IMPORTANT NOTICE

NOT TO BE PUBLISHED OPINION

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RENDERED: MAY 18, 2006
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2004-SC-0687-MR

WILLIAM HOPKINS — APPELLANT

V.

APPEAL FROM PIKE CIRCUIT COURT
HON. EDDY COLEMAN, JUDGE
03-CR-00100-002

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

I. Introduction

Appellant, William Hopkins, was convicted of complicity to murder and complicity to first-degree robbery. He alleges four errors on this appeal: (1) that the Commonwealth gave insufficient notice of its intent to introduce KRE 404(b) evidence and that the evidence was not admissible under KRE 404(b); (2) the trial court's refusal to grant a continuance after his codefendant, who was facing the death penalty, pled guilty the morning of trial; (3) the trial court's failure to give the jury instructions including facilitation of the murder and robbery as lesser-included offenses; and (4) the trial court's denial of his motions to strike three jurors for cause. Finding no merit in his claims of error, we affirm.

II. Background

Between 6:30 a.m. and 7:00 a.m. on November 21, 2001, Patrick Etherton, Raymond French, and Appellant drove together to Thompson's Market, located in

Raccoon, Kentucky. They stopped the car a short distance away. Etherton got out of the car and entered the store. He was wearing a ski mask and carrying a gun. After entering the store, he encountered the owner, Charles Thompson. Etherton demanded money, and Thompson complied. Though the details are not clear, it appears that Etherton shot Thompson in the stomach while in the store. Thompson followed Etherton out of the store, pushing him as he went through the doorway toward the parking lot. Etherton fell to the ground, shot Thompson a second time, this time in the chest, and ran to the car where French and Appellant were waiting. Etherton got in the car, and the three men drove away. Charles Thompson died at the scene.

On April 16, 2003, Etherton and Appellant were indicted for first-degree robbery and murder. That same day, French approached the police to make a statement. He later pled guilty to facilitation of robbery and received a 2.5 year sentence in exchange for testifying against Etherton and Appellant at trial. Before trial, the Commonwealth had indicated its intent to seek the death penalty against Etherton. The Commonwealth had agreed not to seek the death penalty against Appellant, but was still planning to seek the other aggravated penalties.

On June 28, 2003, the first day of the trial, Appellant's attorney filed a motion in limine to prohibit the introduction of KRE 404(b) evidence, or at least for a continuance, arguing that she had inadequate time to prepare because the Commonwealth's formal notice of intent to introduce such evidence was not filed until June 25, 2003. The trial court held a short hearing to consider the motion, the details of which are discussed in more detail below.

Etherton pled guilty almost immediately following the hearing, having agreed to testify against Appellant in exchange for a sentence of life without the possibility of

parole for twenty-five years. Following the guilty plea, Appellant's attorney asked for a continuance to "revamp" her case. This discussion is also described in more detail below. The trial court then proceeded to voir dire, which lasted until about 5:30 that afternoon. The court then recessed until 1:00 p.m. the next day, when the attorneys began their opening statements.

The Commonwealth called seven witnesses during its case in chief and the bulk of their testimony related to the events leading up to the robbery and shooting described above. The testimony established that Etherton, French, Joe Hopkins (Appellant's brother), and Appellant gathered at Appellant's trailer in Pike County on November 20, 2001. (Etherton and French were also living in Appellant's trailer at the time.) While at the trailer that night, Etherton took some Valium, and French smoked marijuana. The four men left in two vehicles and traveled to Velocity Market, which they intended to burglarize. Etherton and French testified that Appellant told Etherton to enter the market and rob it, while Appellant's brother acted as a lookout some distance away. Etherton attempted to break in through a window, but an alarm sounded, and he ran back to the car.

The men left the scene and returned to Appellant's trailer, where Appellant's brother indicated that he knew of some local pharmacies they could burglarize. Tammy Hopkins (who was then Appellant's girlfriend, and later his wife) testified that after the attempted break-in at Velocity Market, the men planned to break into some pharmacies. She also testified that Etherton indicated he would not participate "without anything," meaning without drugs, and that Appellant's brother then gave Etherton more Valium. She also claimed that Etherton went to his room and retrieved a .380 handgun, a ski mask, and a hooded sweatshirt, and that she did not know whether Appellant knew that

Etherton had the gun with him that night. She testified that Etherton had told her that he had obtained the gun by trading marijuana for it.

Tammy's testimony in this regard conflicted with that of the other witnesses. French testified that Appellant had bought the gun as a Christmas present for Etherton and had kept it locked in a drawer, but that it was in the glove box of Appellant's car the night of the crime. French also testified that while Appellant's brother brought the drugs to the trailer, it was Appellant who actually gave Etherton the Valium. Appellant's brother testified that Appellant owned a .380 handgun, but that he did not see it that night. He also testified that he did not see Etherton take any pills that night. Etherton testified that he obtained Valium from both Appellant and his brother that night.

The four men left the trailer again, this time driving to a Rite-Aid pharmacy in Elkhorn City, Kentucky. Again, Etherton attempted to break in, but he was unable to get into the building. The men drove around for several hours, and Appellant's brother left the group. At approximately 6:00 a.m., the three remaining men drove to Zebulon, Kentucky and stopped near a convenience store called Happy Mart. French testified that they discussed robbing the store, but decided against it because two women were working there. Etherton could not recall any discussion of robbing the Happy Mart.

The three men then started to drive back to Appellant's trailer, and stopped at Thompson's Market. French and Etherton testified that Appellant gave Etherton the .380 handgun, told him to go into the store, and rob it. Both men also testified that Appellant told Etherton to shoot the store owner in the leg "if he had to." Etherton put on a ski mask and approached the store. Appellant and French drove down the road out of sight of the store and parked in a driveway. According to French, they heard a gunshot a few minutes later. Appellant pulled out of the driveway, and Etherton ran up

to the car and got in. They then drove back to Appellant's trailer. Appellant and French put the gun and the money from the robbery in a plastic bag and then buried them. They burned the ski mask and Etherton's shoes. Tammy testified that she and Appellant later dug up the gun and threw it in a river.

The jury convicted Appellant of complicity to both first-degree robbery and murder, and he was sentenced to thirty-five years in prison. He appeals to this Court as a matter of right. Ky. Const. § 110(2)(b).

III. Analysis

A. KRE 404(b) Evidence

On January 20, 2004, Appellant's attorney filed a motion to compel the Commonwealth to disclose any evidence of uncharged misconduct, bad acts, prior convictions, and other crimes that it intended to introduce at trial—basically, evidence of any other crimes, wrongs, or acts covered by KRE 404(b). The motion was also one in limine seeking to prohibit the introduction of any such evidence at trial. The motion was general and did not state any specific evidence that Appellant sought to suppress.

On March 18, 2004, the trial court entered an extensive discovery order that addressed, among other things, Appellant's January 20 motion. In relevant part, the order read:

> As to the Defendants' Motions to Disclose evidence of prior "bad acts," uncharged misconduct, prior convictions and other crimes proposed to be offered against the Defendants [and] Hopkins' Motion in Limine to prohibit their admission if unrelated to the crimes charged in this Indictment, the Commonwealth shall disclose any KRE 404(b) evidence proposed to be introduced thirty (30) days prior to trial.

As noted above, it was not until the Friday before trial that the Commonwealth gave formal, written notice of its intent to introduce evidence of other crimes committed by Appellant. The Commonwealth faxed the notice to the Frankfort office of Appellant's

attorney, who was then in Pike County. The notice described the following evidence that the Commonwealth intended to introduce:

> Within 24 hrs. prior the burglary, robbery and murder committed at Charles Thompsons' Grocery, these defendants and others planned and burglarized Velocity Market and attempted a theft at Velocity Market,
>
> Discussed burglarizing and robbing clerks at a 24 hr. gas station and market,
>
> Discussed burglarizing and committing thefts from pharmacies in Elkhorn City (actually attempted), Virgie, and Mud Creek.

The notice also indicated that the acts were to be offered under KRE 404(b)(2) as being "inextricably intertwined" with the Commonwealth's other evidence.

Monday, the morning of trial, Appellant filed and argued a second motion in limine, this time challenging both the reasonableness of the Commonwealth's notice and the general admissibility of the evidence. Appellant's attorney stated that she had been out of her office on the previous Friday and had not received the notice until Sunday when her investigator delivered it from Frankfort. However, she did admit that the Commonwealth had spoken with her the prior Friday about sending "something," though it is not clear from the record whether she knew the nature of the "something." The Commonwealth stated that the formal notice had been filed "in an abundance of caution," claiming that the information had previously been provided in discovery.

Appellant's attorney replied, "I take some exception to that." She then admitted that she had received notice several months before of the break-in at the Rite-Aid and a tobacco shop (Shopper's Express Tobacco). She also admitted that the week before she had received by way of a discovery disclosure a copy of the KSP phone logs of 911 calls regarding reported break-ins at Velocity Market, the Rite-Aid, and Shopper's Express Tobacco. Notice of the phone logs was filed with the trial court on June 15, 2004 (though copies of the logs themselves, and the rest of the discovery materials, do

not appear to be in the record). Appellant's attorney only denied prior knowledge of the burglaries of the pharmacies in "Mud Creek and the other one," no evidence of which was introduced at trial. Her ensuing discussion focused on the fact that the written KRE 404(b) notice was unreasonably late. She argued that KRE 404(c) requires that the trial judge choose between two remedies—suppression of the evidence or a continuance. She relied on Daniel v. Commonwealth, 905 S.W.2d 76 (Ky. 1995), which states that a police report does not give adequate notice under KRE 404(c).

The Commonwealth responded by noting that some of the evidence it intended to introduce had not been discovered until the previous Thursday, when Tammy Hopkins entered into a plea agreement and disclosed a variety of statements made by Etherton and Appellant, some of which related to the other burglaries and attempted burglaries. The Commonwealth claimed to have sent notice of those statements to Appellant immediately that day. The Commonwealth also noted that the rest of the information, specifically including the Velocity Market burglary, had been provided "months ago."

Appellant's attorney responded by saying:

> There has never been anything provided in any discovery about the night of the incident about anything going on in Elkhorn City or with any pharmacies on that evening. That has never been provided. And to my knowledge there has not been a witness that has stated any of those things . . . .

It is apparent that Appellant's attorney got some of the attempted burglaries mixed up in this discussion, since she had already admitted to knowledge of the attempted burglary at the Rite-Aid, which occurred in Elkhorn City.

The Commonwealth and Appellant's attorney then addressed the issue of the late notice of the hearsay statements that the Commonwealth intended to introduce through Tammy Hopkins. The trial court then addressed both issues by stating:

> We have this motion in limine to prohibit admission of uncharged misconduct under 404(b), and the complaint is that there was inadequate notice of 404(c), which was given admittedly on Friday afternoon, based on statements of a witness [Tammy Hopkins] we discussed at some length at the last pretrial. Obviously all the parties knew she was a potential witness, and that she may have information that may be used by the Commonwealth or even by the defendants, that the Commonwealth may potentially offer her a plea bargain agreement based on her willingness to testify. All that was discussed at the pretrial. Oral statements—I'm going to take [the Commonwealth's attorney] at his word that when he interviewed her, he disclosed that information immediately to the other defendants.
>
> And then we have the 404(c). The defendant Hopkins has provided the case of Daniels v. Commonwealth . . . . It's not clear to me. Basically in that case, on the first day of trial, the Commonwealth gave notice to the defendant of other children who made statements resulting—made statements that they had been involved in illegal criminal—been the subject of illegal criminal sexual abuse. Basically, [reading from Daniels] "[a]ccording to the Commonwealth, the police report made available to Appellant through discovery indicated that the Commonwealth spoke to all the children, putting Appellant on reasonable notice of T.W. as a potential witness and eye-witness." [Daniels, 905 S.W.2d at 77.] And then, the statement that Justice Stumbo writes: "A police report alone does not provide reasonable pretrial notice pursuant to KRE 404(c)." [Id.]
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> However, in this case we have specific information given before the day of trial involving a witness that all the parties were familiar with and knew would be a potential witness. So the motion—there may be particular items that we may excise on the basis of inadequate notice, but for our purposes on the motion for continuance. There's inadequate grounds for the motion for a continuance and that will be denied. Generally speaking, most of these statements will be allowed as admitted. There may be particular statements or particular events that we'll exclude, and we'll have to look at that in more detail.

In making this ruling, the trial court appeared to be addressing both the claimed KRE 404(c) violation and Appellant's separate challenge to the admissibility of some hearsay statements to be recounted by Tammy Hopkins, notice of which had also been given

the previous Friday. However, as the Commonwealth had pointed out, part of the KRE 404(c) notice was based on those statements to be repeated by Tammy Hopkins.

Apparently worried that the trial court was confusing the hearsay issue with the KRE 404 issue, Appellant's attorney took up the issue again, noting that she was separately challenging the two sets of evidence:

> I would like to focus differently on the statements or evidence the Commonwealth gave notice of on Friday afternoon that they wish to introduce at trial, and that has to do with the previous break-ins. I want to make it very clear for the record that all these things provided by the Commonwealth in discovery and late discovery and police reports, none of them, I've not seen a piece of paper anywhere that says anything about any break-ins or discussions of break-ins at pharmacies in Mud Creek and Elkhorn City. I continue to object about the late notice of criminal activity. But if they're going to give late notice at least we should only be able to use what we were given some notice of through discovery and there's no notice anywhere, in any discovery, about any pharmacies going on in Elkhorn City. It's not contained in the statements of Raymond French, it is not contained in the supplemental discovery provided by the Commonwealth on June 15, 2004, where they give a copy of a run sheet from 911 about a Velocity Market break-in in Zebulon, about a Rite-Aid drugstore break-in, and about a Shoppers Express Tobacco break-in. That's all. It's also late notice on some firearms examinations that were completed in November of 2002, and we didn't receive until June 14, 2004. But my point is now, I realize that this court's ruling is that they get to use some 404(b) evidence, I obviously object to that, I believe the notice is not only late, but I believe it hasn't been shown to have a nexus of why it's important. But I would like the court to at least fashion and make it smaller than that given by the Commonwealth of what they're allowed to put in at trial. I don't want to get into the middle of trial and have a big mess about that. If the Court would like to take that up prior to the evidence, I'll bring it up again, but I want to make very clear, it's a completely separate issue than the Tammy Hopkins things that were just being discussed.[1]

The trial court then stated: "Okay. Between voir dire and openings, we'll go back and look at the motions in limine a little bit more—in a little more detail." The court then

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[1] This statement further illustrates the conflict between the statements by Appellant's attorney that she had no notice of the attempted burglary in Elkhorn City and her admission that she had notice of the attempted burglary of the Rite-Aid, which was located in Elkhorn City. As noted above, this was likely just a bit of confusion in the heat of the discussion at trial.

proceeded to set up for voir dire before adjourning for a short break. During the break, Appellant's co-defendant, Patrick Etherton, entered a guilty plea in the judge's chambers. After Etherton's guilty plea, Appellant's attorney again requested a continuance, and though she did not expressly raise the KRE 404 issue, she mentioned it in passing when discussing her motion.

1. Reasonable Notice

On appeal, Appellant continues to claim that the Commonwealth's notice of KRE 404(b) evidence was unreasonable. He argues both that the formal notice filed only days before trial and the discovery items, which could be considered constructive notice, were insufficient.

We begin by noting that there is some question as to whether the error is actually preserved. We have recently held that a pre-trial motion in limine is sufficient to preserve an evidentiary error under KRE 103(d), provided that the motion (1) specifically identifies the evidence to which the party objects, (2) identifies the reason that the party thinks the evidence should not be admitted, and (3) is resolved by an order of the trial court. Lanham v. Commonwealth, 171 S.W.3d 14, 20-23 (Ky. 2005); see also Metcalf v. Commonwealth, 158 S.W.3d 740 (Ky.2005) (holding that a specific motion in limine preserves an error); Davis v. Commonwealth, 147 S.W.3d 709, 722 (Ky. 2004) ("Where a party specifies what evidence should be suppressed and why, the question has been 'fairly brought to the attention of the trial court' and the trial court's ruling preserves the issue for appeal. In that scenario, the opponent of the evidence need not object when the same evidence is offered at trial. However, the same principle does not apply to broad, generic objections."). Appellant's motion in limine, at least as orally argued before the trial court, specifically identified the objected to evidence,

namely evidence of the other burglaries, attempted burglaries, and discussion of potential burglaries on November 21, 2001. The motion also advanced two distinct rationales for the objection, namely the alleged unreasonably late notice and that the evidence did not fall under KRE 404(b).

The third issue under Lanham—KRE 103(d)'s requirement that the "motion in limine [be] resolved by order of record [to be] sufficient to preserve error for appellate review"—is more problematic. Though the judge indicated before voir dire that some of the evidence would be admissible, he also stated twice that the parties would need to take the matter up again later in trial. KRE 103(d) specifically allows that "[t]he court may rule on such a motion in advance of trial or may defer a decision on admissibility until the evidence is offered at trial." The trial judge deferred some of his decision as to the admissibility of the KRE 404(b) evidence, specifically in light of the reasonableness of the Commonwealth's notice, until later in the trial. Appellant's attorney did not raise the issue later in trial, either at the end of voir dire or when the evidence was introduced. Therefore, we cannot say that Appellant's attorney clearly preserved the error.

Since the alleged error was not properly preserved, we are left to examine if it was palpable error under RCr 10.26. The rule provides:

> A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.

KRE 404(c) requires that "[i]n a criminal case, if the prosecution intends to introduce evidence pursuant to subdivision (b) of this rule as a part of its case in chief, it shall give reasonable pretrial notice to the defendant of its intention to offer such evidence." We have held that the notice requirement is satisfied when a defendant has

"actual notice"[2] of the evidence through the discovery process and has challenged the evidence through a motion in limine. Tamme v. Commonwealth, 973 S.W.2d 13, 31-32 (Ky. 1998) ("Obviously, no prejudice occurred, because Appellant had actual notice of this evidence and raised the KRE 404(b) issue both in his own in limine motion and when the evidence was offered at trial."); Bowling v. Commonwealth, 942 S.W.2d 293, 300 (Ky. 1997) ("Obviously, no prejudice occurred, because Appellant had actual notice and did raise the 404(b) issue in his in limine motion."). We have since held that the notice requirement has been satisfied when the defendant files a pretrial motion in limine that references the objectionable 404(b) evidence. Metcalf v. Commonwealth, 158 S.W.3d 740, 743 (Ky. 2005) ("The fact that Appellant filed a motion in limine to suppress the evidence is proof that he was not prejudiced by a failure to receive formal notice."); Soto v. Commonwealth, 139 S.W.3d 827, 859 (Ky. 2004) ("Obviously, Appellant had actual notice since he filed a motion in limine to suppress the evidence.").

The latter formulation of the rule has been applied where the defendant has received notice far ahead of trial, for example when the KRE 404(b) evidence was discussed in the Commonwealth's bill of particulars. Metcalf, 158 S.W.3d at 743. The filing of a motion in limine is usually sufficient because it is evidence that the purpose of KRE 404(c) has been satisfied. As Professor Lawson notes, "[the] intent [of KRE 404(c)] is to provide the accused with an opportunity to challenge the admissibility of this evidence before trial and to deal with reliability and prejudice problems at trial."

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[2] This does not technically meet the requirements of KRE 404(c) in that the rule requires the Commonwealth to give notice of its "intention to offer such evidence." We have not previously discussed exactly how "actual notice" of the evidence itself is sufficient under the rule, but it appears to be so because notice of the evidence itself constitutes constructive notice of the Commonwealth's intent. Our use of the phrase "actual notice" in our discussion of KRE 404(c) amounts to a shorthand version of this analysis. Because our case law employs the term "actual notice," we continue to do so here.

Robert G. Lawson, The Kentucky Evidence Law Handbook § 2.25[7], at 156 (4th ed. 2003). But when formal notice is given extremely late, as in this case, resulting in the motion in limine being filed the morning that trial begins, we cannot be sure from the motion in limine alone that the defendant has had the chance to adequately address reliability and prejudice problems related to the evidence.

It is also unclear whether there was actual notice in this case, since the Commonwealth claimed at trial that Appellant was put on notice of some of the other acts by the KSP phone logs related to the burglary and attempted burglaries. Surely phone logs, being merely a record of a phone call and thus lacking a substantive description of the evidence of the crime, are no better at providing notice than a police report. And, as we have previously held, police reports alone are insufficient notice under KRE 404(c). Daniel v. Commonwealth, 905 S.W.2d 76, 77 (Ky. 1995). But Appellant's attorney had filed a motion in limine as to KRE 404(b) evidence, and expressly admitted having known about the two other burglaries and attempted burglaries that were actually introduced at trial (the Velocity Market break-in and the Rite-Aid attempted break-in), indicating that there was some actual notice. And actual notice seems to be what satisfies Professor Lawson's, and our own, concern that defendants are afforded a chance to "deal with reliability and prejudice problems at trial."

Ultimately, however, we cannot ignore that Appellant's attorney had filed a previous motion in limine several months before trial was slated to begin.[3] At the very least, this indicates some awareness of the possibility that KRE 404(b) evidence would

[3] Appellant also raises the side point that the Commonwealth's formal notice violated the court's order that notice be given at least thirty days before trial. A trial court, however, enjoys broad discretion as to what sanctions, if any, to employ for violations of its own orders.

play a role at trial. We also cannot ignore that the trial judge declined to make a final ruling on the second motion in limine before trial, that he twice expressly invited counsel to address the KRE 404(b) evidence later in trial, and that Appellant's attorney failed to return to the issue. In light of these facts, we cannot say that the Commonwealth's compliance with the KRE 404(c) reasonable notice requirement (the correctness of which, as the discussion above demonstrates, was a very close question) was so insufficient as to result in manifest injustice to Appellant.

2. Admissiblity of the KRE 404(b) Evidence

Appellant also challenges whether the evidence met any of the KRE 404(b) exceptions.[4] The Commonwealth's notice at trial indicated that the evidence was to be introduced under KRE 404(b)(2) as being "inextricably intertwined" with the evidence of the charged offenses. Although both of Appellant's motions in limine challenged the admissibility of the evidence, these claims suffer from the same preservation error as his notice claim since the issues presented in the motions in limine were left unresolved by the trial court. In fact, the question of preservation of this claimed error is even clearer since Appellant's entire discussion at trial related to the notice issue—the substance of the KRE 404(b) issue was never raised during the argument before the trial court.

Appellant's claim is easily addressed, however, without even resorting to the palpable error analysis of RCr 10.26. Appellant is likely correct that the evidence was not inextricably intertwined with the evidence of the charged crimes, since the witnesses' testimony could have been limited to the events directly related to the charged crimes, i.e., beginning when Appellant, French, and Etherton pulled up to

[4] Notably, the Commonwealth's brief fails to discuss this aspect of Appellant's claim.

Thompson's Market. However, since the KRE 404(b) evidence at issue detailed Appellant's actions in planning and participating with his cohorts in a series of similar burglaries and attempted burglaries over the course of a single night, there is no doubt that "the charged offense was but one of two or more related criminal acts." Commonwealth v. English, 993 S.W.2d 941, 943 (Ky. 1999). Thus, the evidence was admissible under KRE 404(b)(1) as evidence of plan and preparation, or what was called a "common scheme" under the common law.

B. Motion for Continuance After Co-Defendant's Plea

Immediately following Patrick Etherton's guilty pleas, Appellant's attorney moved for a continuance. She noted that she had been on notice that such a plea was possible, but the fact that Etherton's attorney had filed a petition for a writ with the Court of Appeals the previous week had made the plea unlikely. She also noted that voir dire would be significantly shorter since the jury would not have to be "death qualified." She also asked the court to still do individual voir dire as to pretrial publicity. When the court agreed to do so, she noted that the case was still on course, but still asked for a continuance of "a couple of days" in order to allow her to revamp the case to take into account Etherton's last minute plea agreement.

Appellant's attorney also cited to Eldred v. Commonwealth, 906 S.W.2d 694 (Ky. 1994), and Snodgrass v. Commonwealth, 814 S.W.2d 579 (Ky. 1991), the latter of which lays out a seven-factor analysis for determining if a defendant is entitled to a continuance. She then engaged in a discussion of the Snodgrass factors:

> Snodgrass v. Commonwealth is a case that the Kentucky Supreme Court set forth seven different factors to be considered in whether or not the Court was going to give a bit of continuance. One is the length of delay. Here your honor we're asking for a fairly minimal delay. Whether or not there have been any previous continuances. And Judge, we have not asked for any continuances in this case. The convenience, or

> inconvenience. I realize it would be slightly inconvenient, but I don't believe that's a factor that should carry the day since we were not the instrument of the inconvenience here. Whether the delay is purposeful. We didn't cause it. The complexity of the case. I realize ours is not a death penalty case but we still have a fairly complex case here in that aggravated penalties are being sought and my client faces life without parole in jail. And whether denying the continuance would lead to any identifiable prejudice. We're scrambling right now, Judge, to try and revamp a lot of things and we would appreciate a day or two in order to do just that so that we can put on a case for Mr. Hopkins. We have always complied with this Court's orders and always complied with this Court's time schedule that the Court had us on. I would ask for some time in that regard, sir.

The trial court expressed concern about the possibility of further pretrial publicity due to news about Etherton's guilty plea. Appellant's attorney responded by noting her belief that admonishments not to read newspapers are not a "panacea" because there is no real control over the jurors once they go home. The judge countered that he had more faith that jurors obey a court's admonitions.

The Commonwealth's attorney then stated that he was ready to go to trial, noting that Appellant's attorney had received notice of a possible guilty plea the week before and that Appellant's attorney was aware (and had put the court on notice with a motion for separate trial) that Appellant's defense was antagonistic to Etherton's. He then stated, "I don't think there's any surprise whatsoever that affects their ability to try this case because they were not going to be able to rely upon anything in Etherton's trial as being favorable to them." The Commonwealth's attorney also noted his concern that a delay of several days would increase the possible taint of the jury pool, and stated that Etherton's attorney had agreed to make his client available for an interview.

The trial judge then noted that Appellant's attorney had been pushing for separate trials, to which she responded in detail (and with her voice raised):

> And that's true, Judge. But that doesn't take into account all the changes that have happened since then. I can interview Mr. Etherton, and that's

great, but what good does it do me if I don't have time to interview him and prepare it for trial? I'm not asking a lot. I've worked my tail end off to comply with every deadline in this case, Judge. And all I'm asking for is a couple of days. I can't help the newspaper. And I can't help if it messes up the jury panel. But I can't trade the chance that the jury panel may read something, so we lose something, so it's inconvenient to be able to properly represent my client. I can't make that trade-off. That's not a fair trade-off to ask me to do. I'm not asking for a lot here. And everything has been up in the air and I've gotten a lot of late discovery. We're starting to get a lot of cumulative things coming in here too, Judge. All of a sudden, I've got to deal with a new witness with Tammy Hopkins giving statements when [the Commonwealth] had her under an agreement over a year ago to cooperate and at the ninth hour we get this. I've got the new statement supposedly, but I'm not so sure from whom, on 404(b) evidence saying they were at pharmacies. That's nowhere in anywhere. And now I'm going to have to interview Mr. Etherton and prepare him for trial in the middle of—I'm not sure, everything else I'm doing right now, Judge. So, yes sir, I did say I was ready and I'm not asking for a month here. Although maybe a month would be better to let the taint of the jury, as [the Commonwealth] is so concerned about, die down. I'm asking for a little time to revamp the case and put it on. And I don't think that's unreasonable at all, sir. I think in light of everything that's happened this morning, in light of the late discovery, in light of the late plea, and that's not necessarily Mister— And also we have a brand new situation with facts of the case in the guilty plea. There's stuff in here I've never seen before, Judge. Never seen. The investigation indicated Mr. Hopkins had a history of using young boys to commit crimes for him in this manner. I have nothing that says anything about that anywhere. Now I suspect that Ms. Howard had something to do with typing this up and is trying to make her client in a good light so that later down the road maybe he gets something, but there's nothing about that in here. That's brand spanking new. And also this stuff that drugs provided to him by the co-defendant, William Hopkins, my investigation reveals someone else gave Pat Etherton those drugs. So that's a little bit different too. So I'm getting all kinds of new information very quickly. And you know, it's really hard to change your defense, not change it totally, but to revamp everything. It's all about how you present your case, Judge. You understand, having presented cases before, to revamp everything right in the middle of it all? That's asking an awful lot. And I grant you, I'm a trained professional, but even I need a little time to talk to [co-counsel], to talk to my client, to put this case together, so I can provide effective assistance of counsel, sir.

The court and the attorneys next discussed how long the trial would take, reaching the consensus of three days. The court then implied that the trial, which was beginning on Monday, could extend to Friday if they "start[ed] right [then]

and ha[d] some sizable breaks," and suggested that they go ahead with voir dire.

The court and Appellant's attorney then engaged in the following short exchange:

> Attorney: Does that mean that the Court's not going to allow us any time to revamp our case and get ready for all these changes, sir.
>
> Court: Well, you'll have here and there.
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> Attorney: You're killing me, Judge.
>
> Court: Okay.
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> Attorney: I object for the record, sir.
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> Court: We'll probably help you out as we go through.
>
> Attorney: Thank you, sir.

Voir dire began a short time later and ran through the end of the day. When the Commonwealth finished its questions, Appellant's attorney again raised the issue of a continuance to have a chance to revamp her own questions. She stated:

> Earlier today I asked a request for a continuance for two days. I would settle for one day in order to revamp our general voir dire questions in order to conform with the significant changes that have occurred today. The court deferred ruling, and has pursued individual voir dire and gone through those things which we did anticipate today. And I have no quarrel with that with the court. I would request once again that I be allowed to properly put together my general voir dire, and take under consideration all of the changes that have occurred today, changes in the evidence of the Commonwealth, changes in the witness of the Commonwealth, and changes in the entire makeup of this case.

The judge responded that he did not want to bring the entire venire panel back to court at a later date. Appellant's attorney then noted that she had an "incredibly high ethical duty . . . to make effective representation of [her] client" and expressed her concern that she could not uphold that duty while having to revamp large portions of her case in such a short amount of time. The judge noted that his only concern at that point was in selecting the jury and that discussion of scheduling could come after that. Appellant's

attorney proceeded with her voir dire, which ended at approximately 5:30 p.m. The judge recessed court until after lunch the next day.

RCr 9.04 allows for postponement of trial upon a sufficient showing of cause. However,

> [t]he decision to delay trial rests solely within the court's discretion. Whether a continuance is appropriate in a particular case depends upon the unique facts and circumstances of that case. Factors the trial court is to consider in exercising its discretion are: length of delay; previous continuances; inconvenience to litigants, witnesses, counsel and the court; whether the delay is purposeful or is caused by the accused; availability of other competent counsel; complexity of the case; and whether denying the continuance will lead to identifiable prejudice.

Snodgrass v. Commonwealth, 814 S.W.2d 579, 581 (Ky. 1991), overruled on other grounds by Lawson v. Commonwealth, 53 S.W.3d 534 (Ky. 2001) (citations omitted).

The trial court was well aware of the Snodgrass factors, as Appellant's attorney recited and discussed them during the initial short hearing on the continuance issue. In fact, it is clear from the record that the trial court contemplated those factors in the course of ruling on the continuance. The court's stated primary concern, even during the later discussion, was with possible prejudice to the jury pool if the trial were continued. This goes to the inconvenience factor of Snodgrass, in that a continuance would have made selection of a jury at a later time a significantly more difficult task. The length of the proposed delay was not significant, and there had been no significant prior continuances. The reason for the delay was not Appellant's fault, since it stemmed from his co-defendant's guilty plea. The other counsel factor does not apply here. Finally, there was no identifiable prejudice to Appellant. As the Commonwealth and trial court noted, Appellant had always claimed a defense that was antagonistic to his co-defendant. Thus, inculpatory evidence and other testimony from the co-defendant should have been no surprise. Appellant's attorney as much as admitted this was the

case. Given the trial court's legitimate concern about further taint of the jury pool, we cannot say that the Snodgrass factors weigh in Appellant's favor. Moreover, we note that once the jury selection process was over, the court allowed a short continuance of a half day. Appellant's attorney admitted that she sought only a day or two at most. The trial court did not abuse its discretion.

C. Facilitation as a Lesser-Included Offense

Appellant was convicted of murder and first-degree robbery under a complicity instruction. He claims that he was entitled to an instruction as to facilitation of murder and robbery as lesser included offenses because the jury could have believed that he drove Etherton around and provided him with the gun used in the shooting without intending that Etherton commit the crimes.

We have long held that a trial court is required to instruct the jury on "every state of [the] case covered by the indictment and deducible from or supported to any extent by the testimony." Lee v. Commonwealth, 329 S.W.2d 57, 60 (Ky. 1959). And our cases have consistently distinguished between complicity, KRS 502.020, and facilitation, KRS 506.080, by noting that the former requires an additional element, meaning that the latter can be a lesser-included offense. The requirements of the additional element depend on whether complicity to the act or complicity to the result is alleged. See Tharp v. Commonwealth, 40 S.W.3d 356, 360-61 (Ky. 2000) (distinguishing between "complicity to the act" under KRS 502.020(1) and "complicity to the result" under KRS 502.020(2)). When the primary offense is a so-called "act offense," the additional element is intent that the crime be committed. See KRS 502.020(1); Thompkins v. Commonwealth, 54 S.W.3d 147, 150 (Ky. 2001) ("Under either statute, the defendant acts with knowledge that the principal actor is committing

or intends to commit a crime. Under the complicity statute, the defendant must intend that the crime be committed; under the facilitation statute, the defendant acts without such intent. Facilitation only requires provision of the means or opportunity to commit a crime, while complicity requires solicitation, conspiracy, or some form of assistance."); Luttrell v. Commonwealth,.554 S.W.2d 75, 79 (Ky. 1977) ("Sullivan would be guilty of criminal facilitation if he furnished Luttrell with the means of committing a crime knowing that he would use it to commit a crime but without intention to promote or contribute to its fruition. He is guilty of the substantive offense by complicity if he furnished the means of committing the crime intending to aid in the commission of the crime."). Where the primary offense is a "result offense," the additional element is that the accomplice "have [a] guilty state[] of mind with respect to th[e] result; this is the rule contained in KRS 502.020(2)." Robert G. Lawson & William H. Fortune, Kentucky Criminal Law § 3-3(c)(1), at 114 (1998). Appellant argues that the convergence of these principles required the trial court to instruct the jury as to facilitation because it was up to the jury to determine his state of mind.

This reading, however, would require that we construe various aspects of the testimony, e.g., that Appellant provided his car for transportation and the gun for use in the robbery and shooting, in a vacuum. Such bare facts would support a facilitation instruction as to robbery, an "act offense," under Webb v. Commonwealth, 904 S.W.2d 226 (Ky. 1995). In Webb, we held it was error not to give a facilitation instruction where the defendant admitted driving his girlfriend around knowing that she was engaging in a drug transaction. But the defendant in Webb also testified that he did not intend that his girlfriend commit the crime. Id. at 229. This distinction was crucial in Thompkins v. Commonwealth, where the defendant declined to testify, and all the evidence at trial

indicated that the defendant participated in the drug transaction that was the basis of that case. 54 S.W.3d 150-51. Basically, there was no evidence in Thompkins that the defendant possessed only knowledge of the crime without any intent that it be committed. Thus, we held:

> The duty to instruct on any lesser included offenses supported by the evidence does not require an instruction on a theory with no evidentiary foundation. The jury is required to decide a criminal case on the evidence as presented or reasonably deducible therefrom, not on imaginary scenarios. Appellant was not entitled to a facilitation instruction in this case.

Id. at 151 (citation omitted); see also Houston v. Commonwealth, 975 S.W.2d 925, 929 (Ky. 1998) ("Although a trial judge has a duty to prepare and give instructions on the whole law of the case, including any lesser included offenses which are supported by the evidence, . . . that duty does not require an instruction on a theory with no evidentiary foundation . . . . An instruction on a lesser included offense is required only if, considering the totality of the evidence, the jury might have a reasonable doubt as to the defendant's guilt of the greater offense, and yet believe beyond a reasonable doubt that he is guilty of the lesser offense."). This reasoning is due in large part to the fact that "[f]acilitation reflects the mental state of one who is 'wholly indifferent' to the actual completion of the crime." Perdue v. Commonwealth, 916 S.W.2d 148, 160 (Ky. 1995).

Appellant argues that the jury could have disbelieved the testimony that established his active participation in the planning and preparation of the robbery, while still believing he had knowledge that Etherton would commit the crime. Appellant's claim is based primarily on his attorney's bald assertion at trial that Appellant never intended that Etherton rob or murder Charles Thompson. But there is nothing in the evidence which supports such a conclusion. Appellant's characterization of the crime is more a rhetorical tool that allows him to fit his acts into the facilitation framework—

knowingly providing the means or opportunity for the commission of a crime—than it is a reasonable interpretation of the evidence that was presented. We cannot ignore that the evidence at trial showed broader participation, and ultimately, this fact precludes Appellant's request for a facilitation instruction.

The evidence showed that Appellant, Etherton, and French engaged in a series of burglaries and attempted burglaries of other stores and pharmacies over the course of the evening and that they planned the robbery of Thompson's Market together. The evidence also showed that Appellant directed Etherton to commit the robbery and gave him instructions on how to do it. There was also testimony indicating that Appellant disposed of the gun after the crime. Given all of this evidence, Appellant's primary argument—that the jury could simply have disbelieved that he intended that Etherton carry out the robbery—is untenable. Far from showing that Appellant was "wholly indifferent," the evidence depicted Appellant, without exception, as actively supporting and providing aid in the commission of the robbery. He did more than provide the means or opportunity for the crime (e.g., by driving Etherton around and giving him the gun)—he both solicited Etherton to commit the crime and assisted in the crime by instructing how it was to be committed. Such broad, uncontroverted evidence prevents any inference that Appellant acted with mere knowledge. Rather, this evidence, which reveals Appellant's vital role in planning, participating, and covering up a crime, can logically lead a jury to only one possible inference: that Appellant intended that the crime be committed. Much like the defendant in Thompkins, Appellant offered no testimony or evidence, nor can he identify any produced at trial, that contradicts the basic testimony that showed Appellant's central role in planning and preparing for the robbery. As such, Appellant's argument as to the robbery falls squarely within the

holding of Thompkins: "The jury is required to decide a criminal case on the evidence as presented or reasonably deducible therefrom, not on imaginary scenarios." 54 S.W.3d 151.

Appellant also extends his argument to the murder conviction. He focuses on the evidence that he came up with the idea for the robbery, which would have been the wanton aspect of his behavior, and claims that the jury could have disbelieved this evidence. Again, the complicity to murder conviction was not based on such a narrow factual ground. Appellant did not simply come up with the idea for the robbery, during which the murder just happened to occur. Rather, the murder occurred in the course of a robbery that the evidence indicates Appellant solicited and helped to plan. Moreover, in the course of that planning, Appellant specifically instructed Etherton to shoot the victim if necessary. The evidence showed that Appellant was fully enmeshed and participating in a plan of robbery and that Appellant anticipated, condoned, and even commanded Etherton's use of violence against the victim of the robbery. Again, because this evidence was uncontradicted, Appellant was not entitled to a facilitation instruction as he was not wholly indifferent to the commission of the violent crime. The trial court's instruction as to complicity was the proper approach. See Neal v. Commonwealth, 95 S.W.3d 843 (Ky. 2003) (holding that it was proper to deny an instruction on facilitation of wanton murder as a lesser included offense where defendant provided gun, instructions, and aid in planning robbery that resulted in a death); see also Meredith v. Commonwealth, 164 S.W.3d 500, 504-06 (Ky. 2005) (discussing accomplice participation in a robbery in which a person was also killed was sufficient for complicity to wanton murder). And while there may have been a question as to Appellant's specific mental state with regard to the result (e.g., wanton and

manifesting extreme indifference to human life, intent to injure but not kill, merely wanton, or reckless), that question was fully addressed by the court's instruction on the various forms of homicide—first-degree manslaughter, second-degree manslaughter, and reckless homicide—as lesser included offenses of wanton murder.

D. Peremptory Challenges

During voir dire of potential jurors, the trial court denied Appellant's requests to strike three jurors for cause. Though the juror strike sheets are not included in the record, Appellant's motion for a new trial indicates that he used peremptory strikes to remove the three jurors he challenged for cause. He now claims the trial court erred in not granting the for-cause strikes and that because he would have struck other specific jurors had the trial court not erred, he is now entitled to a reversal of his conviction.

In support of his argument, Appellant cites Marsch v. Commonwealth, 743 S.W.2d 830 (Ky. 1987). Specifically, he quotes the following language: "[T]o obtain a reversal for infringement of his right to exercise peremptory challenges, appellant need only show that the trial court erred in overruling any one of his challenges for cause." Id. at 834. This language is taken out of context, however, since it assumes several facts—namely that the defendant exhausted all of his peremptory challenges on jurors he had previously challenged for cause and that at least one other juror who should have been dismissed for cause heard the case—that are not present here. Despite Appellant's selective quotation, Marsch does not create a per se reversal rule. Because there is no claim that a juror who should have been struck for cause actually sat on Appellant's case, Marsch is inapplicable here.

The per-se reversal rule that Appellant urges us to apply actually derives from Thomas v. Commonwealth, 864 S.W.2d 252 (Ky. 1993). However, we have since

departed from the per se reversal rule and no longer presume prejudice where a defendant uses a peremptory strike to remove a juror who should have been struck for cause. See Morgan v. Commonwealth, ___ S.W.3d ___ (Ky. 2006). We noted in Morgan:

> A defendant's right to be tried by an impartial jury is infringed only if an unqualified juror participates in the decision. As long as the jury that actually hears and decides the case is impartial, there is no constitutional violation. Even if a juror should have been removed for cause, such error does not violate the constitutional right to an impartial jury if the person did not actually sit on the jury.

Id. at ___ (citations omitted). Our decision in Morgan recognizes that peremptory strikes are merely a means to an end—namely, trial by an impartial jury—and that they should not be treated in such a way as to allow a defendant to manufacture error on appeal. If a defendant employs peremptory strikes to remove questionable jurors, any unintentional error committed by the trial court in failing to strike a juror for cause is rendered harmless. Thus, the relevant inquiry is whether an unqualified juror actually sat on the jury. The objectionable jurors in this case were removed with peremptory strikes, and there is no suggestion that any juror who actually participated in deciding the case was biased, unfair, or otherwise unqualified. Accordingly, the trial court's error, if any, was cured by Appellant's use of his peremptory challenges.

IV. Conclusion

For the foregoing reasons, the judgment of the Pike Circuit Court is affirmed.

Lambert, C.J.; Graves, Johnstone, Roach, Scott and Wintersheimer, JJ., concur. Cooper, J., concurs in result only.

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