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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-001576-MR

LYNN PORTER — APPELLANT

v.

APPEAL FROM MARION CIRCUIT COURT
HONORABLE JUDGE DOUGHLAS M. GEORGE, JUDGE
ACTION NO. 96-CR-00171

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
REVERSING AND REMANDING
** ** ** ** **

BEFORE: GUDGEL, CHIEF JUDGE; BUCKINGHAM AND JOHNSON, JUDGES.

JOHNSON, JUDGE: Lynn Porter has appealed the judgment entered by the Marion Circuit Court on June 16, 1998, that convicted her of complicity to robbery in the first degree[1] and sentenced her to prison for ten years. Having concluded that the trial court erred to Porter's substantial prejudice by allowing the Commonwealth to introduce Porter's mug shot as evidence, we must reverse and remand for a new trial.

[1]Kentucky Revised Statutes (KRS) 502.020 (complicity) and KRS 515.020 (robbery in the first degree).

This case was tried before a jury on May 22, 1998. The only witness to testify at the trial was the victim, Michala Wilcher. She testified that on November 6, 1996, at approximately 7:45 p.m. she drove to the Wal-Mart store in Lebanon, Kentucky. As she entered the front entrance of the store, she heard someone call out to her. Porter and her companion, Angela Johnson, were in the lobby of the store. Johnson asked Wilcher if she was "Mickie" or "Monty."[2] Johnson then told Wilcher they were waiting for a friend; but since they were not sure the friend would come, she asked Wilcher to give them a ride to a nearby McDonald's restaurant. Wilcher told Porter and Johnson that after she finished her shopping she would give them a ride.

When Wilcher left the Wal-Mart store approximately 30 minutes later, she notice Porter and Johnson standing outside the building. Again, they asked for a ride and Wilcher agreed. When the women got into the car, Porter asked Wilcher if she knew who they were. Wilcher replied that she remembered them from high school, but could not remember their names. Porter then told Wilcher that she was "Kendra" and Johnson was "Monica".

After arriving at McDonald's, Porter and Johnson stated that they did not see their friends and asked Wilcher to drive them to the Maple Street Apartments. Porter gave Wilcher

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[2]Wilcher identified herself as "Mickie". Her twin sister is known as "Monty". The twin sisters had attended high school with Porter and Johnson about four to five years before the robbery. Porter graduated from high school in 1991 and Wilcher in 1992.

directions. Upon arrival at the apartments, Porter saw a car drive by and said "that's my brother, I don't want to stay here, I don't want to see him." Porter and Johnson then asked Wilcher to drive them to Hamilton Heights Apartments. Wilcher said that at that point she "was getting scared." When they entered the apartments' premises, Porter and Johnson told Wilcher to stop the car in a cul-de-sac in front of the apartments and to park under the street light. After Wilcher started to open the door to let Johnson out of the back seat, Johnson told Wilcher "Mickie, the best thing for you to do now is to give us your purse." As Wilcher turned her head to look at Johnson, she felt the small handgun that Johnson was holding against her face. Wilcher turned back around, picked up her purse and handed it over the seat to Johnson. Johnson then told Wilcher to empty her pockets. At this point Wilcher got out of the car to show Johnson that she did not have any pockets to empty. Porter told Johnson, "Don't hurt her, just take her purse." Porter got out of the car and she and Johnson walked away with Johnson carrying Wilcher's purse.

Wilcher drove to the attorney's office where her twin sister was working late and her sister took her immediately to the police department to report the robbery. Wilcher gave Officer Shelton Young a statement about the robbery, but she did not know Porter's and Johnson's real names. Officer Johnny Masterson took Wilcher's sister to Wilcher's mother's house to locate some high school yearbooks for Wilcher to use in

identifying the suspects. About three days after the robbery, Wilcher tentatively identified Porter and Johnson from the 1989 and 1991 high school yearbooks; but since she had not seen the suspects in three to five years, she asked to see more recent pictures of them. Approximately two weeks later, Wilcher identified Porter and Johnson from a photo line-up that included a mug shot of Porter.[3]

Porter argues that she was unduly prejudiced when her mug shot was introduced into evidence and shown to the jury. The Commonwealth claims that introduction of the mug shot was necessary "to confirm the victim's positive out of court identification of [Porter]." We disagree.

The factors that the trial court must consider in determining the admissibility of a mug shot were set forth by this Court in Redd v. Commonwealth,[4] which involved the eye witness identification of a robber. In reversing the conviction for robbery in the first degree and remanding for a new trial, Judge Howerton, writing for a split panel, stated that "[t]he

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[3]The record is unclear as to when the mug shot was taken. The robbery occurred on November 6, 1996, and Porter was indicted on December 2, 1996, and arrested on the indictment on December 5, 1996. At the bench conference concerning the admissibility of the mug shot, the prosecutor indicated that the mug shot was taken before Porter's arrest on December 5, 1996. The prosecutor said, "They arrested her on an unrelated charge." Defense counsel responded, "For which, for which [sic] it was dropped because the were just fishing." The best that we can determine from this rather scant record is that Wilcher made the identification of Porter from the mug shot on November 21, 1996, after Porter had been arrested on an unrelated charge.

[4]Ky.App., 591 S.W.2d 704 (1979).

error we find so unnecessary, inexcusable, unfair, and reversible relates to the introduction of improper character evidence through the use of mug shots and the references to them at trial."[5] The Court noted that "when [mug shots] are used, the implication is quite clear that the accused has previously been in the hands of the law. Mug shots are so familiar as to create a natural inference that the one photographed has a criminal record [citation omitted]."[6] The Court noted that "it appears that the admission of Redd's mug shot added little probative value, but it did provide substantial and unnecessary prejudice."[7] The Court also stated:

> When we review this case as a whole, we can only conclude that there is more than mere prosecutorial overkill. Some of the errors complained of were unnecessary, prejudicial and reversible. Despite the apparent reliable and positive identification of Redd as the perpetrator of the offense, he did not receive a fair trial, and for the sake of the law, a new trial must be granted.[8]

In determining that the mug shot was erroneously admitted, the Court adopted the three-prong test from United States v. Harrington[9]:

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[5] Id. at 707.

[6] Id.

[7] Id. at 708.

[8] Id. at 706.

[9] 490 F.2d 487 (2d Cir. 1973).

> (1) the prosecution must have a demonstrable need to introduce the photographs;
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> (2) the photos themselves, if shown to the jury, must not imply that the defendant had a criminal record; and
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> (3) the manner of their introduction at trial must be such that it does not draw particular attention to the source or implications of the photographs.[10]

To determine whether the trial court committed reversible error in the case sub judice, we need look no further then the first factor. Clearly, the Commonwealth cannot demonstrate any need to introduce the photographs. Wilcher's identification of Porter and Johnson was never questioned by Porter. In fact, defense counsel in her opening statement conceded that Porter "was with Angela Johnson" when Johnson robbed Wilcher. The only issue before the jury was whether Porter was a complicitor with Johnson.

The case at bar is easily distinguishable from Williams v. Commonwealth.[11] In Williams, where our Supreme Court adopted the three-part Harrington test that was used in Redd, the Court concluded that "[t]he trial court, using its discretion, found that the Commonwealth demonstrated the need to introduce the mug shot in order to confirm the victim's positive identification of the appellant."[12] The Supreme Court cited Redd and stated,

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[10]Redd, supra at 708.

[11]Ky., 810 S.W.2d 511 (1991).

[12]Id. at 513.

"[w]hen mug shots are shown at the trial level, the probative value of the mug shot must outweigh the prejudicial effect."[13] As previously noted, in the case sub judice it is impossible for the Commonwealth to meet this test since the mug shot had absolutely no probative value--the identity of Porter was not at issue. The Commonwealth's argument that admission of the mug shot was necessary "in order to confirm the victim's positive out of court identification of the appellant" is not supported by the record. The record clearly demonstrates the contrary, and we reverse and remand for a new trial.

Porter also claims that the trial court erred when it refused to instruct the jury on the lesser-included offense of criminal facilitation to robbery in the first degree. Since this issue is likely to recur at the new trial, we will address it. However, under the evidence as presented at this trial, we do not believe that Porter was entitled to such an instruction.

A trial court's duty to instruct on a lesser-included offense arises only when the evidence justifies a finding of guilt on the lesser-included offense.[14] Our analysis requires a close examination of the definitions of criminal facilitation and complicity. Criminal facilitation is defined at KRS 506.080:

> (1) A person is guilty of criminal facilitation when, acting with knowledge that another person is committing or intends to

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[13] Id.

[14] Wombles v. Commonwealth, Ky., 831 S.W.2d 172 (1992); Martin v. Commonwealth, Ky., 571 S.W.2d 613 (1978).

> 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.

Complicity is defined at 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:
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> (a) Solicits, commands or engages in a conspiracy with such other person to commit the offense; or
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> (b) Aids, counsel, or attempts to aid such person in planning or committing the offense; or
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> (c) Having a legal duty to prevent the commission of the offense, fails to make a proper effort to do so.

The principle distinction between criminal facilitation and complicity is that "[f]acilitation reflects the mental state of one who is 'wholly indifferent' to the actual completion of the crime[,]" while complicity "may be accomplished without physical aid or involvement in the crime, so long as the defendant's actions involve participating with others to carry out a planned crime."[15] "The main difference between [criminal facilitation] and complicity is the state of mind; complicity requires the complicitor to "intend" that the crime take place."[16]

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[15]Perdue v. Commonwealth, Ky., 916 S.W.2d 148, 160 (1995).

[16]Webb v. Commonwealth, Ky., 904 S.W.2d 226, 228 (1995).

The differences in the two offenses were explained in Kentucky Criminal Law[17] as follows:

> Kentucky . . . is now one of a few jurisdictions that provides for a lesser degree of liability for knowingly aiding another in the commission of a crime. KRS 502.020 forecloses the possibility of accomplice liability for such conduct (by requiring the mental state of intention for such liability) and KRS 506.080 provides for the lesser form of liability by defining the offense of criminal facilitation. The new offense is best described as "a kind of accessorial conduct in which the actor aids the commission of a crime with knowledge that he is doing so but without any specific intent to participate therein or to benefit therefrom."
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> . . .
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> Under the accomplice [complicity] statute, the giving of aid with intent that the offense be committed is the key element, whereas under the facilitation statute knowingly providing assistance[,] without intent to commit an offense [,] to a person who intends to commit a felony and actually commits the crime contemplated, is the key element and difference.

In Houston v. Commonwealth,[18] our Supreme Court noted that it had consistently held that criminal facilitation can be a lesser-included offense of complicity.

> We have consistently held that criminal facilitation can be a lesser included offense of an indictment charging complicity, "because it has the same elements except that the state of mind required for its commission

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[17]Lawson and Fortune, Kentucky Criminal Law §7-5(a) and (b)(1) (1998)(quoting N.Y. Penal Law, Article 115, Practice Commentaries (McKinney 1987)).

[18]Ky., 975 S.W.2d 925, 930 (1998).

> [knowledge] is less culpable than the state of mind [intent] required for commission of the other [complicity] offenses." Luttrell v. Commonwealth, Ky., 554 S.W.2d 75, 79 (1977); see also Chumbler v. Commonwealth, Ky., 905 S.W.2d 488, 499 (1995); Webb v. Commonwealth, Ky., 904 S.W.2d 226, 229 (1995); cf. Skinner v. Commonwealth, Ky., 864 S.W.2d 290, 298-99 (1993).

These principles provide a workable framework that we can apply in the case sub judice. Porter claims that "[t]he evidence presented. . . would have allowed a reasonable jury to choose between differing interpretations regarding the Appellant's state of mind." The Commonwealth responds by arguing that "[t]he record discloses that appellant did more than simply provide an opportunity for the robbery to occur, she was an active participant in the crime."

At trial, Porter's counsel forcefully argued that from the evidence the jury could have reasonably believed one of three things: (1) that Porter was not involved in Johnson's plan to rob Wilcher and was surprised when the robbery occurred, but feared expressing her objection to the robbery since Johnson was armed, and therefore was not guilty; (2) that Porter intended to promote or facilitate the robbery by aiding Johnson in planning or committing the robbing by falsely telling Wilcher their names were "Kendra" and "Monica," by giving Wilcher directions to the apartments, and by saying, "Don't hurt her, just take her purse," and therefore was guilty of complicity; or (3) that Porter knew that Johnson intended to commit a crime, and that Porter knowingly provided Johnson with the opportunity to commit the

crime and in fact aided her in committing the crime, but that Porter lacked any specific intent to participate therein or to benefit therefrom, and therefore was guilty of criminal facilitation.

The flaw in Porter's criminal facilitation argument is that the evidence does not support finding both (1) that Porter knew that Johnson intended to rob Wilcher, that she knowingly provided Johnson with the opportunity to commit the robbery and in fact aided her in committing the robbery; but (2) that Porter lacked any specific intent to participate in the robbery. If the jury did not believe that Porter acted as set forth in (1), then Porter was not guilty. If the jury believed Porter committed the acts in (1), Porter was guilty of complicity because there was no evidence to support the requirement of (2) that Porter lacked any specific intent to participate in the robbery. Under the evidence presented, it would have been inconsistent and unreasonable for a jury to have believed both (1) and (2). Our conclusion is based on the fact that if the jury believed Porter was aiding Johnson in committing the robbery, that it would also have to believe that Porter intended to participate in the robbery. There was no evidence to support a finding that Porter did not intend to participate in the robbery other than evidence that supported a finding of not guilty. There was no basis for finding that Porter was not guilty of complicity, but also not totally innocent. She was either an unknowing and unwilling spectator or a complicitor. On remand, for Porter to be entitled

to a criminal facilitation instruction, there will have to be some evidence that she did not intend to participate in the robbery, but only knew of Johnson's intentions and knowingly aided Johnson, e.g., if Porter had knowingly aided Johnson in getting Johnson a ride with Wilcher, but Porter had exited Wilcher's car before Johnson committed the robbery.

Porter relies primarily on Luttrell v. Commonwealth,[19] and Webb, supra. Luttrell has often been cited by our courts in addressing the issue of entitlement to a jury instruction for criminal facilitation. In Luttrell, the Supreme Court reversed the trial court for refusing to give an instruction on criminal facilitation that was requested by defendant Sullivan. Luttrell, age 25, and Sullivan, age 17, stole a car in Jeffersonville, Indiana, and drove to Louisville, Kentucky. "Sullivan discovered a .38 caliber revolver which belonged to the owner of the car,"[20] and showed it to Luttrell. When Luttrell ran a stop sign, he was pulled over by Officer Phillips. Luttrell got out of the stolen car, walked toward the police car, noticed that the police car was equipped with a computer that could be used to trace the license plate of the stolen car, and told Officer Phillips he would have to get his driver's license out of the car. Luttrell "returned to the car and told Sullivan to 'shoot him,' the police

[19]Ky., 554 S.W.2d 75 (1977).

[20]Id. at 77.

officer. Sullivan got the gun out and handed it to Luttrell. Luttrell spun around and shot Officer Phillips in the chest."[21]

In holding that Sullivan was entitled to an instruction on criminal facilitation the Supreme Court stated:

> Sullivan would be guilty of criminal facilitation if he furnished Luttrell with the means of committing a crime knowing that he would use it to commit a crime but without intention to promote or contribute to its fruition. He is guilty of the substantive offense by complicity if he furnished the means of committing the crime intending to aid in the commission of the crime. Under these circumstances criminal facilitation is a lesser included offense because it has the same elements except that the state of mind required for its commission is less culpable that [sic] the state of mind required for commission of the other offenses [emphasis original].
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> While a reasonable juror might doubt that Sullivan acted as a principal, because of the age difference between Sullivan and Luttrell and the difference between the levels of activity of Sullivan and Luttrell, a reasonable juror could conclude that Sullivan acted as a facilitator. Consequently, at the new trial Sullivan is entitled to instructions on criminal facilitation of attempted murder and assault in the second degree [emphasis added].[22]

Our Supreme Court in Webb, relied on Luttrell when it once again reversed the trial court for refusing to give a jury instruction on criminal facilitation. The evidence in Webb

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[21]Id.

[22]Id. at 79.

"presented two significantly different versions of events."[23] "According to [Webb's] theory of the case, his girlfriend, [ ] Phelps, had been introduced to Detective [ ] Roberts by [ ] Thompson, a confidential police informant."[24] Webb, in his own car, drove Phelps and Thompson to meet Det. Roberts. Thompson left the car, walked over to Det. Roberts, spoke to Det. Roberts, returned to Webb's car, and gave Phelps $150.00. Webb then drove Phelps to an apartment where she bought some controlled substances. Phelps told Webb she intended to give all the pills to Thompson except for one pill that he said she could keep. Webb drove Phelps back to the parking lot where Det. Roberts was waiting. Webb gave all but one of the pills to Thompson and Det. Roberts. Webb claimed "that he never got out of the car, never got any of the money, and never got any of the pills." "The Commonwealth present[ed] a different version."[25] Det. Roberts claimed that Webb went with him to an apartment and handed him a Dilaudid pill.

In reversing, the Supreme Court stated:

> [T]he appellant's testimony alternatively provides ample evidence to suggest that, though he became aware of Phelp's criminal activity and provided her with transportation, he did not actually intend that the criminal transaction occur. His version of the incident, provided to the jury, presented evidence that he did not know

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[23] Webb, supra at 227.

[24] Id.

[25] Id. at 228.

> about Phelps' criminal activity until she had purchased the drugs. He then drove her back to the apartment. He testified that he did not accompany Phelps when she agreed to get the drugs for Roberts, nor when she purchased the drugs, nor did he deliver the Diluadid pill to Roberts. Appellant claims he never helped plan the transaction nor received any money or other benefit from it.
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> In light of this evidence, a reasonable juror could believe that appellant gave Phelps a ride in his car, knowing that she was in the process of a drug transaction, but that appellant did not specifically intend that that crime be accomplished. An instruction on a lesser-included offense should be given if the evidence is such that a reasonable juror could doubt that the defendant is guilty of the crime charged, but conclude that he is guilty of the lesser-included offense. Luttrell v. Commonwealth, Ky., 554 S.W.2d 75, 78 (1977).
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> The decision as to whose story to believe is, of course, an issue for the jury to decide. The jury should have been given an opportunity to consider this criminal facilitation instruction. Refusal to allow such an instruction, when supported by the evidence presented, constitutes reversible error.[26]

While Luttrell and Webb support Porter's argument and Luttrell, in particular, is difficult to distinguish, we must also consider four cases that strongly support the Commonwealth's position.[27] In Commonwealth v. Caswell,[28] the Commonwealth appealed from the dismissal of an indictment and sought a

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[26]Id. at 228-29.

[27]We note that in the four pages devoted to this issue in the Commonwealth's brief these four cases are not even mentioned.

[28]Ky.App., 614 S.W.2d 253 (1981).

certification of the law. This Court noted that Caswell and Montgomery "acting alone or in complicity, were charged with 15 counts of forgery in the second degree in the use of a stolen credit card."[29] While Caswell "did not sign or actually forge the name of the holders of the card, she was with Mrs. Montgomery when 14 of the 15 purchases were made, she selected the merchandise which was purchased on many of the occasions, she drove Mrs. Montgomery to all of the stores where Mrs. Montgomery made purchases and she carried the merchandise so purchased in her automobile."[30] This Court held that if Caswell "knew that [ ] Montgomery intended to commit or was committing a forgery, her action in providing transportation, selecting various items to be purchased and hauling the loot away from the stores would necessarily have evinced an intent to promote the commission of the crime. An instruction on criminal facilitation was not warranted."[31]

In Skinner v. Commonwealth,[32] the Supreme Court held that Griffieth was not entitled to an instruction on criminal facilitation because

> [i]n view of all the evidence--that Griffieth not only provided the car but drove the car to the scene, returned to the house on foot, held open the door while Skinner and Hale

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[29] Id. at 253.

[30] Id. at 253-54.

[31] Id. at 254.

[32] Ky., 864 S.W.2d 290, 298 (1993).

> loaded items from the house into the wheelbarrow, and accompanied the two with the wheelbarrow in flight from the house--we believe that a reasonable juror could not have acquitted Griffieth both of burglary in the second degree and burglary by complicity, and still have found him guilty of criminal facilitation.

In Churchwell v. Commonwealth,[33] this Court held that Churchwell was not entitled to an instruction on criminal facilitation because

> Irvan testified that Churchwell suggested they "[get] some radar detectors." He then said that the two men gathered rocks from the side of the dam to shatter the car windows. He explained that Churchwell "busted the window out of the first car," then went to the next car while Irvan grabbed the radar detector. According to Irvan, Churchwell "busted the window out of [the second car] and reached in a grabbed the radar detector." Obviously, Churchwell did more than simply provide an opportunity for Irvan to steal the radar detectors: he was an active participant in the crimes [footnote omitted].

In Adkins v. Commonwealth,[34] this Court held that Adkins was not entitled to an instruction on criminal facilitation when the evidence showed that Adkins and an accomplice were in a department store examining some dresses when "the other man put four of the dresses over his shoulder, placed his pea-coat on top of them, and both men then walked rapidly to an exit." The store manager "followed them and attempted to stop them by placing a hand on each man's shoulder, whereupon [Adkins]

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[33]Ky.App., 843 S.W.2d 336, 338 (1992).

[34]Ky.App., 647 S.W.2d 502, 504-06 (1982).

shoved him away." The store manager "then grabbed the man with the dresses, and [Adkins] again shoved him. The two men then ran in opposite directions." This Court stated that "the jury could reasonably infer . . . that [Adkins] had knowingly assisted his colleague in stealing the dresses, whereas there is no evidence to justify a finding that [Adkins] merely provided an opportunity for the theft."[35]

We recognize that it is difficult to distinguish some of these cases on their facts. However, we feel more able to decide this issue when we apply the general principles that were set forth in Luttrell, supra, Webb, supra, Perdue, supra and Houston, supra. Unless the jury found Porter not guilty, we believe that it would be unreasonable for the jury to determine that Porter was "wholly indifferent to the actual completion" of the robbery;[36] that she did not "intend that the crime take place"[37]; or that she acted "without any specific intent to participate" in the robbery.[38] Thus, based on the evidence presented below, these principles support the trial court's denial of the criminal facilitation instruction.

Accordingly, we reverse on the mug shot issue and remand for a new trial consistent with this Opinion.

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[36]Perdue, supra at 160.

[37]Webb, supra at 228.

[38]Kentucky Criminal Law, supra.

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