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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: AUGUST 25, 2005
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2003-SC-0925-MR

DATE 9-15-05 ELA Grav. to D.C.

BARBARA FAYE (BROCK) JOHNSON — APPELLANT

V.

APPEAL FROM BELL CIRCUIT COURT
HONORABLE JAMES L. BOWLING, JR., JUDGE
01-CR-179

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Barbara Faye Johnson, was convicted in the Bell Circuit Court of first-degree robbery and sentenced to twenty years imprisonment. She appeals to this Court as a matter of right, Ky. Const. § 110(2)(b). Finding no error, we affirm.

On August 7, 2001, sixty-seven-year-old Kitty Nelson was leaving a pharmacy in Pineville, Kentucky, after having several prescriptions filled, when Appellant grabbed the bag containing Nelson's medications. A car then pulled up, and the driver reached over and opened the passenger door. As Appellant got into the car, Nelson attempted to reclaim the prescription bag and held on to the car door as the driver accelerated. Nelson was dragged down the street, suffering a broken hip and crushed elbow.

A witness to the incident, Tracey Baker, was able to get the license plate number of the vehicle and called the police. Pineville Police Officer Greg Hendrickson

responded to the call and traced the license plate to a vehicle registered to Jerry Wayne Brock, Appellant's ex-husband. Police immediately suspected Appellant and apprehended her a short time later. Appellant initially told police that she drove Brock's vehicle while another individual, Melinda Davenport, committed the robbery. Brock was subsequently arrested while visiting Appellant at the Bell County Detention Center after he told police that he drove the car but that he had no idea Johnson intended to rob Nelson. Appellant and Brock were indicted and tried together.

At trial, Nelson testified that both Appellant and Brock had been present at her doctor's office on the morning of the incident and, in fact, Appellant had asked her where she filled her prescriptions. Further, Nelson stated that after Appellant grabbed the prescription bag, Brock pulled up in his car and opened the passenger door so Appellant could get in. When Nelson grabbed the door, Brock sped away dragging Nelson along the street. Baker's testimony substantially corroborated Nelson's version of events.

I. Sufficiency of the Evidence.

Appellant contends that the evidence was insufficient to convict her of robbery in the first degree as the principal actor. Robbery in the second degree is defined as follows:

> A person is guilty of robbery in the second degree when, in the course of committing theft, he uses or threatens the immediate use of physical force upon another person with intent to accomplish the theft.

KRS 515.030(1). For purposes of this appeal, Appellant does not dispute that the evidence was sufficient to permit a jury to conclude that she was guilty of robbery in the second degree. Robbery in the first degree, KRS 515.020, occurs when, in addition to committing a second-degree robbery, "he: (a) [c]auses physical injury to any person

who is not a participant in the crime. . . ." (emphasis added). Appellant asserts that the use of the phrase, "when he: (a) causes physical injury . . . ," requires the same person who commits the basic offense of robbery to be the one who causes the physical injury. She argues that because it was Brock's action, in continuing to drive the car, that caused Nelson's injury, she cannot be liable for robbery in the first degree as the principal actor. We disagree. In Commonwealth v. Smith, 5 S.W.3d 126 (Ky. 1999), this Court held, "a mere division of labor between robbers in the commission of the crime does not preclude conviction of each as a principal." Id. at 129. Appellant recognizes Smith but asks us to overrule it. We decline to do so.

It is sound legal principle that "[t]o be liable, the accused need not . . . actually participate in any . . . act of force or violence. . . . It is sufficient that he or she come and go with the robbers, is present when the robbery is committed, and acquiesces therein." 67 Am. Jur. 2d Robbery § 10 (2004) (emphasis added), prior version cited with approval in Smith, 5 S.W.3d at 129. This view of liability articulated in Smith is neither novel, Marion v. Commonwealth, 269 Ky. 729, 108 S.W.2d 721, 723 (1937) ("one participating in a conspiracy to commit robbery is held accountable for any act done by any member of the conspiracy in furtherance of the design, and cannot escape the consequences"), superseded on other grounds by RCr 8.28(5), nor in contradiction to the rules of our sister states. See, e.g., Williams v. State, 578 S.E.2d 858, 861 (Ga. 2003) ("[A] defendant can be convicted of armed robbery even though he might not have had knowledge that his accomplice was going to use a weapon to perpetrate it . . . .") Smith v. State, 549 N.E.2d 1036, 1038 (Ind. 1990) ("The use of a deadly weapon or the intention to harm a victim are not necessary parts of a conspiracy. It is sufficient if the conspiracy is to commit the crime and that serious bodily injury was a natural and

probable consequence."); State v. Johnson, 595 S.E.2d 176, 183 (N.C. Ct. App. 2004) (holding that a conviction for committing a robbery with a dangerous weapon did not require a finding that defendant intended to use a dangerous weapon; a conviction required only a finding that defendant acted in concert to commit robbery and that his co-defendant used the dangerous weapon in pursuance of the common purpose to commit robbery).

In a similar vein, Appellant additionally asserts that the trial court erred when it instructed the jury that it could find Appellant guilty of robbery in the first degree without finding that Appellant intended for Brock to use the physical force that caused Nelson's injuries. Though unpreserved, Appellant requests us to review this assertion for palpable error. RCr 10.26. No error occurred.

Though neither Appellant nor Brock intended Nelson's injury, robbery in the first degree does not require intent to cause physical injury. Ray v. Commonwealth, 550 S.W.2d 482, 484-85 (Ky. 1977). It merely requires a showing that a physical injury was caused as a result of the theft. KRS 515.020(1)(a). As stated in Ray, physical injury "is not an element of the crime of robbery, but only an aggravating circumstance increasing the degree." Id. at 485. Accordingly, the evidence sufficed to withstand a directed verdict of acquittal of robbery in the first degree. Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991).

II. Intoxication Defense.

At trial, Appellant testified that prior to going to the doctor's office on the day of the robbery, she had injected 120 milligrams of Oxycontin and had taken approximately 20 Xanax tablets. She testified that she could not recall following Nelson from the drugstore or tugging on her bag. Likewise, she could not recall Nelson being injured;

she claimed she discovered this only after her stay in jail. Appellant asserts that the trial court erred by failing to instruct the jury on a defense of voluntary intoxication. However, Appellant neither requested nor tendered instructions on voluntary intoxication. The issue is therefore not preserved for appellate review. Appellant requests this court to review the assertion pursuant to RCr 10.26 as palpable error.

Voluntary intoxication is a defense to a criminal charge if it "[n]egatives the existence of an element of the offense." KRS 501.080(1). In the case of robbery, the "intent to accomplish the theft" could be negated by intoxication. Mishler v. Commonwealth, 556 S.W.2d 676, 680 (Ky. 1977). However, Appellant testified to stealing the prescription bag from Nelson. She described how she grabbed the bag, wrestled with Nelson, and then ran to the vehicle with Nelson following her. Based on this evidence, we do not view the error as rising to the level of manifest injustice required by RCr 10.26. See Taylor v. Commonwealth, 995 S.W.2d 355, 362 (Ky. 1999) ("His claim of selective memory loss traceable to his ingestion of an unidentified substance several hours before the commission of these offenses is so unbelievable that the failure to instruct the jury on the issue of intoxication could not possibly rise to the level of manifest injustice.").

Accordingly, we affirm the judgment of the trial court.

All concur.

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