

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2001-CA-001122-MR

THOMAS M. REED

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE LAURANCE B. VanMETER, JUDGE  
ACTION NO. 00-CR-00378

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING  
\*\* \*\* \* \* \* \* \*

BEFORE: BUCKINGHAM, KNOPF, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: Thomas M. Reed appeals from his conviction of complicity to first-degree robbery. Having reviewed the record and the applicable law, we affirm.

On April 4, 2000, appellant and McClellan Gaines were indicted for first-degree robbery. The charge stemmed from the robbery of a cab driver, James Lane, which occurred in Lexington, Kentucky on August 21, 1999. Appellant's fingerprints, along with those of Gaines and a Kenneth Williams, also believed to be involved in the crime, were found on the cab. Appellant and Gaines were tried together in a jury trial which commenced April 4, 2001.

At trial, the victim, James Lane, testified that, on August 21, 1999, he was working as a cab driver for United Transportation Cab Company in Lexington, Kentucky. Around dusk on that date, he received a call from his dispatcher to go to 510 Hollow Creek Road, Apartment 57. When he arrived, he honked his horn but no one came out, so he took another call to go to the Congress Inn. That call got cancelled, and then he got sent back to 510 Hollow Creek Road, Apartment 57, as the dispatcher said the people had called back.

When Lane pulled into the lot, there were two men standing there, and he blew his horn and they walked up. One of the men got in the front passenger seat of the cab, and the other got in the rear behind the driver's seat. Lane testified that there were always only two people in the cab, never three. The men told Lane that they needed to go down the street to get money, and then they needed to go to the Eastland area. Lane first drove the men about a block to 456 Hollow Creek Road where they got out - one saying he was going to go in and get the money and the other deciding to go with him. Lane pulled into a parking spot to wait.

After about five minutes, Lane looked in his rearview mirror and saw the two men. Again, one man got in the front seat of Lane's cab, and the other man got in the back. The man in the back seat asked how much they owed. Lane said \$2.90 and immediately felt an awful pain in the back of his head. Lane tried to start the cab, and the man in the front seat took the keys out of the ignition. The man in the front seat kept telling

the man in the back seat to "hit him again." Lane testified that he kept getting beat on the head. Although he did not know it at the time, Lane learned that he had been beaten with a brick. At one point the beating stopped. Lane testified that this was when the brick had broken.

At this point Lane got out of the cab and tried to run. The man in the front seat told the other man to shoot him. Lane testified that the men never asked for money, but that was all he could think to do, so he reached in his pocket and threw his money, about \$50. The men grabbed for it and wanted to know if he had any more, and Lane said that was all he had. The men then took off running and went over a chain link fence. The man who had been in the front seat threw Lane's keys back at him. Lane made it back to his cab, radioed his dispatcher, and the police were called. Lane's \$50 was gone.

Lane was taken to the hospital. He testified that his head was "lopsided" and split open in three different spots, and that it had to be stapled together. Lane testified that he had never seen or given rides to the two men before that day. The police talked to Lane about trying to identify the men, and, after looking at photographs, Lane identified Kenneth Williams as the man who had been in the front seat. Lane later identified appellant as being the man in the backseat from a happenstance encounter with him at the courthouse which occurred about a year later, testifying that he recognized him by the back of his head and ears. Lane testified that he was "almost positive" that appellant was the man in the back seat.

Lane testified that he believed it was Williams in the front seat and appellant in the back seat when he picked the men up the first time. Because he was hit so quickly after the men got back in the car the second time, Lane testified that he could not be positive that it was Williams who got in the front seat of the car the second time, because the man in the back seat hit him so fast. Lane believed it was appellant in the back seat again the second time. Lane testified that he did not remember ever seeing Gaines.

Officer Harold Faulconer was the first police officer on the scene. He testified as to finding Lane sitting on the curb, covered with blood. The driver's side door of the cab was open. Faulconer called for the Identification Unit to come and take photographs of the cab, which photographs are among those at issue in this case. Faulconer testified that the photographs were an accurate reflection of the way he found the cab.

Detective William Ramsey, of the Lexington Police Department's Evidence Collection Unit, testified that he was the person who took the photographs at issue of the cab and dusted it for fingerprints. Ramsey testified that the photos were an accurate depiction of the scene. Ramsey further testified that he took photographs of Lane at the University of Kentucky hospital, which photos are also at issue in this case.

Sergeant Richard Bottoms, supervisor of the Evidence Collection Identification Unit, testified that finger, hand, and palm prints on the cab were identified as being the prints of appellant, Gaines, and Williams. Bottoms testified that

appellant's prints were found on the rear driver's side door frame. Bottoms further testified that the print near the left rear fender above the tire was identified as the palm print of Williams, and the print on the front edge of the right rear door window frame was identified as the print of Gaines.

Mark Dawson testified that on August 21, 1999 he was at 510 Hollow Creek Road, Apartment 58. Dawson testified that appellant, Williams, and Gaines were there too, and that the three men were saying that Williams was going to call a cab, and that Gaines and appellant were going to rob it. They asked Dawson if he wanted to come, but he said no. Dawson testified that the three men left, and after about 30-40 minutes they came back sweating. Dawson testified that Gaines was cussing out appellant, saying that appellant was too scared to hit the man with a brick so he had to do it.

Detective Joe Hess testified that he interviewed appellant on January 31, 2000 at the Lexington Police Department. Appellant at first denied knowledge of the crime, but eventually stated that he was a participant. Appellant told Hess that he was not the one that called the cab, and didn't know who did. Appellant said that he got in the back seat and they went around the corner, and that there were a lot of people at both places. Appellant told Hess that he did not hit Lane with the brick, but that he "done my part." When asked what he did, appellant told Hess that he "just got in and went," and that the cabbie threw money on the ground, but that he didn't grab any, and that he

just jumped out and took off running. At one point, appellant told Hess that he didn't get much money from the cab driver.

Appellant testified in his own defense. Appellant testified that on the evening of the robbery, he was at 510 Hollow Creek Road, Apartment 58, and that he had been doing drugs for three or four days nonstop. Appellant testified that he and Gaines left together to go see some girls, and that he didn't know who called the cab. Appellant and Gaines got in the cab, and wanted to stop and get some marijuana first. Appellant got in the back seat. First they rode down the street and got out of the cab, where there were three or four guys standing around on the sidewalk. Appellant and Gaines were talking to the guys about buying marijuana, when another man warned the guys that appellant and Gaines were cops. Appellant testified that he got scared and headed back to the cab. He then heard a voice saying to hold the cab up, and saw three or four people coming toward the cab. Appellant testified that he jumped out of the cab and backed up, and saw the cab driver bleeding and saw him throw some money down. Appellant then took off running. Appellant testified that his previous statements to Detective Hess, about not getting much money from the cab driver and that he was a participant were "slips of the tongue" and not what he really meant. Appellant testified that he did not know the perpetrators, and that he didn't report the crime or help the cab driver because he was scared.

With respect to both appellant and co-defendant Gaines, the jury was instructed on first-degree robbery; complicity to

first-degree robbery; first-degree robbery principal or accomplice; and theft by unlawful taking. An instruction on criminal facilitation to first-degree robbery was also given as to appellant. Gaines was found not guilty of all charges. The jury found appellant guilty of complicity to first-degree robbery and recommended a sentence of ten years. On May 8, 2001, the trial court entered final judgment and sentenced appellant to ten years' imprisonment in accordance with the jury's recommendation. This appeal followed.

On appeal, appellant first argues that the trial court abused its discretion in allowing bloody photographs to be introduced that were clearly more prejudicial than probative. The photographs at issue in the present case depict various views of the interior and exterior of the cab, and its immediate surrounding area, taken at the crime scene, as well as photos of Lane's head showing his injuries. The interior photographs also show the broken brick, with which Lane was beaten. "[R]elevant pictures are not inadmissible just because they are gruesome and the crime they depict is heinous." Eldred v. Commonwealth, Ky., 906 S.W.2d 694, 704 (1994). The Commonwealth is allowed to depict the actual crime scene. Id.; McKinney v. Commonwealth, Ky., 60 S.W.3d 499, 509 (2001). The photographs at issue of the cab and its surrounding area were an accurate depiction of the crime scene. Further, the photographs depicting Lane's head injuries were relevant to the circumstances of the commission of the crime, and serve to corroborate Lane's testimony that he was beaten in the head by the man in the back seat. See Sanders v.

Commonwealth, Ky., 801 S.W.2d 665, 676 (1990); Foley v. Commonwealth, Ky., 953 S.W.2d 924, 935 (1997). Further, the photographs are relevant to proving the elements of first-degree robbery, in that they are probative of the fact that physical force was used upon Lane. KRS 515.020. "An accurate photograph is more believable than any chart or second-hand description . . ." Napier v. Commonwealth, Ky., 426 S.W.2d 121, 122 (1968). Although the photographs show blood on and in the cab, on the broken brick, on the surrounding pavement, and on Lane, we cannot say that they were so gruesome as would inflame or unduly prejudice the jury. Clark v. Commonwealth, Ky., 833 S.W.2d 793, 794-795 (1991); Foley, 953 S.W.2d at 935. Accordingly, the trial court did not abuse its discretion in admitting the photographs. Sanders, 801 S.W.2d at 676.

Appellant additionally argues that the evidence presented at trial was insufficient to support appellant's conviction of complicity to first degree robbery, and further contends that the jury should not have been instructed on complicity as the evidence did not support such an instruction. Appellant did not object to the complicity instruction at trial and hence, this issue is unpreserved. "RCr 9.54(2) [] requires a party to make a specific objection to the giving or the failure to give an instruction before the Court instructs the jury . . . in order to preserve that issue for review on appeal." Commonwealth v. Collins, Ky., 821 S.W.2d 488, 492 (1991).

KRS 502.020 provides that a person is guilty of an offense committed by another, when, with the intention to promote



or facilitate the commission of the offense, he aids or attempts to aid in the planning or commission of the offense. Slone v. Commonwealth, Ky. App., 677 S.W.2d 894, 896 (1984). Although sufficient evidence was presented to find appellant was a principal, we conclude the evidence was also sufficient for the jury to reasonably believe that appellant's role was to assist the man in the front seat in committing the robbery, and hence support a finding of complicity.

For the aforementioned reasons, the judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

J. Nick Payne  
Lexington, Kentucky

BRIEF FOR APPELLEE:

A. B. Chandler, III  
Attorney General

J. Gary Bale  
Assistant Attorney General  
Frankfort, Kentucky