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RENDERED: MARCH 17, 2016
NOT TO BE PUBLISHED

FINAL

Supreme Court of Kentucky

2014-SC-000639-MR

DATE 4-7-16 Enid Brown, DC

TIMOTHY PRATER — APPELLANT

V.

ON APPEAL FROM McCREARY CIRCUIT COURT
HONORABLE DANIEL L. BALLOU, JUDGE
NO. 13-CR-00016

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING IN PART, REVERSING AND VACATING IN PART, AND REMANDING

A McCreary County jury found Timothy Prater guilty of conspiracy to commit murder, unlawful imprisonment in the first degree, complicity to commit robbery in the first degree, and impersonating a peace officer. Consistent with the jury's recommendation, the trial court sentenced Prater to 40 years' imprisonment. Prater, who did not contest the unlawful imprisonment and impersonating a peace officer charges, appeals as a matter of right from his convictions of conspiracy to commit murder and complicity to commit robbery.[1] On appeal, Prater argues that the trial court erroneously: (1) admitted hearsay testimony; (2) permitted the Commonwealth to amend the

[1] The jury returned guilty verdicts on the charges of unlawful imprisonment and impersonating a police officer. However, in his opening statement, Prater admitted his guilt to these charges, and he did not contest his guilt to these charges during trial.

indictment during trial; and (3) instructed the jury on second-degree complicity to commit robbery during the guilt phase but instructed the jury to fix Prater's penalty based on first-degree complicity to commit robbery during the penalty phase. Because only one of the alleged errors mandates reversal, we affirm in part, reverse and vacate in part, and remand.

I. BACKGROUND.

Regina Stephens and Prater worked together at a restaurant in Somerset. Stephens and her then husband were friends with Larry Taylor and his wife, Debbie. Sometime in 2011, Stephens and Larry began having an extra-marital affair. Stephens and her husband ultimately divorced, but Larry and Debbie remained married. In the fall of 2012, Stephens asked Prater, who had bragged that he had relatives in the mafia, if he could arrange to have Debbie killed. Prater said that he could, and Stephens gave Prater $1,200 to $1,500[2] in October 2012, with the promise of an additional $2,500.

The Taylors lived in a rural area of McCreary County and, between October 2012 and February 2013, Prater made at least two trips to conduct surveillance of the Taylor residence. During one of those trips, Billy Aul, a neighbor of the Taylors who walked past their residence on his way to work every morning, saw Prater's car and noted his license plate number. Several weeks later, Aul again saw Prater's car and met Prater, who was walking along

[2] In his statements to police, Prater changed the amount paid several times.

the road dressed in "tactical gear[3]" and wearing a black ski mask. Prater told Aul that he was with the FBI and was conducting an investigation in the area. He then offered Aul a ride to work, which Aul accepted. While in Prater's car, Aul saw mail with Prater's name and address on it.

On the evening of February 6, 2013, Prater asked two acquaintances, brothers Joseph Denning and Antonio Turner, if they would accompany him to the Taylor residence the next morning to act as lookouts.[4] The brothers agreed and, on February 7, 2013, as Debbie was leaving her residence, one or all three of them knocked her to the ground, handcuffed her, and shocked her several times with a stun gun.[5] They then asked Debbie if there were any drugs or guns in the residence and for the security code to the alarm system. When Debbie asked what they were doing, Prater said that they were with the FBI and that they were investigating the Taylors for their participation in a "Mexican drug cartel."

While this was taking place, Aul, who was walking along the road, saw Prater's car and heard the Taylors' dog yelp. Judy Wilson, another neighbor,

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[3] Based on testimony, Prater's tactical gear appears to have consisted of black cargo pants, a black vest, a police type belt with a stun gun, a pistol, and handcuffs attached.

[4] It is unclear from the evidence the reason Prater gave the brothers for going to the Taylor residence. Turner and Denning said in their statements to police and in their testimony that Prater told them he was going to rob the Taylors or that he was going to stage a scene showing Debbie being unfaithful so that Larry would divorce her. Prater said in his statements to police and in his testimony that he wanted the brothers to help him "knock [Debbie] down" so that he could warn her about Stephens.

[5] It is unclear from the evidence whether Prater, Denning, or Turner, or a combination of the three, assaulted Debbie. However, the majority of the evidence pointed to Prater as being Debbie's primary assailant.

was driving to work and stopped to say hello to Aul. Aul told Wilson that he had seen Prater's car and had heard the Taylors' dog yelp and said that Wilson might want to check on Debbie. Wilson tried to call Debbie but got no answer, so Wilson went to the house of another neighbor, George Lay. Lay and Wilson then drove to the Taylors' residence. Prater, who was again dressed in tactical gear and wearing a ski mask, told the two that he, Denning, and Turner were with the FBI and conducting an investigation of the Taylors' involvement with a Mexican drug cartel. Lay and Wilson were skeptical about this story, particularly when Prater could not produce any identification. After several minutes, Prater told Denning and Turner to take the handcuffs off of Debbie and the three left. Lay, Wilson, or Debbie contacted the police and Detective Billy Correll of the Kentucky State Police conducted an investigation.

Based on information he obtained from Aul, Lay, Wilson, and Debbie, Det. Correll interviewed Prater several times. During the first interview, Prater denied any knowledge of what occurred at the Taylor residence. He explained his car's presence in the area by stating that his third cousin, Kevo Blair, an investigator from "up north," might have borrowed it to use as part of an investigation. When Det. Correll could not find any evidence that Kevo Blair existed, he obtained a search warrant for Prater's residence. During the search, Det. Correll found tactical gear consistent with what had been described by Aul, Wilson, Lay, and Debbie. He also found a stun gun which had Debbie's DNA on it.

Following the search Det. Correll re-interviewed Prater. During this second interview, Prater admitted that there was no Kevo Blair. He also admitted that he had been paid by Stephens to kill Debbie and that he had gone to the Taylors' residence the morning of February 7 with Turner and Denning. However, Prater said that he did not go to the Taylors' residence to kill Debbie but to scare her or warn her that Stephens was trying to have her killed.

Based on Det. Correll's investigation, police arrested Prater, Denning, and Turner. A grand jury charged all three with unlawful imprisonment, conspiracy to commit murder, and facilitation to first-degree robbery and charged Prater with impersonating a peace officer. In exchange for dismissal of the conspiracy to murder charges, Denning and Turner agreed to testify against Prater.

As noted above, Prater conceded his guilt as to the unlawful imprisonment and impersonating a peace officer charges; therefore, his convictions of those charges are not before us on appeal. However, Prater contested his guilt as to the other two charges, and he appeals his convictions on those charges. We set forth additional facts as necessary below.

II. STANDARD OF REVIEW.

Prater preserved some of the issues for review but did not preserve others. Therefore, we apply different standards of review, which we set forth as we address each issue.

III. ANALYSIS.

A. Hearsay.

At trial, Larry testified that he and Stephens had been engaged in an affair for approximately two years before the attack on Debbie. Although he admitted that he had feelings for Stephens, he denied loving her, and he stated that he tried to make it clear to Stephens that, even if something happened to Debbie, he and Stephens would not be "together."

In response to a question by the Commonwealth, Larry testified that he had spoken on the telephone with Stephens the morning after Debbie was attacked. According to Larry, Stephens stated that she had paid Prater $2,500 to kill Debbie. Prater objected, arguing that Larry's testimony was hearsay. During a bench conference, the parties noted that Stephens had committed suicide sometime after this phone conversation and was not available to testify. The court determined that, although the testimony was hearsay, it was admissible as either an excited utterance or a dying declaration.

In an attempt to impeach Larry, Prater played the statement Larry had given to the police. In that statement, Prater gave additional details about his relationship with Stephens and his phone call with her. In pertinent part, he stated that Stephens said that she wanted Prater to make Debbie's death look like a heart attack.

Larry then testified that Stephens was speaking with a flat affect, which was not her normal speech pattern. She stated that she had arranged for Prater to kill Debbie so that Larry could get "the insurance money." Larry told

Stephens that there was not that much insurance and that he had no alternative but to call the police and tell them what she had said. Stephens then said that she would not go to jail but would "cash out." Sometime later Larry discovered that Stephens had committed suicide.

The standard of review regarding evidentiary issues is abuse of discretion. *Clark v. Commonwealth*, 223 S.W.3d 90, 95 (Ky. 2007), and *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Id.*

Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Kentucky Rule of Evidence (KRE) 801. Pursuant to KRE 802 (the hearsay rule), such evidence is admissible only if it falls within one of the enumerated exceptions set forth in KRE 803 or 804. The trial court held that Larry's testimony was admissible because Stephens's statement was either an excited utterance ("[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition") under KRE 803(2), or a dying declaration ("a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be his impending death") under KRE 804(b)(2). Prater argues that Larry's testimony does not properly fall within either exception. The Commonwealth argues that we need

not address Prater's argument because Larry's testimony, even if erroneously admitted, was harmless. We agree with the Commonwealth.

> 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 . . . The inquiry is not simply 'whether there was enough [evidence] to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.

Winstead v. Commonwealth, 283 S.W.3d 678, 688-89 (Ky. 2009) *citing Kotteakos v. United States*, 328 U.S. 750 (1946). However, if the error is a constitutional error, we must determine "whether it appears 'beyond a reasonable doubt that the error . . . did not contribute to the verdict obtained.'" *Stewart v Commonwealth*, 306 S.W.3d 502, 508 (Ky. 2010) *citing Neder v. United States*, 527 U.S. 1, 2 (1999). Prater alleges both non-constitutional error – admission of Larry's testimony in violation of the hearsay rule – and constitutional error – admission of Larry's testimony impeded his constitutional right to confront a witness. Applying either standard, Larry's testimony was harmless.

In his statement to Det. Correll, Prater stated that Stephens paid him either $1,500 or $1,200 to kill Debbie and to make it look like it was from natural causes. Larry testified that Stephens admitted she had paid Prater $1,500 to kill Debbie and to make it look like Debbie had a heart attack. Thus, Larry's testimony about what Stephens said was merely cumulative of Prater's own admission. Furthermore, the Commonwealth put forth evidence from Prater's statement that: he hired Denning and Turner to act as lookouts;

Stephens told him to kill Debbie when Larry would be out of town; Stephens told him to kill Debbie in the furnace room and make it look like Debbie died of natural causes; he was armed with a gun and a stun gun when he went to the Taylors' residence; and he made at least two trips to "scope out" the Taylors' residence. Additionally, the Commonwealth put forth evidence that Prater received and responded to a text message from Stephens stating that Larry had left town on February 5, as well as text messages from Stephens on February 7 asking Prater what had happened. Finally, both Turner and Denning testified that Prater threatened to inject Debbie with something if she did not keep quiet and Debbie testified that Prater threatened to kill her if she did not give him the correct security code to her residence.

In light of the preceding evidence, which came from Prater's own statement or which was elicited by him on cross-examination, we hold that, beyond a reasonable doubt, any error in admitting Larry's testimony did not contribute to the verdict. Therefore, we need not address whether Larry's testimony was erroneously admitted.

B. The Trial Court's Amendment of the Indictment Was Not Erroneous and the Resultant Jury Instruction Did Not Affect the Unanimity of the Verdict.

The indictment for criminal conspiracy to commit murder stated that Prater, Denning, and Turner "individually and/or in combination with each other knowingly and unlawfully planned to murder Deborah Taylor." At the close of its case in chief, the Commonwealth moved to amend the indictment to add Stephens as a named co-conspirator. Prater objected arguing that he had

prepared his case based on Denning and Turner as co-conspirators, not based on Stephens as a co-conspirator. The court, for reasons that are unclear, was willing to grant the motion to amend the indictment but was reluctant to specifically name Stephens as a co-conspirator. Therefore, the court granted the Commonwealth's motion and amended the indictment but added "other persons" to the list of co-conspirators rather than specifically naming Stephens. The jury instructions for criminal conspiracy to commit murder were consistent with this change in the indictment.

Although Prater separately lists only one issue with regard to the amendment of the indictment, he makes two arguments. First, he argues that the trial court erred by amending the indictment, an issue he preserved. Second, he argues that the jury instruction flowing from the amendment resulted in a non-unanimous verdict, an issue he did not preserve. We address each separately below.

1. Amendment of Indictment.

> The court may permit an indictment, information, complaint or citation to be amended any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced. If justice requires, however, the court shall grant the defendant a continuance when such an amendment is permitted.

Kentucky Rule of Criminal Procedure (RCr) 6.16. We review a trial court's determination to permit amendment of an indictment for abuse of discretion. *See Riley v. Commonwealth*, 120 S.W.3d 622, 632 (Ky. 2003).

Prater argues that the change in the indictment forced him to "defend against the charge that [he] conspired with 'other persons' not named in the

indictment" thus substantially prejudicing his rights. In support of his argument, Prater relies on *Wolhbrecht v. Commonwealth*, 955 S.W.2d 533 (Ky. 1997). That reliance is misplaced, and Prater's argument is flawed for the following reasons.

In *Wolhbrect,* three co-defendants were charged with conspiring to kill Wohlbrecht's husband. *Id.* at 533. The indictment further stated that, as a result of the conspiracy, one of the three actually did kill the husband. *Id.* Based on the language in the indictment, the co-defendants focused their defenses on providing alibi witnesses for the time the husband was murdered. *Id.* at 538. When the Commonwealth realized it had failed to prove that any of the co-defendants had actually shot and killed the husband, it moved to amend the indictment to state that the co-defendants conspired and, as a result of the conspiracy, the husband was shot and killed. *Id.* at 536-37. Thus, the amendment changed the offense with which the co-defendants were charged from conspiracy that resulted in one of them killing the husband to conspiracy resulting in an unknown person or persons killing the husband. Prior to the Commonwealth's motion, which it made five days into trial, "there was no notice, or even suggestion, that another or others might [have been] involved" in the husband's murder. *Id.* at 538. Based on the preceding factors, the Court held that the trial court abused its discretion by permitting the Commonwealth to amend the indictment.

Wohlbrecht is distinguishable from the case herein for three reasons. First, unlike the defendants in *Wohlbrecht,* who were surprised by the addition

of an unknown actor, Prater could not have been surprised by the amendment. He admitted to conspiring with Stephens. Furthermore, nearly two months before trial the Commonwealth, in response to Prater's motion for a bill of particulars, specifically put Prater on notice that it was going to present evidence of Stephens's involvement in the conspiracy.

Second, the crime in *Wohlbrecht* changed from commission of the murder to conspiring to cause the murder, which forced the defendants to completely alter their alibi defenses mid-trial. Here, the crime with which Prater was charged – conspiracy – remained the same. Furthermore, Prater has not delineated how his defense – that he did not go to Debbie's residence with the intention of killing her – was changed by the addition of an unnamed conspirator.

Third, unlike the defendants in *Wholbrecht*, Prater did not seek a continuance when the Commonwealth moved to amend. While seeking a continuance is not a pre-condition to raising improper amendment of an indictment as an issue on appeal, failure to do so is an indication that Prater was not surprised or unduly prejudiced by the amendment.

Therefore, although we believe it would have been better to simply name Stephens in the amended indictment, we discern no abuse of discretion by the trial court in permitting the Commonwealth to do so.

2. Unanimity.

Prater argues that the jury instruction on criminal conspiracy to commit murder was faulty because it is unclear whether the jury found that Prater

conspired with Turner, Denning, or "other persons." Prater did not object to the wording of this instruction, therefore, this issue is not preserved and subject to palpable error review. RCr 10.26. When we engage in palpable error review, our "focus is on what happened and whether the defect is so manifest, fundamental and unambiguous that it threatens the integrity of the judicial process." *Baumia v. Commonwealth*, 402 S.W.3d 530, 542 (Ky. 2013).

As noted by the Commonwealth, it was clear from Prater's statement that he entered into criminal conspiracies with Stephens, Turner, and Denning. The only issue was what criminal activity those conspiracies entailed, not who the participants were. Therefore, the addition of "other persons" to the conspiracy jury instruction did not rise to the level of a fundamental error that threatened the integrity of the judicial process.

Furthermore, as noted by the Commonwealth, Prater did not cite any law indicating that putting "other persons" in a conspiracy instruction invalidates that instruction. As the United States Sixth Circuit Court of Appeals held in *United States v. Anderson*, 76 F.3d 685, 688-89 (6th Cir. 1996), "an individual's conviction for conspiracy may stand, despite acquittal of other alleged coconspirators, when the indictment refers to unknown or unnamed conspirators and there is sufficient evidence to show the existence of a conspiracy between the convicted defendant and [those] other conspirators." Here there was more than sufficient evidence to show the existence of a conspiracy between Prater and other persons; therefore, any error in the wording of the conspiracy instruction was not palpable.

C. The Penalty-Phase Robbery Instruction Was Erroneous.

The parties agree that the guilt-phase jury instruction captioned "Criminal Complicity to Robbery First Degree," which omitted the element of physical injury, was actually an instruction on criminal complicity to robbery in the second degree. Furthermore, the parties agree that the penalty-phase instruction for first-degree criminal complicity to robbery provided for assessment of a term of imprisonment of 10 to 20 years, the correct penalty for the named crime. Neither party objected to either instruction; however, Prater filed a motion for a new trial, arguing that the jury had been instructed in the guilt phase regarding the incorrect degree of complicity to commit robbery. The Commonwealth argued, and the trial court found, that the error was harmless because the evidence overwhelmingly supported a finding that Debbie had suffered a physical injury, thus supporting a conviction of first-degree complicity to commit robbery. The parties make the same arguments on appeal.

The parties misconstrue the issues. The issues are not with the body of the guilt-phase instruction, they are with the caption to the guilt-phase instruction and with the penalty-phase instruction. We address each in turn.

The parties may have wanted and been entitled to a guilt-phase instruction regarding first-degree complicity to commit robbery; however, what they got was a mis-captioned legally acceptable instruction regarding second-degree complicity to commit robbery. A "technical error appearing in the caption of the instructions does not authorize a reversal of the judgments."

Underhill v. Commonwealth, 289 S.W.2d 509, 512 (Ky. 1956).

Even if this error was more than a technical one, because Prater did not timely object to this instruction, we review any defect for palpable error and provide relief only as necessary "to avoid manifest injustice." *Martin v. Commonwealth*, 409 S.W.3d 340, 346 (Ky. 2013). Prater has not shown us what defect this instruction has other than that it has the incorrect caption. Although the evidence would have supported an instruction regarding first-degree complicity to commit robbery, it also supported the instruction given. Furthermore, even though the instruction did not comport with the indictment, Prater raised no objection and has not shown what manifest injustice resulted from his conviction of a lesser degree of complicity. In fact, the jury's finding that Prater was guilty of only second-degree complicity to commit robbery was to his benefit because the possible penalty range is 5 to 10 years' imprisonment rather than 10 to 20.

That brings us to the second instruction issue, which occurred in the penalty phase. The court instructed the jury on the penalty for first-degree complicity to commit robbery when the jury had not convicted Prater of that crime. Prater was entitled to be sentenced for the crime the jury found him guilty of committing – second-degree complicity to commit robbery. That crime has a penalty range of 5 to 10 years. Giving the jury the option to sentence Prater to a longer period of imprisonment than is provided for by law is a structural error that is so fundamentally unfair it warrants reversal. ("Structural errors are defects affecting the entire framework of the trial and

necessarily render the trial fundamentally unfair. Such errors preclude application of the harmless error rule and warrant automatic reversal under that standard." *McCleery v. Commonwealth*, 410 S.W.3d 597, 604 (Ky. 2013)(citation omitted)).

That brings us to the second instruction issue, which occurred in the penalty phase. The court instructed the jury on the penalty for first-degree complicity to commit robbery when the jury had not convicted Prater of that crime. Prater was entitled to be sentenced for the crime the jury found him guilty of committing – second-degree complicity to commit robbery. That crime has a penalty range of 5 to 10 years. Giving the jury the option to sentence Prater to a longer period of imprisonment than is provided for by law is palpable error. (A palpable error is one that is so grave that, if uncorrected, it would seriously affect the fairness of the proceedings. *Ernst v. Commonwealth*, 160 S.W.3d 744, 758 (Ky. 2005)).

This error is compounded by the fact that the jury recommended the minimum sentence for first-degree complicity to commit robbery – 10 years. Given the correct instruction, and a predilection to impose the minimum sentence, the jury may well have recommended a sentence of 5 years. However, the faulty penalty-phase instruction deprived the jury of that option. Therefore, we must reverse and vacate Prater's conviction of first-degree complicity to commit robbery and remand to the trial court. On remand, the trial court shall enter a judgment reflecting the jury's verdict of guilt of second-

degree complicity to commit robbery. Absent a plea agreement, the court shall then conduct a new penalty phase trial with the proper instruction.

IV. CONCLUSION.

We affirm the trial court's judgment insofar as it reflects Prater's convictions of conspiracy to commit murder, unlawful imprisonment in the first degree, and impersonating a peace officer. We vacate that portion of the trial court's judgment that reflects Prater's conviction of first-degree complicity to commit robbery, and remand with instructions for the court to enter a new judgment reflecting that Prater is guilty of second-degree complicity to commit robbery. Finally, we vacate that portion of Prater's sentence related to his conviction of first-degree complicity to commit robbery and remand for the trial court to hold a new penalty-phase trial on Prater's conviction of second-degree complicity to commit robbery.

All sitting. Minton, CJ., Cunningham, Hughes, Keller and Venters, JJ., concur. Wright, J., concurs in part and dissents in part by separate opinion in which Noble, J., joins.

WRIGHT, J., CONCURRING IN PART AND DISSENTING IN PART: While I concur with the majority in all other respects, I respectfully dissent insofar as the Court affirms Prater's conviction for second-degree robbery. Prater was indicted for complicity to commit first-degree robbery, that indictment was never amended, and the case was tried and argued as such. The headings for the guilt-phase instructions were captioned as instructions for robbery first (although the instructions omitted the element of physical injury). The

penalty- phase instructions—in both heading and body—included the penalty range for first-degree robbery. This is much more than a mere mistake in a heading. Rather, it permeates the entire trial in that the indictment, evidence, closing arguments during the guilt and penalty phases, and jury verdict all revolved around first-degree robbery. The trial court, the Commonwealth, and Appellant all thought, presented evidence, argued, and instructed based on first-degree robbery. Furthermore, the jury returned a verdict of guilty of first-degree robbery in spite of the inadequacy of the instructions. The appropriate action is to reverse and remand for a new trial on this charge rather than changing the jury's verdict. Therefore, while the majority only remands for a new penalty phase as to the robbery charge, I would reverse and remand for a new guilt phase as well, as I believe the guilt-phase instructions also amounted to palpable error.

Noble, J., joins.

COUNSEL FOR APPELLANT:

Brandon Neil Jewell
Department of Public Advocacy

COUNSEL FOR APPELLEE:

Andy Beshear
Attorney General of Kentucky

Jeffrey Allan Cross
Assistant Attorney General