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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-001394-MR
AND
NO. 2010-CA-000146-MR

MATERA PATE

APPELLANT

v. APPEAL FROM FULTON CIRCUIT COURT
HONORABLE TIMOTHY A. LANGFORD, JUDGE
ACTION NO. 08-CR-00068 AND NO. 09-CR-00006

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING JUDGMENT IN NO. 08-CR-00068,
AND REVERSING AND REMANDING
JUDGMENT IN NO. 09-CR-00006

** ** * ** * ** *

BEFORE: TAYLOR, CHIEF JUDGE; LAMBERT, JUDGE; AND ISAAC,¹
SENIOR JUDGE.

LAMBERT, JUDGE: Matera Pate (Appellant) directly appeals from two criminal convictions related to the December 2007 robbery of a Save-A-Lot store in Fulton

¹ Senior Judge Sheila R. Isaac sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

County, Kentucky. Following a jury trial, the Fulton Circuit Court convicted Appellant on one count each of complicity to first-degree robbery (No. 08-CR-00068) and of theft by unlawful taking over \$300.00 (No. 09-CR-00006).

Appellant received a ten-year sentence for the complicity conviction and a one-year sentence for the theft conviction, which were ordered to be served concurrently for a total of ten years in prison. Appellant now contends that the complicity instruction was not supported by the record and that the conviction for theft by unlawful taking should be vacated on double jeopardy grounds. We affirm Appellant's complicity conviction, but we reverse her conviction for theft by unlawful taking and remand for dismissal of that charge.

During the evening hours of December 19, 2007, three individuals, one armed with a handgun, entered a Save-A-Lot store and stole approximately \$1300.00 in cash. One person subdued store clerk Michelle Fields, while the other two went into the manager's office and ordered night manager Dionne Patrick to give them the money from the safe. The robbery ended when stock clerk David Shehorn appeared from the back of the store. The three individuals, along with a fourth person, the driver, proceeded to Hickman where they split the stolen money.

Several months later, five people were indicted on charges related to the robbery. Appellant, the participant who subdued Fields during the robbery, was indicted on charges of first-degree robbery² and of engaging in organized crime.³

² KRS 515.020.

³ KRS 506.120.

She was later indicted on the charge of theft by unlawful taking over \$300.00⁴ after she joined her co-defendant's motion to dismiss the criminal syndicate charge.

Also indicted were Cornelius Woody; Tanya Brown, who was armed with a handgun and stole money from the manager's office; Johana (Jody) Spears, who acted as the lookout and getaway driver; and Fields, the store clerk who acted as the inside person. Brown, Spears, and Fields entered guilty pleas to reduced charges conditioned on their truthful testimony at the trial of Appellant and Woody.

Appellant and Woody were tried jointly before a jury in April 2009. Prior to the start of the trial, the circuit court granted the Commonwealth's motion to amend the charge against Appellant from first-degree robbery to complicity to first-degree robbery. At the conclusion of the trial, the jury found Appellant guilty of complicity to first-degree robbery and of the theft charge, but found her not guilty on the organized crime charge.⁵ In accordance with the jury's recommendation following the penalty phase, the circuit court sentenced Appellant to a ten-year sentence on the complicity to first-degree robbery conviction and to a one-year sentence on the theft conviction, to be served concurrently. The circuit court also ordered Appellant to pay restitution to Save-A-Lot.

Prior to the entry of the judgment, Appellant moved to dismiss the theft charge on double jeopardy grounds as the theft charge arose from the robbery. The

⁴ KRS 514.030.

⁵ The jury found Woody guilty of facilitation to first-degree robbery and theft by unlawful taking, and likewise found him not guilty on the organized crime charge.

circuit court denied the motion in a docket order dated June 25, 2009. The record does not contain a separate, written order addressing the motion. This consolidated appeal follows.

On appeal, Appellant raises two issues. The first claim of error addresses an unpreserved issue; namely, whether the theories underlying the instruction for complicity to robbery were sufficiently supported by the record so as to protect her right to a unanimous verdict. Appellant's second claim of error is whether her convictions for complicity to robbery and theft constituted a double jeopardy violation. We shall consider each of these arguments in turn.

Appellant's first argument is unpreserved, and she requests review of this matter under the palpable error rule, Kentucky Rules of Criminal Procedure (RCr) 10.26, to correct what she alleges is a manifest injustice. Appellant contends that she did not object to the tendered instruction because the Commonwealth moved to amend the original robbery charge to complicity to robbery shortly before the trial. Because the circuit court denied her motion to continue the trial due to the late amendment, she claims she did not have sufficient time to understand all of the Commonwealth's strategies in going forward on the amended charge.

RCr 10.26 provides for the review of an unpreserved claim of error by an appellate court under certain circumstances:

A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or 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.

The instruction at issue is Instruction Number 5, which reads as follows:

Instruction No. 5

Complicity to Robbery in the First Degree

You, the jury, will find the Defendant, Matera Pate, guilty of Complicity to Robbery in the First Degree under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

A. That in this county on or about the 19th day of December, 2007 and before the finding of the Indictment herein, the Defendant, Matera Pate aided, counseled or attempted to aide Cornilious [sic] Woody, Tanya Brown, Jody Spears and Michelle Fields, in the robbery of the Save-A-Lot by taking \$1,358.08 cash monies;

AND

B. That in the course of so doing and with the intent to accomplish the theft, the Defendant, Matera Pate, aided, counseled or attempted to aide Cornilious [sic] Woody, Tanya Brown, Jody Spears or Michelle Fields in the use or threat of the immediate use of physical force upon Dione Patrick and/or David Shehorn;

AND

C. That the Co-Defendants Cornilious [sic] Woody, Tanya Brown, Jody Spears or Michelle Fields was armed with a deadly weapon, namely a gun[.]

Appellant contends that the evidence elicited at trial does not support any of the three lettered paragraphs in the instruction, while the Commonwealth argues that there was little dispute as to the participants' respective actions in the robbery and that there was overwhelming evidence of guilt for all involved. We agree with the Commonwealth that although the instruction could have been better articulated,

Appellant has not established that the alleged error caused such manifest injustice to justify our review.

The testimony elicited at trial, some by participants in the crime, established Appellant's actions in the robbery, including the planning of the theft itself, the decision to obtain and take a gun to the store, and the threat to use the gun in the course of the robbery. Accordingly, any minor discrepancies in the instruction were rendered harmless by the evidence submitted at trial.

Turning to Appellant's second argument that her convictions for complicity to robbery and theft constitute a double jeopardy violation, we recognize that the Commonwealth agrees with Appellant that the two crimes merged. Accordingly, the theft conviction must be reversed for dismissal of that charge.

Briefly, the United States Supreme Court set forth the federal rule addressing double jeopardy in *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306 (1932):

The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.

The Supreme Court of Kentucky's test as set forth in *Commonwealth v. Burge*, 947 S.W.2d 805 (Ky. 1996), parallels the *Blockburger* test: "We are to determine whether the act or transaction complained of constitutes a violation of two distinct statutes and, if it does, if each statute requires proof of a fact the other does not. Put differently, is one offense included within another?" *Burge*, 947 S.W.2d at 811

(internal citations omitted). *See also* KRS 505.020 (codifying the holdings in *Blockburger* and *Burge*).

The circuit court convicted Appellant of complicity to first-degree robbery.

KRS 502.020(1) defines complicity as follows:

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.

The crime underlying the complicity charge was first-degree robbery, which is defined by KRS 515.020(1):

A person is guilty of robbery in the first degree when, in the course of committing theft, he uses or threatens the immediate use of physical force upon another person with intent to accomplish the theft and when he:

- (a) Causes physical injury to any person who is not a participant in the crime; or
- (b) Is armed with a deadly weapon; or
- (c) Uses or threatens the immediate use of a dangerous instrument upon any person who is not a participant in the crime.

Finally, KRS 514.030(1) defines theft by unlawful taking:

Except as otherwise provided in KRS 217.181 or 218A.1418, a person is guilty of theft by unlawful taking or disposition when he unlawfully:

(a) Takes or exercises control over movable property of another with the intent to deprive him thereof[.]

We agree with Appellant and the Commonwealth that the taking of the cash supporting the theft charge should have merged with the robbery charge, as the taking of the same cash represented the theft element in the robbery charge. Accordingly, the circuit court erred when it failed to dismiss the charge for theft by unlawful taking.

For the foregoing reasons, the judgment of conviction in No. 08-CR-00068 for complicity to first-degree robbery is affirmed. The judgment entered in No. 09-CR-00006 convicting Appellant of theft by unlawful taking over \$300.00 is reversed, and this matter is remanded for dismissal of that charge.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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