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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001040-MR

JACOB TACKETT — APPELLANT

v.

APPEAL FROM PIKE CIRCUIT COURT
HONORABLE STEVEN D. COMBS, JUDGE
ACTION NO. 13-CR-00176

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, NICKELL, AND THOMPSON, JUDGES.

NICKELL, JUDGE: Jacob Tackett appeals from a final judgment entered by the Pike Circuit Court following a jury trial at which he was found guilty of criminal mischief in the first degree,[1] burglary in the third degree,[2] and theft by unlawful

[1] Kentucky Revised Statutes (KRS) 512.020, a Class D felony, and KRS 502.020 (accomplice liability). Jacob—jointly indicted with Julius Tackett—was also charged with one count of criminal mischief in the third degree, a Class B misdemeanor, KRS 514.030. However, the Commonwealth moved to dismiss that charge because any sentence would have run concurrently with any felony conviction.

[2] KRS 511.040, a Class D felony, and KRS 502.020.

taking over $500.00.[3] Upon finding he qualified for enhancement as a persistent felony offender in the second degree,[4] jurors recommended he be sentenced to serve fifteen years for his role—as a principal or accomplice—in burglarizing a business. The trial court sentenced him in conformity with the jury's recommendation. Having reviewed the record, the briefs and the law, we affirm.

FACTS

Joanne Mayhorn, a woman in her seventies, lives in an apartment above her family's landscaping business in Pikeville, Kentucky. Around 1:00 a.m. on May 15, 2012, while her husband was out of town, she was awakened by noises. Looking out the window, she saw someone run from the back of the store and dialed 911. She then saw someone drive the store's Bobcat skid loader toward the back of the building. Shortly thereafter, she heard noises inside the store below her. She would soon learn the Bobcat had been used to penetrate the building, pull down metal shelving and destroy office equipment, all with a goal of removing a gun safe and loading it into Mrs. Mayhorn's SUV.[5] She remained upstairs during the burglary, and later saw three people dressed in dark clothing with hoods near

[3] KRS 514.030, a Class D felony, and KRS 502.020.

[4] KRS 532.080.

[5] A review of the scene indicated the store's front doors had been pried open with two crowbars and keys to the Bobcat had been taken from a desk drawer in the store's office. The Bobcat was driven inside the store, knocking down a wall, overturning shelves, destroying merchandise and spilling cleaning solvents. Both the gun safe and Mrs. Mayhorn's SUV received extensive damage. Sales manager Todd Mayhorn estimated the total damage exceeded $40,000.00.

the back of the store. When police arrived, Mrs. Mayhorn saw the intruders run toward a storage barn at the rear of the building which borders an open field.

Crystal Hamilton, a residential neighbor across the road, heard her dog barking about 1:00 a.m. Looking toward the store, she noticed the lights were on and three people wearing "hoodies" were moving around inside the store—it appeared they were "tearing things up." Hamilton also saw the people move an SUV from the side of the store and back it up to the store's front doors. Suspecting trouble, she also called 911.

Kentucky State Police (KSP) Sgt. John Michael Gabbard was the first officer to arrive at the store. He saw the Bobcat, an SUV, and two people starting to run; he pursued the two subjects on foot behind the store. Although he lost sight of the subjects, he continued in pursuit. He found Julius lying face-down in the bottom of a deep ditch or creek; his clothes were muddy, he appeared to have been running, and he had a pair of pruning shears in his pants pocket. He claimed he was fishing for crawdads with a large net, but no fishing gear was found. Trooper Kevin Thacker had joined Sgt. Gabbard in the pursuit. Thacker described Julius as appearing to be intoxicated, and "very disorderly and aggressive" toward the officers.

After placing Julius in a police cruiser, Sgt. Gabbard resumed the hunt and found Jacob lying on his back in bushes in the general vicinity in which Julius had been found. Jacob also claimed to be fishing, although he had no gear either

and appeared to be intoxicated. Wearing a dark-colored shirt and pants, he had a folding knife with a razor blade in his pocket.

After securing Jacob, officers heard an alarm at a nearby car lot. They investigated because both 911 calls had reported three people were involved in the mischief and only two had been captured. Trooper William Petry heard a vehicle "take off" at a high rate of speed. He caught up to a purple Nissan van with a temporary tag, but eventually lost it as the chase neared the county line. Trooper Petry later found the van—which had been purchased by "Shirley Tackett"—abandoned at the end of the road.

Julius and Jacob elected to stand trial and were tried together. On the morning trial was to finally begin, during *ex parte* discussions with the court and the defendants, counsel for both stated they had advised their clients to accept the Commonwealth's offers and plead guilty. As it happened, both defendants were willing to accept the Commonwealth's offers, but only *after* the time for accepting the deals had expired, thus, the march to trial continued.

That same morning, both defendants and the prosecutor had received a one-page document styled "Crime Supplement" prepared by KSP Detective James Anderson on May 15, 2012, the date of the crimes. The narrative states as follows:

> On Monday May 15th, 2012, I was requested to assist with Burglary investigation by Sgt J. Kidd Unit 165 due to assigned unit Trooper Kevin Thacker Unit 770 had completed his shift and was currently not working at the time. I follow-up with Mr. Mayhorn at the location who

> advised he located a set of gloves and a (sic) article of clothing in the creek. I photographed the scene as I approached which the trail lead (sic) to a creek approximately 250 feet from the building were (sic) several subjects were hiding the night of the incident and later arrested. I collected the article of clothing which was photographed and placed in a (sic) evidence bag for storage. I further photographed the scene and further *collected a key ring* found outside the rear door that belong (sic) to a *pickup* on site. The *plastic key ring was collected and the key was returned to owner*. The *plastic portion was placed in a (sic) evidence bag and sealed and later transported to Central Lab for analysis*.
>
> The shirt and clothes were placed in a dry locker to dry to be submitted to Central Lab for DNA analysis. Upon examination of the shirt I observed several holes cut out and was tied in a knot possibly used as a face mask.
>
> On Monday May 22, 2012 at 1300 hours, I collected the items from the dry locker and placed them in evidence bags to be examine (sic) by Central Lab Touch DNA section. Evidence was placed in evidence locker to be transported to the lab.
>
> Case pending examination.

(Emphasis added). Upon receipt of the report, both defense attorneys jointly requested time to review the report—especially any lab tests of the key ring—the defense theory being if DNA belonging to someone other than Julius or Jacob was found on the key ring, criminal responsibility would be deflected away from their clients because no evidence directly placed them inside the store. Counsel for Julius stated he was more concerned about seeing the photos referenced in the report, but readily admitted he could not say what they depicted without seeing them. The prosecutor stated she had just received the report as well, was unaware

of any additional lab work, and would not introduce anything mentioned in the supplemental report.

The trial court stated it was not inclined to continue the trial, but was inclined to give the defense time to review the newly revealed items. The court directed that *voir dire* commence, the Commonwealth expedite its investigation into the late revelations, and if exculpatory evidence had not been provided in conformity with the discovery order, the court could declare a mistrial.

As time wore on, the Commonwealth located twenty photos and a hearing was convened outside the jury's presence with Det. Anderson, a KSP trooper for more than a decade, as the sole witness. He testified he had been asked to collect evidence at the scene. He photographed the scene—both inside and outside the store. He was taken to a creek where he was told a shirt and gloves had been found; he collected evidence pointed out by Todd Mayhorn, Mrs. Mayhorn's son and the store's sales manager.

Det. Anderson then testified, as he was leaving the scene, he saw a key ring and keys either on the ground or in the Bobcat's ignition; he later said the key ring was found on the ground near a piece of equipment. He collected the key ring, but removed and returned the keys to Mayhorn. Initially he intended to submit the key ring to the crime lab for Touch DNA[6] analysis, but then realized if the culprits had been wearing gloves—and two gloves were recovered at the scene

[6] "Touch DNA" refers to the analysis of DNA left on an item at a crime scene that has been touched or casually handled. Testing requires only a few cells from one's epidermis.

—there would be nothing to test. There was no indication the key ring was ever submitted for testing.

Det. Anderson testified he had not reviewed the case between March 15, 2012—the day he collected the items—and May 17, 2014, the day before the supplemental report was provided. Despite searching his temporary locker, he was unable to locate the key ring. He further stated he believed the key ring had no evidentiary value and acknowledged making an administrative error he did not have the opportunity to correct.

On cross-examination, Det. Anderson explained in felony property crimes, the crime lab will accept only three items for analysis. Believing the shirt and the two gloves to be the most valuable pieces of evidence, those were the three items he submitted for testing. He also clarified he never intended to submit the key ring for fingerprints, only for Touch DNA analysis.

At the conclusion of the proof, counsel for Julius again urged the court to dismiss the charges claiming the state police—not the prosecutor—had concealed, mishandled and then lost, valuable evidence—a scenario no missing evidence instruction could cure. Counsel for Jacob joined the motion and pointed out that because a van had fled from a neighboring car lot, there was a third culprit.

The court asked defense counsel why they had not gotten the Bobcat keys and had them tested themselves. Counsel for Julius responded he guessed they could have gotten the keys, and wished they had, but had not done so. The court then overruled the motion to dismiss the charges because: whether the key

ring contained evidence was unknown; nothing prevented the defense from getting the keys and testing them if that was their desire; there was no proof the key ring held a key to the Bobcat—the supplemental report stated the key "belong to a pickup on site"; Det. Anderson testified he believed the key ring had no evidentiary value; and, no bad faith had been demonstrated on the part of KSP. Neither defendant objected to any of the new photos—the initial reason for seeking to question Det. Anderson and delay trial.

As trial progressed, the defendants jointly requested an instruction on criminal facilitation—a request that was denied because it was unsupported by the evidence. Jurors ultimately found both men guilty. Jacob appeals his conviction. We affirm.

ANALYSIS

We begin with the question of whether the trial court erred in denying a motion to dismiss due to the loss of a key ring collected by KSP but never submitted for testing and unavailable at the time of trial. Under *Estep v. Commonwealth*, 64 S.W.3d 805, 809-10 (Ky. 2002), we discern no error.

First, a due process violation under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), requiring dismissal, suppression of evidence or a missing evidence instruction, occurs only when the Commonwealth intentionally destroys exculpatory evidence. Det. Anderson admitted collecting the key ring with an idea of submitting it for testing, but upon further consideration rejected the need for testing because of the possibility the culprits wore gloves,

ultimately lost the item, and never corrected his supplemental report. While his conduct was careless, it did not constitute intentional destruction and there was no indication his actions were nefarious. The trial court found no proof of bad faith on KSP's part, and

> the Due Process Clause is not implicated by "the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant." *Collins* [*v. Commonwealth*, Ky. 951 S.W.2d 569, 572 (1997)](quoting [*Arizona v.*] *Youngblood,* [488 U.S. 51, 58, 109 S.Ct. 333, 337, 102 L.Ed.2d 281).

Second, we will never truly know whether the key ring held exculpatory evidence, but that result is highly unlikely. Close inspection of Det. Anderson's written report, prepared at the time of evidence collection—some two years before the hearing—shows the key found on the key ring "belong (sic) to a pickup on site." There was no indication a pickup was involved in the crime. Furthermore, it was only Det. Anderson's live testimony—two years *after* the fact—that linked the key—and, therefore, the key ring—to the Bobcat—the piece of equipment used to gain entry to the store and carry the gun safe to Mrs. Mayhorn's SUV. In light of the written report prepared when the key ring was collected, it is highly unlikely the key ring held any significant information for either defendant.

Third, as the trial court noted from the bench, it should have been obvious to defense counsel that a key was needed to operate the Bobcat. If they deemed the key critical to their defense, they could have acquired it and had it tested themselves—something they admitted they could have done, but did not do.

Requesting the key would have opened an inquiry into any key ring to which that key may have been attached and its location.

Finally, a missing evidence instruction might have been appropriate, but counsel emphatically stated during the hearing no such instruction could cure the error and such an instruction was not pursued. Upon review of the record, we discern no due process violation and no basis for reversal.

The remaining claim is that jurors should have been instructed on criminal facilitation as a lesser included offense on all counts. The trial court overruled the motion on the strength of *Commonwealth v. Caswell*, 614 S.W.2d 253 (Ky. App. 1981), in which the defendant's actions, if coupled with knowledge, would have demonstrated "an intent to promote the commission of the crime[,]" making an instruction on criminal facilitation unjustified.

Luttrell v. Commonwealth, 554 S.W.2d 75, 79 (Ky. 1977), cited in *Caswell,* explains when an instruction on criminal facilitation should be given:

> KRS 506.080 provides that 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 commission of the crime and which in fact aids such person to commit the crime." The example used in Palmore, Instructions to Juries, Sec. 907 (1975), to illustrate when this instruction should be given is in the case of one who sells a gun to another whom he knows is going to use it in committing a crime. KRS 502.020 provides that a person is guilty of a substantive offense committed by another where with intention of promoting or facilitating the commission of the offense, he "Aids, counsels, or attempts to aid such person in planning or committing the

> offense . . .". The example used in Palmore, Instructions to Juries, Sec. 913 (1975), to illustrate when this instruction should be given is in the case of one who aids or assists another in an unlawful shooting by handing him a gun.

By all accounts, this case was based on circumstantial evidence; no direct evidence placed Jacob or Julius inside the store or at the wheel of the Bobcat, and neither defendant testified. However, the proof jurors did hear was that around 1:00 a.m. on May 15, 2012, Mrs. Mayhorn heard noises, looked outside and saw someone moving the store's Bobcat to the back of the family business. She then heard noises from the store below that sounded like wood cracking, breaking and popping. This was followed by her seeing three people near the back of the store using the Bobcat to load the store's gun safe into her SUV. When police arrived, the subjects ran.

A second eyewitness, Hamilton, who lived across the road, was awakened by her barking dog around 1:00 a.m. She saw three people tearing up the inside of the store, and watched the trio move the SUV from the side of the store to its front doors. When Sgt. Gabbard arrived a few minutes later, he saw two people run from the scene. After a short pursuit he discovered Julius and Jacob in a nearby ditch. Both claimed to be fishing, but neither had any gear.

A facilitator is a "knowing, cooperative bystander with no stake in the crime." *Monroe v. Commonwealth*, 244 S.W.3d 69, 75 (Ky. 2008). A facilitator is *not* an active participant in the crime. *Churchwell v. Commonwealth*, 843 S.W.2d 336, 338 (Ky. App. 1992).

Jacob argues jurors could have convicted him of facilitation if they believed he remained outside the store and did not enter the building. We reject his theory because the testimony was that three people, whether inside destroying the premises, or outside moving the Bobcat and SUV and attempting to load the gun safe into the SUV, were active. Based on the evidence, jurors could—and did—convict Jacob as a principal or an accomplice. An instruction on criminal facilitation, however, was unsupported by the proof and was properly denied.

WHEREFORE, the final judgment and order of imprisonment entered by the Pike Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

John Gerhart Landon
Assistant Public Advocate
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

John Paul Varo
Assistant Attorney General
Frankfort, Kentucky