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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-002475-MR

BRADLEY WILLIAM PAGE — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE F. KENNETH CONLIFFE, JUDGE
ACTION NO. 05-CR-000076

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON AND THOMPSON, JUDGES; HENRY,[1] SENIOR JUDGE.

DIXON, JUDGE: Bradley Page was convicted by a Jefferson Circuit Court jury of complicity to first degree robbery. The jury recommended a sentence of ten years' imprisonment, and the court sentenced Page accordingly. He now appeals to this Court, and we affirm his conviction.

On the evening of October 15, 2004, Page (age twenty-one at the time) and a juvenile companion were drinking alcohol in anticipation of attending a party. Page

[1] Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

was driving his 1986 Lincoln Towncar with the juvenile as a passenger. The two stopped at a Dairy Mart convenience store at the intersection of Bardstown Road and Midland Avenue in Louisville. Page parked his car beside a vehicle occupied by Kenneth Hoskins. Hoskins sat in his car talking on a cellular telephone and watched as Page and the juvenile exited the Lincoln. Page went into the store and purchased alcohol while the juvenile disappeared around the side of the building. After the men returned to the Lincoln, Page backed out of the parking space and blocked Hoskins's car at a perpendicular angle. Page then "popped" open the car's trunk. The juvenile alighted from the Lincoln and knocked on Hoskins's window. Hoskins lowered the window a few inches, and the juvenile raised his shirt, revealing a gun in his waistband. The juvenile told Hoskins he wanted cash, and the victim handed over approximately $80.00. The juvenile jumped into the Lincoln, and Page attempted to speed away, but was caught in traffic on Bardstown Road. Hoskins wrote down the license plate number and gave it to police.

After an investigation, police made contact with Page, and he gave a statement regarding the robbery. Page was subsequently indicted on one count of first degree robbery, and his case proceeded to trial on July 5, 2005. The juvenile had not been apprehended at the time of Page's trial. Page was ultimately convicted of complicity to first degree robbery and sentenced to ten years' imprisonment. He now raises four issues on appeal.

Page contends: 1) his constitutional right to counsel of his choice was denied; 2) the trial court erroneously failed to instruct the jury on criminal facilitation; 3) the court incorrectly instructed the jury on the burden of proof and presumption of innocence; and 4) the trial court erroneously designated Page a violent offender and denied probation.

I.

Page first argues the trial court erred by denying him the right to representation by counsel of his own choosing. Page was represented by a public defender, James Harmon. Page's trial was initially set to begin June 16, 2005, but the trial was continued because of discovery issues. The trial was then set for July 5, 2005. The week prior to trial, on June 29, Attorney Harmon resigned from the public defender's office and opened his own law practice. A court order was entered allowing Harmon to represent Page *pro bono*. On the morning of trial, Harmon advised the trial court that Page was displeased with his representation and wanted to hire private counsel. The trial court gave Page the opportunity to speak, and he stated his aunt was trying to hire a private attorney. Page also advised he would like another public defender until private counsel was hired. The Commonwealth objected to a continuance because the victim was moving out of state at the end of the month. The Commonwealth also pointed out that Page had three weeks after the original trial date to request a continuance to secure new counsel. The trial court ultimately denied a continuance, and the trial was held with Harmon representing Page.

"[T]he Sixth Amendment guarantees a defendant the right to be represented by an otherwise qualified attorney whom that defendant can afford to hire, or who is willing to represent the defendant even though he is without funds." *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 624-25, 109 S. Ct. 2646, 2652, 105 L. Ed. 2d 528 (1989). Page cites several federal cases to support his argument and contends that because he was represented by Harmon *pro bono*, he had the absolute right to choose new counsel. Page specifically points to *United States v. Gonzalez-Lopez*, 126 S. Ct. 2557, 165 L. Ed. 2d 409 (2006), which held, "[w]here the right to be assisted by counsel of one's choice is wrongly denied . . . it is unnecessary to conduct an ineffectiveness or prejudice inquiry to establish a Sixth Amendment violation."[2] *Id*. at 2563. The crux of Page's argument is that he is not required to establish ineffective assistance of counsel and is automatically entitled to a new trial.

Our review of the record shows Page's claim is without merit. His argument wholly misconstrues the plain facts of this case. A criminal defendant's constitutional right to choose his attorney is limited by what legal services he can afford. *Wheat v. United States*, 486 U.S. 153, 159, 108 S. Ct. 1692, 1698, 100 L. Ed. 2d 140 (1988). At the time of his trial, Page was indigent and unable to afford counsel of his own choosing. "The expression 'counsel of one's own choice' . . . does not mean that an indigent defendant is entitled to the appointment of any particular attorney." *Baker v. Commonwealth*, 574 S.W.2d 325, 326-27 (Ky. App. 1978) quoting *Hargrove v.*

[2] *Gonzales-Lopez* involved a private attorney licensed in California who was denied *pro hac vice* admission to represent his client in Missouri. *Id*. at 2560.

Commonwealth, 362 S.W.2d 37 (Ky. 1962) (internal citation omitted). Page's assertion on the morning of trial that he could secure private counsel was speculative at best, and it could easily be perceived as an attempt to postpone his trial. *See Shegog v. Commonwealth*, 142 S.W.3d 101 (Ky. 2004). Contrary to Page's vigorous argument, the record fails to demonstrate that the trial court erroneously denied him the right to choose his representative.

Furthermore, we are mindful that "[w]hen counsel has been appointed by the court, the defendant is not entitled to dismiss counsel and have a substitute appointed except for adequate reasons or a clear abuse by counsel." *Fultz v. Commonwealth*, 398 S.W.2d 881, 882 (Ky. 1966).

Page alternatively relies on *Baucom v. Commonwealth*, 134 S.W.3d 591 (Ky. 2004), to support his argument for a new trial. Page's reliance on *Baucom* is misplaced because, unlike Baucom, Page did not attempt to invoke his right to hybrid representation under §11 of the Kentucky Constitution.

II.

Page next argues he was denied the right to a fair trial and the right to present a defense because the trial court refused to instruct the jury on criminal facilitation. The jury was ultimately instructed on complicity to first degree robbery and complicity to second degree robbery. Complicity liability is codified in Kentucky Revised Statutes (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.

However, KRS 506.080(1) codifies facilitation:

> 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.

Page concedes that the evidence supported an instruction on complicity. However, he argues that his own testimony was sufficient evidence that he only provided the "means or opportunity" for the juvenile to rob Hoskins, thereby supporting a theory of criminal facilitation. We disagree.

The Kentucky Supreme Court summarized the difference between complicity liability and facilitation:

> Under either statute, the defendant acts with knowledge that the principal actor is committing or intends to commit a crime. Under the complicity statute, the defendant must intend that the crime be committed; under the facilitation statute, the defendant acts without such intent. Facilitation only requires provision of the means or opportunity to commit a crime, while complicity requires solicitation, conspiracy, or some form of assistance. "Facilitation reflects

> the mental state of one who is 'wholly indifferent' to the actual completion of the crime."

Thompkins v. Commonwealth, 54 S.W.3d 147, 150-51 (Ky. 2001) (citations omitted).

Page admitted in his statement to police that the juvenile talked him into doing "something stupid." He also "popped" the trunk for the juvenile to find something to scare Hoskins. Furthermore, Page accepted $10.00 from the proceeds of the robbery. However, there was no evidence Page intentionally provided the juvenile with the opportunity to commit the robbery while remaining "wholly indifferent" to whether the crime was completed. In fact, Page's testimony at trial contradicted his statement to police and implied he was innocent of any wrongdoing and had no knowledge that the juvenile planned to rob Hoskins.

"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." *Webb v. Commonwealth*, 904 S.W.2d 226, 229 (Ky. 1995) citing *Luttrell v. Commonwealth*, 554 S.W.2d 75, 78 (Ky. 1977). Here, there was no evidence for a jury to find Page guilty of facilitation to commit robbery. As such, the trial court did not err in refusing to instruct the jury on facilitation.

III.

For his third assignment of error, Page claims that the trial court failed to instruct the jury consistent with the presumption of innocence. The tendered jury instructions began: "You will find the defendant, William Bradley Page guilty of

complicity to robbery . . . ." The instructions were modeled after the form instructions found in *Kentucky Instructions to Juries*. *See* 1 William Cooper, *Kentucky Instructions to Juries* § 6.14 (5th ed. 1999). Page argues the instructions should have stated: "You shall find the defendant not guilty, unless . . . ." Page opines the language used in the instructions improperly shifted the burden of proof.

The jury was given a separate instruction on the presumption of innocence consistent with RCr[3] 9.56(1). Page concedes that a separate instruction on the presumption of innocence is not mandatory. *Patterson v. Commonwealth*, 630 S.W.2d 73, 75 (Ky. App. 1981). As such, we disagree with Page's assertion that the phrasing of the robbery instructions negated the meaning of the presumption of innocence instruction. We conclude the jury was properly instructed consistent with the burden of proof and presumption of innocence.

IV.

As his last argument, Page raises two issues related to sentencing. First, Page contends KRS 439.3401 is unconstitutional as applied to the facts of his case. KRS 439.3401 limits parole eligibility for violent offenders. The statute was amended in 2002 to include first degree robbery as a violent offense. After his conviction, the trial court designated Page as a violent offender and advised Page he must serve 85% of his sentence before being eligible for parole. Page argues that his conduct was not what the legislature intended to sanction when the violent offender statute was amended. We disagree.

[3] Kentucky Rules of Criminal Procedure.

The legislature clearly added the stand-alone offense of first degree robbery in the violent offender statute. Furthermore, "one who is found guilty of complicity to a crime occupies the same status as one being guilty of the principal offense." *Wilson v. Commonwealth*, 601 S.W.2d 280, 286 (Ky. 1980). Accordingly, we find the trial court properly designated Page as a violent offender.

Page next asserts the trial court erred by applying KRS 533.060 to deny probation. The statute reads in part:

> When a person has been convicted of an offense or has entered a plea of guilty to an offense classified as a Class A, B, or C felony and the commission of the offense involved the use of a weapon from which a shot or projectile may be discharged that is readily capable of producing death or other serious physical injury, the person shall not be eligible for probation, shock probation, or conditional discharge. . .

KRS 533.060(1). Page contends the term "use of a weapon" is ambiguous and all doubts should be resolved in his favor. *Haymon v. Commonwealth*, 657 S.W.2d 239, 240 (Ky. 1983). He specifically asserts there was no factual finding that a weapon as defined in the statute was "used" during the robbery of Hoskins. We disagree.

By convicting Page of complicity to first degree robbery, the jury found that a deadly weapon was used to accomplish the crime. Furthermore, contrary to Page's assertion, "the definition is satisfied if the weapon is intended by its user to convince a victim that it is deadly and the victim is in fact convinced." *Fultz v. Commonwealth*, 596 S.W.2d 28, 29 (Ky. App. 1979) (comparing the language of KRS 500.080(4)(a) and KRS

533.060) . After considering all of Page's arguments on this issue, we believe the trial court properly denied probation.

The conviction and sentence of Jefferson Circuit Court are affirmed.

ALL CONCUR.

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