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RENDERED: JUNE 19, 2014
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2012-SC-000650-MR

CHRISTOPHER ANTONIO JOHNSON — APPELLANT

V.

ON APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MARTIN F. McDONALD, SENIOR JUDGE
NOS. 11-CR-002918-002 AND 12-CR-001713

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Christopher Johnson wrapped a scarf around his face and entered a convenience store where he pointed a gun at the clerk and robbed the store of cash, lottery tickets, and cigarettes. A few hours later, police arrested Johnson and his girlfriend after they attempted to cash the stolen lottery tickets. During the police interrogation following arrest, Johnson made a full confession.

A circuit court jury convicted Johnson of first-degree robbery and after also finding him guilty of being a first-degree Persistent Felony Offender (PFO 1), recommended enhancing Johnson's sentence from twenty to thirty-three years' imprisonment. The trial court followed the jury's recommendation

and sentenced Johnson accordingly. Johnson now appeals the resulting judgment as a matter of right.[1]

Johnson alleges two trial errors requiring reversal of the judgment: (1) the trial court's jury instruction on first-degree-robbery included superfluous language about complicity that resulted in a violation of Johnson's constitutional right to a unanimous verdict; and (2) the trial court's refusal to give an instruction on the lesser, uncharged crime of receiving stolen property over $500 denied Johnson's right to have the jury fully consider his defense theory.

We affirm the judgment. As to the first assigned error, our precedent is clear that the superfluous language in the jury instructions presented here was not palpable error. As to the second assigned error, we conclude, regardless of whether erroneous or not, the trial court's refusal to instruct on receiving stolen property was harmless.

I. FACTUAL AND PROCEDURAL BACKGROUND.

Very early one Friday morning, Johnson walked into a Louisville convenience store clad in a dark-colored, puffy jacket with a scarf wrapped around his face and a gun in his gloved hand. As Johnson entered, he held the gun over his head, pointed it at the clerk, and announced to her that this was not a joke; he was there to rob the store. Placing the gun against the clerk's head, he demanded she open both cash registers. Johnson then pocketed all

[1] Ky. Const. § 110(b)(2).

the cash from the registers, totaling $400. Johnson also took the change left over from the previous night.

Johnson then ordered the clerk to get on the floor and open the store's safe. The clerk, however, informed Johnson that she was unable to open the safe. Grabbing a clear plastic trash bag from the trash can, Johnson snatched various items, including scratch-off lottery tickets and approximately fifty packs of Newport cigarettes.

After Johnson left, the clerk notified the police and the Kentucky Lottery headquarters to report the serial numbers of the stolen lottery tickets. The clerk was never able positively to identify Johnson throughout the investigation or at trial. But the store's surveillance camera caught the entire incident on film.

The stolen lottery tickets included several winning tickets; and Johnson and his girlfriend, Jillian Cabknor, attempted to cash these tickets at a Speedway just a few hours after the robbery. But when the attendant scanned the tickets, she was prompted to contact the Lottery Commission office. Noticing Johnson and Cabknor appeared jittery, the clerk told them they must have won a large prize because of the alert to contact the Lottery Commission. Johnson and Cabknor fled the Speedway without their winnings but not without being caught on surveillance footage.

Louisville Metro Police were notified of the attempt to cash the stolen lottery tickets, and Detective James Clark responded to the call. The Speedway attendant was able to provide a broad description of Johnson and Cabknor, so

Detective Clark set out in an unsuccessful effort to find them in the neighboring businesses. After viewing the Speedway surveillance footage, Detective Clark realized he had seen the couple standing outside a nearby Captain D's. So he returned there, approached Johnson and Cabknor, and arrested them. A search of Cabknor's purse incident to the arrest revealed numerous scratch-off lottery tickets.

At the police station, Johnson confessed to the robbery. He went on to provide details of the robbery that were not provided to him, and he was not shown the surveillance footage of the robbery. The details Johnson provided included: he approached the store on foot; held the gun in a manner consistent with the perpetrator in the security footage; pointed the gun at the clerk; had a gun in his right hand; stole cigarettes, lottery tickets, and cash; placed the stolen goods in a clear plastic garbage bag; and tried to get the clerk to open the safe, but she told him she could not. Going further, Johnson wrote, "This is me," on a still photo from the security video and signed his name.

During her interrogation, Cabknor consented to a search of the home where she and Johnson were staying. In the kitchen, police found scratch-off lottery tickets in the garbage can. Numerous packs of Newport cigarettes were found in a chest of drawers in the bedroom Johnson and Cabknor shared. Additionally, over $400 and a bag of coins were found in a purse in the shared bedroom. Finally, the police seized from the residence a blue coat, which was

later identified to be similar to the one worn by Johnson during the armed robbery.

The jury found Johnson guilty of first-degree robbery, for which the jury recommended a sentence of twenty years' imprisonment. Upon convicting Johnson of being a PFO 1, the jury enhanced the sentence to thirty-three years' imprisonment. And the jury found Cabknor, who was tried with Johnson, guilty of receiving stolen property less than $500. As part of a deal with the prosecution, Cabknor agreed to a twelve-month sentence, conditionally discharged for two years.

II. ANALYSIS.

A. The Trial Court's Inclusion of Superfluous Language in Johnson's First-Degree Robbery Jury Instruction was not Palpable Error.

Johnson argues the trial court erroneously included robbery-by-complicity language in the jury instruction for the charge of first-degree robbery; namely, "acting alone or in complicity with another." But at no point during the trial—neither when the court read the instructions to the jury nor when the Commonwealth mentioned the language during its closing argument—did Johnson's counsel make an objection. As a result, we will only review for palpable error.[2]

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[2] *See* RCr 10.26. Palpable error review is available to Johnson because the alleged error is in a properly given, yet defectively worded instruction. RCr 9.54(2) requires an objection in order to preserve the giving or failure to give of a jury instruction. We made clear in *Martin v. Commonwealth*, 409 S.W.3d 340, 346 (Ky. 2013), that palpable error review is appropriate when "a defendant's assignment of error is not that a particular instruction should not have been given, but that the given instruction was incorrectly stated." Such is the case here.

An error is palpable only if it is "easily perceptible, plain, obvious and readily noticeable" or "so grave in nature that if it were uncorrected, it would seriously affect the fairness of the proceedings."[3] Even if the error is palpable, we afford relief only "upon a determination that manifest injustice has resulted from the error."[4] Of course, manifest injustice is a substantial burden. Specifically, the error must "so seriously affect[] the fairness, integrity, or public reputation of the proceeding as to be 'shocking or jurisprudentially intolerable.'"[5] As we have continually reiterated, "what a palpable error analysis boils down to is whether the reviewing court believes there is a substantial possibility that the result in the case would have been different without the error.[6]"

Johnson directs our attention to a single phrase in the jury instruction on the first-degree robbery charge. Despite the admitted lack of any evidence Johnson was complicit with anyone—indeed, the trial judge frankly commented there was no evidence to support a complicity conviction—the instruction, nevertheless, read as follows:

> You will find the defendant, Christopher Johnson, guilty of Robbery in the First Degree under this instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

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[3] *Brewer v. Commonwealth*, 206 S.W.3d 343, 349 (Ky. 2006) (internal quotation marks omitted).

[4] *Commonwealth v. Jones*, 283 S.W.3d 665, 668 (Ky. 2009).

[5] *Id.* (quoting *Martin v. Commonwealth*, 207 S.W.3d 1, 4 (Ky. 2006)).

[6] *Brewer*, 206 S.W.3d at 349 (internal quotation marks omitted).

A. That in Jefferson County on or about September 23, 2011, he, *acting alone or in complicity with another*, stole business cash, cigarettes, and lottery tickets from Patricia Manning;

AND

B. That, in the course of so doing and with the intent to accomplish the theft, he used or threatened the immediate use of physical force upon her;

AND

C. That when he did so, he was armed with a deadly weapon as defined in these instructions, to wit: a handgun.

(Emphasis added.)

Plainly, the instruction includes complicity language perhaps allowing the jury to convict Johnson of first-degree robbery if it believed Johnson acted with someone else, the Commonwealth offering no evidence of complicity notwithstanding. So Johnson contends that including the words "acting alone or in complicity with another" was unduly prejudicial to him, resulting in manifest injustice because he was denied his guarantee of a unanimous jury to convict him. And Johnson argues the trial judge's comment regarding the absence of complicity in the case is tantamount to a directed verdict of acquittal on complicity. We disagree.

Johnson was indicted on a charge of first-degree robbery as well as complicity to commit first-degree robbery. At trial, as now seemingly acknowledged by both parties, the Commonwealth tacitly abandoned the complicity theory by offering no evidence to indicate Johnson was complicit with anyone as he robbed the convenience store. Ostensibly acknowledging

this abandonment, during a conversation with the Commonwealth regarding the jury instructions, the trial judge commented that complicity was not present in the case.

Attempting to equate the judge's comment about the absence of evidence supporting a complicity conviction with a ruling directing a verdict of acquittal on the complicity theory is misguided. If the trial judge's comment were considered a directed verdict of acquittal, of course giving an instruction involving complicity would infringe on Johnson's right of protection against double jeopardy and could potentially be palpable error. But, here, no directed-verdict ruling occurred.

The trial court heard and denied Johnson's motions for directed verdict, which occurred at three points in the trial proceeding before the discussion concerning the jury instructions; and Johnson does not challenge on appeal the trial court's rulings on the directed verdict motions. In none of the arguments concerning directed verdict did either party raise the issue of the complicity charge. While settling on the jury instructions, the trial court commented that the court removed the definition of complicity from the jury instructions because the Commonwealth presented no evidence. Arising as it does in this context, we are unconvinced by Johnson's argument that this statement by the trial court can be construed as an order directing a verdict on the complicity theory. The trial court's comment was not made in response to a timely motion for directed verdict nor was it intended as a substitute for a

proper directed-verdict ruling.[7] If defense counsel understood it as a directed verdict, there was sufficient opportunity to present the argument to the trial court.

Instead, in our view, the case of *Smith v. Commonwealth*[8] appears controlling. The facts of *Smith* are comparable to those presented here. Smith, along with two other individuals, was charged with first-degree robbery after executing a robbery of a small grocery store. During the robbery, Smith approached the clerk, demanded money from the cash register, and then struck the clerk with both his fists and a flashlight when she failed to respond adequately to his demand. After the group's arrest, Smith provided police with a statement confessing to the robbery and striking the clerk; but Smith did not admit to using a flashlight in the beating.

At trial, Smith's jury was given a "combination instruction,"[9] which specifically combined first-degree robbery and complicity. But the "Commonwealth's theory of the case was that Smith alone was the attacker. . . . Likewise, Smith never suggested that either [of his accomplices] had attacked the clerk."[10] Complicity language, however, remained in Smith's

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[7] Furthermore, permitting defense counsel to sit quietly while the trial judge freely discusses jury instructions with the Commonwealth and then to argue on appeal the comments serve as a directed appeal may encourage—or, at the least, permit—defense counsel to plant the proverbial bomb in the record, timed to detonate on appeal. This is a practice we discourage, with good reason.

[8] 366 S.W.3d 399 (Ky. 2012).

[9] Multiple theories of a crime presented in a single instruction. *Smith*, 366 S.W.3d at 403.

[10] *Smith*, 366 S.W.3d at 402.

jury instructions despite the absolute lack of any "evidence that anyone other than Smith had used force against the clerk[.]"[11]

Of course, as we acknowledged in *Smith*, "instructing on theories insufficiently supported by evidence is error."[12] A defendant's right to a unanimous verdict is implicated and possibly violated when unsupported theories of conviction find their way into jury instructions.[13] Even so, instructing on unsupported theories only becomes prejudicial error when "it is reasonably likely that some members of the jury actually followed the erroneously inserted theory in reaching their verdict."[14] If, on the other hand, "there is no reasonable possibility that the jury actually relied on the erroneous theory—in particular, where there is no evidence of the theory that could mislead the jury—then there is no unanimity problem."[15]

Applying this principle in *Smith*, we found "the complete absence of any evidence that [Smith's accomplices] used force against the clerk [indicated] there was absolutely no reason for any juror to believe that the alternative could have occurred."[16] The circumstances of the present case are virtually identical with the exception that the Commonwealth mentioned the complicity language in its closing argument. We see no reason to depart from the

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[11] *Id.*

[12] *Id.* at 403. If the error is preserved, "it must always cause the conviction to be reversed." *Id.* (citing *Burnett v. Commonwealth*, 31 S.W.3d 878, 883 (Ky. 2000).

[13] *See Smith*, 366 S.W.3d at 403-04 (quoting *Travis v. Commonwealth*, 327 S.W.3d 456, 463 (Ky. 2010)).

[14] *Smith*, 366 S.W.3d at 404 (quoting *Travis*, 327 S.W.3d at 463).

[15] *Id.* (emphasis omitted).

[16] *Id.*

reasoning of *Smith*. The instant jury was presented with no evidence that would possibly lead them to believe Johnson was involved in a complicit enterprise. And Cabknor, Johnson's apparent accomplice, was not even charged with, let alone tried for, robbery of any degree.

We are unable to find the trial court's error harmful, much less resultant in manifest injustice. Simply put, the portion of the instruction referencing complicity was erroneous, superfluous language that in light of the evidence, in no way subtracted from the unanimity of Johnson's jury verdict. That being said, we encourage trial courts to be more careful in instruction of the jury.[17] Courts should always endeavor to eliminate extraneous language from jury instructions that may confuse or mislead the jury—or worse, violate the rights of the defendant.

B. Regardless of Error, the Trial Court's Refusal to Give an Instruction for Receiving Stolen Property Over $500 was Harmless.

Johnson requested an instruction on the lesser offense of receiving stolen property over $500. The evidentiary basis for Johnson's request was his own testimony that he simply happened upon an overnight bag full of cigarettes, cash, and lottery tickets on his way to a local fruit stand Friday morning. Johnson, understanding this to be incredibly fortuitous, admitted to believing the items were stolen. The trial judge rejected Johnson's request for a receiving-stolen-property instruction, reasoning that the charge was not a

[17] Additionally, we urge trial counsel to be more specific when moving the court for directed verdict. Counsel here only requested a directed verdict on the broad basis of first-degree robbery, never mentioning complicity. The trial court properly denied those motions because the Commonwealth met its burden regarding first-degree robbery. The theory of complicity, however, was never mentioned.

lesser-included offense of first-degree robbery. This issue is preserved for our review, and we review issues of this nature for an abuse of discretion.

At the outset, it is important to clarify the issue. The trial judge apparently believed Johnson was requesting an instruction for a lesser-included offense. Acting on that belief, the trial judge correctly denied the instruction. Our case law is settled that receiving stolen property is not a lesser-included offense of robbery.[18] Were that the issue presented, we would cease our review; but the issue is not Johnson's request of a lesser-included offense. Instead, Johnson requested a lesser, uncharged offense in his attempt to present to the jury an alternative theory of the crime and a full defense to robbery. To argue otherwise is missing the point.

Generally speaking, a trial court is obligated to "instruct the jury on the whole law of the case[;] and this rule requires instructions applicable to every state of the case deducible from or supported to any extent by the testimony."[19] However, when dealing with a lesser, uncharged crime—even if the evidence supports a guilty verdict on the lesser offense—the defendant is not necessarily entitled to a jury instruction on that lesser offense.[20] "An instruction on a separate, uncharged, but 'lesser' crime—in other words, an alternative theory of the crime—is required only when a guilty verdict as to the alternative crime

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[18] *See Brown v. Commonwealth*, 313 S.W.3d 577, 627 (Ky. 2010).

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

[20] *Hudson v. Commonwealth*, 202 S.W.3d 17, 21 (Ky. 2006).

would amount to a defense to the charged crime, *i.e.*, when being guilty of both crimes is mutually exclusive."[21]

According to Johnson, and in direct opposition to the Commonwealth's proof at trial, he stumbled upon a bag full of cigarettes, cash, and scratch-off lottery tickets. After finding the bag, Johnson returned to Cabknor's house where he was staying. Johnson stashed the money and cigarettes in Cabknor's dresser. He and Cabknor scratched off the lottery tickets. According to the Commonwealth, Johnson robbed the store and stole the items Johnson claims he merely discovered. An individual cannot both steal and find items. So, given Johnson's testimony, the crimes of first-degree robbery and receiving stolen property over $500 are mutually exclusive.

Here, however, the evidence supporting Johnson's guilt of first-degree robbery overwhelms any evidence to the contrary. Indeed, Johnson confessed to the crime and signed a photograph of the scarfed bandit with, "This is me." The only evidence supporting Johnson's account of the crime is his own testimony. Considering the totality of the evidence, we do not believe the "evidence would permit the jury to *rationally* find the defendant not guilty of the primary offense, but guilty of the lesser offense."[22] We take no position on whether the trial court erred by not offering the receiving stolen property instruction because, error or not, it was harmless. We cannot say the

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[21] *Id.* at 22.

[22] *Fields v. Commonwealth*, 219 S.W.3d 742, 749 (Ky. 2007) (quoting *Thomas v. Commonwealth*, 170 S.W.3d 343, 349 (Ky. 2005)).

judgment was substantially swayed by the absence of a receiving stolen property instruction.[23]

III. CONCLUSION.

For the foregoing reasons, we affirm Johnson's conviction and associated sentence.

All sitting. All concur.

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[23] *See Crossland v. Commonwealth*, 291 S.W.3d 223, 233 (Ky. 2009).

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