IMPORTANT NOTICE

NOT TO BE PUBLISHED OPINION

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RENDERED: AUGUST 26, 2004
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2002-SC-1025-MR

FRED COLLETT — APPELLANT

V.

APPEAL FROM LESLIE CIRCUIT COURT
HONORABLE R. CLETUS MARICLE, JUDGE
00-CR-19-1

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING IN PART AND
REVERSING AND REMANDING IN PART

A Leslie Circuit Court jury convicted Appellant, Fred Collett, of murder, as principal or accomplice, assault in the first degree, as principal or accomplice, complicity to robbery in the first degree, and arson in the first degree. The jury also found that the murder was aggravated because it was accompanied by robbery and arson.[1] Appellant was sentenced to life in prison without the possibility of parole for murder, twenty years each for assault in the first degree and complicity to robbery in the first degree, and fifty years for arson in the first degree, to run concurrently. Appellant appeals to this Court as a matter of right, Ky. Const. § 110(2)(b), asserting the following claims of error, viz:

[1] Appellant's mental retardation precluded the Commonwealth from seeking the death penalty. KRS 532.140(1); see also Atkins v. Virginia, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002).

(1) there was insufficient evidence to support his convictions of murder, assault and arson; (2) the murder and assault convictions stemmed from a defective indictment; (3) baseball bats admitted into evidence were irrelevant and prejudicial; (4) introduction of evidence of his prior bad acts denied him a fair trial; (5) the trial judge should have instructed the jury on receiving stolen property and criminal facilitation as lesser included offenses; (6) the murder and assault verdicts violated his right to unanimous verdicts; and (7) the penalty phase verdict forms precluded the jury from recommending a term of years for the murder conviction upon a finding of an aggravating circumstance. Agreeing that Appellant was entitled to an instruction on criminal facilitation to robbery in the first degree, we reverse the robbery conviction for a new trial; in all other respects, we affirm.

I. SUFFICIENCY OF THE EVIDENCE.

Robert and Laura Williams were robbed, beaten, and shot in their home on April 25, 2000. Robert Williams suffered fractures to the skull and face inflicted by a blunt object, and Laura Williams was beaten with a blunt object and shot in the face and chest. After the robbery and attacks, someone set fire to their residence. Neighbors pulled the victims from the burning house. Mr. Williams survived but suffered permanent brain damage from the blows to his head. Mrs. Williams died from her gunshot wounds. Mr. Williams did not testify at trial but testimony was given without objection that at the time of his rescue, Mr. Williams was asked what happened and responded, "They was two of them."

The central issue at trial was the extent of Appellant's involvement in the crimes. Roy Wayne Halcomb, Jr., a relative of the Williamses, testified pursuant to a plea agreement that he initiated the robbery plans and targeted Mr. Williams, a gun dealer

who was known to keep large amounts of money in his home. Halcomb and Appellant lived in Perry County; the Williamses lived in Leslie County. According to Halcomb, he told Appellant of his plan to rob Williams and offered to give Appellant half the money if Appellant would drive him to the Williams residence. Appellant agreed and borrowed his wife's gray Pontiac automobile for that purpose.

Halcomb testified that Appellant played an active role in the crimes. The plan was to offer to sell Appellant's wife's .25 caliber automatic pistol to Mr. Williams as a pretext to gain entry into the home. Halcomb stated that he initially entered the home alone, carrying both the .25 automatic and his own .380 caliber AMT semiautomatic pistol. Because he was having difficulty formulating exactly how to accomplish the robbery, he was inside for more than a half hour before Appellant entered the residence. Halcomb claimed that after Appellant entered, Mr. Williams started to call a local gun shop to arrange payment to Halcomb for the .25 automatic pistol. Halcomb then attacked Mr. Williams to stop him from making the call because he knew the call would place him at the Williams residence at the time of the robbery. Halcomb asserted that his .380 caliber pistol accidentally discharged during the ensuing struggle, shooting Mr. Williams in the hand, and that Appellant must have shot Mrs. Williams with the .25 caliber automatic because "[I]t wasn't me and there was no one in the house but me and Robert and Fred and Laura, so it had to be him." Halcomb also denied striking Mr. Williams in the head with a blunt object. While he admitted to stealing $10,000 to $15,000 from the Williams residence, he denied setting the fire. Instead, he claimed that after stealing the money, he returned to the Pontiac automobile and waited two to three minutes before Appellant left the house and joined him. According to Halcomb, he told Appellant that he had stolen $4,000 and paid Appellant $2,000 as his share.

Appellant did not testify but gave an audiotaped statement to the police that was played for the jury. In his statement, Appellant denied any knowledge of Halcomb's plan to rob the Williamses. He claimed that Halcomb asked him to drive him to the Williams home to get some pills and agreed to pay him fifty dollars for transportation. According to Appellant, Halcomb stayed inside the house for a long time before returning and asking Appellant for his wife's .25 caliber pistol so that he could buy some shells for it from Mr. Williams. Appellant stated that he only left the car one time, and that was to knock on the front door to inform Halcomb that he needed to leave so that he could pick up his daughter at the bus stop. Halcomb advised Appellant that he would be ready in a few minutes. Appellant claimed that he never saw the Williamses, but that when Halcomb returned to the vehicle a second time, he had the .25 caliber pistol and a white envelope which he placed on the front seat. Halcomb paid Appellant fifty dollars for transportation as promised. After dropping Halcomb off at a place where Halcomb was to meet his girlfriend, Stacey Combs, Appellant noticed that Halcomb had left the white envelope on the front seat of the vehicle. When he opened the envelope, he was surprised to discover that it contained $2,000 in cash.

At approximately 4:00 to 4:30 p.m., Appellant arrived at the home of Richard Brashear, one of his aunt's neighbors. Brashear owned a police scanner and Appellant inquired whether the scanner would pick up activity in Leslie County and asked Brashear to turn it on "as loud as it will go." Brashear turned on the scanner and asked Appellant what he had done. Appellant told Brashear that he had "let a couple of people off" in Leslie County. He then asked Brashear whether he would drive him across town to buy cigarettes. When Brashear responded that he had no money for gas, Appellant gave him fifty dollars and told him that he had "plenty of money." When

asked where he obtained the money, Appellant replied that he had sold some stolen copper. Appellant attempted to sell the .25 caliber automatic pistol to Brashear. He also asked Brashear where he could sell his wife's car and indicated that if he could not sell it, he would trade it for another car.

Later that day, Appellant and his wife, Nellie Collett, arrived at the home of Nellie's brother, Lonnie Riddle, and asked to watch the news on television. The two stayed at Riddle's home that night. Riddle testified that Appellant seemed nervous and told him that he had gone to Leslie County to trade a gun and that something had gone wrong, although he did not know exactly what. He also informed Riddle that he thought that his wife's car had "been involved in something." Appellant watched the news again the next morning and told Riddle that he needed to get rid of his wife's car. He and Riddle then drove to Bee Hive Mountain where Appellant removed two baseball bats and some other items from the car, then set it afire. Appellant then buried the .25 caliber pistol in a cemetery. Afterwards, the two men went to Steele's Auto Sales to buy another automobile. Appellant, who did not want to be seen, insisted that Riddle buy the car for him. Riddle bought a 1988 Pontiac Sunbird with $1,250 that Appellant had given him and told the salesman that he was buying the car for his sister (Appellant's wife), whose name appeared on the invoice.

When he returned to Riddle's home, Appellant's mother-in-law informed him that the police had been there looking for him. He left all of the items that he had removed from his wife's car, including the baseball bats, along with his hat, shoes, and shirt, at the Riddle home and fled to hide in the hills. Police subsequently located Appellant's belongings hidden under the floor in Riddle's home. Sometime thereafter, Appellant turned himself in to the police. In his statement to police, Appellant claimed that he had

fled because he wanted to learn whether Mr. Williams was alive and would be able to testify that Appellant did not participate in the robbery.

Halcomb's then-girlfriend, Stacey Combs, could not be located to obtain her appearance at trial. However she had given two audiotaped statements to the police about prior statements made to her by Halcomb, some which were inconsistent with Halcomb's trial testimony, KRE 801A(a)(1), and others which partially exculpated and partially inculpated Appellant. By agreement, both audiotapes were played for the jury in their entirety. Combs told the police that when she met Halcomb after the crimes, Halcomb told her about the robbery and shootings at the Williams residence but did not mention the arson. Halcomb told Combs that Appellant knew of his plan to rob the Williamses and that he paid Appellant $2,000 of the stolen money for driving him to the crime scene. However, Halcomb told her that Appellant stayed in the car during the robbery and did not enter the Williams residence. When she first saw Halcomb after the robbery, he was wearing oversized, baggy pants which he claimed to have stolen from Mr. Williams to wear over his own bloodstained pants so that Appellant would not be frightened by the blood.

The Commonwealth presented six witnesses to refute the evidence that Appellant remained outside in the gray Pontiac while the crimes were committed. Jake Burkhart, Sarah and Charles Blair, Viola and Jerry Caldwell, and Gary Baker all testified that they saw a gray car parked in front of the residence. Burkhart, who lived nearby, testified that the car was parked there for nearly two hours but that he could not see if anyone was sitting inside. The Blairs testified that they drove by the Williams residence at approximately 2:30 p.m. and did not see anyone sitting inside the Pontiac. The Caldwells, who passed the residence at approximately 1:00 p.m. and again, between

2:30 to 3:00 p.m., also stated that no one was inside the vehicle. Baker passed the Williams residence between 1:30 and 2:00 p.m. and saw someone with fuzzy hair sitting in the passenger seat.

A forensic biologist testified that he tested Appellant's shoes, shirt, hat, and two aluminum baseball bats found under the floor of the Riddle residence for blood and DNA. While the hat and bats tested negative for the presence of blood, the shoes and shirt tested positive. However, the sample was too limited to determine if there was a match with the DNA of either victim.

Based on this evidence, a reasonable jury could believe beyond a reasonable doubt that Appellant committed the crimes of which he was convicted. Commonwealth v. Benham, Ky., 816 S.W.2d 186, 187 (1991). First, there was Halcomb's testimony that he and Appellant acted in concert and that they were both in the Williams residence when the murder, assault and robbery were committed. Halcomb claimed that he (Halcomb) did not shoot Mrs. Williams, did not strike Mr. Williams in the head with a blunt object, and did not set fire to the Williams residence, thus inferring that Appellant committed those crimes. Although Halcomb confessed to his girlfriend of his involvement in the other crimes, he did not mention the arson. He claimed that Appellant remained in the home for a short while after he left, thus affording Appellant the opportunity to set the fire. The jury, as arbiter of credibility, id., was entitled to believe Halcomb's testimony, and that if Halcomb did not commit the murder, assault and arson, Appellant must have committed them.

Second, there was ample circumstantial evidence from which a reasonable jury could have inferred Appellant's guilt. Bussell v. Commonwealth, Ky., 882 S.W.2d 111, 114 (1994) (circumstantial evidence is sufficient basis for a conviction so long as given

the evidence as a whole, it is not "clearly unreasonable for the jury to find guilt"). Appellant concedes his presence at the Williams residence at the time the crimes were committed, and multiple witnesses testified not only that they saw his wife's car sitting in front of the house, but that it was empty. Crayton v. Commonwealth, Ky., 846 S.W.2d 684, 689-90 (1992) (presence at the scene of the crime is circumstantial evidence of guilt). While an individual's presence at the scene of the crime is insufficient standing alone to survive a directed verdict, Brison v. Commonwealth, Ky., 519 S.W.2d 833, 838 (1975) (citations omitted), that evidence was bolstered by Halcomb's testimony, by Mr. Williams's statement to his rescuers that "[t]hey was two of them," the fact that Appellant had in his car two baseball bats capable of inflicting the blunt force trauma sustained by both victims, and the undisputed evidence of Appellant's guilty behavior after the crimes were committed. In determining guilt, the jury may consider attempts to conceal evidence, Smith v. Commonwealth, Ky., 712 S.W.2d 360, 361 (1986), flight from authorities, Mayfield v. Commonwealth, Ky., 479 S.W.2d 578, 579 (1972), and the sharing of proceeds from the crime in question, Callahan v. Commonwealth, Ky., 508 S.W.2d 583, 584 (1974). Appellant engaged in all three of these activities. He destroyed evidence, i.e., his wife's car, and concealed the .25 caliber pistol used during the commission of the robbery. He fled and hid himself from police before surrendering. Although he testified that he fled in order to buy time to see if Mr. Williams would be able to testify as to his innocence, the jury was free to believe otherwise. Benham, 816 S.W.2d at 187. Finally, there was evidence that Appellant shared the robbery money and used some of it to purchase an automobile for his wife.

II. SUFFICIENCY OF THE INDICTMENT.

Appellant challenges the sufficiency of the indictment on the murder and assault charges. The indictment states in pertinent part:

> That on or about April 25, 2000, in Leslie County, Kentucky, the above-named defendants, and each of them, separate and apart from the other charges herein, committed the offense of capital murder by participating in a robbery in which Laura Williams was killed;
>
> and
>
> That on or about April 25, 2000, in Leslie County, Kentucky, the above-named defendants, and each of them, separate and apart from the other charges herein, committed the offense of Assault in the first degree by participating in an attempted robbery of Laura Williams and Robert Williams in which Robert Williams was beaten with a blunt instrument . . . .

Citing the indictment's failure to set forth the requisite mental state for murder and the elements of assault, Appellant contends that he was deprived of his Due Process right to fair notice and indictment by a grand jury, both guaranteed by the Fifth Amendment to the United States Constitution. In fact, the Grand Jury Clause of the Fifth Amendment has never been made applicable to the states. Hurtado v. California, 110 U.S. 516, 534-35, 4 S.Ct. 111, 120, 28 L.Ed. 232 (1884); see Apprendi v. New Jersey, 530 U.S. 466, 477 n.3, 120 S.Ct. 2348, 2355 n.3, 147 L.Ed.2d 435 (2000). Although the right to indictment by grand jury is afforded only by inference in Section 12 of the Constitution of Kentucky, we agree that Section 12 guarantees that right. See Malone v. Commonwealth, Ky., 30 S.W.3d 180, 182 (2000). Appellant concedes that he did not preserve this claim of error by a timely objection to the indictment but asserts that the defects deprived the trial court of subject matter jurisdiction over the murder and assault charges and, as such, the indictment is subject to challenge at any stage of the proceedings. See Johnson v. Bishop, Ky., 587 S.W.2d 284, 285 (1979).

We disagree. Generally, an indictment confers subject matter jurisdiction so long as it names a cognizable offense. Caudill v. Commonwealth, Ky., 120 S.W.3d 635, 650 (2003) (indictment conferred subject matter jurisdiction by naming the offense even though it did not include all requisite elements; lack of specificity did not invalidate indictment) (citing Thomas v. Commonwealth, Ky., 931 S.W.2d 446, 450 (1996)). As the indictment explicitly charged Appellant with murder and first-degree assault and made reference to the corresponding statutes, KRS 507.020, 508.010, it properly conferred subject matter jurisdiction on the trial court. Thomas, 931 S.W.2d at 450 (noting that the indictment in question cited the statutes that defendant was charged with violating). Thus, Appellant's failure to object renders his challenges to the indictment unpreserved and reviewable only for palpable error per RCr 10.26.

A finding of palpable error is inappropriate absent manifest injustice. As required by Thomas, 931 S.W.2d at 449, and Salinas v. Commonwealth, Ky., 84 S.W.3d 913, 916 (2002), the indictment informed Appellant of the charges against him, i.e., murder and first-degree assault. It also cited the relevant statutory provisions, which set forth all of the elements of those offenses, rebutting any claim that Appellant's Sixth Amendment right to notice was violated. Additionally, Appellant makes no claim that he would have prepared differently for trial had the indictment included all elements of the charged offenses.

Appellant's argument that the indictment's lack of specificity permitted the grand jury to indict him on inadequate evidence also fails. It is not within our province to determine whether the grand jury had sufficient evidence upon which to issue an indictment. RCr 5.10 ("[N]o indictment shall be quashed or judgment of conviction reversed on the ground that there was not sufficient evidence before the grand jury to

support the indictment."); Russell v. Commonwealth, Ky. App., 992 S.W.2d 871, 874 (1999).

III. EVIDENCE ISSUES.

A. Relevancy.

At trial, the Commonwealth introduced into evidence the two baseball bats that Appellant removed from his wife's car as circumstantial evidence of Appellant's participation in the crimes. This evidence showed that Appellant had immediate access to objects capable of inflicting blunt force trauma such as that sustained by the Williamses. Citing both the absence of blood on the bats and the absence of testimony that either of the victims were struck with a baseball bat, Appellant argues that the bats were irrelevant under KRE 401 and thus inadmissible under KRE 402.

We disagree. A trial judge's decision regarding the relevancy of evidence will not be reversed on appeal absent an abuse of discretion. Love v. Commonwealth, Ky., 55 S.W.3d 816, 822 (2001). Evidence is relevant if it has any tendency, however slight, "to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." KRE 401. This is not a high standard. Springer v. Commonwealth, Ky., 998 S.W.2d 439, 449 (1999). Here, the relevancy of the bats turns on whether adequate evidence exists to link them to the robbery. Robert G. Lawson, The Kentucky Evidence Law Handbook § 11.00, at 590 (3d ed. 1984) ("Identification of tangible evidence, like authentication of documents, is an aspect of relevancy . . ."). See also Dyer v. Commonwealth, Ky., 816 S.W.2d 647, 651-52 (1991) (error to admit sexually explicit materials in child sodomy case where prosecutor failed to establish that defendant showed them to the victim), overruled on other grounds by Baker v. Commonwealth, Ky., 973 S.W.2d 54, 55 (1998).

Establishment of identity requires preliminary proof to link the objects in question by "time, place, and circumstance." Lawson, supra, § 11.00, at 590.

We find those links here. Dr. Gregory Davis, who performed the post-mortem examination of Mrs. Williams's body, testified that a baseball bat could have caused the blunt force injuries that she sustained. Barth v. Commonwealth, Ky., 80 S.W.3d 390, 402 (2001) (wooden sticks found at scene of crime and consistent with victim's injuries admissible despite victim's inability to confirm their identity); Tarrence v. Commonwealth, Ky., 265 S.W.2d 40, 49 (1954) (tools found in trunk of defendant's automobile consistent with victim's injuries admissible despite lack of positive identification), superseded by statute on other grounds as stated in Spears v. Commonwealth, Ky., 30 S.W.3d 152, 154-55 (2000). Additionally, Appellant concedes the presence of the bats in his wife's car at the scene and time of the crime, thus connecting the bats to the crime by time and place. While relevant to the weight of the bats as evidence, the absence of blood is of no import to their admissibility. Tarrance, 265 S.W.2d at 49 (objects purportedly used in murder admitted although no blood was found on them). The trial court did not abuse its discretion in admitting the bats into evidence.

B. Prior Bad Acts.

Citing the prohibition set forth in KRE 404(b) against evidence of other crimes, wrongs, or acts, Appellant asserts that the admission of the following three statements denied him a fair trial: (1) Richard Brashear's statement that Appellant "stays in trouble;" (2) Brashear's statement that he and Appellant were in jail at the same time; and (3) a portion of Appellant's statement to police that revealed his status as a convicted felon. Since Appellant failed to object to any of those statements at trial, we

review the issue for palpable error, RCr 10.26, and apply the manifest injustice standard.

Although the statements fit none of the exceptions set forth in KRE 404(b) or elsewhere, and undoubtedly portrayed Appellant in a negative light, they do not justify the extraordinary finding of palpable error. Lawson, supra, § 1.10, at 39 ("[p]alpable error is designed for occasional and extraordinary rather than routine use") (citation and quotation omitted). An admonition to the jury would have cured any prejudice resulting from the statements because none of them were inflammatory, detailed, or emphasized. Johnson v. Commonwealth, Ky., 105 S.W.3d 430, 441 (2003). The statements revealed that Appellant had previously committed crimes, but did not explain the nature or severity of those offenses; thus, reversal for palpable error is unwarranted. Cf. id. (prosecutor's reference to defendant's past guilty plea curable by admonition because nature of offense not specified); Redd v. Commonwealth, Ky., 591 S.W.2d 704, 707 (1979) (no grounds for reversal where defendant volunteered on cross-examination that he served jail time and counsel failed to object); Bledsoe v. State, 21 S.W.3d 615, 624 (Tex. Ct. App. 2000) (admonition cured prejudice resulting from police officer's testimony that he served warrant on defendant in jail).

IV. GUILT PHASE INSTRUCTIONS.

A. Lesser Included Offenses.

Appellant asserts that the trial court erred by denying his requests to instruct the jury on receiving stolen property as a lesser included offense of first-degree robbery and on criminal facilitation as a lesser included offense of murder, arson, and robbery. Appellant was not entitled to an instruction on receiving stolen property because that

crime is not a lesser-included offense of robbery. Roark v. Commonwealth, Ky., 90 S.W.3d 24, 38 (2002).

Appellant claims entitlement to instructions on criminal facilitation because of his own statement that his only participation in the crimes involved providing Halcomb with transportation to the Williams residence. The Commonwealth points out that Appellant also stated that he did not know of Halcomb's intent to engage in criminal conduct. His version was that he took Halcomb to the Williams residence to get some pills. Halcomb's and Combs's version was that Appellant knew of Halcomb's intent to rob the Williamses and agreed to drive Halcomb to the Williams residence in exchange for one half of any money stolen. Halcomb and Combs only differed about whether Appellant participated in the actual robbery, assault, murder and arson.

Instructions on criminal facilitation are warranted when there is evidence from which a jury could deduce that the defendant, knowing that another person intends to commit a crime, engages in conduct that the defendant knows will provide such person with the means and opportunity to commit the crime and which, in fact, aids such person to commit the crime. KRS 506.080(1). If the defendant also intends that the other person commit the crime, the offense is complicity under KRS 502.020(1), not facilitation. "Facilitation reflects the mental state of one who is 'wholly indifferent' to the actual completion of the crime," Perdue v. Commonwealth, Ky., 916 S.W.2d 148, 160 (1995), as opposed to one who intends that the crime be committed. Young v. Commonwealth, Ky., 50 S.W.3d 148, 165 (2001). In Caudill v. Commonwealth, supra, we held that where each codefendant accused the other of being the perpetrator and both denied any knowledge of the other's intent, neither was entitled to an instruction on facilitation. 120 S.W.3d at 670. And in Taylor v. Commonwealth, Ky., 995 S.W.2d 355

(1999), we held that "[a]n instruction on a lesser included offense requiring a different mental state from the primary offense is unwarranted unless there is evidence supporting the existence of both mental states." Id. at 362.

Here, Appellant claimed neither knowledge nor intent, but Halcomb and Combs claimed he had both knowledge and intent. From this evidence, a reasonable jury could have believed that Appellant had knowledge of Halcomb's plan to rob Williams but was indifferent as to whether the plan was carried out, i.e., he was only interested in collecting his fifty-dollar fee for providing transportation. Thus, he was entitled to an instruction on criminal facilitation to robbery in the first degree. Webb v. Commonwealth, Ky., 904 S.W.2d 226, 229 (1995) (facilitation instruction warranted based on evidence that defendant knew of the plan to commit the crime but did not intend for it to occur). See also Chumbler v. Commonwealth, Ky., 905 S.W.2d 488, 498-99 (1995); Perry v. Commonwealth, Ky., 839 S.W.2d 268, 273 (1992) ("The only element in this case which separated a conviction for attempted murder from first-degree assault was the mental state of Perry at the time of the incidents. . . . The law not only permits the court to give such an instruction, but requires the court to give instructions when they are . . . deducible from or supported to any extent by the testimony." (Emphasis added and citation omitted)); cf. Mishler v. Commonwealth, Ky., 556 S.W.2d 676, 680 (1977) (no matter how preposterous defendant's story, he was still entitled to an intoxication instruction). However, Appellant was not entitled to instructions on facilitation to murder, assault, or arson because there was no evidence that Halcomb possessed an advance intent to commit those crimes, much less that Appellant knew of that intent.

B. Unanimous verdict.

The jury was instructed on three theories of each offense: (1) that Appellant was the principal offender; (2) that Halcomb was the principal offender and Appellant was an accomplice; and (3) that Appellant was either "the principal or an accomplice" if the jury was unable to determine from the evidence which actor was the principal and which was the accomplice. Appellant complains that this last "combination" instruction denied him his right to a unanimous verdict with respect to his convictions of murder and assault in the first degree because some jurors may have believed he committed those offenses and others that he was only an accomplice. This issue is unpreserved as it was first mentioned in Appellant's motion for a new trial. RCr 9.54(2). His generic objection to the murder and assault instructions failed to preserve the issue because he did not specifically object on the grounds he now raises. Id. (objection must state specifically the matter to which the party objects and the ground or grounds of the objection); McCranney v. Commonwealth, Ky., 449 S.W.2d 914, 915 (1970) (objection to instructions as a whole insufficient). See also Commonwealth v. Duke, Ky., 750 S.W.2d 432, 433 (1988) (party cannot argue different grounds on appeal than were raised in objection below). Again, we review the issue for palpable error. RCr 10.26.

In Halvorsen v. Commonwealth, Ky., 730 S.W.2d 921 (1986), we approved of instructions of this type so long as sufficient evidence exists to support both theories of criminal liability. Id. at 925. See also Caudill, 120 S.W.3d at 666. We find that it does. Appellant denied any involvement in the murder or assault. Halcomb testified otherwise and claimed that except for accidentally shooting Mr. Williams in the hand, he neither shot nor assaulted either victim and that Appellant must have shot Mrs. Williams, presumably with the .25 caliber automatic. (No bullets or shells were recovered from

the crime scene or Mrs. Williams's body.) From this conflicting testimony, the jury could have concluded that either Appellant or Halcomb murdered Mrs. Williams and assaulted Mr. Williams and that the other acted as an accomplice, but were unable to determine which perpetrator played which role. That is exactly the type of factual scenario for which the "principal or accomplice" instruction was approved. Caudill, supra; Halvorsen, supra. No manifest injustice occurred here.

V. PENALTY PHASE VERDICT FORMS.

Appellant raises yet another unpreserved error, contending that the penalty phase verdict forms corresponding to his murder conviction erroneously required the jury to impose the maximum penalty upon finding the existence of an aggravating circumstance. This same issue has been raised in many cases. E.g., Caudill, 120 S.W.3d at 674-75; Hodge v. Commonwealth, Ky., 17 S.W.3d 824, 854 (2000); Slaven v. Commonwealth, Ky., 962 S.W.2d 845, 859-60 (1997); Foley v. Commonwealth, Ky., 942 S.W.2d 876, 888-89 (1996); Haight v. Commonwealth, Ky., 938 S.W.2d 243, 249 (1996). As we stated in each of those cases, we prefer use of the specimen verdict forms at 1 William S. Cooper, Kentucky Instructions to Juries (Criminal) § 12.10A (4th ed. rev. 1999), but do not regard use of the forms at § 12.10 as reversible error.

Accordingly, we affirm Appellant's convictions and the sentences imposed for murder, assault in the first degree, and arson in the first degree, but reverse the conviction of robbery in the first degree and remand that charge to the Leslie Circuit Court for a new trial at which Appellant shall be entitled to an instruction on the lesser included offense of facilitation of robbery in the first degree.

All concur.

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