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RENDERED: AUGUST 20, 2015
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2014-SC-000133-MR

DAVID SALYERS — APPELLANT

V.

ON APPEAL FROM GREEN CIRCUIT COURT
HONORABLE JUDY DENISE VANCE, JUDGE
NO. 14-CR-00001

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, David Salyers, appeals from a judgment of the Green Circuit Court convicting him of murder by complicity and imposing a sentence of imprisonment for twenty years, six months. As grounds for relief, Appellant contends that the trial court erred by: 1) refusing to suppress statements he made to the police; 2) refusing to exclude recordings of phone conversations Appellant had during his pretrial incarceration; 3) refusing to suppress a statement made by a non-testifying witness; 4) allowing the Commonwealth to introduce expert testimony regarding gang behavior; 5) denying his motion to reduce police presence at the courthouse during his trial; 6) refusing to allow Appellant to cross-examine a police officer about a wrongful death action in

which the officer was a defendant; and 7) refusing to instruct the jury on the lesser offense of facilitation to murder.

As explained below, we find that no reversible error occurred at Appellant's trial, and accordingly affirm the judgment of the Green Circuit Court.

I. FACTUAL AND PROCEDURAL BACKGROUND

Appellant was president of the Iron Horsemen Motorcycle Club. He assisted Gleason Pyle, a member of the Iron Horsemen, by loaning him money for the purchase of a motorcycle. Animosity developed between Appellant and Pyles after Pyles failed to repay the loan on time. Eventually, Pyles "turn[ed] in his colors" and left the Iron Horsemen.

Despite these troubles, Appellant testified that he and Pyles had made amends and that, in a renewed spirit of friendship, Appellant began negotiating with Pyles for the sale of the aforementioned motorcycle. As further proof of his good will toward Pyles, Appellant asserts that he helped Pyles get a job at a nearby factory.

On the fateful night, Appellant called an acquaintance, who was supervisor at the factory where Pyles worked, to learn whether Pyles was at work and whether he was alone. Appellant told the supervisor that he needed to see Pyles to discuss the sale of the motorcycle. Appellant then drove his truck to see Pyles, taking with him another member of the Iron Horsemen, Bobby Rigdon. Appellant claimed that during their discussions about the motorcycle, Pyles insulted Rigdon, and as result, Rigdon shot and killed Pyles.

Appellant testified that he and Rigdon fled the scene, and that Rigdon demanded that Appellant relinquish the truck to him. A short while later, Rigdon set the truck ablaze.

Appellant contacted police to report that his truck had been stolen. Ostensibly following up on Appellant's stolen truck report, police officers went to Appellant's home to investigate.[1] Appellant willingly agreed to take the officers to the place he had last seen his truck. As they drove, Appellant openly discussed his missing truck. Eventually, the officers took Appellant to the police station, where they administered *Miranda* warnings and began asking questions about Pyles' murder. Appellant was then arrested and charged with being complicit in the murder.

II. ANALYSIS

A. The Trial Court Did Not Err in Denying Appellant's Motion to Suppress His Statements to the Police.

Appellant first argues that his pre-arrest statements to police should have been suppressed because he had not been properly apprised of his *Miranda* rights. Appellant presented the issue to the trial court by way of a motion *in limine*.

Following a hearing pursuant to RCr 9.78, the trial court found that: 1) Appellant initiated the contact with the police by reporting his truck stolen; 2) the police responded to this report by visiting Appellant at his home; 3)

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[1] The evidence suggests that the police had reason to doubt the veracity of the stolen truck report; and suspected a connection between Appellant and Pyles' murder before they responded to his call.

Appellant voluntarily took the officers to the site where he claimed to have last seen the vehicle; 4) Appellant voluntarily accompanied the police to the police station; 5) at the police station, the officers continued to question Appellant about the alleged theft of his truck as they shifted the subject of the conversation to Pyles' murder; 6) police rendered *Miranda* warnings to Appellant about 15-20 minutes before questioning Appellant about the murder; 7) the officers who informed Appellant of his *Miranda* rights were the same officers who interrogated him about the murder; 8) Appellant communicated that he understood his rights, voluntarily answered questions, and did not request an attorney; 9) Appellant was not restricted from taking his medication or denied the ability to move about freely; and 10) after Appellant took his medication he demonstrated an ability to recall and coherently convey details regarding the murder.

Based upon these facts, the trial court concluded that before his arrival at the police station Appellant was not in custody so *Miranda* warnings were not required during that phase of the investigation. The trial court also found that Appellant was given the *Miranda* warnings before he was questioned about Pyles' murder, and that he "made an intelligent and voluntary waiver of his rights."

Upon appeal from the denial of a suppression motion under RCr 9.78, we review the trial court's factual findings for clear error; conclusions of law are reviewed *de novo* review. *Jackson v. Commonwealth*, 187 S.W.3d 300, 305 (Ky. 2006); *Welch v. Commonwealth*, 149 S.W.3d 407, 409 (Ky. 2004). "If supported

by substantial evidence the factual findings of the trial court shall be conclusive." Without identifying any specific portion of the statements he made to police, Appellant challenges generally the introduction into evidence of what he calls "his lengthy statement." Our analysis of his *Miranda* claim requires us to distinguish the statements made by Appellant *before* he was apprised of the *Miranda* warnings from the statements he made *after* receiving the *Miranda* warnings.

1. Statements given before officers issued Miranda warnings.

All of Appellant's statements to police before the *Miranda* warnings resulted from his decision to report his truck as a stolen vehicle. He suggests, however, that because police had reason to doubt the sincerity of his report, they deceptively approached him under the guise of investigating his stolen vehicle report, gaining his confidence in order to get information linking him to the murder. He insists that by enticing him to "leave his home under false pretenses," police lured him to the police station. He argues that the lack of candor in their approach to his stolen vehicle report vitiated the voluntariness of his pre-*Miranda* statements, rendering them inadmissible.

We reject Appellant's argument. It directly conflicts with the trial court's findings that Appellant voluntarily communicated with police and voluntarily accompanied police in their search for his missing truck. Appellant fails to cite, and we fail to find, anything in the record showing that these findings are clearly erroneous. Appellant was not in custody when he first spoke to the police officers who responded to his stolen vehicle report. There was no reason

for *Miranda* warnings to be given. *See Welch v. Commonwealth,* 149 S.W.3d 407, 410 (Ky. 2004) (custodial interrogation required before triggering the need for *Miranda* warnings); *See also Miranda v. Arizona,* 384 U.S. 436 (1966). The fact that the police failed to Mirandize Appellant before or immediately upon his arrival at police headquarters does not affect the admissibility of his statements.

Once they arrived at the police station, the officers continued the discussion with Appellant about his stolen vehicle report. They asked him to acknowledge the truthfulness and accuracy of the information contained in his report. Following Appellant's acknowledgement, one of the officers read Appellant his *Miranda* rights, telling him that he might be guilty of committing insurance fraud. Until that point, no questions had been asked pertaining to the Pyles murder.

We have held that the police may employ deceptive tactics in order to elicit incriminating responses from suspects, so long as those tactics do not rise to the level of coercion or compulsion. *See Leger v. Commonwealth,* 400 S.W.3d 745, 750 (Ky. 2013) ("We recognize that our law allows, and should allow, police officers to use deception and artifice to 'mislead a suspect or lull him into a false sense of security' that, *despite his understanding of the Miranda warning,* might prompt him to speak against his own interest."); *Illinois v. Perkins,* 469 U.S. 292, 297 (1990); and *Springer v. Commonwealth,* 998 S.W.2d 439, 447 (Ky. 1999). Moreover, we remain mindful that the police approached Appellant only in response to his own ruse to deceive them into

believing that his truck was stolen. The fact they pretended to believe his false story did not compel or coerce Appellant to speak against his own interest.

2. Statements given after officers issued Miranda warnings.

After arriving at the station, police gave Appellant *Miranda* warnings and expressly cautioned him with respect to the crime of insurance fraud in connection with the loss of his truck. Appellant argues that as much as forty-five minutes passed between the rendition of the *Miranda* warnings and the first mention of the Pyles murder. His argument boils down to the assertion that, by the time police had turned their attention to the Pyles murder, Appellant would not have understood that his *Miranda* rights also applied with equal vigor to that line of inquiry. He suggests, therefore, that a second reading of *Miranda* warnings should have been given immediately before questioning Appellant about the murder.

The trial court found that the *Miranda* warnings preceded the questions about the Pyles murder by only fifteen to twenty minutes, not forty-five minutes as claimed by Appellant. The time difference is inconsequential. As we noted in *Wise v. Commonwealth*:

> [N]either the U.S. Supreme Court nor this Court has addressed when *Miranda* warnings 'go stale,' that is, when previously given warnings are no longer sufficient to advise a defendant of his rights. While 'an excessive delay between an initial and subsequent interrogation can vitiate the effect of the *Miranda* warning given at the initial interrogation,' there is very little consensus in other jurisdictions of how long that delay must be, or whether there are other additional factors courts should consider.

422 S.W.3d 262, 270 n.3 (2013) (quoting *United States v. White*, 68 Fed.Appx. 535, 542–43 (6th Cir. 2003)). In any event, we are confident that the *Miranda*

warnings here had not gone stale by the time Appellant made his incriminating statements.

The only case Appellant cites in support of his position is a decision of a Pennsylvania federal district court: *United States v. Hanton*, 418 F.Supp.2d 757 (W.D. Penn. 2006). The judge in *Hanton* held that a fresh reading of the *Miranda* warnings should have been provided for a suspect when one set of police officers, who had been questioning him about misdemeanor marijuana charges, turned him over to a different group of officers who began questioning him about felony distribution charges. Like the trial court in this case, the judge in *Hanton* applied a "totality of the circumstances test," which inevitably depends heavily upon the facts of each case.

With this fact-intensive analysis in mind, it is especially relevant that there are major differences between the Pennsylvania case and the one at bar: 1) the officers who Mirandized the Appellant were the same ones who began questioning Appellant about the murder; 2) the second phase of questioning occurred between fifteen minutes and forty-five minutes after Appellant was Mirandized, as opposed to *Hanton*'s delay of four hours; and 3) Appellant's second phase of questioning occurred in the same location as his *Miranda* warnings, whereas the defendant in *Hanton* was moved to another location for his "second interview." As such, even though *Hanton* is not binding precedent, we are satisfied that the circumstances here are distinguishable and, therefore, compel a different result.

We also note that at no point during the interview with police did Appellant request an attorney, nor did he invoke his right to remain silent. When he asked to terminate the interview and go home, the officers informed him that he could not leave, but they ended the interview.

Appellant also argues that his statements were elicited involuntarily because, while at the police station, he was under the influence of powerful medications prescribed for him. The trial court's findings of fact readily dispose of this additional aspect of Appellant's claim regarding his station-house interview. Before they allowed Appellant to take his medicine, officers examined the medicine container to confirm that he was taking it as prescribed. Appellant identifies no evidence to suggest that he was intoxicated or otherwise affected by his medication to the point of being unable to knowingly waive his rights. The trial court found that Appellant cogently and coherently communicated with the officers, and that he knowingly and voluntarily waived his *Miranda* rights and spoke to the police. These findings are supported by substantial evidence and are thus conclusive in our review of the trial court's holding. RCr 9.78. The trial court did not err in denying Appellant's motion to suppress statements he made to police.

B. The Trial Court Did Not Err in Denying Appellant's Motion to Exclude Jail Phone Calls.

Appellant next argues that the trial court erred by allowing the prosecution to present as evidence the recordings of telephone conversations between Appellant, who was at the time in jail awaiting trial, and his son, Dereck Salyers. The recordings document angry outbursts by Appellant

directed at his son. At trial, Appellant challenged the use of these recordings as a violation of his rights under the Confrontation Clause. He argues on appeal that the recordings should have been excluded because they were irrelevant.

We decline to entertain Appellant's arguments regarding relevancy because he failed to make such objections at the trial court. *Kennedy v. Commonwealth*, 544 S.W.2d 219, 222 (Ky. 1976), *overruled on other grounds by Wilburn v. Commonwealth*, 312 S.W.3d 321 (Ky. 2010). Appellant does not clearly articulate how the use of the recorded conversation violated his right of confrontation, except to say that he "never had an opportunity to cross-examine his son as to actions taken by Dereck (such as drug use and the theft of [Appellant's] property while [Appellant] sat in jail) which would have caused his father's extreme, and highly prejudicial, outburst on the jail telephone."

Appellant makes no argument that Dereck's statements on the recorded phone call were "testimonial" in nature. In *Crawford v. Washington*, 541 U.S. 36, (2004), the United States Supreme Court held that the Confrontation Clause precludes the introduction of an unavailable witness's out-of-court *testimonial* statements against the accused, unless the accused was previously afforded an opportunity to cross-examine that witness. *Id.* at 53-54. In general, testimonial statements are those which are made "under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Id.* at 52. For example, affidavits, depositions, prior testimony, or statements made during

police interrogation are all statements that would normally be considered "testimonial." *Id.*

The personal conversation between Appellant and his son is not in any way similar to the example of "testimonial" statements described in *Crawford* and its progeny. Appellant does not contend that Dereck's statements were somehow intended to bear witness against his father. We see no basis upon which to conclude that Appellant's rights under the Confrontation Clause were compromised by the introduction of these telephone conversations.

C. The Trial Court's Error in Admitting Statements in Contravention of the Confrontation Clause was Harmless Beyond a Reasonable Doubt.

Over Appellant's objections at trial, out-of-court statements that Dereck Salyers made to police were admitted into evidence as a "statement by a co-conspirator of a party during the course and in furtherance of the conspiracy" pursuant to the hearsay exception provided in KRE 801A(b)(5).[2]

Detective Burton testified that in a pre-trial interview, Dereck first tried to corroborate Appellant's story about his truck being stolen. Then, Dereck recanted, and admitted that on the day after the murder, he and Appellant concocted a story to explain Appellant's whereabouts on the day of the murder. Appellant argues now, as he did in the trial court, that the introduction of these statements was not supported by KRE 801A(b)(5), and that because of their testimonial nature, the use of Dereck's out-of-court statements violated

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[2] 801A(b)(5) provides: "A statement is not excluded by the hearsay rule, even though the declarant is available as a witness, if the statement is offered against a party and is [. . .] A statement by a coconspirator of a party during the course and in furtherance of the conspiracy."

Appellant's rights under the Confrontation Clause. We agree with Appellant that the trial court misapplied KRE 801A(b)(5) and that the introduction of these statements violated the Confrontation Clause as explained in *Crawford*.

To qualify for admission into evidence as the statement of a co-conspirator under KRE 801(b)(5), the statement must be made by a co-conspirator of the party and "during the course and in furtherance of the conspiracy." Dereck's statements to the police were not made during the conspiracy to kill Pyles because the objective of the conspiracy had been attained. *Cf. Perdue v. Commonwealth*, 916 S.W.2d 148, 158 (Ky. 1996) ("As the object of the conspiracy had not yet been accomplished, statements made in furtherance thereof by the co-conspirators concerning their continuing endeavor were admissible."). Without the exception afforded by KRE 801(b)((5), Dereck's out-of-court statement was inadmissible hearsay.

Furthermore, the admission of these statements, which are plainly of a testimonial nature, and their use as evidence against Appellant violated his rights under the Confrontation Clause. However, as discussed below, we are satisfied that Appellant was not prejudiced by the introduction of these statements, and that the trial court's error in admitting the evidence was therefore harmless beyond a reasonable doubt. *Star v. Commonwealth* states:

> [the] constitutionally improper denial of a defendant's opportunity to [cross-examine a witness], like other Confrontation Clause errors, is subject to . . . harmless-error analysis. The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt.

313 S.W.3d 30, 39 (Ky. 2010) (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986)).

Appellant does not articulate any specific prejudicial impact of this improper testimony, beyond its contribution to "the overall fundamental unfair nature" of his trial. We discern no substantial prejudice that might have accompanied the introduction of this evidence since Appellant essentially echoed the same testimony when he took the stand during the trial. He admitted that he had created an alibi for himself on the night of the murder and that he instructed Dereck on how to corroborate the alibi, and therefore Appellant's testimony was cumulative to Dereck's improperly admitted statements.

It is difficult to conceive what benefit Appellant may have derived from being able to confront Dereck through cross-examination at trial. We are satisfied beyond a reasonable doubt that the introduction of these statements was harmless.

D. The Trial Court Did Not Abuse its Discretion in Allowing the Commonwealth to Present Expert Evidence on Motorcycle Gangs.

A substantial aspect of the Commonwealth's theory of the case concerned the relationship of Appellant and Pyles with the Iron Horsemen, which the Commonwealth contends is more aptly described as a motorcycle "gang." The Commonwealth argued that Appellant was upset about how Pyles left the Iron Horsemen and that, as the leader of the group, Appellant was obliged to punish Pyles for his insubordination. In support of its theory of the case and to "illuminate [Appellant's] motives," the Commonwealth introduced

expert testimony on motorcycle gangs by Earl Robinson, a Special Agent with the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), a law enforcement agency of the United States Department of Justice. Appellant argues that Robinson failed to testify to any probative facts, and that his testimony "was essentially a full-on character assassination of anyone who would join a motorcycle club." Appellant cites to KRE 402, KRE 403, and KRE 702 as grounds for his objections.

1. KRE 702

"[A] witness qualified as an expert by knowledge, skill, experience, training, or education[,]" may give testimony if it "will assist the trier of fact to understand the evidence or to determine a fact in issue . . . ." KRE 702. In reviewing a trial court's ruling on the admissibility of expert testimony, we employ an abuse of discretion standard. *Toyota Motor Corp. v. Gregory*, 136 S.W.3d 35, 39 (Ky. 2004). "The test for abuse of discretion is whether the trial court's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Id.*

Appellant does not challenge Robinson's qualifications as an expert. Robinson had 26 years of experience as an ATF agent at the time of trial, and had undertaken a special undercover investigation into the Iron Horsemen during his tenure with the ATF. Instead, Appellant claims that Robinson's testimony was not admissible under KRE 702 because it did not "assist the trier of fact to understand the evidence or to determine a fact in issue," and

that Robinson's testimony only served to inflame the jury's prejudices. We disagree with Appellant's characterization of Robinson's testimony.

Ordinary jurors would not reasonably be expected to have knowledge about the inner-workings of an organization like the Iron Horsemen, just as they would be unlikely to have detailed knowledge of more conventional groups like civic clubs, churches, and fraternal organizations. Such information is simply beyond the common, everyday experience of most people. Robinson's testimony about the organizational hierarchy, customs, practices, and values of the Iron Horsemen assisted the jury by explaining the cultural context in which Appellant and Pyles interacted, shedding light on the Commonwealth's theory regarding Appellant's motive. Its introduction into evidence did not violate KRE 702.

2. KRE 402

Appellant claims that the testimony presented by Robinson was irrelevant and thus barred by KRE 402, which provides in part: "Evidence which is not relevant is not admissible." Evidence is relevant *only* if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." KRE 401. The evidence need only slightly increase the probability of the existence of such a fact to be relevant. *Harris v. Commonwealth*, 134 S.W.3d 603, 607 (Ky. 2004).

Appellant, Bobby Rigdon, Dereck Salyers, and Gleason Pyles, all of the persons most directly connected with Pyles' death, were members of the Iron

Horsemen. Pyles "turned in his colors" after a dispute with Appellant, the acknowledged leader of the group. Robinson's testimony provided the jury with information about the procedures for joining the Iron Horsemen, the symbolism of their club patches and insignia, the consequences for being disrespectful of the club, and most importantly, the consequences of leaving the club in bad standing. We explained in the preceding section of this opinion that this evidence assisted the jury by enabling it to better understand the context in which the individuals in this case interacted with each other. It therefore follows that knowing the customs and mores of the Iron Horsemen makes it more likely that Appellant acted toward Pyles in a manner consistent with those mores. The testimony was clearly not irrelevant. However, not all relevant evidence is admissible, and so we proceed to Appellant's next argument.

3. KRE 403

Appellant argues that even though Robinson's testimony was relevant, its probative value was substantially outweighed by undue prejudice, citing KRE 403: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence."

First, it should be noted that Appellant spent a fair amount of time testifying at trial about his membership in various civic organizations, including the Freemasons and other local groups. His apparent purpose was

to portray himself as a solid citizen involved in the work of many worthwhile organizations. Another effect of this testimony was to soften the image of the Iron Horsemen by likening it to the benevolent groups to which Appellant belonged.

Of course, Robinson's testimony was prejudicial in the sense that it was detrimental to Appellant's case, but the prejudice it brought into the case against Appellant cannot be regarded as undue. For better or worse, Appellant cannot evade his voluntary participation in a group whose identity was a central theme of the case. Whatever stigma or honor that might attach as a result of that participation is simply part of the landscape upon which his case must be defended.

We have permitted gang-related expert testimony in at least two recent decisions involving similar issues: *Hudson v. Commonwealth*, 385 S.W.3d 411, 420 (Ky. 2012) and *Smith v. Commonwealth*, 454 S.W.3d 283 (Ky. 2015). In *Hudson*, we reasoned that expert testimony about gang-behavior was highly probative of motive and was not unduly prejudicial. In *Smith*, we allowed expert testimony of gang activity relevant to motive, despite its prejudicial impact.

Upon review we are satisfied that Robinson's testimony was a proper use of expert testimony under KRE 703; that it was relevant to an issue in the trial in accordance with KRE 402; and that it was not unduly prejudicial, under KRE 403. In allowing this evidence, the trial court properly exercised its discretion.

E. Appellant's Argument Regarding Police Presence at the Courthouse is Without Merit.

Appellant complains that the "exorbitant" presence of "six or seven uniformed Kentucky State Police Troopers" and as many as "four or five [Kentucky State Police] officers in plain clothes" around the courtroom during the course of Appellant's trial violated his due process rights, and, as such, rendered his trial unfair. Although he does not expressly say so, we presume Appellant's concern was that this exaggerated police presence overemphasized the notoriety of Appellant and his motorcycle club associates.

Upon review of the courtroom video recordings, we see no indication of undue police presence in the courtroom itself. We are not persuaded by Appellant's argument that the presence outside the courtroom of numerous police officers and their vehicles parked nearby, to which the jurors would have been exposed as they entered and exited the Green County court facility, created a prejudicial climate that deprived Appellant of a fair trial.

We do not believe that the trial court abused its discretion, or otherwise acted irresponsibly, when it denied Appellant's objection to this apparently enhanced level of security.

F. The Trial Court was Correct in Not Allowing Appellant to Cross-Examine an Officer Regarding a Pending Wrongful Death Suit.

In response to the Commonwealth's motion *in limine*, the trial court prohibited Appellant from cross-examining Detective Burton about a wrongful death suit pending against him in the Adair Circuit Court. Apparently, Burton was also charged criminally in the matter, but was eventually tried and

acquitted. The trial court instructed Appellant to refrain from any references to the claim pending against Burton.

Appellant argues that this order deprived him of his Sixth Amendment right to confront a witness against him. The civil and criminal claims of wrongful death asserted against Burton were totally unrelated to the events connected to the Pyles murder. Appellant asserts that he needed to question Burton about the wrongful death claims to reveal Burton's own personal experience "as a defendant in a death investigation" and to "illustrate [Burton's] first-hand knowledge of the investigatory process."

We see absolutely no relevance to Burton's personal experience as a defendant, and to the extent that his knowledge of the investigatory process was relevant at all, Appellant had other means during cross-examination to illustrate that point. We find no fault in the trial court's decision to limit the cross-examination of Burton to that extent.

G. The Trial Court Did Not Err in Declining to Give a Facilitation Instruction.

Appellant alleges that the trial court committed reversible error when it failed to instruct on the lesser included offense of facilitation to commit murder. As defined in KRS 506.080(1), "[a] person is guilty of criminal facilitation when, acting with knowledge that another person is committing or intends to commit a crime, 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."

We reiterated in *Dixon v. Commonwealth*, that:

> the chief difference between complicity and facilitation is intent: "u]nder the complicity statute[KRS 506.080(1)], the defendant must intend that the crime be committed; under the facilitation statute [KRS 502.020], the defendant acts without such intent." Thus, we have described facilitation as "reflect[ing] the mental state of one who is 'wholly indifferent' to the actual completion of the crime."

263 S.W.3d 583, 586 (Ky. 2008) (citations omitted).

Thus, to be guilty of criminal facilitation to commit murder, one must act without intending the death of the victim, but with conscious awareness that the principal offender intends to kill the victim. In that sense, the criminal facilitator would be "wholly indifferent" to the completion of the crime that he knew was about to occur.

We also rejected in *Dixon*, "any notion that a facilitation instruction must always accompany a complicity instruction. Rather, a lesser-included instruction, such as facilitation, may be given 'only when supported by the evidence.'" *Id.* (quoting *White v. Commonwealth*, 178 S.W.3d 470, 490 (Ky. 2005)).

In accordance with the foregoing analysis, Appellant was entitled to an instruction on the lesser offense of criminal facilitation only if, from the evidence, a reasonable juror could have believed beyond a reasonable doubt that Appellant drove Rigdon to the gate company knowing that Rigdon intended to kill Pyles, but at the same time have a reasonable doubt that Appellant had intended Pyle's death. This is so because if the jury believed that Appellant intended Pyles' death, it would find him guilty of murder by complicity, not facilitation; and, if the jury did not believe that Appellant knew Rigdon was going to kill Pyles, then Appellant is guilty of nothing.

Although Appellant argues that "reasonable jurors could have concluded that [Appellant] acted as a facilitator rather than in complicity," he offers no explanation of what specific evidence would support such a conclusion. Upon review of the evidence, we find none. Appellant's argument at trial was that he had no idea that Rigdon was going to kill Pyles; conversely, the Commonwealth's theory at trial was that Appellant knew of Rigdon's ill motive, intended that Rigdon carry out the plan to kill Pyles, and Appellant actively helped Rigdon achieve that goal and conceal the crime. Neither of these theories warrants an instruction on facilitation, and none of the evidence presented at trial would support such an instruction. Accordingly, we find that the trial court did not abuse its discretion in declining to instruct the jury on facilitation to commit murder.

H. The Cumulative Error Doctrine is Inapplicable in this Instance.

Appellant's final contention is that his trial was so plagued with error that it was fundamentally unfair. As noted above, the only error that occurred at trial was the introduction of Dereck Salyers' statements in violation of the rules of evidence and the Confrontation Clause. As we concluded that error to be harmless, with no other errors contributing any prejudicial effect, we find no grounds for reversal based upon cumulative error. Accordingly, we reject Appellant's argument.

III. CONCLUSION

For the foregoing reasons, we affirm the judgment of the Green Circuit Court.

All sitting. All concur.

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