IMPORTANT NOTICE

NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

RENDERED: JUNE 17, 2004
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

DATE 7-8-04 E.H.C. Frankfort, D.C.

2003-SC-0623-TG

JEANIE L. LONGWELL — APPELLANT

V.

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE JANET P. COLEMAN, JUDGE
02-CR-00222

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

Affirming

Appellant, Jeanie L. Longwell, was convicted in the Hardin Circuit Court of complicity to commit first-degree robbery, first-degree fleeing and evading police, and for being a first-degree persistent felony offender. She was sentenced to a total of twenty years imprisonment and appeals to this Court as a matter of right. Finding no error, we affirm.

On December 5, 2001, Appellant and her boyfriend, Ray Shively, drove from Louisville to Proffitt's Department Store in Elizabethtown, Kentucky. While Shively waited in the car, Appellant entered the store and proceeded to hide numerous articles of clothing in her pants. Jonathon Goldsburg, the store's Loss Prevention Manager, observed Appellant shoplifting items from several areas of the store. Goldsburg called another Loss Prevention Manager, Chad Harrod, and both men confronted Appellant

after she exited the store. While Appellant was arguing with Goldsburg and Harrod, Shively approached, armed with two knives. Shively ordered both men back into the store as Appellant ran to the car. Shively thereafter got into the passenger side of the car and Appellant sped away. After a lengthy car chase during which Appellant ran numerous traffic lights and ignored police sirens, six police cruisers blocked the car and she and Shively were apprehended. When police approached the vehicle, Shively was in the passenger seat holding the stolen clothing.

Appellant and Shively were indicted in the Hardin Circuit Court for first-degree robbery (Appellant as an accomplice) and first-degree fleeing or evading police. Following a trial, Appellant was found guilty on both charges, while Shively was convicted of terroristic threatening and fleeing or evading police. Based upon the additional first-degree persistent felony offender conviction, Appellant received an enhanced sentence of twenty years imprisonment. Additional facts are set forth as necessary.

I.

Appellant first argues that the complicity to commit first-degree robbery instruction did not require the jury to find that she, as an accomplice, intended that Shively (the principal) commit robbery. Instruction No. 2, under which Appellant was convicted, provided:

> You will find the Defendant guilty of Complicity to Commit First-Degree Robbery under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt, the Defendant, alone or complicity with another, committed all of the following:

A. That in this county on or about December 5, 2001, and before the finding of the Indictment herein, she stole items of clothing from Proffitt's at Towne Mall, Elizabethtown, Kentucky;

B. That in the course of doing so and with the intent to accomplish the theft, she by herself or with the aid of Ray Shively used or threatened the immediate use of physical force upon Chad Harrod and Jonathon Goldsburg and that she acquiesced in his actions;

AND

C. That when she did so, Ray Shively was armed with two knives.

In Harper v. Commonwealth, Ky., 43 S.W.3d 261, 263-64 (2001), we stated,

> The language of KRS 502.020(1) and the accompanying commentary make clear that intent is an essential element to a conviction under subsection (1) of the statute. "To be guilty under subsection (1) for a crime committed by another, a defendant must have *specifically intended* to promote or facilitate the commission of *that* offense. This means that the statute is not applicable to a person acting with a culpable mental state other than 'intentionally.'" KRS 502.020, Official Commentary (emphasis added). Thus, the "[i]ntention to promote or facilitate the *charged* offense is what must be proved for conviction under KRS 502.020(1). . . ." Robert G. Lawson and William H. Fortune, Kentucky Criminal Law § 3-3(b)(3) (Lexis 1998) (emphasis in original).

Since robbery requires both the intent to accomplish a theft and the use or threat of immediate use of physical force upon the victim, KRS 515.020(1), the complicity instruction erroneously failed to include the element of intent. See Carpenter v. Commonwealth, Ky., 771 S.W.2d 822 (1989); Watkins v. Commonwealth, Ky., 298 S.W.2d 306 (1957).

However, the instructions furthered defined Complicity as:

> Complicity – 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.

Thus, while the complicity to commit first-degree robbery instruction should have required that Appellant, as an accomplice, intended that the principal use or threaten the immediate use of physical force upon Goldsburg and Harrod, Harper, supra, the element of intent was satisfied by the separate instruction defining complicity. Compare Crawley v. Commonwealth, Ky., 107 S.W.3d 197, 200 (2003). No reversible error occurred.

II.

Next, Appellant argues that she was entitled to a directed verdict on the robbery charge because the Commonwealth failed to prove that she intended that Ray Shively use force to assist her in committing the theft. Appellant relies on the fact that she testified at trial she did not tell Shively she was going into the store to shoplift, and that Shively testified he only brandished the knives because he believed Appellant was being accosted. And, in fact, the jury did not find Shively guilty of first-degree robbery, but rather only of terroristic threatening. Accordingly, Appellant contends that the jury could not have reasonably concluded that she intended Shively to use force to further the commission of the theft. We disagree.

The jury's finding that Shively was not guilty of robbery has no bearing on Appellant's criminal liability. KRS 502.030(1) provides, in pertinent part:

> In any prosecution for an offense in which the criminal liability of the accused is based upon the conduct of another person pursuant to KRS 502.010 and 502.020, it is no defense that:
>
> (1) Such other person has not been prosecuted for or convicted of any offense based on the conduct in question, or has previously

> been acquitted thereof, or has been convicted of a different offense, or has an immunity to prosecution or conviction for such conduct[.]

Therefore, the fact that Shively was only convicted of terroristic threatening did not preclude the jury from finding that Appellant was, in fact, guilty of complicity to commit first-degree robbery.

However, in addition to proving that it was the defendant's intention to promote or facilitate the charged offense by another person, the Commonwealth has the burden of proving that the defendant participated in that offense. Lawson and Fortune, supra, at §3-3(d)(2). It is an oft-cited principle that a person is presumed to intend the logical and probable consequences of his actions and, thus, "a person's state of mind may be inferred from actions preceding and following the charged offense." Parker v. Commonwealth, Ky., 952 S.W.2d 209, 212 (1997), cert. denied, 522 U.S. 1122 (1998); see also Harper, supra, at 265.

The Commonwealth introduced evidence that: (1) Appellant and Shively drove from Louisville to Proffitt's in Elizabethtown; (2) Appellant entered the store with the intention of shoplifting items to sell for money to support her drug habit; (2) Shively waited in the driver's seat of the car with the door open; (4) Shively, armed with two knives, approached Goldsburg and Harrod when they attempted to confront Appellant; (5) Appellant immediately thereafter ran to the car with the stolen items; (6) Appellant and Shively fled from the scene and were only apprehended after a lengthy police chase; and (7) police found Shively sitting in the car holding the stolen merchandise. From this evidence, the jury could have reasonably concluded that Appellant and Shively had planned to commit the robbery before Appellant ever entered the store.

Certainly, Appellant's acquiescence in Shively's use of force and their subsequent flight from the store was indicia of her intent that the robbery be committed. As this Court held in Smith v. Commonwealth, Ky., 5 S.W.3d 126, 129 (1999):

> Generally, all who are present at the commission of a robbery, rendering it countenance and encouragement, and ready to assist if needed, are liable as principal actors. *To be liable, the accused need not to have taken any money from the victim with his own hands*, or actually participated in any other act of force or violence; it is sufficient that he came and went with the robbers, was present when the robbery was committed, and acquiesced therein. (Emphasis in original) (Citing 67 Am.Jur.2d, Robbery § 9 p.62)

Viewing the evidence in the light most favorable to the Commonwealth, we conclude that the trial court did not err in refusing to grant Appellant's motion for a directed verdict. Commonwealth v. Benham, Ky., 816 S.W.2d 186 (1991).

The judgment and sentence of the Hardin Circuit Court are affirmed.

All concur.

COUNSEL FOR APPELLANT

John Palombi
Department of Public Advocacy
100 Fair Oaks Lane, Ste. 302
Frankfort, KY 40601

COUNSEL FOR APPELLEE

Gregory D. Stumbo
Attorney General

Courtney J. Hightower
Assistant Attorney General
Office of Attorney General
Criminal Appellate Division
1024 Capital Center Drive
Frankfort, KY 40601-8204

Christopher G. Shaw
26 Public Square
Elizabethtown, KY 42701