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RENDERED: SEPTEMBER 24, 2015
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2013-SC-000728-MR

JESSICA HAILEY ROBINSON — APPELLANT

V.

ON APPEAL FROM ROCKCASTLE CIRCUIT COURT
HONORABLE JEFFREY THOMAS BURDETTE, JUDGE
NO. 12-CR-00017-002

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

REVERSING IN PART AND AFFIRMING IN PART

The Appellant, Jessica Hailey Robinson, was convicted of wanton murder, complicity to first-degree robbery, and complicity to manufacturing methamphetamine and was sentenced to 26 years' imprisonment. In her matter of right appeal, she raises five claims of error: (1) that the manufacturing methamphetamine charge should have been severed and tried separately from the murder and robbery charges; (2) that evidence of her alleged involvement in a prior theft was inadmissible character evidence; (3) that evidence of her prior conviction of facilitation to manufacturing methamphetamine was inadmissible; (4) that the trial court should have granted a directed verdict on the methamphetamine charge; and (5) that the trial court erred in failing to give criminal facilitation instructions on all the charges.

Because there was insufficient evidence to sustain the manufacturing methamphetamine conviction, that conviction must be reversed. Because we do not believe the remaining claims warrant reversal of the murder and robbery convictions, we affirm those convictions and remand the case for entry of a revised judgment of conviction and sentence consistent with this opinion.

I. Background

In the days leading up the shooting death of Jackie Bullock, his "friends"—Bobby Peters, Hanna Hunsucker (Peters' girlfriend), Josh Cameron, Gary Lee Kirby, and Jessica Robinson—partied and consumed methamphetamine at Peters' house in Rockcastle County, Kentucky. At some point during this time, at least some members of the group hatched a plot to rob Bullock of his prescription pain pills and money. Bullock was known to fill prescriptions for pain pills in Georgia and was alleged to sell some of the drugs. The group believed Bullock had just returned from Georgia and believed he would have a ready supply of pills. The primary issue at trial was Robinson's role in this plot, and the evidence introduced at trial was conflicting on this point and others.

On the evening of November 30, 2011, Bullock was at home—where he lived with his father—when Robinson called and invited him over to Peters' house. His father testified that Bullock left around 9:30 p.m., and according to his father, there was nothing unusual about that.

According to one of several statements Robinson made to police,[1] she called Bullock to get money for a medical appointment the next day. She also stated, in one of the statements, that Peters said something about robbing Bullock about thirty minutes before Bullock arrived, and Kirby said he would do it because he had a gun. Robinson claimed at times that she did not care whether they robbed Bullock and at other times that she did not want them to rob him. She consistently stated that she did not help them do it.

According to statements from the others, however, Robinson had helped plan the robbery attempt, implying that the call to Bullock was part of that plan. They claimed that part of the impetus behind her participation was that Bullock had been claiming to have had sex with Robinson and Hunsucker, which angered them. The plan was to rob Bullock at Peters' house.

At some point after Bullock arrived at Peters' house, he and Robinson left in his car to get soda and cigarettes. They also stopped at a cemetery to talk. Bullock produced four pain pills, all he had, and they took them.[2] While they were there, Robinson claimed, Hunsucker called her and told her that they were ready to rob Bullock.

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[1] On December 2, 2011, Robinson reported the homicide to Pulaski County police and gave a recorded statement. That same day, Rockcastle County Deputy Sheriff Matt Bryant, who was investigating the crime, followed up with her and she provided another recorded statement. And in the weeks that followed, she gave three additional recorded statements. Each recording was played for the jury at trial. Robinson did not take the stand.

[2] According to his father, Bullock received prescription pain pills from a clinic in Georgia, purportedly related to injuries sustained in a four-wheeler accident that occurred when he was in seventh grade. On the night of his robbery and murder, however, his father had given him four of his own pain pills because Bullock had failed to fill his prescription.

According to Robinson, she told Hunsucker repeatedly that Bullock did not have his pills and tried to get them to not go forward with the robbery. Hunsucker, however, told Robinson that Kirby and Cameron were going to the cemetery to commit the robbery. According to Robinson, she told Bullock to go back to the house from the cemetery at that point to avoid the robbery. She claimed she was "scared" and "didn't want him to be robbed."

According to Josh Cameron, who was still at the house, the phone call was to let them know that the plan was "a go." He and Kirby donned masks and dark clothing and hid outside Peters' house by a fence, waiting for Bullock and Robinson to return.

Upon arriving back at the house, Bullock and Robinson went inside briefly. They found Hannah claiming Kirby was sick in a bathroom with the door closed. Bullock stayed for a short time, and then walked outside. At that point, Robinson claimed, she discovered that Kirby was not in the bathroom.

Robinson's statements differed dramatically as to what she did next. She initially stated that she witnessed the robbery and shooting from inside the house looking through a window.[3] Police confronted her with the fact that it would have been impossible for her to see the shooting from the angle she claimed, and she later changed her story. In later interviews, she claimed that she went back outside with Bullock because she was worried about something bad happening to him.

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[3] Robinson later claimed Kirby told her to tell police that she had been inside the house when she witnessed unknown assailants shoot Bullock outside.

In her fourth interview, she denied getting in the car with Bullock to leave. She stated that she thought he was safe when she saw him drive off and that otherwise she would have tried to stop the robbery because she did not think the others would hurt her.

In her fifth interview, she finally admitted to getting into the car to leave with Bullock. She claimed that upon hearing that Kirby was in the bathroom (and knowing he was not), she was scared and went back outside, planning to leave with Bullock. She claimed she got in the car at that time but did not tell the victim that Kirby was not in the bathroom, because she did not want him to think she was involved in the robbery the others had planned. She seemed to think she could keep the robbery from happening by being in the car, stating that she wanted to "protect him" and that she wanted to "keep it all from happening without having to explain to him." (This seems to echo her comment in the fourth interview that she did not think the others would hurt her, which is why she thought she could stop the robbery if necessary.)

Regardless of which, if any, version of those events actually happened, there is little question what happened to Bullock. He got in his car to leave. After traveling a short distance down the driveway, Kirby and Cameron jumped out, and Kirby shot Bullock.

The car continued down the driveway and came to a stop after going through a fence. Robinson claimed in her last statement that she got blood on her shirt because she grabbed Bullock and that she thought he was dead before the car reached the end of the driveway. A neighbor who lived nearby testified to hearing a gunshot sometime between 10:00 p.m. and midnight.

According to Cameron, they had not intended to kill Bullock and had just wanted his pills and money. Peters also testified that their only intention was to take the victim's pills, believing it unlikely that Bullock would call the police about his pills being stolen because he was a drug dealer, but that the robbery had gone bad because they had been too long without sleep (and on methamphetamine). And Hunsucker testified that she did not know why Kirby killed Bullock and that she had been shocked and devastated by it. In her own statements, Robinson claimed not to know why Kirby pulled the trigger, though she suggested that it was because Bullock was not going to stop the car.

After the shooting, everyone returned to the house. Cameron had apparently taken the gun from Kirby, and he pointed it at all of them and threatened them not to say anything. All five then got in a car and left. They first dropped Cameron off somewhere, and he got rid of the gun (which was never recovered by police). Then Robinson and Kirby went to Robinson's boyfriend's house where, according to Robinson, Kirby made them burn his and her clothing and the mask. Robinson claimed that she revealed the shooting to her boyfriend and that she claimed, in Kirby's presence, that Kirby had shot Bullock for trying to rape her.

Bullock's car was found later that day, and it was initially believed that he died from wrecking his car. That he had been shot was not revealed until a medical examination. In fact, when Robinson first went to the police, claiming she wanted to report a murder, they were not aware that Bullock had been killed.

In the course of the ensuing investigation, police found a bag in Peters' bedroom (which he shared with Hunsucker) containing items associated with drug use. A one-step meth lab was also found in the couple's room.

Each member of the group was indicted for murder, robbery, and various methamphetamine offenses. Peters, Hunsucker, and Cameron entered guilty pleas to complicity to murder. Peters and Cameron also pleaded guilty to methamphetamine offenses. They were sentenced to 20 years, 20 years, and 25 years, respectively. And all three testified for the Commonwealth at Robinson's trial. Kirby had also been convicted, albeit of murder as a principal, and refused to testify.

The jury found Robinson guilty of wanton murder, complicity to first-degree robbery, complicity to manufacturing methamphetamine, and being a second-degree persistent felony offender. The jury recommended prison sentences of 22 years for wanton murder, 10 years enhanced to 20 years for complicity to first-degree robbery, and 15 years enhanced to 22 years for complicity to manufacturing methamphetamine; and it recommended that these sentences run concurrently for a total prison sentence of 22 years. The trial court departed upward from the jury's recommendation, choosing instead to have four years of the methamphetamine sentence run consecutively to the murder sentence. Robinson was thus sentenced to a total of 26 years' imprisonment.

Robinson now appeals to this Court as a matter of right. *See* Ky. Const. § 110(2)(b). Additional facts will be developed as necessary in the discussion below.

II. Analysis

A. The trial court erred in failing to grant a directed verdict on the manufacturing methamphetamine charge.

Robinson first claims that the Commonwealth produced insufficient evidence of her alleged participation in manufacturing methamphetamine and that the trial court should have therefore granted her motion for directed verdict on that charge.

A reviewing court deciding whether a defendant should have been granted a directed verdict of acquittal must determine whether "under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt." *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991). A trial court should not grant a directed verdict "[i]f the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty." *Id.* And when assessing the sufficiency of the evidence, the court is required to "draw all fair and reasonable inferences from the evidence in favor of the Commonwealth" and "assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given such testimony." *Id.* The prosecution must produce evidence of substance to support a conviction; a mere scintilla will not do. *Commonwealth v. Sawhill*, 660 S.W.2d 3, 5 (Ky. 1983).

The proof presented of Robinson's alleged involvement in manufacturing methamphetamine was scant indeed. There was no direct evidence of Robinson herself manufacturing methamphetamine. The Commonwealth contends that

her involvement was established by Hunsucker's affirmative response to the questions: "All of you were making meth? It was an ongoing thing, right?"

The Commonwealth's reliance on this response is misplaced for two reasons. First, because the prosecutor asked two questions in one, it is at best ambiguous as to what Hunsucker was actually answering "yes" to. And the second and perhaps more significant reason is that, considering the entire line of questioning in which that response was given, it is clear that Hunsucker's testimony was actually that all of her friends were *not* making methamphetamine with her. Indeed, Hunsucker clarified on cross-examination that only she and Peters were manufacturing the drugs and that she had never seen Robinson do so.

Nevertheless, the Commonwealth contends that there was sufficient other evidence to allow the jury to find Robinson guilty beyond a reasonable doubt of manufacturing methamphetamine or at least complicity[4] to do so. This includes, of course, the methamphetamine lab found in Peters' and Hunsucker's bedroom. The Commonwealth also showed that manufacturing was occurring at Peters' residence on an ongoing basis and that Robinson

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[4] Kentucky's complicity statute, KRS 502.020, provides, in part:

> (1) 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; or
>
> (c) Having a legal duty to prevent the commission of the offense, fails to make a proper effort to do so.

knew about it. It was also shown that Robinson and the others had excessively consumed the products of those endeavors over extended periods of time. And there was evidence of Robinson's possible knowledge of how to manufacture the drug.[5] Finally, the Commonwealth points to the admission of Robinson's prior conviction for facilitation to manufacturing methamphetamine, which it claims shows intent, knowledge, and motive (a claim which Robinson disputes in arguing that the admission of this evidence was error[6]). The Commonwealth thus argues that because there was evidence that Robinson had the means and opportunity to cook meth, had the knowledge to do so, and had the intent because she was a user, it was reasonable for the jury to find her guilty of manufacturing methamphetamine. That is not correct.

The problem for the Commonwealth is that it failed to produce even a scintilla of evidence that Robinson was in any way actually involved or complicit in the manufacturing at Peters' house, whether as solicitor, conspirator, or aider. There was no proof, for example, that she helped purchase or acquire any raw materials used in manufacturing the drug, or that she taught the others how to cook meth, or that she was involved in the decision to begin cooking the drug.

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[5] Hunsucker testified that she thought Robinson knew how to "cook" methamphetamine but had never seen her do so.

[6] Because we conclude that Robinson was entitled to a directed verdict of acquittal on the methamphetamine charge, the issue of the admissibility of this conviction is moot. The jury was admonished at the time to consider that proof only as evidence of intent or knowledge of manufacturing methamphetamine. She does not suggest that this proof affected the robbery and murder verdicts, and this Court sees little chance of any such effect. Therefore, we need not and do not address it further.

Instead, there was only proof of her presence and knowledge of the crime, and her apparent desire to use methamphetamine. It should go without saying that "one's mere presence at the scene of a crime is not evidence that such one committed it or aided in its commission." *Rose v. Commonwealth*, 385 S.W.2d 202, 204 (Ky. 1964). "Likewise, mere knowledge that a crime is occurring is insufficient to support a conviction of that crime, as is mere association with the persons involved at the time of its commission." *Hayes v. Commonwealth*, 175 S.W.3d 574, 590 (Ky. 2005) (citation omitted). And "[m]ere acquiescence in, or approval of, the criminal act, without cooperation or agreement to cooperate in its commission, is not sufficient to constitute one an aider and abettor." *Moore v. Commonwealth*, 282 S.W.2d 613, 614–15 (Ky. 1955). (An aider and abettor is equated to an accomplice under the modern Penal Code. *See* KRS 505.020 Ky. Crime Comm'n/LRC Cmt. (1974) (quoting this language from *Moore* but substituting "accomplice").) Applying these longstanding principles, we must conclude the Commonwealth's proof on the methamphetamine charge was insufficient.

The circumstantial evidence relied upon to prove Robinson manufactured or was complicit in manufacturing methamphetamine, even when viewed in the light most favorable to the Commonwealth, was simply too speculative and tenuous. And as a result, it was clearly unreasonable for the jury to have found guilt on that charge. Therefore, Robinson's conviction for complicity to manufacturing methamphetamine must be reversed. Because this reversal operates as an acquittal, she is not subject to retrial on that charge.

B. The failure to sever the methamphetamine charge from the murder and robbery charges was not reversible error.

Before trial, Robinson moved to have the manufacturing-methamphetamine charge severed from the murder and robbery charges and tried separately. The trial court declined to do so, and the charges were tried together.

Joinder of multiple offenses is appropriate "if the offenses are of the same or similar character or are based on the same acts or transactions connected together or constituting parts of a common scheme or plan." RCr 6.18. Trial courts have broad discretion when making joinder decisions, and such decisions will not be reversed on appeal absent a showing of clear abuse of discretion and prejudice. *Jackson v. Commonwealth*, 20 S.W.3d 906, 908 (Ky. 2000).

When assessing whether joinder resulted in prejudice, the first inquiry is typically, "with KRE 404(b) particularly in mind, whether evidence necessary to prove each offense would have been admissible in a separate trial of the other." *Peacher v. Commonwealth*, 391 S.W.3d 821, 838 (Ky. 2013) (internal quotation marks omitted). "If not, if evidence of the separate offenses would not have been mutually admissible at separate trials, then we have asked further whether the jury's belief as to either offense was 'substantial[ly] like[ly] ... [to have been] tainted' by inadmissible evidence of the other." *Id.* at 839 (quoting *Rearick v. Commonwealth*, 858 S.W.2d 185, 188 (Ky. 1993)) (alterations in original). Indeed, when there is a lack of mutual admissibility, the misjoinder in effect results in a KRE 404(b) error that could nevertheless be found harmless

under our harmless error standards. *Id.* That is, an erroneous joinder decision will not be reversed unless the evidence related to the improperly joined charges "substantial[ly] influence[d]" the jury's verdict on the other charges. *Winstead v. Commonwealth*, 283 S.W.3d 678, 689 (Ky. 2009) (quoting *Kotteakos v. United States*, 328 U.S. 750, 765 (1946)); *see also id.* at 688–89 ("A non-constitutional evidentiary error may be deemed harmless ... if the reviewing court can say with fair assurance that the judgment was not substantially swayed by the error.").

Even assuming the trial court abused its discretion in refusing to sever the manufacturing methamphetamine charge, the misjoinder here is not reversible error. This Court simply is not convinced that the jury's verdict finding Robinson guilty of wanton murder and complicity to first-degree robbery was substantially swayed by the joined drug charge and the evidence related to it.[7] There was significant evidence that Robinson was involved in the robbery plot that resulted in Bullock's murder. It is apparent that the jury chose to disbelieve Robinson's claim of innocence based on this evidence as well as the numerous inconsistencies in the recorded statements she gave to police. Because we cannot say that the evidence that methamphetamine was being manufactured at the Peters' house and that Robinson had previously been convicted of facilitation to manufacturing methamphetamine substantially

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[7] In light of our conclusion that Robinson is entitled to a directed verdict of acquittal on the manufacturing meth charge, the extent to which she was prejudiced by the jury hearing the murder and robbery evidence when considering guilt or innocence on the drug charge is irrelevant to our analysis here.

influenced the jury's decision on the murder and robbery charges, the failure to sever the manufacturing charge does not require reversal.

C. The admission of evidence of an alleged prior theft was harmless error.

Before trial, the Commonwealth gave notice under KRE 404(c) of its intent to introduce evidence that Robinson allegedly stole a firearm and other items from a man in Mercer County more than eight months before Bullock's robbery and murder. She was apparently never convicted or even indicted for the alleged offense. The trial court initially ruled the evidence inadmissible under KRE 404(b).

As the trial unfolded, however, the Commonwealth again sought to introduce this proof. The following exchange occurred during the cross-examination of Hanna Hunsucker:

> Defense Counsel: Has [Robinson] ever talked to you about being called a "pill whore"?
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> Hunsucker: Yes.
>
> Defense Counsel: How was her reaction about that?
>
> Hunsucker: Her feelings was hurt.
>
> Defense Counsel: Her feelings were hurt? She offer to kill anybody over that?
>
> Hunsucker: Not that I'm aware of.
>
> Defense Counsel: Rob them?
>
> Hunsucker: No.
>
> Defense Counsel: Beat them or anything?
>
> Hunsucker: No.

Hunsucker also testified later that she could not recall Robinson ever making any threats toward Bullock or anybody else.

On redirect examination, the Commonwealth moved for permission to ask Hunsucker about the prior alleged theft in Mercer County, arguing that Robinson had "opened the door" to this evidence by putting on testimony of her good character. The trial court agreed that defense counsel had opened the door to limited character evidence by having Hunsucker depict Robinson as someone who would not rob or kill or threaten anyone and, over defense objection, allowed the Commonwealth to ask the witness about the prior incident in Mercer County. Questioning then proceeded as follows:

> Commonwealth: I was asking you if you have any knowledge about the incident in Harrodsburg.
>
> Hunsucker: Yes, sir.
>
> Commonwealth: Do you know about that?
>
> Hunsucker: Yes
>
> Commonwealth: Did [Robinson] talk to you about that?
>
> Hunsucker: Yes.
>
> Commonwealth: Okay, what'd [Robinson] tell you about that?
>
> Hunsucker: I really can't recall. I just know that we discussed it, but I can't remember the details.
>
> Commonwealth: What was the general parameters of it?
>
> Hunsucker: That she had a, that they had like allegedly, that some man had allegedly put charges on her or something for robbery or theft or something. I think it was theft.
>
> Commonwealth: Did she tell you anything about the details of it?
>
> Hunsucker: No, sir.
>
> Commonwealth: Had she done it?

Hunsucker: No.

Commonwealth: Or said anything?

Hunsucker: She just said that she was charged in another county for theft or something.

At that point, Robinson's counsel objected. The trial court sustained the objection and admonished the jury to disregard whether Robinson was charged or uncharged. Questioning continued as follows:

Commonwealth: Did she tell you any details about that?

Hunsucker: No.

Commonwealth: So you have no personal knowledge of the details of it?

Hunsucker: No.

Robinson maintains on appeal that this line of questioning was irrelevant and prejudicial, and violated KRE 404(b)'s bar against evidence of other bad acts to show action in conformity therewith. She disputes the trial court's finding that she had opened the door to character evidence, arguing that defense counsel's questions did not amount to asking whether she was the type of person who would rob or kill but, rather, whether she knew if Robinson had done so after she was insulted. And she claims that defense counsel's questions were a proper response to the Commonwealth's theory that Robinson had been angry with Bullock over his comments and wanted to rob him for revenge.

In arguing that there was no error, the Commonwealth first responds that Robinson admitted she opened the door to questioning about the prior theft when defense counsel stated at trial, "Obviously, judge, I'm standing on

one foot here because it looks like I might have shot it." This argument is not well-taken because it ignores the rest of the discussion during which defense counsel vehemently argued against her questions being construed as character evidence and against the admissibility of the Commonwealth's proffer. And how weak or strong trial counsel may have personally believed a given argument to be is irrelevant to this Court's assessment of the merits of the issue that was argued.

The Commonwealth also contends that its questions to Hunsucker did not actually introduce any prior acts or character evidence. According to the Commonwealth, the jury was admonished to disregard that Robinson had told Hunsucker she had been charged with theft in another county—purportedly, "the only evidence Hunsucker admitted to"—and, therefore, the only evidence the jury heard (and did not disregard) was that Hunsucker "had no personal knowledge of any prior robberies or thefts." This is flat-out wrong. The evidence elicited from Hunsucker was that she recalled being told about an incident in Harrodsburg where a man alleged that Robinson had committed a theft or a robbery, but that she knew no details. This questioning was clearly in reference to a particular prior occurrence, and regardless of whether the witness admitted to having personal knowledge or testified to specific details, it was nevertheless evidence of an alleged prior bad act by Robinson. Therefore, the rules of evidence governing proof of specific instances of prior conduct govern the admissibility of this evidence.

Evidence of other bad acts by the defendant is generally inadmissible as proof that the defendant acted similarly in the instant case, but can be

admitted for some "other purpose"—e.g., to prove motive, identity, intent, knowledge, etc. KRE 404(b). The testimony of the alleged Mercer County theft falls squarely within this prohibition because it was evidence of Robinson's bad character for stealing and was offered for no other legitimate purpose.

And character evidence, when admissible, is generally limited to general reputation or opinion testimony. KRE 405(a). Character evidence in the form of specific instances of conduct, however, may be introduced for impeachment purposes during cross-examination of a witness that has testified about the defendant's good character. KRE 405(b). In such situations, "it is proper to inquire if the witness has heard of or knows about relevant specific instances of conduct." *Id.* The scope of cross-examination under this rule is limited to other acts that are "relevant" to the character testimony provided by the witness. As our predecessor court explained, "inquiry may be made only about those acts of misconduct having some relation to the particular trait of character which the defendant has put in issue." *Broyles v. Commonwealth*, 267 S.W.2d 73, 74 (Ky. 1954). For example, "if a defendant offers direct testimony about character for honesty (or peacefulness) cross-examination would be limited to questions about specific acts of dishonesty (or violence)." Robert G. Lawson, *The Kentucky Evidence Law Handbook* § 2.25[4][b], at 125 (5th ed. 2013).

Therefore, assuming the questioning by defense counsel did put in issue Robinson's character for not being one to offer or threaten to kill, rob, or beat people that call her bad names, the scope of the Commonwealth's redirect examination was limited to asking about specific instances of conduct where she actually did something that contradicts that character—i.e., that she had

threatened bodily harm to someone in retaliation for being insulted. But the Commonwealth inquired about an alleged prior theft which involved none of those characteristics. It was therefore irrelevant to impeach the character witness's credibility because it did not contradict her prior testimony. This evidence clearly exceeded the permissible scope of cross-examination under KRE 405(b), was prohibited by KRE 404(b), and should have been excluded.

But because this Court can say with fair assurance that the erroneous admission of the evidence of the alleged Mercer County theft did not substantially sway the jury's decision, it is harmless. *Winstead v. Commonwealth*, 283 S.W.3d 678, 688–89 (Ky. 2009). The reference to Robinson's prior alleged theft was fleeting, and the evidence of her guilt was substantial. It is unlikely that the evidence of the theft played any role in the jury's decision-making, much less a substantial one.

D. The trial court did not err in refusing to instruct on criminal facilitation of the murder and robbery.

Robinson argues that the trial court erred in refusing to give facilitation instructions for the murder and robbery charges.[8] Instead, the court instructed the jury on intentional murder as a principal and, separately, complicity to murder (which included both intentional and wanton theories) as alternatives. The court also instructed, as lesser included offenses,[9] on wanton murder,

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[8] Robinson also argues that she was entitled to a facilitation instruction on the manufacturing methamphetamine charge, but our holding that she was entitled to a directed verdict of acquittal on that charge renders that issue moot.

[9] The court, however, did not follow the usual method of giving instructions on offenses and lesser included offenses, with the jury first considering the highest offense and proceeding to the next charge only if it finds the defendant not guilty of the higher charges. Instructions on lesser included offenses are usually prefaced with

second-degree manslaughter, and reckless homicide, all with Robinson as a principal through her participation in the robbery. As to robbery, the court gave instructions on first-degree robbery and, again separately, complicity to first-degree robbery.

Generally, a trial court must give any requested instruction that is supported by a reasonable view of the evidence. *Monroe v. Commonwealth,* 244 S.W.3d 69, 75 (Ky. 2008). An instruction on facilitation as a lesser included offense of complicity "is appropriate if and only if on the given evidence 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, 150–51 (Ky. 2001) (quoting *Skinner v. Commonwealth,* 864 S.W.2d 290, 298 (Ky. 1993)). Here, the greater charges were complicity to murder and robbery, and the lesser charges would have been facilitation of murder and robbery. Had the jury been instructed on and convicted Robinson of facilitation, her sentence would have been radically different, as facilitation under these circumstances would have been only a Class D felony. KRS 506.080(1).

A person is guilty of criminal facilitation if, "acting with knowledge that another person is committing or intends to commit a crime, he engages in

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language like "If you do not find the Defendant guilty of Murder under Instruction No. ___, you ...." 1 William S. Cooper & Donald P. Cetrulo, *Kentucky Instructions to Juries, Criminal* § 3.27, at 3-43 (5th ed. 2008). The court here did not employ such language in its instructions. Rather than lay out the various levels of homicide as a hierarchy through which the jury was to proceed in a linear fashion, the court instead laid out all the levels of homicide in parallel, with the jury free to consider them all in reaching a verdict and with nothing directing them to an order in which to consider the offenses.

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." KRS 506.080. Criminal liability for complicity, on the other hand, is predicated on the accomplice[10] intending that a crime be committed and participating somehow in the principal actor's commission of the crime. *See* KRS 502.020. Both the facilitator and the accomplice act with the knowledge that the principal actor is committing or intends to commit a crime; but the accomplice acts with the additional "inten[t] that the crime take place," while the facilitator has no such intent. *Webb v. Commonwealth*, 904 S.W.2d 226, 228 (Ky. 1995); *see also Perdue v. Commonwealth*, 916 S.W.2d 148, 160 (Ky. 1995) ("Facilitation reflects the mental state of one who is 'wholly indifferent' to the actual completion of the crime."). In other words, "a[n accomplice] must be an instigator, or otherwise invested in the crime, while a facilitator need only be a knowing, cooperative bystander with no stake in the crime." *Monroe v. Commonwealth*, 244 S.W.3d 69, 75 (Ky. 2008).

Robinson argues that there was evidence that she either was indifferent towards the robbery or did not want it to be committed, that she knew of the plot to rob Bullock, and that she provided the opportunity for the robbery.

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[10] Though our case law frequently uses the term *complicitor* to refer to a person who commits a crime through complicity, the better term is *accomplice*. In fact, the commentary to the complicity statute uses the term "accomplice." KRS 505.020 Ky. Crime Comm'n/LRC Cmt. (1974). It is unclear whether *complicitor* is even properly a word, though some courts, including those in Colorado and some federal courts in Ohio, have used it. The term *complicitor* does not even appear in the most recent edition of *Black's Law Dictionary*. Instead, *complicitor* appears to have been developed to parallel the term *facilitator* and to be a back-formation from the term *complicity*, but that term already "derives from the idea of being an *accomplice*." Bryan A. Garner, *Garner's Dictionary of Legal Usage* 187 (3d. ed. 2011) (emphasis added).

The Commonwealth argues that Robinson could not have been indifferent towards the robbery even under her own theory because she claims to have actively opposed the robbery on the phone. But that is a specious view of the term *indifferent*. A person who opposes an offense but nevertheless provides the means of its commission and has knowledge that it will be committed is on the right side of the argument, and legally is sufficiently *indifferent* to allow a conviction for facilitation. "Indifference" is used to indicate a lack of desire that the crime *be* committed, as well as a lack of care one way or the other. It is simply an absurdity to argue that if a person does not want a crime to occur, then she is guilty of a crime. And if the jury believed such proof, a conviction for complicity would certainly be improper because the accused would not intend that the crime be committed.

There was also ample evidence that Robinson knew of the plot to rob Bullock by the time he arrived at Peters' house. Her own statements were that after she called Bullock, the others mentioned the robbery plot.

Where Robinson's claim to entitlement to a robbery-facilitation instruction fails is the requirement of providing the means or opportunity for the crime. She argues that she did so, with knowledge and indifference, "by coming to the residence with [Bullock]." The problem, however, is that Robinson's own statements—the only evidence from which a jury could possibly find mere facilitation—undermine this theory of her involvement. In her fourth and fifth interviews, Robinson stated that she was trying to get Bullock out of the line of fire, so to speak, and avoid the robbery that was then allegedly coming to them by having him leave the cemetery and return to the

house. Far from trying to provide an opportunity for the robbery, she was, according to her own statements, trying to remove the opportunity. It just happened that the robbers, Kirby and Cameron, had not gone to the cemetery and instead had waited at the house. At least based on her statements, Robinson could not have known of this, and thus by returning to the house with Bullock, she did not knowingly provide the opportunity for the robbery. An unknowing patsy is not a facilitator.

There is little doubt that a jury could have disbelieved this statement, but that would not call for a facilitation instruction. A jury would have no reason to disbelieve that single point of her statement—that she returned to the house to avoid a robbery—and simultaneously believe that she knew the robbery would occur upon her return to the house but was indifferent toward its commission. If the jury was to disbelieve her, it would have disbelieved her entire statement.

At that point, a reasonable jury could only believe one of two things: (1) that Robinson was lying about everything and, instead, was part of the planning (which the others claimed was the case, going so far as to suggest she was the instigator), or (2) that she was wholly innocent, having only knowledge of the plot to rob and trying, lamely, to foil it as it played out. Mere knowledge of the robbery plot is insufficient to create facilitator liability; she also had to have provided the means or opportunity.

Robinson has not suggested that she provided the opportunity by initially luring the victim to the house by calling him. But even if she had, that also does not establish a facilitation offense. The testimony shows that Bullock

went to the house initially because of a phone call from Robinson (this is backed up by the victim's father). Given the whole evidence, the jury could have believed that she did this as part of the robbery plot she had helped plan. But in her own statements, which are the best support for a facilitation instruction, she claimed that she did not get him to come to the house for the robbery plan but to get money for a medical appointment the next day. She claimed not to have learned of the robbery plot until *after* she had called the victim to come over. Again, the jury is left to conclude she is innocent of any offense defined in the penal code or that she was a full participant (in that they could believe she lured him to the scene in the first place with the intent to rob him).

Thus, Robinson was not entitled to a robbery-facilitation instruction. There is no reasonable view of the evidence that would lead a jury to find her not guilty of complicity to the robbery but guilty of facilitation. The evidence established only two possible stories: either she was a full accomplice and conspirator or she had knowledge of the plot but was otherwise innocent of any crime.

Robinson also would not be entitled to a murder-facilitation instruction if only for the simple reason that she was not entitled to a robbery-facilitation instruction, as explained above. But even if she was entitled to a robbery-facilitation instruction, the evidence would not support an instruction for murder because there is no evidence at all that she knew of a plot to kill the victim but was indifferent toward it. Indeed, most of the proof shows that Bullock's killing was a surprise to everyone who testified or whose statements

were admitted into evidence.[11] So even if Robinson had known of and provided the opportunity for the robbery, there is no evidence that she knew of a plan to kill Bullock but was indifferent.

III. Conclusion

For the reasons set forth above, Robinson's conviction and sentence for complicity to manufacturing methamphetamine is reversed, and the judgment of the Rockcastle Circuit Court is otherwise affirmed. Accordingly, this case is remanded to the circuit court to amend the final judgment convicting Robinson of wanton murder and complicity to first-degree robbery to reflect the remaining sentence of 22 years' imprisonment for those offenses.

All sitting. All concur.

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[11] There was, however, some evidence that Robinson knew of and intended the killing. There was evidence that Robinson and the others had been shooting a gun the day before, presumably a trial run, and evidence that after the killing, Robinson had kissed Kirby and said she loved him. There was some suggestion also that she and Kirby were having a romantic or sexual relationship. From this, a jury could have inferred that even if the others did not know of an intent to kill Bullock, Robinson (and Kirby) did. There was also ample proof from which a jury could believe the killing was a surprise to Robinson and everyone else but that it was a product of a robbery gone bad. This supported the trial court's giving of intentional and wanton murder instructions.

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