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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-000825-MR

EBONI PRITCHETT — APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE PATRICIA M. SUMME, JUDGE
ACTION NO. 12-CR-00535-004

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KRAMER, CHIEF JUDGE; ACREE AND CLAYTON, JUDGES.

ACREE, JUDGE: Eboni Pritchett appeals the judgment of the Kenton Circuit Court affirming the jury's verdict finding her guilty of first-degree complicity to possession of a controlled substance. She takes issue with the instructions provided to the jury at trial as well as the trial court's denial of her motions for directed verdicts. We find no error and affirm.

I. Factual and Procedural Background

Eboni Pritchett arrived at her cousin's house at 1226 Fisk Street in Covington, Kentucky, on May 18, 2012. It was evening. She testified she was at the residence to watch her cousin's children while her cousin went to work. When Pritchett arrived at the residence, she testified that only her cousin, the children, and Jaleesa Cuthbertson were there. Pritchett placed her purse upstairs, but slept that night on a couch downstairs. Sometime after Pritchett went to sleep, Jason Dukes arrived at the house. Pritchett testified that Dukes was upstairs, but she did not know what he was doing. When Pritchett woke up the next morning, she took a shower in the upstairs bathroom.

On the afternoon of May 19, 2012, Covington Police Officer, Ryan Malone, was on routine patrol in the area of 1226 Fisk Street. Malone was familiar with the area, which was known for drug-trafficking. Malone observed a man, Clay Hall, on his cell phone pacing in the alley adjacent to 1226 Fisk Street. Shortly thereafter, Malone was joined by Officer Gideon Cramer. Both officers observed Hall in the alley.

The officers then heard a door open and saw two women, Pritchett and Cuthbertson, in the yard of 1226 Fisk Street. The women approached Hall and met him at the yard's chain-linked fence. The officers saw Cuthbertson hand something to Hall. Hall then proceeded down the alley. Officer Malone believed the exchange to be a hand-to-hand drug transaction.

The officers approached Hall. When one of the officers attempted to grab Hall's clenched fist, Hall threw the item he was holding. Hall was detained and searched. The officers found a used syringe and spoon on Hall's person, each of the items marked with suspected heroin residue. At Hall's feet, the officers found a crack pipe. The officers searched for the object thrown by Hall, but were not able to locate the item. Pritchett and Cuthbertson were also detained.

Officer Malone then secured the residence, and upon execution of a search warrant, the officers searched 1226 Fisk Street. Officers found a total of 3.8 grams of heroin in various places throughout the residence, including on the living room mantel, in the upstairs bathroom on the tank of the toilet, and next to the bed in the front bedroom. Officers also found multiple sets of digital scales in the kitchen, some of which had a white powdery substance on them. Additionally, officers found several cell phones and multiple syringes throughout the residence.

In one of the bedrooms, officers discovered a "packaging center" for heroin which included bits of plastic, packaging bags, and an iron to seal the bags. Pritchett's ID card was found in a pile of clothes in the packaging center bedroom along with two syringes.

Pritchett was indicted for first-degree trafficking in a controlled substance. At trial, the jury was instructed on complicity to trafficking in a controlled substance and complicity to possession of a controlled substance. Pritchett was convicted of the latter. The jury recommended a sentence of two years' imprisonment. In its judgment, the court affirmed the guilty verdict but

deviated from the jury's recommendation on Pritchett's sentence; her sentence was probated for two years. This appeal followed.

III. Analysis

Jury Instructions

"Alleged errors regarding jury instructions are considered questions of law that we examine under a *de novo* standard of review." *Hamilton v. CSX Transp., Inc.*, 208 S.W.3d 272, 275 (Ky. App. 2006) (citing *Reece v. Dixie Warehouse and Cartage Co.*, 188 S.W.3d 440, 449 (Ky. App. 2006)). Jury instructions "must state the applicable law correctly and neither confuse nor mislead jurors." *CSX Transp., Inc. v. Begley*, 313 S.W.3d 52, 60 (Ky. 2010). Thus, "[i]f the statements of law contained in the instructions are substantially correct, they will not be condemned as prejudicial unless they are calculated to mislead the jury." *Ballback's Adm'r v. Boland–Maloney Lumber Co.*, 306 Ky. 647, 208 S.W.2d 940, 943 (1948).

Pritchett's main contention on appeal is that the jury instructions given at trial were unsupported by evidence, and are therefore, clearly erroneous.

"A trial court is required to instruct the jury on every theory of the case that is reasonably deducible from the evidence." *Fredline v. Commonwealth*, 241 S.W.3d 793, 797 (Ky. 2007). However, Kentucky courts utilize a "bare bones" approach to jury instructions, "leaving it to counsel to assure in closing arguments that the jury understands what the instructions do and do not mean." *Begley*, 313 S.W.3d at 60. We examine Pritchett's specific objections to the

instructions in turn, but we also keep in mind that jury instructions are reviewed "as a whole to determine whether they adequately inform the jury of relevant considerations and provide a basis in law for the jury to reach its decision." *Smith v. Commonwealth*, 370 S.W.3d 871, 880 (Ky. 2012) (citing *Gibson v. City of Louisville*, 336 F.3d 511, 512 (6th Cir. 2003); quoting *Vance v. Spencer County Public Sch. Dist.*, 231 F.3d 253, 263 (6th Cir. 2000)).

The instruction for complicity to possession of a controlled substance used at trial was as follows:

> A. That in Kenton County on or about May 19, 2012, and before the finding of the indictment herein, the defendant had in her possession a quantity of heroin; or Jaleesa Cuthbertson, Jason Dukes, or another, with the knowledge of Eboni Pritchett, knowingly had in their possession a quantity of heroin;
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> AND,
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> B. That the defendant, Eboni Pritchett knew the substance so possessed by any of them was heroin;
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> AND,
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> C. That Eboni Pritchett intended to promote or facilitate the commission of the offense of Possession of a Controlled Substance in the First Degree;
>
> AND,
>
> D. Either,
>
> > 1. That Eboni Pritchett, Jaleesa Cuthbertson, Jason Dukes, or another, a combination of them, or all of them, aided, commanded, or engaged in a conspiracy to commit the offense of Possession of a Controlled Substance in the First Degree;

OR

> 2. That Eboni Pritchett, Jaleesa Cuthbertson, Jason Dukes, another, a combination of them, or all of them, aided counseled or attempted to aid the other or others in planning or committing the offense of Possession of a Controlled Substance in the First Degree.

The instructions also included twelve definitions of words relevant to the offense.

Pritchett first specifically takes issue with the definition of "possession" in the instructions. Possession was defined as "hav[ing] actual physical possession of, or otherwise to exercise actual dominion or control over, a tangible object." Pritchett maintains that there was no proof that she ever had actual physical possession of any heroin or that any heroin found in the home belonged to her.

We find no error with the possession definition. Possession does not necessarily need to be actual physical possession as Kentucky courts utilize the concept of constructive possession to connect defendants to illegal drugs and contraband. *Rupard v. Commonwealth*, 475 S.W.2d 473, 475 (Ky. App. 1971); *Hargrave v. Commonwealth*, 724 S.W.2d 202, 203 (Ky.1986); *Houston v. Commonwealth*, 975 S.W.2d 925, 928 (Ky. 1998); *Leavell v. Commonwealth*, 737 S.W.2d 695, 697 (Ky. 1987), *Clay v. Commonwealth*, 867 S.W.2d 200 (Ky. App. 1993). Constructive possession is established by demonstrating that the contraband was subject to the defendant's dominion or control. *Clay*, 867 S.W.2d at 202 (citations omitted). The definition provided in the jury instructions plainly

provides for this theory of possession, and it is also supported by the evidence of record.

Although no heroin was found on Pritchett's person, the evidence presented supports that Pritchett had constructive possession of the heroin or was at least complicit in the possession of heroin by others. Pritchett had arrived and stayed overnight at the residence the day before police openly found contraband in several rooms which Pritchett admitted she occupied during her stay. Pritchett clearly had access to the heroin. Furthermore, Pritchett testified that she was at the residence to take care of her cousin's children while her cousin went to work. Pritchett was thus in control of the household. Consequently, it was not unreasonable for the jury to conclude that Pritchett constructively possessed the heroin.

Next, Pritchett contends that there is no evidence supporting the instruction that she had knowledge the substance found in the residence was heroin. She claims to have only been an innocent bystander, and that proximity to the drugs, without more, is insufficient to support the knowledge instruction.

The open and widespread dispersal of drug paraphernalia and heroin itself throughout the residence where she spent the night was probative of her knowledge that the substance was heroin. Also, officers observed Pritchett accompany Cuthbertson in an apparent hand-to-hand drug transaction indicating she had knowledge of what changed hands at the fence. Provided the amount of heroin confiscated from 1226 Fisk Street, much of which was plainly observable in many of the rooms, and her suspected involvement in the contact with Hall, a reasonable

juror could analyze these facts and conclude that Pritchett knew the substance was heroin. Accordingly, there was sufficient evidence to support the instruction regarding Pritchett's knowledge of the heroin.

Pritchett further claims that the absence of other drug paraphernalia, money, and other direct evidence specifically connecting her with the possession of the heroin demonstrates she did not have the requisite intent to promote or facilitate the commission of the offense. However, intent may be proven by circumstantial evidence as there is not often direct evidence of a defendant's state of mind. *Quisenberry v. Commonwealth*, 336 S.W.3d 19, 36 (Ky. 2011). This evidence may include conduct of the defendant as well as the defendant's knowledge of surrounding circumstances. *Id.*

The contraband seized from the home was indeed accessible and viewable by Pritchett, and she testified to being in several of the rooms just shortly before the heroin was found by police. Her ID card was found in the bedroom with the visible packaging materials for the drugs. Also, Pritchett was present and appeared to be attentive to Cuthbertson's encounter with Hall. From these circumstances, a jury could reasonably infer that Pritchett intended to promote or facilitate the others' possession of the heroin.

Pritchett further asserts there is no evidence that she engaged in a conspiracy with Cuthbertson, Dukes, or anyone else or that she aided, counseled, or attempted to aid anyone in the possession of heroin.

The complicity statute, KRS[1] 502.020(1),[2] does not require an express agreement between complicitors. *Peacher v. Commonwealth*, 391 S.W.3d 821, 841-42 (Ky. 2013). Rather, circumstantial evidence of complicity suffices. *Id.* at 842 (citations omitted). "Conspiracy, as envisioned by the statute governing complicity, does not necessarily require detailed planning and a concomitant lengthy passage of time." *Rogers v. Commonwealth*, 315 S.W.3d 303, 310 (Ky. 2010). The language of KRS 502.020(1) is sufficiently broad that a jury could find Pritchett guilty of complicity to possession of heroin under these circumstances.

Pritchett's complicity liability may be inferred based upon the circumstances surrounding the discovery of the contraband presented by the Commonwealth. She was aware Dukes was present at the residence in the room with the packaging materials. Shortly before the police searched the home, she testified that she took a shower in the same bathroom in which heroin was found in plain view on the tank of the toilet. Pritchett also testified that she went into several of the rooms in which the contraband was openly visible when the police found it. She was also observed approaching Hall along with Cuthbertson. While Pritchett maintains that

[1] Kentucky Revised Statutes.

[2] KRS 502.020(1) provides: (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.

none of the heroin belonged to her, the evidence supports the jury's determination that she was complicit in its possession by others.

Pritchett also takes issue with the use of the term "another" provided in the instruction. She claims that the inclusion of this term effectively amended the indictment, resulting in a prejudicial and erroneous jury instruction. Pritchett argues that "another" required her to defend against complicity with some unknown person after all of the evidence had already been presented. This alleged error was not preserved for appellate review. Pritchett requests review for palpable error pursuant to RCr[3] 10.26.

Inclusion of the term "another" in the jury instructions does not constitute palpable error. An unpreserved error may be noticed on appeal only if the error is "palpable" and "affects the substantial rights of a party," and even then relief is appropriate only "upon a determination that manifest injustice has resulted from the error." RCr 10.26. An error is palpable when it is "easily perceptible, plain, obvious and readily noticeable." *Brewer v. Commonwealth*, 206 S.W.3d 343, 349 (Ky. 2006)(citation omitted). "A palpable error must be so grave in nature that if it were uncorrected, it would seriously affect the fairness of the proceedings." *Id.* (citing *Ernst v. Commonwealth*, 160 S.W.3d 744, 758 (Ky. 2005)). Determinative of a palpable error analysis is "whether the reviewing court believes there is a substantial possibility that the result in the case would have been different without the error." *Brewer*, 206 S.W.3d at 349 (internal quotations omitted).

[3] Kentucky Rule of Criminal Procedure.

Pritchett cites *Wolbrecht v. Commonwealth*, 955 S.W.2d 533 (Ky. 1997) to support her argument that use of the term "another" in the jury instruction effectively amended the indictment. In *Wolbrecht*, three individuals were charged with murdering and/or conspiring to murder the victim, Robert Wolbrecht. The original indictment provided that one of the three had actually killed Wolbrecht. During trial, the Commonwealth moved to amend the indictment to reflect that someone other than the three named defendants may have killed Wolbrecht. The court granted the motion to amend. *Id.* at 536–37. On appeal, the Supreme Court held that it was error for the trial court to grant that motion because the change "placed the defense in the position of beginning its case totally unprepared on the issue raised by the amended indictment." *Id.* at 537. Pritchett contends that she was neither prepared nor provided the opportunity to defend against some unknown principal actor.

Pritchett maintains that because the jury asked a question at trial as to what was meant by "another" in the instruction, it supports her theory that the instructions were prejudicial. She argues that it was reasonably likely that a juror may have thought "another" was someone not named in the indictment or present at 1226 Fisk Street at the time of the incident, and therefore, the jury's verdict cannot be considered unanimous. We disagree.

Pritchett was not prejudiced by the use of the term "another" because its inclusion in the jury instructions was supported by the evidence presented at trial. It was mentioned several times at trial that the residence in which the contraband

was found was owned by Pritchett's cousin, who was not present at the time of the search, but was present the previous evening when Pritchett arrived. There was also reference several times of an unidentified woman who opened the door at 1226 Fisk Street when the police secured the residence after the detention of Hall, Cuthbertson, and Pritchett.

Furthermore, prior to Pritchett's testimony at trial, the court and counsel agreed that the more appropriate charges were complicity to trafficking in a controlled substance and complicity to possession of a controlled substance. Pritchett was provided the opportunity to refute the proof of the Commonwealth of the elements of these offenses through her testimony. Accordingly, the inclusion of the term "another" did not require Pritchett to defend against some new theory of the case like in *Wolbrecht*, and therefore, the use of the term "another" in the jury instructions does not constitute palpable error.

Pritchett's last assertion regarding the jury instructions is that the form of the instruction used at trial was confusing and erroneous. She suggests a form from *Cooper's Instructions to Juries* §10.09, which she believes provides a more clear instruction. Pritchett concedes that this issue also is not preserved for appellate review.

When a defendant's assignment of error relates to whether a particular jury instruction should or should not have been given, RCr 9.54[4] operates as a bar to

[4] The rule provides in relevant part: "No party may assign as error the giving or the failure to give an instruction unless the party's position has been fairly and adequately presented to the trial judge by an offered instruction or by motion, or unless the party makes objection before the court instructs the jury, stating specifically the matter to which the party objects and the ground or

appellate review unless the argument was adequately presented to the trial court for a determination. *Martin v. Commonwealth*, 409 S.W.3d 340, 346 (Ky. 2013). Unpreserved allegations of defects in the given instructions or that the given instructions were incorrectly stated may be afforded review under RCr 10.26 if the error is palpable. *Holland v. Commonwealth*, 466 S.W.3d 493, 502 (Ky. 2015). As Pritchett claims the jury instruction provided was defectively phrased, her concern is not precluded from review under RCr 10.26 by RCr 9.54. *Id.*

Nonetheless, we cannot say that the trial court's failure to use the phrasing now suggested by Pritchett constitutes palpable error. The question is not whether "better instructions could have been designed for this particular case." *Id.* at 503. When reviewing instructions for palpable error, the question is whether the instruction actually given the jury was so failing in its purpose as to constitute a manifestation of injustice. Just as the Supreme Court found in *Holland*, *supra*, "[w]e see no manifestation of injustice here, and so we reject Appellant's argument." *Id.*

Furthermore, the instructions used at trial were substantially similar to the form of instruction Pritchett belatedly offers now. The trial court's failure to use Pritchett's preferred instruction is not palpable error because its nonuse did not deprive Pritchett of fairness in the proceedings and does not result in manifest injustice. We are satisfied that even if the proffered instructions had been used,

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grounds of the objection." RCr 9.54(2).

there is a substantial possibility the result of the case would have been the same. Accordingly, we find no error.

Directed Verdict

Pritchett's counsel moved the trial court for a directed verdict at the close of the Commonwealth's case as well as after all of the evidence was presented. The trial court overruled both motions. Pritchett's final argument on appeal is that in denying her motions for directed verdicts, the trial court violated her due process rights because the Commonwealth failed to prove every element of the complicity to possession offense.

Appellate review of a denial of a motion for a directed verdict is as follows: "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)(citing *Commonwealth v. Sawhill*, 660 S.W.2d 3 (Ky. 1983)). Thus, "there must be evidence of substance, and the trial court is expressly authorized to direct a verdict for the defendant if the prosecution produces no more than a mere scintilla of evidence." *Benham*, 816 S.W.2d at 187-88.

We have previously examined the elements comprising the offense of complicity to possession of a controlled substance and the corresponding supporting evidence in response to Pritchett's preceding arguments. Pritchett's contention that there is no evidence that she was complicit with the others in the possession of heroin is clearly incorrect. The Commonwealth presented evidence

that was considerably more than a mere scintilla and the case was properly presented to the jury for determination.

IV. Conclusion

For the reasons set forth above, the judgment of the Kenton Circuit Court is affirmed.

ALL CONCUR.

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