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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001578-MR

LASARO REYES — APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE PATRICIA M. SUMME, JUDGE
ACTION NO. 16-CR-01145-002

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KRAMER, LAMBERT, AND NICKELL, JUDGES.

KRAMER, JUDGE: Appellant, Lasaro Reyes,[1] appeals as a matter of right from a judgment of the Kenton Circuit Court convicting him of complicity to burglary in the third degree; complicity to theft by unlawful taking (value greater than or equal

[1] It was noted during the trial that Defendant's name is spelled "Lazaro" as opposed to "Lasaro." The Commonwealth orally moved to amend the indictment; however, the Notice of Appeal and all subsequent filings list Defendant's name as "Lasaro."

to $10,000); and complicity to criminal mischief in the first degree. He was sentenced to a total of five years' imprisonment and assessed $2,310.44 in restitution. Having reviewed the arguments of the parties, the record and the applicable law, we find no reversible error and affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

On Wednesday, November 16, 2016, at approximately 2:00 a.m., Independence police officer Matthew Fehler responded to a call regarding the Sprint store at 2081 Centennial Boulevard in Kenton County. Upon arrival at the scene, Officer Fehler noted that the front door had been forced open and the store had been ransacked. The store had closed Tuesday evening at 8:00 p.m. and was not scheduled to open again until 10:00 a.m. Wednesday morning.

While Independence police were responding at the scene, Kenton County police were following a signal from a GPS tracker on a device taken from the store. Officer Fehler testified that he went to a location on Route 25 after leaving the store and saw that Kenton County police officer Billy Snipes had stopped a pickup truck believed to be involved in the incident, based on the GPS signal from the stolen device. Upon approaching the vehicle, Officer Fehler noted a box in plain view in the cab of the truck behind the two front seats, that contained cellular telephones and other electronic devices. Officer Fehler also located miscellaneous tools, gardening gloves, and a sledgehammer in the bed of the truck.

Officer Snipes, who had stopped the vehicle, testified that he initially saw only two people in the truck, Dubiel Legon and Danny Torres. Boone County police officers arrived on the scene as back-up and located Reyes in the cab of the truck, behind the two front seats.

Reyes was indicted on burglary and/or complicity to burglary in the third degree;[2] theft and/or complicity to theft by unlawful taking (value greater than or equal to $10,000);[3] and criminal mischief and/or complicity to criminal mischief in the first degree.[4] Torres and Legon were also indicted. Torres absconded shortly after being released on bond, and Legon entered into a plea agreement with the Commonwealth, pleading guilty to burglary in the third degree and criminal mischief in the first degree. In exchange for his plea and testimony against his co-defendants, the Commonwealth dismissed the charge of theft by unlawful taking (value greater than or equal to $10,000) against Legon and recommended a sentence of five years' imprisonment.

At the trial, Legon testified that Reyes is his older brother and that they reside in Louisville. On the night of November 16, 2016, sometime prior to 2:00 a.m., Legon received a call from Torres, who wanted Legon to give him a ride. Legon agreed, but picked up Reyes first. The two of them drove together to

[2] Kentucky Revised Statute (KRS) 511.040 and KRS 502.020.
[3] KRS 514.030 and KRS 502.020.
[4] KRS 512.020 and KRS 502.020.

meet Torres. Although testimony was unclear as to exactly where Torres was located, Legon testified that Torres was in the car for approximately 20 minutes before the three of them arrived at the Sprint store in Independence. Legon testified that Torres was the one who directed him to drive to the Sprint store. Upon arrival at the store at approximately 2:00 a.m., the parking lot was empty; there were no cars or people around; and the store was closed. Torres and Legon got out of the vehicle. Torres forcefully opened the door and entered the store, followed by Legon. Both men wore gardening gloves, and Legon carried a sledgehammer. It is undisputed that Reyes did not enter the store and waited in the vehicle.

A jury trial was conducted on July 18-19, 2017. At the close of the Commonwealth's case, Reyes moved for a directed verdict. He argued there was insufficient evidence of complicity and that Reyes either did not know he stood to profit or did not stand to profit from the alleged crimes.[5] The trial court denied his motion. The defense rested after Reyes declined to testify or call any witnesses. Reyes renewed his motion for directed verdict, which was again denied. Reyes was found guilty on complicity to all charges, and the jury recommended a

[5] Defense counsel mentioned only the charge of complicity to burglary in his motion for directed verdict and failed to argue insufficient evidence specifically as to the charges of complicity to theft by unlawful taking and complicity to criminal mischief. We generously deem the motion for directed verdict preserved as to all crimes because, in the facts of the instant case, the theft and criminal mischief charges would not have occurred but for the burglary.

sentence totaling five years' imprisonment.[6] On September 23, 2017, the trial court sentenced Reyes to a total of five years' incarceration and assessed $2,310.44 in restitution. The trial court later found Reyes to be indigent for appellate purposes, and the Department of Public Advocacy was appointed to represent him in this matter of right appeal.

Reyes raises two claims of error on appeal: 1) the evidence was not sufficient to convict him of complicity; and 2) he was substantially prejudiced when the trial court overruled his objection to re-direct examination of Legon by the Commonwealth, which he argues went beyond the scope of cross-examination. Further facts will be developed as necessary.

II. ANALYSIS

A. Directed Verdict

The standard for a directed verdict is outlined in *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991):

> On 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

[6] The jury recommended two and a half years' imprisonment for complicity to burglary in the third degree; five years' imprisonment on complicity to theft by unlawful taking (value greater than or equal to $10,000); and one year's imprisonment on complicity to criminal mischief in the first degree. The jury further recommended that all time to run concurrently for a total of five years' imprisonment.

> 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.
>
> 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.

A reviewing court does not make determinations regarding credibility or weight of the evidence. *Benham*, 816 S.W.3d at 187. The appellate court is "to affirm . . . unless there is a complete absence of proof on a material issue in the action, or if no disputed issue of fact exists upon which reasonable men could differ." *Fister v. Commonwealth*, 133 S.W.3d 480, 487 (Ky. App. 2003) (internal quotation marks and citation omitted). With these standards in mind, we review whether the trial court erroneously denied Reyes's motion for a directed verdict.

1) Sufficiency of evidence as to complicity to burglary in the third degree

Under KRS 511.040(1), a person is guilty of burglary in the third degree when, "with the intent to commit a crime, he knowingly enters or remains unlawfully in a building." Under KRS 502.020(1)(b), "[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]ids, counsels, or attempts to aid such person in planning or committing the offense . . . ." Hence, to prove complicity to burglary in the third degree, the Commonwealth had to prove beyond

a reasonable doubt that Reyes, with the intent of promoting or facilitating commission of the offense, aided or attempted to aid Legon and Torres in planning or committing the offense of knowingly entering and remaining unlawfully in a building with the intent to commit a crime, and his conduct caused such a result. The Commonwealth's theory of the case was that Reyes aided and assisted Legon and Torres by acting as lookout at the Sprint store and that it was Reyes's intention that Legon and Torres enter or remain in the Sprint store unlawfully and for the purpose of committing a crime therein.

Reyes argues that the court erred by denying his motion for a directed verdict on his charge of complicity to burglary in the third degree because there was insufficient evidence submitted at trial that Reyes knew that there was going to be a burglary. Reyes preserved this issue for appellate review by his motion for a directed verdict at the close of the Commonwealth's case, which was also the close of all of the evidence. We are generously giving Reyes the benefit of the doubt that, in moving the trial court for a directed verdict, he meant to argue that there was insufficient evidence presented at trial as to his *intention* of promoting or facilitating the offense of burglary in the third degree under KRS 502.020(1), rather than arguing that there was insufficient evidence presented at trial that Reyes

knew there was going to be a burglary.[7] Even granting Reyes this assumption, after review of the record, we affirm.

When considered in the light most favorable to the Commonwealth, the jury was presented with sufficient evidence that Reyes, with the intent of promoting or facilitating commission of burglary in the third degree by Legon and Torres, aided Legon and Torres in knowingly entering and remaining unlawfully in the Sprint store with the intent to commit a crime. The evidence included testimony establishing that Reyes and Legon were from Louisville, and Torres was from Miami, Florida. None of the men had ever lived in Northern Kentucky, and did not know anyone who did. The evidence established that Reyes drove with Legon from Louisville to Independence, just prior to 2:00 a.m. on November 16, 2016, and they picked up Torres approximately twenty minutes before arriving at the store. Upon arrival at the store, it was obviously closed—it was dark, the parking lot was empty, and there were no other cars or people around. After arriving at the store, Legon and Torres donned gardening gloves. Legon grabbed a sledgehammer, which he took with him into the store. Although Legon testified

[7] Reyes did move for, and the trial court granted, inclusion of jury instructions for facilitation as a lesser-included offense after his motion for directed verdict as to complicity was denied. The principal distinctions between facilitation and complicity are that a) facilitation requires knowledge that another intends to commit a crime, while complicity requires an intention to promote or facilitate commission of the offense; and b) facilitation requires provision of means or opportunity for commission of the crime, while complicity requires either solicitation, conspiracy, assistance, counsel, etc. *Skinner v. Commonwealth*, 864 S.W.2d 290, 298 (Ky. 1993).

that the gloves and sledgehammer were already in the vehicle due to his work as a mechanic, both items were new and unused prior to that night. Legon testified that Torres instructed Reyes to remain in the vehicle to look out for other people and cars, and Reyes agreed. Surveillance video obtained from the premises undisputedly showed Legon and Torres forcefully opening the door, burglarizing, ransacking, and taking items from the store. Reyes did not flee the scene after Legon and Torres entered the store, nor did he contact authorities.

In his argument against sufficiency of evidence, Reyes cites Legon's credibility as a factor, arguing that he gave inconsistent statements throughout the proceedings, including his testimony at trial. For example, Legon signed the Commonwealth's Offer on a Plea of Guilty, which stated that Reyes operated the getaway vehicle. At his guilty plea hearing, Legon testified that he was driving the vehicle rather than Reyes. At trial, Legon testified that Reyes had been acting as a lookout for other people and vehicles while the two men were in the store. However, it is undisputed that Reyes remained in the vehicle when Legon and Torres entered the Sprint store. Surveillance video showed that, after Legon and Torres had been in the store for approximately two minutes, a vehicle drove past the front door even though there were no other vehicles or people in the area.[8]

[8] Officer Fehler also testified that the streets in Independence typically "roll-up" at around midnight or before and that, in the early morning hours of November 16, 2016, "no one was out

Legon may have given inconsistent statements, and his credibility was questioned by both the Commonwealth and defense counsel. Nonetheless, this court cannot substitute its judgment as to credibility of a witness for that of the trial court and the jury. *Commonwealth v. Bivins*, 740 S.W.2d 954, 956 (Ky. 1987).

Considering the evidence as a whole, we cannot say it would be clearly unreasonable for a jury to find guilt on complicity to the charge of burglary in the third degree based on the evidence presented. *Benham*, 816 S.W.2d at 187.

Accordingly, the trial court did not abuse its discretion when it denied Reyes's motion for a directed verdict.

2) Sufficiency of evidence for complicity to theft by unlawful taking (value greater than or equal to $10,000)

Under KRS 514.030(1)(a), a person is guilty of theft by unlawful taking when he "[t]akes or exercises control over movable property of another with intent to deprive him thereof . . . ."[9] KRS 502.020(1)(b), *supra*, applies with regard to complicity of the offense. Hence, to prove complicity to theft by unlawful taking, the Commonwealth had to prove that Reyes, with the intent of promoting or

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on the streets." However, it is not possible to discern the make and model of the vehicle in the surveillance video.

[9] Pursuant to KRS 514.030(2)(e), the offense is a Class C felony if the value of the property is $10,000 or more, but less than $1 million. The charge was stated as a Class D felony in the Judgment and Sentence on Verdict of the Jury entered September 23, 2017. Regardless, the five-year sentence imposed on Reyes by the trial court comported with that recommended by the jury for a Class C felony.

facilitating commission of the offense, aided Legon and Torres in planning or committing the taking or exercising control over movable property of another (value greater than or equal to $10,000) with intent to deprive him thereof and that Reyes's conduct caused such a result. The Commonwealth's theory of the case was that Reyes, in acting as a lookout, aided and assisted Legon and Torres and that it was Reyes's intention that Legon and Torres take or exercise control over electronic devices that belonged to the Sprint store.

When considered in the light most favorable to the Commonwealth, the jury was presented with sufficient evidence that Reyes, with the intent of promoting or facilitating commission of theft by unlawful taking by Legon and Torres, aided Legon and Torres in exercising control over electronic devices that belonged to the Sprint store with intent to deprive the store thereof. Although Legon testified that he initially believed that they were going to "pick up" some telephones from the Sprint store and that the store would be open at 2:00 a.m., Legon also testified that, upon arrival at the store, he became aware that they were there to steal the cellular telephones and electronic devices. As previously stated, Reyes agreed to remain in the vehicle and lookout for other cars and people. Surveillance video presented at trial showed Legon and Torres loading electronic devices into a box while in the store, and that either Legon or Torres carried the box out the door when they exited the store. When Reyes, Legon, and Torres were

stopped shortly after the incident, police located a box behind the two front seats of the vehicle.[10] The box had a shipping label addressed to the Sprint store affixed to the outside and contained business cards from the same Sprint store as well as cellular telephones and other electronic devices. At trial, the Commonwealth presented testimony that the value of the electronic devices taken from the Sprint store totaled $18,804.79.

Using the standard set forth in *Benham*, it would not be clearly unreasonable for a jury to find guilt on the charge of complicity to theft by unlawful taking (value greater than or equal to $10,000) based on the evidence as a whole in this case. Accordingly, the question of whether Reyes was guilty of complicity to theft by unlawful taking (value greater than or equal to $10,000) was properly submitted to the jury, and the trial court did not abuse its discretion when it denied Reyes's motion for directed verdict.

3) Sufficiency of evidence for complicity to criminal mischief in the first degree

Pursuant to KRS 512.020(1), "[a] person is guilty of criminal mischief in the first degree when, having no right to do so or any reasonable ground to believe that he has such right, he intentionally or wantonly defaces, destroys or damages any property causing pecuniary loss of $1,000 or more." Under KRS

[10] Kenton County police officer Billy Snipes testified that the vehicle was a compact pick-up truck, similar to a Chevrolet S-10, without a rear seat.

502.020(2)(b), "[w]hen 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]ids, counsels, or attempts to aid another person in planning, or engaging in the conduct causing such result . . . ."

A person can therefore be guilty of "complicity to the result" under KRS 502.020(2) without the specific intent that the principal's act caused the criminal result. *Tharp v. Commonwealth*, 40 S.W.3d 356, 360 (Ky. 2000). Criminal mischief is a "result" crime. This means that the punishment is for the result of a particular conduct rather than the conduct itself. *R.S. v. Commonwealth*, 423 S.W.3d 178, 186 (Ky. 2014). Hence, to prove complicity to commit criminal mischief in the first degree, the Commonwealth had to prove: (1) that Legon and Torres defaced, destroyed, or damaged property at the Sprint store; (2) that Reyes actively participated in the actions of Legon and Torres that resulted in the defaced, destroyed, or damaged property by aiding them; and (3) that Reyes acted intentionally or wantonly. *Id.*[11]

[11] We note that Jury Instruction No. 9(E) instructed that the jury was to find the Defendant guilty to Complicity to Criminal Mischief 1st Degree if, and only if, "you believe from the evidence beyond a reasonable doubt . . . that in aiding or assisting Danny Torres and Dubiel Legon, it was the Defendant's intention that Danny Torres and Dubiel Legon intentionally or wantonly damage the Sprint store." This subsection of the instruction is closer to KRS 502.020(1) in that it requires intent necessary for complicity to the act rather than the result. However, Reyes did not object to any aspect of the jury instructions for complicity (other than motioning for inclusion of jury instructions for facilitation as a lesser-included offense, which was granted by the trial

Reyes also argues that the trial court improperly denied his motion for a directed verdict on the charge of complicity to criminal mischief in the first degree. However, when considered in the light most favorable to the Commonwealth, the jury was presented with sufficient evidence that Legon and Torres defaced, destroyed and damaged property at the Sprint store and that Reyes actively participated in the offense by aiding Legon and Torres in acting as a lookout. Surveillance video presented at trial showed Legon and Torres ripping display cases from the walls, pulling out drawers and emptying them, and damaging cabinets. Photographs entered into evidence showed food and open condiment packages strewn about the store, boxes emptied and overturned, damage to the computer, and the store's security system was ripped from the wall. Officer Fehler also testified as to the condition of the store when he arrived on the scene. Michael Groneck, Chief Operating Officer of the Sprint store, testified that damage to the store exceeded $1000.00.

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court); the issue was not properly preserved; and was not raised on appeal. Although specific intent is not required for a guilty verdict as to criminal mischief, we do not believe that including "Defendant's intention" in Jury Instruction No. 9(E) is palpable error under Kentucky Rule of Criminal Procedure (RCr) 10.26. 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) (internal citations omitted). Any error was harmless because the Commonwealth needed to prove that Reyes acted intentionally *or* wantonly, and the penalty range is the same regardless of the culpable mental state. Furthermore, Jury Instruction No. 4 defined intentionally, wantonly, and complicity.

Re-applying the standard set forth in *Benham*, it would not be clearly unreasonable for a jury to find guilt on the charge of complicity to criminal mischief in the first degree based on the evidence as a whole in this case. Accordingly, the question of whether Reyes was guilty of complicity to criminal mischief in the first degree was properly submitted to the jury, and the trial court did not abuse its discretion when it denied Reyes's motion for directed verdict.

4) Profit or potential for profit as an element of the crimes charged to Reyes

In his motion for directed verdict, Reyes also argued that there was insufficient evidence that Reyes would either profit or knew he would profit from the crimes. We agree with the trial court that this aspect of Reyes's argument is immaterial to the crimes charged to Reyes because the Commonwealth was not required to prove profit or the potential for profit as an element of any of the offenses. Accordingly, we find no reversible error.

B. Defendant's objection to the scope of the Commonwealth's re-direct examination of Legon

On appeal, Reyes argues that the trial court abused its discretion when it overruled his objection regarding the scope of questioning of Legon on re-direct examination by the Commonwealth. Reyes asserts that this error by the trial court resulted in substantial prejudice against him because it allowed into evidence that

Reyes was close to the box of stolen electronic devices and, therefore, reversal is required. We disagree.

On cross-examination of Legon, defense counsel questioned him about the inconsistencies between the facts (1) as contained in the Commonwealth's offer signed by Legon; (2) according to the statement made by Legon to police on the night of the incident; (3) as stated by Legon during his guilty plea; and (4) as testified to by Legon at the trial.

The Commonwealth's re-direct examination of Legon went, in relevant part, as follows:

> Q: And when the police stopped you, all of the phones were behind the seat with [Reyes], correct?
> A: Yes.
> Q: Who put the phones back there with [Reyes]?
> A: [Torres].
> Q: Could [Reyes] see [Torres] put that box behind the seats?

At this point, defense counsel objected, and the trial court sustained the objection.

> Q: How far away was [Reyes] from the phones?

Here, defense counsel objected, stating that the questioning was now beyond the scope of his cross-examination. The trial court overruled the objection and the Commonwealth continued the questioning.

> Q: How far away was [Reyes] from the phones?
> A: Close.

Under KRE[12] 611 the trial court "shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to: (1) Make the interrogation and presentation effective for the ascertainment of the truth; (2) Avoid needless consumption of time; and (3) Protect witnesses from harassment or undue embarrassment." A trial court's exercise of that control is reviewed for abuse of discretion. *Mullikan v. Commonwealth*, 341 S.W.3d 99, 104 (Ky. 2011). An abuse of discretion occurs if a "trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

Even if we assume that Reyes's argument is correct and that Legon's testimony on re-direct examination should have been limited by the trial court as outside the scope of cross-examination, admission of this testimony was harmless error at best. Error is not harmless if it "had substantial influence" on the judgment or if the reviewing court has "grave doubt" whether the error substantially influenced the judgment. *Crossland v. Commonwealth*, 291 S.W.3d 223, 233 (Ky. 2009).

Prior to Legon's testimony, the jury had already heard testimony from Officers Fehler and Snipes regarding the compact size of the truck. Officer Snipes previously testified that there was not a backseat in the truck and that the Boone

[12] Kentucky Rules of Evidence.

County police officers had found Reyes behind the two front seats, which is also where Officer Fehler testified that he saw the box containing the electronic devices. Defense counsel did not object to the scope of the Commonwealth's re-direct examination until after Legon's testimony had already placed Reyes behind the front seats of the truck with the telephones. Given the prior testimony of other witnesses with regard to the compact size of the truck and Reyes's location in the vehicle in relation to the stolen electronic devices, we cannot say that the scope of questioning of Legon by the Commonwealth, after Reyes's objection was overruled, had a substantial influence on the judgment.

For the reasons stated herein, we affirm the judgment of the Kenton Circuit Court.

ALL CONCUR.

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