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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: NOVEMBER 1, 2007
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

DATE 11-26-07 E.H.C.

2006-SC-000862-MR

ANDRE EUGENE FANT, JR — APPELLANT

V.

ON APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE STEPHEN P. RYAN, JUDGE
NO. 05-CR-001757

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Andre Fant Jr., was convicted of three counts of complicity to first-degree robbery (KRS 515.020, 502.020) and three counts of complicity to first-degree assault (KRS 508.010, 502.020) after a two day jury trial in Jefferson Circuit Court, for incidences that occurred on April 3, 2005. Appellant offered proposed jury instructions on facilitation (KRS 506.080(1)) as to all the robbery and assault counts, which the trial court denied. He was sentenced to ten years concurrent on each robbery count and twenty years consecutive on each assault count, for a total of seventy years. Appellant appeals the trial court's denial of his request for jury instructions on facilitation to first-degree robbery and first-degree assault. Because the testimony presented at trial was not such that a reasonable juror could doubt that the Appellant was guilty of the crime charged, but conclude that he was guilty of the lesser-included offense, we affirm.

On April 3, 2005, Appellant met the three co-defendants for the first time while at

the home of a mutual acquaintance. The group left in the car of one co-defendant, Blake Daniels. At some point during the car ride, Appellant and another co-defendant, Cecil Hampton, engaged in a conversation about committing a robbery. Both Appellant and Cecil were armed with .22 caliber weapons that they intended to use to commit the robbery. At this point, they saw Alan Tapscott walking down the sidewalk. Appellant and Cecil got out of the car and approached Mr. Tapscott. Cecil testified that Andre pushed Mr. Tapscott to the ground and went through his pockets. Cecil further testified that when Appellant found nothing of value on Mr. Tapscott's person, he shot him while he was on the ground. The other two co-defendants, Blake Daniels and Jerome Hester, also got out of the car, and saw Mr. Tapscott lying on the ground, but ran back to the car after Mr. Tapscott was shot. A bystander who heard the gunshots shouted out to the four co-defendants, asking them if they were all right. One of the co-defendants shot twice at the bystander, hitting him in the knee, and an employee of a nearby bar testified that the person who did the shooting was standing by the car. Both Cecil and Blake testified that the Appellant talked about shooting Mr. Tapscott once the four co-defendants returned to the car.

The four co-defendants then went to Appellant's aunt's apartment. Appellant changed his clothes and then the four co-defendants headed back out. While out, the conversation again turned to money and robbery. Testimony from co-defendant Hester indicated that Appellant and Cecil brought up the conversation.

About this time, they drove past Dan's Bar and Grill and saw two men waiting outside the bar. Testimony from Cecil, Blake, and Jerome indicated that Appellant and Cecil left the car and approached the two men. One of the men, Ben Ford, testified that two individuals came up to them and demanded money. The other man, Dan Collins,

laughed when the gun was pointed at him, which caused the person pointing the gun at him to start shooting. Neither man could identify the assailants and indicated that their focus was on the gun that was pointed at them. Both men testified that of their two assailants, the taller one stood back a bit and the shorter one actually did the shooting (Appellant is 6'1", Cecil is 5'7"). Cecil testified that Appellant actually shot Mr. Collins after Mr. Collins laughed at him and that Cecil took Mr. Collins' wallet after Mr. Collins fell to the ground.

Dan Clark, the owner of the bar, was closing the register when he saw through his tinted front window, a figure standing over Mr. Collins wearing a dark jacket. Mr. Clark's trial testimony indicated that he could see that it was a dark jacket, and it was his impression that the jacket had a large plaid pattern, but that he could not be certain as to the actual pattern, or lack thereof, on the jacket because he was viewing the assailant through a tinted window. He further testified that what he perceived to be a "plaid" pattern on the jacket could have been a result of shadows and light. Photos in evidence of the co-defendants taken later that night showed that Cecil was wearing a dark letter style jacket with white sleeves, while Appellant was wearing a dark, puffy, nylon jacket.

Mr. Clark testified that he saw a car pull off and that he knew the assailants had jumped into the car. He was able to follow the car long enough to call 911 and report the vehicle's license plate number. While the vehicle the assailants were riding in was stopped at a red light, Mr. Clark was able to secure assistance from police officers he spotted at a nearby gas station. After following the suspect vehicle for a little while, the police pulled it over. When stopped, Blake was driving the car, Appellant was in the passenger seat, and Cecil and Jerome were in the back seat of the vehicle. Ben Ford's wallet and two .22 caliber firearms were found in the glove box of the vehicle.

Gunshot residue tests performed on all four co-defendants showed no significant amounts of antimony, barium or lead on Cecil, Blake, or Jerome. Appellant had significant amounts of lead on his left palm; however, the forensic expert testified that the results were not conclusive in determining which individual had discharged the firearm.

The Appellant did not testify to his version of the events that transpired that night, nor did he present any other evidence tending to show his state of mind. Based on the evidence introduced, Appellant argues that the trial court erred by denying his request for jury instructions on facilitation to first-degree robbery and first-degree assault.

The trial court is required to give jury instructions "applicable to 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). An instruction on a lesser-included offense is required only if, based on the evidence presented at trial, "a reasonable juror could entertain reasonable doubt of the defendant's guilt of the greater charge, but believe beyond a reasonable doubt that the defendant is guilty of the lesser offense." Thompkins v. Commonwealth, 54 S.W.3d 147, 151 (Ky. 2001) (quoting Skinner v. Commonwealth, 864 S.W.2d 290, 298 (Ky. 1993)).

Under KRS 506.080(1), a person is guilty of criminal facilitation when:

> acting with knowledge that another person is committing or intends to commit a crime, [an individual] engages in conduct which knowingly provides such person with means or opportunity for the commission of the crime and which in fact aids such person to commit the crime.

On the other hand, a person is guilty of complicity under KRS 502.020(1) when:

> with the intention of promoting or facilitating the commission of the offense, he:
>
> (a) Solicits, commands, or engages in a conspiracy with such other person to commit

the offense; or
(b) Aids, counsels, or attempts to aid such person in planning or committing the offense; or
(c) Having a legal duty to prevent the commission of the offense, fails to make a proper effort to do so.

Facilitation is a lesser-included offense of complicity because it has the same elements as complicity, except that the state of mind required for its commission is less culpable. Luttrell v. Commonwealth, 554 S.W.2d 75, 79 (Ky. 1977). An individual would be guilty of criminal facilitation if "he furnished [another] with the means [or opportunity] of committing a crime *knowing that he would use it to commit a crime but without intention to promote or contribute to its fruition.*" Id. (emphasis added). This Court has explained that while "[f]acilitation reflects the mental state of one who is 'wholly indifferent' to the actual completion of the crime," an individual may be guilty of complicity to a crime even "without physical aid or involvement in the crime, so long as the defendant's actions involve participating with others to carry out a planned crime." Perdue v. Commonwealth, 916 S.W.2d 148, 160 (Ky. 1995), cert. denied, 519 U.S. 885, 117 S. Ct. 151, 136 L. Ed. 2d 96 (1996). In this case, the Appellant would have only been entitled to a jury instruction on criminal facilitation if his indifference to the planned robberies was fairly deducible from or supported to any extent by the evidence admitted at trial. Lee, 329 S.W.2d at 60.

In the case sub judice, there was no evidence presented at trial from which a reasonable juror could entertain reasonable doubt of the defendant's guilt of the greater charge (of complicity to first-degree robbery and first-degree assault), but believe beyond a reasonable doubt that the defendant is guilty of the lesser offense (of facilitation to first-degree robbery and first-degree assault). All the testimony introduced

pointed to Appellant as one of the two teenagers who initiated the discussion of committing robberies that night. Furthermore, the testimony was consistent that Appellant was one of the two teenagers who approached, beat, robbed, and shot Mr. Tapscott. After this vicious attack, all four co-defendants went back to Appellant's aunt's home. Appellant changed his clothes and then left with the three other co-defendants in search of more victims to rob. The testimony is consistent that Appellant was one of the two assailants who attacked Mr. Ford and Mr. Collins. Additionally, Mr. Clark, the bar owner, testified that the man who shot Mr. Collins was wearing a dark colored jacket that had what appeared to be a large-squared plaid pattern to it. Pictures introduced into evidence that were taken that night show that only Appellant wore a plain dark coat, and that the puffy style of the coat had several horizontal seams. It would have been reasonable for a juror to conclude, based on the totality of the evidence, that Appellant was guilty of complicity because his actions involved participating with the other three co-defendants in planning and carrying out the crime. None of the evidence presented at trial would have supported a theory that the Appellant was indifferent to the events that transpired.

Because the evidence presented at trial indicated that Appellant was participating with others to carry out the planned crimes, and because it did not support to any extent the claim that Appellant was indifferent to the fruition of said crimes, we affirm.

All sitting. All concur, except Abramson, J., not sitting.

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