committed. Here, Appellant was convicted of criminal facilitation to incest. Under Kentucky law, an individual commits criminal facilitation if "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." KRS[9] 506.080.[10]

Here, based on KRS 506.080, the Commonwealth had to show that Appellant: (1) acted with knowledge that the principal actor is committing, or intends to commit, a crime; and (2) knowingly provided either the means or the opportunity for the principal actor to commit the crime. The factual timeline shows that a "reasonable jury" could find that Appellant committed both elements of the crime.

[9] Kentucky Revised Statute.

[10] We note the indictment and jury instruction mirrored the statutory language.

First, it was reasonable to conclude Appellant knew Daniel was committing, or intended to commit, incest. The factual record from February 2016 to March 2017, does not bode well for Appellant's defense. The timeline of events below shows how Appellant should have known sexual misconduct between Daniel and Mary may have been afoot:

> **February 2016** – The Cabinet opened its first investigation because of a tip it received alluding to Daniel's sexual abuse of Mary.
>
> **February 10, 2016** – Ms. Hurst interviews Appellant and Daniel regarding the abuse. Daniel describes Mary as clingy, and Appellant states Daniel constantly defends Mary when she and Appellant get into fights.
>
> During a second interview, at an undisclosed date, Ms. Hurst informs Appellant Daniel stated to a police officer "What's a guy to do if a girl is putting her hand down his pants?"
>
> **June 2016** – The Cabinet placed Mary in Holly Hill and limited Appellant's and Daniel's visitation with Mary.
>
> **September 2016** – Mary began home visits.
>
> **November 4, 2016** – The Cabinet revokes Mary's home visits and opens a second investigation because it received a second report regarding sexual contact between Daniel and Mary.
>
> Ms. Hurst interviewed Daniel and Appellant—again.
>
> **Unknown November date** – Ms. Hurst discusses a "prevention plan" with Appellant. Appellant and Daniel acknowledged and signed the plan. The plan included: (1) barring Daniel from having contact with Mary, while

> she was in the State's custody at Holly Hill; (2) neither Appellant nor Daniel would have any unsupervised contact with Mary until further notice; and (3) prevention of Daniel from being the sole caretaker of Mary.
>
> And Ms. Hurst also informed Appellant Mary would undergo a forensic interview at the Child Advocacy Center ("CAC"). In response to this, Appellant asked if Mary was "blaming Daniel for things that happened in the past?"
>
> **Unknown date between November 2016 and February 2017** – Ms. Patton tells Appellant she "had concerns in regard to sexual abuse, with Daniel as the perpetrator and [Mary] as the victim."
>
> **February 2017** – Ms. Hurst told Appellant she believed Mary was being sexually abused by Daniel and in her own experience, observations, and interviews, she felt there were "too many red flags." Appellant continued expressing her disbelief that anything was happening and told Ms. Hurst that Mary reporting something that happened in the past.

While this factual timeline may be salacious, it goes toward showing Appellant's notice, rather than her knowledge, of Daniel sexually abusing Mary. But those facts, coupled with the photographs she sent and phone calls she made to a friend, prove she had knowledge. Knowledge must be inferred from a defendant's conduct. *Chumbler v. Commonwealth*, 905 S.W.2d 488, 499 (Ky. 1995). And here, a reasonable juror *could* infer that Appellant knew that Daniel intended to sexually abuse Mary when she sent photographs of the two sleeping together and instructed her friend to send the photographs to a social worker.

Second, it was reasonable for a jury to conclude that Appellant provided the "means or opportunity" for Daniel to commit incest. Under the facilitation statute, the Commonwealth need not show that the defendant acted with intent. *Dixon v. Commonwealth*, 263 S.W.3d 583, 586 (Ky. 2008) (internal citations omitted). Therefore, in this case, the Commonwealth's burden was to simply show Appellant, knowing Daniel may commit a crime, provided an avenue or opportunity to commit the crime. She could have been "wholly indifferent to the actual completion of the crime" and still be guilty of facilitation. *Id*.

The factual record indicates prior to March 3, 2017, Appellant knew Daniel was committing or going to commit incest with Mary—as evidenced by her sending the photographs to a friend and wanting them reported to social services. Daniel did not confess and turn himself in until March 27. That means for at least 24 days, Appellant allowed her daughter to live and sleep under the same roof with a man she knew was having, or intending to have, sexual contact with her. And we know a sexual act occurred, at least once, on March 18, 2017.

Thus, our rationale hinges on the fact that Appellant left her home to go to the grocery store and, while gone, left Mary alone at the trailer with Daniel.[11] In this, Appellant created the means or opportunity for Daniel to commit incest

[11] In a statement to Deputy Scott, Daniel told him that the time he had sex with Mary was in the trailer on March 19, 2017, while Appellant was at the store. (VR, 1/29/18, 2:37:39).

against Mary. Given these facts, a reasonable jury could find Appellant facilitated Daniel's commission of incest against Mary.[12]

II. Relevant Evidence

Appellant next argues that the trial court incorrectly admitted irrelevant and prejudicial evidence at trial. In our review, we shall not disturb the trial court's ruling in absence of an abuse of discretion. *Partin v. Commonwealth*, 918 S.W.2d 219, 222 (Ky. 1996), *overruled on other grounds by Chestnut v. Commonwealth*, 250 S.W.3d 288 (Ky. 2008). Our Supreme Court defined abuse of discretion as a court's acting arbitrarily, unreasonably, unfairly, or in a manner "unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

Under the Kentucky Rules of Evidence,[13] a court may deem evidence relevant when it "[has] any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than

[12] We note jurors must weigh witness credibility. *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991). And while a reasonable juror could confer guilt on Appellant based on the singular fact she knew Daniel was going to commit incest and provided the opportunity for him to do so on March 18, 2018, the jury could also render a guilty verdict based on other facts. During an interview, Daniel admitted to Deputy Scott Appellant (1) would send Mary to stay with him in the trailer by herself; and (2) knew he and Mary were having sexual relations. Even though he recanted both these statements at trial, it is left to the jury to weigh conflicting statements and give credence to whichever one it finds more believable. *Nix v. Commonwealth*, 299 S.W.2d 609, 610-11 (Ky. 1957) ("[I]t is the jury's province to determine the weight [given to] conflicting testimony."). Given this, a reasonable jury could have found Appellant guilty of complicity.

[13] Kentucky Rules of Evidence.

it would be without the evidence." KRE 401. And this test requires "only a slight increase in probability . . . ." *Harris v. Commonwealth*, 134 S.W.3d 603, 607 (Ky. 2004).

In this case, Appellant filed a motion *in limine* to exclude the following evidence: (1) "testimony relating to evidence of domestic violence"; and (2) testimony relating to "[Appellant] having sex with Daniel Hiles, kissing Daniel Hiles, or telling Daniel Hiles that she loves him on or about March 26 or 27." R. at 57. The trial court denied Appellant's motion because it stated the acts go toward showing Appellant's state of mind.

First, we shall review each of these statements for their relevancy at trial. In *Adkins v. Commonwealth*, the Supreme Court of Kentucky held the Commonwealth can present a "complete, unfragmented picture of the crime and the investigation." 96 S.W.3d 779, 793 (Ky. 2003). Further, the Commonwealth may put on any theory for its case as to how and why a defendant committed the crime for which he is accused: if the theory is backed by relevant evidence, does not unduly prejudice the defendant, and does not violate any other rules of evidence. Here, the Commonwealth's theory was twofold. It argued Appellant allowed these acts to occur because "she was dependent upon Daniel for money [and because] she cared more about Daniel than her own daughter." Brief of Appellee, at p. 14.

Appellant argues that evidence showing she had a black eye; blamed Mary for giving it to her; and the subsequent discovery that it was, in fact, Daniel that gave her the black eye, was not relevant. Within this argument, she stated that the evidence was "not relevant to whether Rebecca knew Daniel was having sex with Mary and that testimony about domestic violence would cloud the jury's mind." Brief of Appellant, at p. 16. The trial court ruled the evidence showed Appellant's state of mind for covering for Daniel and, therefore, was relevant. We agree.

In arguing Appellant was guilty of facilitation to incest, the Commonwealth proffered the theory Appellant was concerned more about her relationship with Daniel than her relationship with her daughter, Mary. At trial, this theory was used to show Appellant's motive in facilitating Daniel's crime. The facts prove Appellant had a black eye during an interview with a Cabinet official, blamed Mary for giving it to her, and further investigation proved she lied and Daniel hit her. The trial court correctly held these facts could show the Appellant's state of mind at, and around, the time she committed the crime. In sum, this evidence goes toward Appellant's state of mind, which could prove she would "cover" for Daniel at the expense of Mary and, in turn, provided him an opportunity to commit incest.

Further, Appellant argues the trial court was incorrect in ruling evidence of her having sexual intercourse with Daniel, kissing him, and telling him she loved him on or about March 26 or 27 was relevant. In its ruling, the trial court correctly held these three incidences were relevant because it could prove either of the parties' theories. On one hand, it could show Appellant has no knowledge of Daniel's actions. And on the other hand, it could support a theory that Appellant cared more for Daniel than Mary and would cover for him at Mary's expense. Therefore, the trial court correctly ruled these factual instances as relevant.

Second, Appellant argues each of the above referenced facts admitted into evidence was prejudicial under KRE 403. Under the Kentucky Rules of Evidence, relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of undue prejudice . . . ." KRE 403. KRE 403 requires courts to undergo a balancing test, where if the undue prejudice *substantially outweighs* the probative value, the court must exclude the evidence.[14]

[14] *Partin* explains, in greater detail, a court's role in evaluating evidence under KRE 403:

> (i) assessment of the probative worth of the evidence whose exclusion is sought;
>
> (ii) assessment of the probable impact of specified undesirable consequences likely to flow from its admission (i.e., "undue prejudice, confusion of the issues, or misleading the jury, . . . undue delay, or needless presentation of cumulative evidence"); and

Thus, we tailor our analysis to the requirements enumerated in KRE 403 and outlined in *Partin*. In doing so, we find the probative value of the testimony outweighs the prejudicial effect provided by the testimony. In a facilitation prosecution, evidence that the defendant, the wife of the principal actor, protected the principal actor—at the expense of her own daughter—and engaged in intimate acts with him soon after his confession of sexually abusing her daughter is probative of the central inquiry. Prejudice is that which is unnecessary and unreasonable. *Romans v. Commonwealth*, 547 S.W.2d 128 (1977). Here, the testimony regarding domestic violence, past sexual acts between Appellant and Daniel, and Appellant's making intimate gestures toward Daniel as he turned himself in are necessary because each action may prove Appellant placed more emphasis on covering for, loving, and protecting Daniel than that of upholding her duty as a parent to protect her child.

While Appellant correctly states our courts have an indispensable duty to protect individuals' rights to privacy, these rights may be superseded in certain circumstances. At present, the factual record shows: (1) on March 26, Daniel confessed to sexually abusing Mary; (2) Daniel told Deputy Scott he and Appellant

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> (iii) a determination of whether the product of the second judgment (harmful effects from admission) exceeds the product of the first judgment (probative worth of evidence.)

Partin, 918 S.W.2d at 222 (internal citations omitted).

had sexual intercourse the night he confessed to sexually abusing her daughter and, once again, the next morning before turning himself in; and (3) as Appellant drove away from dropping off Daniel, she blew him kisses and told him she loved him.

Daniel sexually abused Appellant's minor child and confessed to doing so to her. Yet, she had sexual relations with him immediately afterward and expressed love for him as he turned himself in. These acts are probative in showing a total inconsistency with the actions of a mother/wife who was blinded by her husband's admission that he was having sexual relations with her minor daughter. The trial court correctly held the undue prejudice of these acts does not substantially outweigh their probative value.

III. Jury Instructions

Briefly, we address Appellant's final argument, which is the trial court erred by inadequately stating the law of facilitation. We review alleged errors in jury instructions *de novo*. *Lawson v. Commonwealth*, 425 S.W.3d 912, 915 (Ky. App. 2014) (citations omitted).

The jury instruction in question reads as follows:

> . . .
>
> B. That the Defendant, Rebecca Renee Hiles, acting with knowledge that Daniel Hiles was committing or intended to commit a crime, **engaged in conduct** which knowingly provided Daniel Hiles with the means or opportunity for the commission of the crime; and

> C. That such conduct on the part of the Defendant in fact, aided Daniel Hiles to commit the crime.

R. at 78 (emphasis added). By contrast, the jury instruction Appellant proposed, which the trial court denied, read:

> . . .
>
> B. That the Defendant, Rebecca Renee Hiles, **knowingly sent [Mary] to the trailer to have sex with Daniel Hiles**; and
>
> C. That such conduct on the part of the Defendant aided Daniel Hiles to commit the incest and that Daniel Hiles did in fact commit the act of incest.

Id. at 139 (emphasis added). As seen above, the difference between the two instructions is the instruction used at trial makes no singular reference of the "conduct" Appellant engaged in to commit the crime. In contrast, Appellant's proposed instruction confines "conduct" to the act of "knowingly sen[ding] [Mary] to the trailer to have sex with Daniel Hiles." Appellant finds fault with this.

Appellant argues the jury instructions offered "failed to adequately state the law of facilitation" and are so "bare bones" that they "mislead[ ] or misstate the law." *Sargent v. Shaffer*, 467 S.W.3d 198, 209 (Ky. 2015) (internal citations omitted). Further, she argues the Commonwealth "preferred the vague language of engaged in conduct because [it] could offer no specific action of how [Appellant] aided Daniel in having had incest with Mary a week before he was arrested." Brief of Appellant, at p. 25. We disagree.

To begin, we note Kentucky courts find the best practice in giving jury instructions is to "follow the language of the statute." *Prince v. Commonwealth*, 987 S.W.2d 324, 327 (Ky. App. 1997).[15] As previously noted, we reiterate the jury instructions used mirrored KRS 506.080. They correctly stated for Appellant to be convicted of facilitation, the jury must find she: (1) acted with knowledge that the principal actor is committing, or intends to commit, a crime; and (2) knowingly provides either the means or the opportunity for that person to commit the crime. Nowhere within the statute does it require a specific act of conduct. For a facilitation conviction, the jury must be instructed on Appellant having knowledge of Daniel's actions or intent, and with that knowledge, provided the means and opportunity for Daniel to commit the crime. The trial court did not need to insert a specific action into the instruction, and its actions were proper in leaving the phrase "engaged in conduct."

Also, as noted by the Commonwealth in its brief, Appellant's instruction "more closely mirrors the language of a complicity charge because it combines the act of sending Mary to the trailer for the *express purpose* of having sex with Daniel." (Emphasis in original). KRS 502.020 uses specific language

[15] Note the court also held "the failure of the court to strictly follow the language of the statute, defining the offense, in its instruction upon the trial of defendant for that particular statutory offense, is not a ground for reversal provided the instruction as given embraced and conveyed the meaning of the statute." *Id*. (quoting *Caldwell v. Commonwealth*, 265 Ky. 402, 96 S.W.2d 1041 (1936)).

establishing a defendant must intend for the crime to be committed.[16] *Dixon*, 263 S.W.3d at 586 (quoting *Thompkins v. Commonwealth*, 54 S.W.3d 147, 150 (Ky. 2001) ("[U]nder the complicity statute, the defendant must intend that the crime be committed; under the facilitation statute, the defendant acts without such intent.").

Here, Appellant's proposed instruction entwined her knowledge and creation of means and opportunity with actual intent. This instruction would not have been correct. She could have been "wholly indifferent"[17] to Daniel's commission of the crime, and her knowledge could be inferred from her conduct. *Chumbler*, 905 S.W.2d at 499. Therefore, her instruction would have misstated the law of facilitation.

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[16] KRS 502.020:

> (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.

(Emphasis added).

[17] *Darcy v. Commonwealth*, 441 S.W.3d 77 (Ky. 2014).

CONCLUSION

In sum, we hold: (1) a reasonable jury could find, beyond a reasonable doubt, Appellant guilty of facilitation to incest; (2) the trial court's rulings proper, regarding the relevancy and probative value of certain testimony at trial; and (3) the trial court correctly instructed the jury. Therefore, we affirm the judgment of the Bracken Circuit Court.

ALL CONCUR.

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