

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001302-MR

JEREMY K. LAWSON

APPELLANT

v.

APPEAL FROM MASON CIRCUIT COURT
HONORABLE ROBERT OVERSTREET, JUDGE
ACTION NO. 09-CR-00141

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING IN PART, REVERSING IN PART,
AND REMANDING

** ** * ** * ** *

BEFORE: CAPERTON, COMBS, AND THOMPSON, JUDGES.

CAPERTON, JUDGE: Jeremy Lawson appeals his conviction for Assault in the Third Degree and Criminal Trespass in Mason Circuit Court for which he received sentences of five years and twelve months, respectively. We agree with Lawson that, based on the Commonwealth's improper statements of law during the sentencing phase and the improper imposition of court costs on an indigent

defendant, his sentence must be reversed and remanded for further proceedings.

However, we find no reversible error in his conviction and, accordingly, affirm his conviction.

According to testimony at trial, on October 18, 2009, at 2 a.m. Officer T.C. Rice, with the Maysville Police Department, was at home when he heard several individuals outside the front of his home making noises that sounded like a fight. Rice got out of bed, put on clothes and grabbed his firearm. Officer Rice unlocked his door, opened it, and observed three intoxicated men arguing on the sidewalk in front of his house. Officer Rice recognized Lawson immediately because he knew him. The other two men were later identified as Kyle McDowell and Michael Elliot.

Officer Rice testified that as a police officer, he felt responsible for addressing problems in his neighborhood when he was home. Officer Rice displayed his weapon to the three men and instructed them to quiet down and move along. Officer Rice stepped back into his home and placed his firearm on the steps of the staircase located immediately within the entry way of his home because he did not have a place on his person to stow the weapon. Officer Rice then opened the front door again to confirm that the three men had complied with his instruction to move along.

When Officer Rice opened his front door, Lawson and McDowell were at the threshold. Officer Rice put both hands up to protect himself and to guide the men back. At this point both Officer Rice and the three men were yelling at one

another. During this exchange, Elliott walked past Officer Rice and entered his home. Remembering that he had placed his firearm just inside his home on the staircase, Officer Rice tackled Elliott in the entryway of his home. The two began to wrestle on the floor. Lawson stood over the two and yelled, “F___ You T.C. Rice, you’re always harassing us and pointing your gun at us.” According to Officer Rice, Lawson was acting in a very aggressive and belligerent manner. Officer Rice was concerned that Lawson was going to jump into the fray and help his friend. By this time, McDowell had told Lawson and Elliott that Officer Rice was a cop and they needed to leave.

Officer Rice began yelling for help and a neighbor called 911. Officer Rice was concerned that he could get hurt or even killed since either Lawson or Elliott could have gotten his firearm. Officer Rice managed to get Elliott in a headlock and pushed Lawson back with his free arm. Lawson came back at Officer Rice and Officer Rice was hit in the head by Elliott. The three men then ran away. During the altercation, Lawson did not hit Officer Rice.

Sgt. Jarred Muse and Officers Steve Moss and Eric Hylander, with the Maysville Police Department, responded to the call at Officer Rice’s residence. Officer Rice advised the officers that the three men fled west down Second Street and that Lawson was one of the perpetrators involved in the altercation. Shortly thereafter, McDowell was apprehended. Officer Rice identified McDowell as one of the three men involved in the altercation. Lawson was arrested later that morning. Elliott and McDowell entered guilty pleas on February 26, 2010, to the

charges they received as a result of their involvement in the altercation with Officer Rice.

On November 25, 2009, Lawson was indicted for one count of Second-Degree Burglary, one count of Third-Degree Assault, and one count of Third-Degree Criminal Mischief. Lawson entered a plea of not guilty. A jury trial was held on May 10, 2010. The Commonwealth introduced the testimony of Officer Rice, McDowell, and the three responding officers with the Maysville Police Department. Lawson also testified.

Lawson testified that he entered Officer Rice's home to help Officer Rice. Lawson alleged that Elliott was not present during the altercation and instead, the third man, who actually attacked Officer Rice, was a "gangster like guy" he and McDowell met after leaving the bar on their walk to McDowell's residence.¹ McDowell testified that he could not remember anything past the time he left the bar on the night of the altercation. However, in his statement given to the police immediately following his arrest, McDowell identified Elliott as the third perpetrator.

After hearing this evidence, the jury convicted Lawson of Third-Degree Assault and First-Degree Criminal Trespass. Lawson was sentenced to five years and twelve months, respectively, based on the jury's recommendation. It is from this that Lawson now appeals.

¹ Officer Rice was unable to identify Elliott on the night of the altercation; however, he knew that Elliott and Lawson grew up together and that he had previously seen them together.

On appeal, Lawson presents six arguments, namely: (1) the Commonwealth's use of false information during sentencing was a palpable error resulting in manifest injustice which requires Lawson's sentence to be vacated; (2) Lawson's due process rights were violated when the Commonwealth failed to prove every essential element of Third-Degree Assault beyond a reasonable doubt; (3) the assault instruction was defective because it invited a non-unanimous verdict and failed to inform the jury as to the essential elements of complicity; (4) the jury heard unreliable hearsay evidence of the other man's identity; (5) no facilitation to assault instruction was given; (6) the trial court improperly imposed court costs on Lawson.

In response, the Commonwealth does not contest the first and last arguments presented by Lawson. The Commonwealth disagrees with Lawson's remaining arguments and instead argues: (1) the trial court properly denied Lawson's motion for a directed verdict; (2) any error with the jury instructions was harmless; (3) evidence of Elliott's identity was properly admitted; (4) Lawson was not entitled to a facilitation instruction. With these arguments in mind, we first address Lawson's first and last arguments because the Commonwealth agrees that the false information during sentencing as well as the imposition of court costs on an indigent defendant constitutes reversible error.

Lawson's first argument is that the Commonwealth's use of false information during sentencing was a palpable error resulting in manifest injustice which requires Lawson's sentence to be vacated. Specifically, the Commonwealth

misinformed the jury that Lawson will be paroled pursuant to statute after serving 15% of his sentence when in actuality Lawson's case would be reviewed by the Parole Board after serving 15% or two months of the original sentence, whichever is longer. *See* Kentucky Revised Statutes (KRS) 439.340(3)(a). The Commonwealth does not contest that this misstatement of law entitles Lawson to reversal of his sentence and remand for a new penalty phase for his resentencing. *See Whitaker v. Commonwealth*, 895 S.W.2d 953, 958 (Ky. 1995).

After our review of the record and the applicable jurisprudence, we agree with the Commonwealth that the misstatement of law during the sentencing phase constitutes palpable error resulting in manifest injustice. *See Robinson v. Commonwealth*, 181 S.W.3d 30, 38 (Ky. 2005). Accordingly, we reverse Lawson's sentence and remand this matter to the trial court for further proceedings.

The Commonwealth also does not contest Lawson's sixth argument that the trial court improperly imposed court costs on Lawson. At trial, Lawson received the services of a public defender and was then granted the right to appeal his conviction *in forma pauperis*. After the trial court issued its judgment in this case, the Kentucky Supreme Court rendered *Travis v. Commonwealth*, 327 S.W.3d 456, 459 (Ky. 2010), which is wholly dispositive of this issue. In *Travis*, the Court held that the trial court erred when it imposed court costs upon clearly indigent defendants, as evidenced by the defendants receiving the services of a public defender and being granted the right to appeal *in forma pauperis*. Applying *Travis* to the case *sub judice*, we must conclude that the trial court erred in imposing court

costs on Lawson, an indigent defendant. We now turn to Lawson's remaining arguments, the validity of which is contested by the Commonwealth.

Lawson's second argument is that his due process rights were violated when the Commonwealth failed to prove every essential element of Third-Degree Assault beyond a reasonable doubt. Specifically, Lawson argues that: (1) there was "no proof [that Officer] Rice was acting in the course of his official duties or that Lawson knew that"; and (2) there was "no evidence that Lawson acted with [the] adequate mental state or actions to support a finding of complicity to assault in the third degree." The Commonwealth asserts that the trial court properly denied Lawson's motion for a directed verdict.

We note that "On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal."

Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991). When confronted with a motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth.

If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony.

Paulley v. Commonwealth, 323 S.W.3d 715, 722 (Ky. 2010).

In the case *sub judice*, Lawson was charged with Assault in the Third

Degree under KRS 508.025, which states:

(1) A person is guilty of assault in the third degree when the actor:

(a) Recklessly, with a deadly weapon or dangerous instrument, or intentionally causes or attempts to cause physical injury to:

1. A state, county, city, or federal peace officer;
2. An employee of a detention facility, or state residential treatment facility or state staff secure facility for residential treatment which provides for the care, treatment, or detention of a juvenile charged with or adjudicated delinquent because of a public offense or as a youthful offender;
3. An employee of the Department for Community Based Services employed as a social worker to provide direct client services, if the event occurs while the worker is performing job-related duties;
4. Paid or volunteer emergency medical services personnel certified or licensed pursuant to KRS Chapter 311A, if the event occurs while personnel are performing job-related duties;
5. A paid or volunteer member of an organized fire department, if the event occurs while the member is performing job-related duties;
6. Paid or volunteer rescue squad personnel affiliated with the Division of Emergency Management of the Department of Military Affairs or a local disaster and emergency

services organization pursuant to KRS Chapter 39F, if the event occurs while personnel are performing job-related duties;

7. A probation and parole officer;

8. A transportation officer appointed by a county fiscal court or legislative body of a consolidated local government, urban-county government, or charter government to transport inmates when the county jail or county correctional facility is closed while the transportation officer is performing job-related duties;

9. A public or private elementary or secondary school or school district classified or certified employee, school bus driver, or other school employee acting in the course and scope of the employee's employment; or

10. A public or private elementary or secondary school or school district volunteer acting in the course and scope of that person's volunteer service for the school or school district; or

(b) Being a person confined in a detention facility, or state residential treatment facility or state staff secure facility for residential treatment which provides for the care, treatment, or detention of a juvenile charged with or adjudicated delinquent because of a public offense or as a youthful offender, inflicts physical injury upon or throws or causes feces, or urine, or other bodily fluid to be thrown upon an employee of the facility.

(2) Assault in the third degree is a Class D felony.

KRS 508.025.

The trial court gave the following jury instructions:

You will find the Defendant guilty of Third-Degree Assault 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 October 18, 2009, and before the finding of the Indictment herein, he intentionally caused or attempted to cause physical injury to Officer T.C. Rice, by striking him about the head, or was complicit thereto,

AND

B. That T.C. Rice, is a law enforcement officer with the Maysville Police Department, and was acting in the course of his official duties and the defendant knew T.C. Rice was acting in his official duties.

Within the jury instructions the trial court defined complicity as:

Complicity

a. Complicity (as to a criminal act)-Means that 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 solicits, commands, or engages in a conspiracy with such other person to commit the offense, or aids, counsels, or attempts to aid such person in planning or committing the offense.

b. Complicity (as to the criminal result)-Means that a person is guilty of an offense committed by another person when, while acting wantonly with regards to the result of another's conduct, he solicits, commands, or engages in a conspiracy with such other person to engage in that conduct, or aids, counsels, or attempts to aid such person in planning or committing such conduct.

Lawson argues there was: (1) “no proof [that Officer] Rice was acting in the course of his official duties or that Lawson knew that”; and (2) there was “no evidence that Lawson acted with the adequate mental state or actions to support finding of complicity to assault in the third degree.” After a review of the record, we disagree. The jury was presented with sufficient evidence, including testimony establishing that: Officer Rice was off duty that evening at home; that Officer Rice felt responsible as a police officer to address any problems in his neighborhood while at home; that McDowell announced during the altercation that Rice was an officer and that they should leave; that Lawson stood over Rice and said, “F___ You T.C. Rice, you’re always harassing us and pointing your gun at us”; and that Lawson testified that Rice was an officer with the Maysville Police Department.

In reviewing KRS 508.025, we note that the Legislature did not qualify assault on a peace officer by including the phrase “while personnel are performing job-related duties” as it did in some of the other categories of people protected by the statute. Thus, we do not believe that Officer Rice was required to be on duty in the case *sub judice*, only that Lawson knew that he was a peace officer at the time of the assault and that he was performing his public duty, such as keeping the peace. *See Love v. Commonwealth*, 55 S.W.3d 816, 826 (Ky. 2001) (defendant must know at the time of the assault that victim was a peace officer to be convicted of third-degree assault) and *Commonwealth v. Johnson*, 245 S.W.3d 821, 824 (Ky. App. 2008) (“It is evident from the enactment of KRS 508.025 that the legislature sought to protect law enforcement officers from violence while

performing their public duty.”) Lawson testified that he knew that Officer Rice was a police officer with the Maysville Police Department because of “dealings” he had with Officer Rice before. It was not clearly unreasonable for the jury to find that Lawson knew that Officer Rice was a peace officer engaged in his official police duties when he attempted to address a problem in his neighborhood and was subsequently assaulted.

Based on this same evidence, it was not clearly unreasonable for the jury to find Lawson was complicit to Assault in the Third Degree. The Kentucky Supreme Court in *Tharp v. Commonwealth*, addressed complicity under KRS 502.020:

KRS 502.020² describes two separate and distinct theories under which a person can be found guilty by complicity, i.e., “complicity to the act” under subsection (1) of the statute, which applies when the principal actor's conduct constitutes the criminal offense, and “complicity to the result” under subsection (2) of the statute, which applies when the result of the principal's conduct constitutes the criminal offense....

² (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.

(2) When causing a particular result is an element of an offense, a person who acts with the kind of culpability with respect to the result that is sufficient for the commission of the offense is guilty of that offense when he:

- (a) Solicits or engages in a conspiracy with another person to engage in the conduct causing such result; or
- (b) Aids, counsels, or attempts to aid another person in planning, or engaging in the conduct causing such result; or
- (c) Having a legal duty to prevent the conduct causing the result, fails to make a proper effort to do so.

The primary distinction between these two statutory theories of accomplice liability is that a person can be guilty of “complicity to the act” under KRS 502.020(1) only if he/she possesses the intent that the principal actor commit the criminal act. However, a person can be guilty of “complicity to the result” under KRS 502.020(2) without the intent that the principal's act cause the criminal result, but with a state of mind which equates with “the kind of culpability with respect to the result that is sufficient for the commission of the offense,” whether intent, recklessness, wantonness, or aggravated wantonness. KRS 502.020 (1974 Official Commentary); R. Lawson and W. Fortune, *Kentucky Criminal Law* § 3–3(b)(3), at 106, § 3–3(c)(2), at 114 (LEXIS 1998). The most common examples of offenses having a prohibited result are homicide, with the death of another as the prohibited result, and assault, with the bodily injury of another as the prohibited result. KRS 502.020 (1974 Official Commentary).

Tharp v. Commonwealth, 40 S.W.3d 356, 360-61 (Ky. 2000).

Building on *Tharp*, the Kentucky Supreme Court in *Rogers v.*

Commonwealth, 315 S.W.3d 303 (Ky. 2010) noted:

Conspiracy, as envisioned by the statute governing complicity, does not necessarily require detailed planning and a concomitant lengthy passage of time. All that is required is that defendants agree to act in concert to achieve a particular objective and that at least one of them commit that objective. *Commonwealth v. Wolford*, 4 S.W.3d 534, 540 (Ky.1999). “The existence of a conspiracy can be proven ... by circumstantial evidence.” *Id.* However, absent a showing of other facts and circumstances connecting a defendant with the crime, mere presence at the scene of the crime is not sufficient to attach guilt to defendant. *McIntosh v. Commonwealth*, 582 S.W.2d 54, 57 (Ky.App.1979)

(abrogated on other grounds by *Commonwealth v. Clemons*, 734 S.W.2d 459 (Ky.1987)).

Rogers at 310.

In the case *sub judice*, the evidence at trial demonstrated that Lawson was in Officer Rice's face when Officer Rice opened the door of his home to check if the three drunken, arguing men had complied with his instruction to move up the street. While Elliott was engaged in the physical altercation with Officer Rice, Lawson entered Rice's home and encouraged Elliott. After Officer Rice managed to get Lawson out of his home, Lawson reentered the home. It was during this exchange that Elliott freed himself from Officer Rice's headlock and struck Officer Rice. Based on this evidence, it was not unreasonable for the jury to conclude that Lawson had the requisite *mens rea* of complicity to Assault in the Third Degree. Thus, the trial court did not err in denying Lawson's directed verdict motion.

Lawson's third argument is that the assault instruction was defective because it invited a non-unanimous verdict and failed to inform the jury as to the essential elements of complicity. Specifically, Lawson argues that: (1) the portions of the assault instruction which instructed the jury it could convict Lawson if he intentionally struck or attempted to strike Officer Rice were given in error because the Commonwealth conceded that Lawson did not strike or attempt to strike Officer Rice in its closing argument; and (2) the definitions of complicity also included methods which were not supported by the evidence. Essentially, Lawson argues that the inclusion of superfluous language in both the assault instruction and the complicity instruction were confusing and left the jury with so many choices

and no guidance as to what elements the evidence in the case supported; therefore, Lawson was not convicted by a unanimous jury. The Commonwealth argues that any error with the jury instructions was harmless.

Lawson recognizes that this alleged error is unpreserved and requests that this matter be reviewed for palpable error under Kentucky Rules of Criminal Procedure (RCr) 10.26. Accordingly, we shall conduct a review for palpable error.

RCr 10.26 states:

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.

Thus, under RCr 10.26, we may grant relief for an unpreserved error only when the error is: (1) palpable; (2) affects the substantial rights of a party; and (3) has caused a manifest injustice. *Commonwealth v. Jones*, 283 S.W.3d 665, 668 (Ky. 2009).

“Manifest injustice” requires showing a probability of a different result or error so fundamental as to threaten a defendant's entitlement to due process of law, i.e., the error so seriously affected the fairness, integrity, or public reputation of the proceeding as to be “shocking or jurisprudentially intolerable.” *Martin v. Commonwealth*, 207 S.W.3d 1, 3, 4 (Ky. 2006).

Further refining the parameters of RCr 10.26, the Kentucky Supreme Court in *Brewer v. Commonwealth*, 206 S.W.3d 343 (Ky. 2006), undertook an analysis of what constitutes a palpable error:

For an error to be palpable, it must be easily perceptible, plain, obvious and readily noticeable. A palpable error must involve prejudice more egregious than that occurring in reversible error. A palpable error must be so grave in nature that if it were uncorrected, it would seriously affect the fairness of the proceedings. Thus, what a palpable error analysis “boils down to” is whether the reviewing court believes there is a “substantial possibility” that the result in the case would have been different without the error. If not, the error cannot be palpable.

Id. at 349.

Recently the Kentucky Supreme Court addressed a similar situation in

Travis v. Commonwealth, 327 S.W.3d 456 (Ky. 2010):

Boulder and *Hayes* established that such superfluous instructing on theories insufficiently supported by evidence is error. Twenty years after that pair of cases, this Court held in *Burnett v. Commonwealth*, 31 S.W.3d 878, 883 (Ky.2000), that when this type of error is preserved, it must always cause the conviction to be reversed. *Burnett's* reasoning was based on the fundamental nature of one's right to a unanimous verdict.

While holding true to that underlying principle, we now step back from our position in *Burnett* because the error resulting only from superfluous language does not present a pure unanimity problem. On the contrary, such flawed instructions only implicate unanimity if it is reasonably likely that some members of the jury actually followed the erroneously inserted theory in reaching their verdict. If that can be shown, then a unanimous verdict has been denied and the verdict must be overruled. However, if there is no reasonable possibility that the jury actually relied on the erroneous theory—in particular, where there is no evidence of the theory that could mislead the jury—then there is no unanimity problem. Though such a case presents an error in the instructions, namely, the inclusion of surplus language, the error is simply harmless because there is no reason to think the jury was misled. To the extent *Burnett*

mandates reversal in this latter situation, it is now overruled.

Travis at 463.

In the case *sub judice*, Officer Rice testified that he was not hit by Lawson. Lawson testified that he did not hit Officer Rice. The testimony on this issue was clear, and we fail to see how the jury would have been misled by the inclusion of the superfluous language in the assault instruction. Accordingly, any error created by the inclusion of the superfluous language was harmless and not palpable error. Regarding the complicity instruction, we again fail to see how the jury would have been misled by any portion of the superfluous language contained in the complicity instruction given the evidence presented. Therefore, we find no palpable error resulting in manifest injustice.

Lawson's fourth argument is that the jury heard unreliable hearsay evidence of the other man's identity. Specifically, Lawson argues: (1) that the introduction of McDowell's written statement given to the police on the night of the assault in which McDowell identified Elliot as the third perpetrator, and (2) the introduction of McDowell's statement to Sergeant Muse in the police station bathroom making the same identification, require reversal. The Commonwealth contends that evidence of Elliott's identity was properly admitted.

We note that this issue is unpreserved; however, Lawson has requested that this matter be reviewed for palpable error under RCr 10.26. Accordingly, we shall conduct a review for palpable error.

At trial, McDowell claimed that he could not remember anything after leaving the bar the night of the assault due to his intoxication. He stated that he did not remember writing a statement which he gave to the police. The Commonwealth then read McDowell's statement and inquired intermittently if he recalled writing any portion of it. McDowell denied any knowledge of this statement. In his signed written statement, McDowell identified Elliott as the third perpetrator in the assault. There was no objection to either the Commonwealth's reading the statement or to its introduction into evidence. Later at trial, Sergeant Muse testified that McDowell made a statement to him in the police station bathroom which implicated Lawson and Elliott. There was no objection to this testimony.

We agree with the Commonwealth that McDowell's written, signed statement qualified as an admissible prior inconsistent statement pursuant to Kentucky Rules of Evidence (KRE) 801(A). In *Brock v. Commonwealth*, 947 S.W.2d 24 (Ky. 1997), the Kentucky Supreme Court noted:

In Kentucky, a prior inconsistent statement is used not only to attack the credibility of the declarant, but also constitutes substantive evidence with respect to the matter asserted. KRE 801A(a)(1); *Jett v. Commonwealth*, Ky., 436 S.W.2d 788 (1969). A statement is inconsistent for purposes of KRE 801A(a)(1) whether the witness presently contradicts or denies the prior statement, or whether he claims to be unable to remember it. *Wise v. Commonwealth*, Ky.App., 600 S.W.2d 470, 472 (1978).

Brock at 27.

The testimony of McDowell and Sergeant Muse provided a proper foundation for the introduction of McDowell's written statement under KRE 801(A). Given that McDowell denied knowledge of this statement, it was properly admitted as substantive evidence. Thus, even if this matter had been properly preserved, there would have been no error; correspondingly, where this matter was unpreserved, there certainly could be no palpable error. While the parties disagree as to whether the oral statement of McDowell made in the police station bathroom was properly admitted, the lack of objection renders the error harmless under a palpable error review because it was merely duplicative of the written statement admitted into evidence by the trial court and already found by this Court not to be error. Accordingly, Lawson is not entitled to relief under this alleged error.

Lawson's fifth and final argument is that the trial court erred by not giving a facilitation to assault instruction. The Commonwealth argues that Lawson was not entitled to a facilitation instruction on the assault charge.

The relevant part of the statute criminalizing complicity, KRS 502.020(1), reads:

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....

In slight contrast, the statute criminalizing facilitation, KRS

506.080(1), reads:

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.

The distinction between the applicability of the two statutes depends on the defendant's mental state. *See White v. Commonwealth*, 178 S.W.3d 470, 489 (Ky. 2005).

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) (citing *Skinner v. Commonwealth*, 864 S.W.2d 290, 298 (Ky.1993), and quoting *Perdue v. Commonwealth*, 916 S.W.2d 148, 160 (Ky. 1995), *cert. denied*, 519 U.S. 855, 117 S. Ct. 151, 136 L. Ed. 2d 96 (1996)).

An instruction on facilitation (as a lesser-included offense of complicity) “is appropriate if and only if on the given evidence a reasonable juror could entertain reasonable doubt of the defendant's guilt on the greater charge, but

believe beyond a reasonable doubt that the defendant is guilty of the lesser offense.” *Skinner*, 864 S.W.2d at 298. An instruction on a lesser-included offense requiring a different mental state from the primary offense is unwarranted, however, unless there is evidence supporting the existence of both mental states. *See Taylor v. Commonwealth*, 995 S.W.2d 355, 362 (Ky. 1999).

In the case *sub judice*, the testimony presented by the parties established two theories: either Lawson was an accomplice to the assault upon Officer Rice, or Lawson attempted to help Officer Rice and was innocent. Neither side presented a theory that Lawson was “wholly indifferent” to the assault.³ Accordingly, “[t]here was no evidence of a middle-ground violation of the facilitation statute.” *White*, 178 S.W.3d at 491. Thus, there was no palpable error.

In light of the aforementioned, we affirm Lawson’s conviction, reverse his sentence and remand this matter for further proceedings.

ALL CONCUR.

³ While Lawson, in his reply brief, argues that the evidence could be interpreted such that he simply gave the opportunity to the other man to hit Officer Rice and thus was entitled to a facilitation instruction, we disagree. Clearly the theories presented to the trial court were either that Lawson was innocent or that he was an accomplice to the assault. Lawson has failed to show this Court where the evidence supported that he was “wholly indifferent” to the commission of the assault. *See Dixon v. Commonwealth*, 263 S.W.3d 583, 587 (Ky. 2008).

BRIEFS FOR APPELLANT:

Kathleen K. Schmidt
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Michael J. Marsch
Assistant Attorney General
Frankfort, Kentucky