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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.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: OCTOBER 21, 2010
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2009-SC-000493-MR

STEVE ALLEN — APPELLANT

V.

ON APPEAL FROM JESSAMINE CIRCUIT COURT
HONORABLE C. HUNTER DAUGHERTY, JUDGE
NO. 08-CR-00144-002

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Steve Allen, was convicted by a Jessamine Circuit Court jury of complicity to first-degree robbery and of being a second-degree persistent felony offender. For these crimes, Appellant received a sentence of twenty-four years' imprisonment. Appellant now appeals to this Court as a matter of right. Ky. Const. § 110.

Appellant asserts two arguments on appeal: 1) that the trial court erred by denying his request for a jury instruction on first-degree facilitation to robbery; and 2) that the trial court erred by allowing the Commonwealth to introduce the parole eligibility guidelines after the close of the penalty phase. For the reasons set forth below, we affirm Appellant's conviction and sentence.

FACTUAL AND PROCEDURAL BACKGROUND

During the early morning hours of June 8, 2008, an armed robbery occurred at a duplex in Nicholasville. As a result, on August 8, 2008, Appellant was indicted by the Jessamine County Grand Jury for one count of first-degree robbery, two counts of second-degree assault,[1] and one count of being a second-degree persistent felony offender. Appellant's trial began on July 6, 2009.

Sasha Burch, one of the robbery victims, testified that on the night of August 8, 2008, she was awakened by Haley Banta's screaming. Banta was the girlfriend of Sasha's brother Corey Burch. After calling the police, Sasha testified that she walked out of her bedroom to find Appellant holding a gun to her brother's head and Eric Wheat, Appellant's co-defendant, holding a gun to Banta's head. Wheat demanded money and Sasha returned to her bedroom to retrieve $100 she was saving for summer school. Wheat and Banta followed Sasha into the bedroom while Appellant remained in the other room with Corey.

Sasha gave Wheat her $100. Wheat made another demand for money to which Sasha and Banta told him they did not have any more. Wheat then hit Banta across her face with his gun and left. Sasha testified that she believes Appellant left with Wheat because she did not hear the duplex door open or close prior to Wheat's exit.

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[1] One of the second-degree assault charges was dismissed prior to trial.

Banta testified that she was watching television with Corey around 3:30 in the morning when Appellant and Wheat entered the duplex and robbed them. Both men were armed with guns. The men demanded money and Corey gave Wheat $200. Appellant held a gun to Corey's head. Banta testified that Wheat demanded more money from her and that is when she woke Sasha up. The last thing Banta remembers is being hit in the head with Wheat's gun.

Appellant also testified at trial. He denied robbing anyone or helping rob anyone. Appellant testified that about 3:00 in the morning, Wheat, who was Appellant's roommate, asked Appellant to go with him to Corey's house. Appellant said he got the impression from Wheat that he had some sort of a deal to complete with Corey. Before going to Corey's house, the pair stopped to pick up guns. Wheat allegedly told Appellant that the guns were necessary to keep Corey from "running his mouth."

Appellant testified that Corey willingly let them in the duplex. Appellant admitted to carrying a shotgun while Wheat carried a handgun. Appellant testified that Wheat told Banta to go into the bedroom. Corey also went while Appellant stayed in the living room. Appellant then heard Wheat repeatedly say, "Where's the money?" Banta defiantly told Wheat that they did not have any money. Wheat then smacked Banta. Appellant at this point testified that he left the house. When Wheat returned to the car, Appellant said he told him "You didn't say nothing about going in there and taking no money."

Appellant denied pointing his gun at Corey during the altercation, and

denied taking any money. He also testified that he had no knowledge before going to the duplex that Wheat intended to rob or assault anyone. Appellant testified that he believed they were just going to talk to Corey and that the guns were just meant to scare him.

The trial court instructed the jury on first-degree robbery, complicity to first-degree robbery, first-degree robbery principal or accomplice, and complicity to second-degree assault. Appellant requested an instruction on facilitation to robbery, but the trial court denied the request because during Appellant's testimony he claimed to have no prior knowledge of Wheat's intent to commit robbery.

The jury found Appellant guilty of complicity to first-degree robbery but not guilty of complicity to second-degree assault. In the penalty phase, the jury found appellant guilty of being a second-degree persistent felony offender. Appellant was sentenced to a ten year sentence for the complicity to first-degree robbery conviction, enhanced to twenty-four years due to the persistent felony offender conviction. Subsequently, Appellant filed this appeal. Additional facts will be developed below as necessary.

I. THE TRIAL COURT CORRECTLY DENIED APPELLANT'S REQUEST FOR A FACILITATION JURY INSTRUCTION

Appellant first argues that the trial court erred by denying his request for a jury instruction on facilitation to first-degree robbery as a lesser-included offense to the charge of complicity to first-degree robbery. A person is guilty of

criminal facilitation under KRS 506.080(1) when:

> acting with knowledge that another person is committing or intends to commit a crime, he 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.

The offense of complicity reads in relevant part:

> A person is guilty of an offense committed by another person when, with the intention of promoting or facilitating the commission of the offense, he:
>
> (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 . . . .

KRS 502.020(1). We note that a lesser-included offense instruction is proper when the jury could maintain doubt concerning the greater offense and also find guilt beyond a reasonable doubt of the lesser offense. *Parker v. Commonwealth*, 952 S.W.2d 209, 211 (Ky. 1997).

Appellant argued to the trial court that he was entitled to a facilitation instruction because he presented evidence that he never intended to commit robbery, but yet did provide Wheat with the means or opportunity to commit robbery. The trial court initially agreed. However, the Commonwealth argued that in order for a facilitation instruction to be given, Appellant had to have actual knowledge that Wheat was going to commit robbery. Thus, based on Appellant's testimony that he was unaware Wheat intended to commit robbery, the trial court denied his request for a facilitation instruction.

We agree with the trial court's decision to deny Appellant's request for a

facilitation instruction, but on different grounds. The trial court correctly concluded that to be guilty of criminal facilitation for a specific crime, the defendant must have actual knowledge that the principal actor is intending to commit that specific crime. *Finnell v. Commonwealth*, 295 S.W.3d 829, 833-834 (Ky. 2009) ("the defendant must have knowledge that the principal actor intends to commit the crime the defendant is actually charged with facilitating"). "However, "[c]redibility and weight of the evidence are matters within the exclusive province of the jury." *Commonwealth v. Smith*, 5 S.W.3d 126, 129 (Ky. 1999). Thus, while Appellant testified that he did not know Wheat intended to commit a robbery, the jury could have disbelieved him, and concluded that, while he knew of Wheat's intent to commit robbery, he lacked the specific intent required for a complicity conviction. It was incorrect to deny Appellant's request for a facilitation instruction on those grounds.

However, the perpetrator's knowledge and state-of-mind do not constitute the only differentiation of complicity from facilitation. In reviewing all of the evidence presented at trial, it becomes clear that Appellant was not entitled to a facilitation instruction because the evidence showed him to be either an "active participant" in the robbery, or not guilty. *See White v. Commonwealth*, 178 S.W.3d 470, 490-491 (Ky. 2005); *Churchwell v. Commonwealth*, 843 S.W.2d 336, 338 (Ky. App. 1993) (holding that a facilitation instruction is not warranted where defendant was an "active participant" in the principal offense). Appellant's own testimony was that he

went with Wheat to the Burchs' apartment in the early hours of the morning brandishing a shotgun as Wheat robbed the victims. Criminal facilitation requires proof that the accused "provide[d] such person with means or opportunity for the commission of the crime." KRS 506.080(1). Appellant argues that the proof at trial satisfied that element of facilitation because the jury could have believed that he "facilitated the robbery by having a gun during those events" but yet was indifferent to whether Wheat committed a robbery or not. We fail to see how entering the residence armed with a shotgun alongside of Wheat could reasonably be construed as merely providing Wheat with the *means* or the *opportunity* for committing the robbery, but yet not constitute being an active participant in the robbery. *Churchwell*, 843 S.W.2d at 338. Wheat had the means and opportunity without Appellant's aid. Even if the jury believed that Appellant left the apartment when he realized Wheat was committing a robbery, Appellant's initial presence at the robbery with a shotgun constituted a threat of deadly force against the victims, and actively aided Wheat's objective. The evidence presented at trial leads to the conclusion that Appellant was an active participant and was thereby complicit with Wheat in the robbery, or that he had no criminal intent to accomplish the robbery and was thereby innocent of the crime. "There was no evidence of a middle-ground violation of the facilitation statute." *White*, 178 S.W.3d at 491. No error was committed by the trial court's denial of Appellant's request for a criminal facilitation instruction.

II. THE INTRODUCTION OF THE PAROLE ELIGIBILITY GUIDELINES, AFTER THE CLOSE OF THE PENALTY PHASE CASE WAS HARMLESS ERROR

Appellant's other allegation of error is that he was prejudiced by the late introduction of the parole eligibility guidelines into evidence at the end of the penalty phase. After the close of evidence and the reading of the penalty phase instructions to the jury, the Commonwealth asked to approach the bench and informed the trial court that it failed to tender parole eligibility guidelines to the jury as required by KRS 532.055. The trial court agreed that the Commonwealth was required to tender the parole eligibility guidelines and over Appellant's objection allowed the Commonwealth to tender the parole eligibility guidelines as Commonwealth's Exhibit 2. Appellant now argues that this ruling was error because the jury was allowed to review the parole sentencing guidelines without any information on how to understand them.

We agree with Appellant that the introduction of the parole sentencing guidelines after the close of evidence and the reading of the penalty phase instructions was error. KRS 532.055 does not *require* the Commonwealth to tender parole eligibility guidelines, but does *allow* the Commonwealth to tender them during the penalty phase. However, while the trial court's ruling to allow the tendering of the parole sentencing guidelines is erroneous, the error is harmless. *Winstead v. Commonwealth*, 283 S.W.3d 678, 689 (Ky. 2009). The Commonwealth could have submitted the parole sentencing guidelines earlier as an exhibit before the close of evidence. Thus, the error is really one of

timing, and Appellant has failed to show he was substantially prejudiced by it.

CONCLUSION

Thus, for the foregoing reasons, Appellant's convictions and sentences are affirmed.

All sitting. All concur.

COUNSEL FOR APPELLANT:

Roy Alyette Durham II
Assistant Public Advocate
Department of Public Advocacy
100 Fair Oaks Lane
Suite 302
Frankfort, Kentucky 40601

COUNSEL FOR APPELLEE:

Jack Conway
Attorney General

John Paul Varo
Assistant Attorney General
Office of Criminal Appeals
Office of the Attorney General
1024 Capital Center Drive
Suite 200
Frankfort, Kentucky 40601