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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.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: JUNE 16, 2011
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2010-SC-000424-MR

GARRY R. SWAN — APPELLANT

V.

ON APPEAL FROM HENDERSON CIRCUIT COURT
HONORABLE KAREN LYNN WILSON, JUDGE
NO. 09-CR-00190-003

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

REVERSING AND REMANDING

Appellant Garry R. Swan appeals from a judgment of the Henderson Circuit Court, finding him guilty of complicity to first-degree robbery and first-degree persistent felony offender (PFO I). The jury recommended, and the trial court imposed, a sentence of 10 years' imprisonment, enhanced to 20 years by virtue of the PFO I conviction. He therefore appeals to this Court as a matter of right.[1] We conclude that reversible error occurred with respect to the trial court's jury instruction on complicity to first-degree robbery.

In September 2009, Appellant was driving his SUV from his home in Manatee County, Florida to Washington, Indiana. He was accompanied by his wife Cynthia Swan and his friends Mickey McGuire and Andrew LeRose. The

[1] KY. CONST. § 110(b)(2).

purpose of the trip was apparently to gain custody of Cynthia's son, who resided in Indiana. At some point during the trip, a decision was made to rob a bank. The group stopped for the night at a Super 8 Motel in Henderson, Kentucky.

That night, the group made plans for a bank robbery. LeRose testified that McGuire and Appellant picked out a Fifth Third Bank branch in Henderson that would be the target. According to LeRose, he, McGuire, and Appellant drove to Wal-Mart in Henderson to purchase disguises. LeRose waited in the vehicle while McGuire and Appellant went inside. A still photo from a Wal-Mart video surveillance camera showed McGuire and Appellant together in the store's Halloween section.

The next morning, according to LeRose, the group cleaned out the motel room to eliminate physical evidence, and then drove across the Ohio River into Evansville, Indiana. Along the way, the group threw over the bridge two bags of garbage (including garbage from the motel), which the Henderson Police Department later recovered. The group proceeded into Evansville, and dropped off Cynthia Swan at a Burger King restaurant. According to LeRose, the plan was for Cynthia to call the police and report the SUV stolen if the men did not return within an hour.

The three men drove back to Henderson, with Appellant driving. They pulled into an apartment complex to write robbery notes. Next, Appellant drove to a gas station, where he was to wait as LeRose and McGuire robbed the

bank. At that point, LeRose backed out, and remained with Appellant, leading McGuire to rob the bank alone.

McGuire walked into the bank, wearing sunglasses, a blonde wig, and a baseball cap. He passed Terra Hurtle, the bank teller, a note demanding her $100 and $20 bills, with no dye packs. Hurtle began handing McGuire cash from her drawer. McGuire noticed a bank manager using the telephone, and told Hurtle to hurry because he had a gun, while motioning to the front of his pants. As McGuire left, and the manager stepped out of his office, McGuire told the manager to get back in his office, because he (McGuire) had a gun. After the robbery, police discovered a pistol-type BB gun in Appellant's SUV, near a document bearing McGuire's name.

After McGuire had completed the robbery, he returned to the gas station, and the men drove toward Evansville, Indiana, throwing their disguises over the Ohio River bridge along the way. McGuire gave LeRose and Appellant $1,000 each. The men then proceeded to the Burger King in Evansville to pick up Cynthia. Appellant gave his $1,000 to Cynthia, which police would later find in her purse. Upon pulling out of the Burger King parking lot, the Evansville Police Department, which had been informed of the robbery, stopped Appellant's SUV. McGuire fled, but was eventually apprehended. Police arrested all four occupants of the vehicle.

Appellant was indicted for first-degree robbery, as a principal and under a theory of complicity, and for PFO I. Cynthia Swan was also indicted and tried

jointly with her husband, but the jury ultimately acquitted her of all charges. LeRose, who had accepted a plea agreement, testified for the Commonwealth.

Appellant also testified, claiming that he was an unwilling participant in the robbery. According to Appellant, McGuire threatened him with the BB gun (which Appellant believed to be a real gun at the time) and forced him to participate in the robbery by driving to and from the bank. Appellant explained that McGuire stole the wig used in the robbery without his (Appellant's) knowledge. Appellant also stated that he tried to get away from McGuire when McGuire left the vehicle to rob the bank, but that McGuire was able to catch up with the SUV. Appellant explained that his wife was dropped off in Evansville after he begged McGuire to leave her out of the robbery.

After the presentation of all evidence, the trial court determined that there was insufficient evidence to instruct the jury on first-degree robbery with Appellant as the principal actor. The jury was instructed on first-degree robbery only under a theory of complicity.[2] Instruction No. 2, as prepared by the trial court and submitted to the jury, read:

> You will find the Defendant, Garry R. Swan, guilty of Complicity to First Degree Robbery under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:
>
> **A.** That in this county on or about September 21, 2009, Mickie McGuire stole U.S. Currency from Fifth Third Bank;

[2] *See* KRS 515.020 (first-degree robbery); KRS 502.020(1) (complicity as to a criminal act).

B. That in the course of doing so and with intent to accomplish the theft, Mickie McGuire used or threatened the immediate use of physical force upon Terra Hurtle or another bank employee;

C. That he used or threatened the immediate use of a dangerous instrument, as defined in Instruction No. 4, upon any person who was not a participant in the crime.

AND

D. That the Defendant, Garry Swan, with the intention of promoting or facilitating the commission of *the theft*, solicited or engaged in a conspiracy with Mickie McGuire to commit the offense and/or aided or attempted to aid Mickie McGuire in planning or committing the offense.[3]

Appellant also tendered jury instructions, which included a definition of complicity as it is defined in KRS 502.020(1) and in Cooper and Cetrulo, *Kentucky Instructions to Juries*, Criminal § 10.01.[4] The trial court ruled that the definition of complicity was implicit in its instruction, and therefore Appellant's definition was not needed. In the course of its deliberations, the jury sent a note to the court, asking for the "legal definition of complicity [and] facilitation." The court informed the jury that it could not provide any definition beyond what was contained in the instructions.

---

[3] Emphasis added.

[4] Appellant's proposed definition of complicity stated:

> Complicity: Means that a person is guilty of an offense committed by another person when, the intention [sic] of promoting or facilitating the commission of the offense, he solicits, commands, or engages in a conspiracy with such other person to commit the offense, or aids, counsels, or attempts to aid such person in planning or committing the offense.

Shortly thereafter, the jury returned a verdict finding Appellant guilty of complicity to first-degree robbery, followed by a penalty phase in which the jury found Appellant guilty of PFO I. This appeal followed.

Appellant argues that Instruction No. 2 was deficient. We begin by noting that a trial court has a duty "to instruct the jury on the whole law of the case."[5] With respect to complicity, we note that complicity is not an additional or different offense from the primary offense.[6] Rather, "complicity constitutes guilt of the primary offense itself, making complicity an alternate means of committing an offense as opposed to a distinct crime."[7]

We agree with Appellant that Instruction No. 2 was erroneous. *Crawley v. Commonwealth* addressed the requirements for a jury instruction on complicity to first-degree robbery:

> Robbery requires not only the element of an intent to accomplish a theft, but also the element of the use or threat of immediate use of physical force upon the victim. KRS 515.020(1)(c). Thus, the instruction also should have required that Appellant, as an accomplice, intended that the principal use or threaten the immediate use of physical force upon the victim. Often, this element of intent is satisfied by giving a separate instruction defining complicity.[8]

---

[5] *Thomas v. Commonwealth*, 170 S.W.3d 343, 348-49 (Ky. 2005).

[6] *See Commonwealth v. McKenzie*, 214 S.W.3d 306, 307 (Ky. 2007); *Commonwealth v. Caswell*, 614 S.W.2d 253, 254 (Ky. App. 1981).

[7] Cooper and Cetrulo, KENTUCKY INSTRUCTIONS TO JURIES, Criminal § 10.01 cmt.

[8] 107 S.W.3d 197, 200 (Ky. 2003). *But see Commonwealth v. Yeager*, 599 S.W.2d 458 (Ky. 1980) (holding that a defendant is guilty of complicity to first-degree robbery where he intended that the offense of robbery be committed, regardless of whether he intended the aggravating circumstance, e.g., the use of a gun).

In *Crawley*, the defendant's jury was instructed on the definition of complicity; however, the definition as written did not require the jury to find that the defendant acted with the intention of promoting or facilitating the commission of the robbery.[9] This Court gave a recommended definition of complicity for use on remand, which was substantially similar to the one proposed by Appellant in this case.[10]

In the instant case, the error in Instruction No. 2 occurred in Part D, which required the jury to find that Appellant acted "with the intention of promoting or facilitating the commission of *the theft* . . . ."[11] This instruction did not require the jury to find that Appellant, as an accomplice, intended that the principal (McGuire) use or threaten the immediate use of physical force upon the victim.

To be guilty of an offense under a theory of complicity as to a criminal act, a defendant must act "with the intention of promoting or facilitating the

---

[9] The instruction in *Crawley* erroneously required only a reckless mental state for the defendant to be guilty by complicity, thereby negating the requirement of intent:

> "Complicity means that a person is guilty of an offense committed by another person when, *while acting recklessly with regards to another's conduct*, he solicits, commands, or engages in a conspiracy with such other person to engage in that conduct, or aids, counsels, or attempts to aid such person in planning or committing such conduct."

107 S.W.3d at 200 (emphasis in *Crawley*).

[10] The recommended definition read:

> "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 solicits, commands, or engages in a conspiracy with such other person to commit the offense, or aids, counsels, or attempts to aid such person in planning or committing the offense."

Id. (emphasis in *Crawley*).

[11] Emphasis added.

commission of *the offense*[.]"[12] Instruction No. 2 required the jury to find only that Appellant intended to promote or facilitate one element of the offense, i.e., the theft. Therefore, the instruction was erroneous.

However, we disagree with Appellant that the only solution to this error is a separate definition of complicity. Regarding complicity to robbery, *Crawley* states, "*Often*, this element of intent is satisfied by giving a separate instruction defining complicity."[13] *Crawley* does not *require* a separate instruction defining complicity.[14] It is perfectly acceptable, particularly in a case such as this where the evidence *only* supported conviction through a theory of complicity, to integrate the definition of complicity into the jury instruction for the offense.

There would have been no error had Part D of Instruction No. 2 read, "That the Defendant, Garry Swan, with the intention of promoting or facilitating the commission of **the offense**, solicited or engaged in a conspiracy with Mickie McGuire to commit the offense and/or aided or attempted to aid Mickie McGuire in planning or committing the offense."[15] The instructional error was in not requiring the jury to find that Appellant intended that McGuire

---

[12] KRS 502.020(1) (emphasis added).

[13] 107 S.W.3d at 200 (emphasis added).

[14] Though *Cooper's* offers a definition of complicity, the accompanying commentary seems to discourage its use: "The instructions should describe the conduct of the defendant constituting complicity, obviating the necessity of the definition in the instructions." Cooper and Cetrulo, KENTUCKY INSTRUCTIONS TO JURIES, Criminal § 10.01 cmt.

[15] *See Crawley*, 107 S.W.3d at 200. Emphasis is added here for clarity, and would obviously not be required in the jury instruction on remand. Additionally, we note that the trial court omitted the "commands" and "counsels" language found in KRS 502.020(1) and in the *Crawley* model instruction. We assume that the trial court determined that the evidence did not support the inclusion of these terms in this case.

use or threaten the immediate use of physical force upon the victim. There is no error in integrating a proper complicity instruction, as opposed to providing a separate definition of complicity. Either approach can be proper.

Having determined that Instruction No. 2 was erroneous, we must determine whether the error was harmless. "In this jurisdiction it is a rule of longstanding and frequent repetition that erroneous instructions to the jury are presumed to be prejudicial; that an appellee claiming harmless error bears the burden of showing affirmatively that no prejudice resulted from the error."[16] Here, the Commonwealth has not met its heavy burden. Instruction No. 2 did not require proof that Appellant intended that McGuire accomplish a theft *by using or threatening the immediate use of physical force upon the victim* (the element which elevates a theft to a robbery). Rather, Instruction No. 2 required proof only that Appellant intended that McGuire commit a theft. Robbery is a much more serious crime than theft.[17]

Thus, Instruction No. 2 erroneously omitted an essential element of the offense, an error which must be harmless beyond a reasonable doubt.[18] We cannot safely say that the error did not contribute to Appellant being convicted of a greater offense than the instruction required the Commonwealth to prove.

---

[16] *McKinney v. Heisel*, 947 S.W.2d 32, 35 (Ky. 1997). *See also Harp v. Commonwealth*, 266 S.W.3d 813, 818 (Ky. 2008) (reaffirming *McKinney*).

[17] *Compare* KRS 515.020 (Robbery in the first degree, a Class B felony, with a penalty range of 10 to 20 years' imprisonment) *and* KRS 514.030(2) (theft by unlawful taking or disposition where the value of the property is over $500, a Class D felony, with a penalty range of 1 to 5 years' imprisonment).

[18] *See Stewart v. Commonwealth*, 306 S.W.3d 502, 508 (Ky. 2010) (citing *Neder v. United States*, 527 U.S. 1, 2 (1999)).

In light of Appellant's defense that he was forced by McGuire to participate, and in light of the fact that the jury acquitted Cynthia Swan of all charges and imposed the minimum sentence upon Appellant, we cannot say that the error was harmless beyond a reasonable doubt. Therefore, we must reverse.

Finally, Appellant also argues that the Commonwealth failed to disclose, prior to trial, statements made by the Commonwealth's witness Andrew LeRose, in violation of RCr 7.26. This error, if it was error, is unlikely to recur on remand. Appellant is highly unlikely to suffer prejudice from unfair surprise if LeRose offers the same testimony upon retrial. Therefore, the issue is moot.

For the foregoing reasons, the judgment of the Henderson Circuit Court is reversed. The case is hereby remanded for proceedings consistent with this opinion.

All sitting. All concur.

COUNSEL FOR APPELLANT:

Dax Ryan Womack
304 First Street
P.O. Box 637
Henderson, KY 42419-0637

COUNSEL FOR APPELLEE:

Jack Conway
Attorney General

Joshua D. Farley
Assistant Attorney General
Attorney General's Office
Office of Criminal Appeals
1024 Capital Center Drive
Frankfort, KY 40601-8204