

IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

Supreme Court of Kentucky **FINAL**

2005-SC-000471-MR

DATE Jan 11, 07 E.A.G. GAVITT, P.C.

ARTHUR EUGENE ROBERTS

APPELLANT

V.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA GOODWINE, JUDGE
NO. 04-CR-00184

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Arthur Roberts (hereinafter appellant) was found guilty following a jury trial of one count of complicity to manslaughter in the second degree and one count of complicity to robbery in the first degree. He was sentenced to serve a total of twenty years in prison. On appeal, he argues that his conviction is invalid because the jury was not properly instructed below. We affirm.

The offenses for which appellant was charged occurred in the early morning hours of July 10, 2003, at an apartment complex in Lexington, Kentucky. John Laswell, his wife, and another couple from Lincoln County decided to go to Lexington to purchase powder cocaine and parcel it into smaller amounts to resell. Laswell called a contact he had once purchased from in the past, Robert Bush. Bush agreed to meet Laswell alone at Bush's residence. Laswell dropped off the others at a restaurant at

2:30 a.m. and went to meet Bush. However, Bush had obtained crack cocaine rather than powder. Laswell decided to go ahead and purchase the crack cocaine, and gave Bush a portion of it as a "finder's fee." As he left, Laswell let Bush know that he would purchase powder cocaine from him if any became available.

Laswell rejoined his wife and friends and was headed home to Lincoln County when he received a call from Bush. Bush indicated that there was a possibility of him being able to find some powder cocaine, and so the group decided Laswell should return. Laswell dropped the others off at a store and went to meet Bush at about 5:00 a.m. Bush made several phone calls but did not locate any powder cocaine. They continued their search for the cocaine by car, and went to the Winburn Apartments. On the street, Bush saw the person from whom he had obtained the crack cocaine. The seller confirmed that he had no powder cocaine, but he directed them to check with his "homeboys" who were standing outside nearby.

Bush approached the persons to whom the seller was referring and spoke to appellant. Appellant told Bush he did not have powder cocaine. Bush asked if they could obtain a quarter ounce of crack cocaine from him. As appellant did not have that much, he turned to his companions, Marcus Lewis, Doug Dodi, Tenna Moberly, and Ostaohanmwun Ighodaro, for more. They pooled their crack cocaine together and still were short of the amount Bush requested. Bush informed Laswell of what he had worked out, but Laswell indicated he was not interested in the crack cocaine and was ready to leave. Bush and Laswell returned to the car and went to a few more locations looking for powder cocaine, but were unsuccessful.

Nearing dawn, Bush suggested that Laswell could check back with him later in the day to see if he had found any. Bush asked for another piece of the crack cocaine.

Laswell informed Bush he had given it to his friends to hold. Bush then asked Laswell for additional money, purportedly for the purpose of obtaining a small amount of powder cocaine when it became available. Bush instead intended to take the money, purchase crack with it and go home, leaving Laswell behind. Bush told Laswell to head back to the Winburn Apartments, and Laswell agreed. Bush left the car with \$20 from Laswell.

Bush located appellant and purchased a piece of crack cocaine from him. Appellant asked if Laswell wanted to buy any crack, and Bush indicated appellant would have to check with Laswell because Bush was leaving. Bush walked home, leaving Laswell waiting for him on the street.

Appellant talked with Dodi, Ighodaro and Lewis outside the Wingate Apartments. He informed the group that Laswell still had a lot of money and suggested they rob him. Though there was some objection from Dodi, everyone agreed to participate. Lewis informed the group that he had a gun. The four of them walked over to Laswell's car. Lewis took the gun out of his pocket and walked to the driver's side door. Appellant walked to the passenger side. Ighodaro and Dodi stood back, having stopped short of the car. Lewis, at the open window, demanded money from Laswell. Laswell stated that he did not have any money. Lewis pointed the gun at Laswell and said that he knew he had money, and again demanded it. Laswell repeated that he did not have money. While Lewis renewed his demand, appellant leaned in the passenger side window and grabbed the keys from the ignition. Laswell then grabbed for the gun, and he and Lewis struggled for it. Laswell attempted to knock the gun out of Lewis' hand by hitting his hand against the frame of the car between the front and back windows. While they were struggling, appellant yelled at Lewis to shoot Laswell. Lewis fired the gun and shot Laswell in the head just above his left ear. Laswell died as a

result of the wound.

Appellant argues that the trial court's instructions to the jury were erroneous because he was denied instructions on facilitation. Appellant emphasizes that instructions must be given regarding every theory of the case supported by the testimony to any extent. Taylor v. Commonwealth, 995 S.W.2d 355, 360 (Ky. 1999). He argues that even though the defendant's argument may appear implausible or incredible, the jury is entitled to such an instruction if there is evidence to support it. Id. at 361; Mishler v. Commonwealth, 556 S.W.2d 676, 680 (Ky. 1977). Appellant argues that because the evidence showed that the only action he took in aid of the commission of the crime was taking the keys out of the ignition, he was entitled to an instruction on facilitation to the charged offenses.

Facilitation is committed when the defendant acts with knowledge that the principal actor is committing or intends to commit a crime, but the defendant acts without the intent that the crime be committed. Thompkins v. Commonwealth, 54 S.W.3d 147, 150 (Ky. 2001). The statute charges that 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. KRS 506.080(1). The crime of facilitation reflects the mental state of one who is wholly indifferent to the actual completion of the crime, whereas that of complicity may be accomplished "without physical aid or involvement in the crime, so long as defendant's actions involve participating with others to carry out a planned crime." Perdue v. Commonwealth, 916 S.W.2d 148, 160 (Ky. 1995).

Appellant was not entitled to instructions on facilitation. The evidence in the

case makes clear that appellant was a participant in the crime, not someone who assisted while remaining wholly indifferent to the commission of the crime. In his statement, appellant admitted that all of those present agreed that they would rob Laswell. His act of approaching the vehicle demonstrated that he was part of the robbery. Appellant's act of taking the keys from Laswell ensured that Laswell could not get away from Lewis. This established that appellant was not indifferent to the commission of the crime of robbery since he prevented Laswell's leaving to avoid the robbery. Contrary to being indifferent, appellant was interested in seeing the crime through to its fruition. All of the evidence points to appellant as a participant, and we observe no evidence to support his assertion that he merely facilitated the robbery. We agree with the trial court that a facilitation instruction would have been inappropriate.

Next, appellant argues that the evidence did not show that he knew that Lewis had a gun when they approached Laswell. Appellant contends that because the jury could have believed he only meant to facilitate or participate in a robbery not involving a weapon, he should have been permitted instructions on facilitation to and complicity to robbery in the second degree. Appellant did not request these instructions at trial or make this argument below, and so we consider this allegation of error unpreserved. RCr 9.54(2); Commonwealth v. Collins, 821 S.W.2d 488, 492 (Ky. 1991). In addition, appellant argues that he should have received facilitation instructions as to the murder and manslaughter counts. He also did not argue for those instructions below.

Appellant asserts that this Court should review the issue anyway pursuant to RCr 10.26. However, that rule is designed to address instances in which a palpable error occurred causing a manifest injustice, not to be used merely to excuse the non-preservation of error. Commonwealth v. Pace, 82 S.W.3d 894, 895 (Ky. 2002). As

appellant has failed to demonstrate any evidence to support facilitation instructions, we find no palpable error. From our review of the record, it is clear that the jury was properly instructed and no further review is warranted.

For the foregoing reasons, we affirm appellant's convictions in the Fayette Circuit Court.

All concur.

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