

PURPOSE

The purpose of this Reply Brief is to respond to argumentation, legal authority, and analysis contained in the Commonwealth’s Brief. If Mr. Wright chooses not to respond to a particular point or argument, this means he reasserts the arguments made in his Opening Brief.

STATEMENT OF POINTS AND AUTHORITIES

PURPOSE..... i

STATEMENT OF POINTS AND AUTHORITIES..... i

ARGUMENT.....1

I. Mr. Wright was entitled a directed verdict of acquittal......1

KRS 502.020.....1

Wright v. Commonwealth Slip Opinion pg. 7.....2

Trowel v. Commonwealth, 550 S.W.2d 530 (Ky. 1977).....3

Adkins v. Commonwealth, 230 S.W.2d 453 (Ky. 1950).....3

II. Reversal was required because Officer Arnsperger improperly interpreted an audio recording of the drug transaction that jurors had difficulty understanding. ...3

The error was palpable:3

KRE 6023

Morgan v. Commonwealth, 421 S.W.3d 388 (Ky. 2014).....4

Cuzick v. Commonwealth, 276 S.W.3d 260 (Ky.2009).....4

Gordon v. Commonwealth, 916 S.W.2d 176 (Ky.1995).....4

Sanborn v. Commonwealth, 754 S.W.2d 534 (Ky. 1988).....4

The error warranted reversal:4

Ernst v. Commonwealth, 160 S.W.3d 744 (Ky. 2005).....4, 5

<u>United States v. Young</u> , 470 U.S. 1 (1985)	4
<u>Wright v. Commonwealth</u> Slip Opinion pg. 7	5
<u>State v. King</u> , 219 P.3d 642 (Wash. 2009)	5
<u>State v. Kirkman</u> , 155 P.3d 125 (Wash. 1997)	5
<u>Ordway v. Commonwealth</u> , 391 S.W.3d 762 (Ky. 2013)	5
<u>Allen v. Commonwealth</u> , 286 S.W.3d 221 (Ky. 2009)	5
<u>Schoenbachler v. Commonwealth</u> , 95 S.W.3d 830 (Ky. 2003).....	5
<u>Funk v. Commonwealth</u> , 842 S.W.2d 476 (Ky. 1992)	6
III. Officer Aaron Arnsperger improperly bolstered and vouched	6
<u>Fairrow v. Commonwealth</u> , 175 S.W.3d 601 (Ky. 2005).....	6
<u>Ernst v. Commonwealth</u> , 160 S.W.3d 744 (Ky. 2005).....	6, 7
<u>United States v. Young</u> , 470 U.S. 1 (1985)	6
<u>Wright v. Commonwealth</u> Slip Opinion, pg. 10-12.....	6
<u>Wright v. Commonwealth</u>	7
<u>Funk v. Commonwealth</u> , 842 S.W.2d 476 (Ky. 1992)	7
<u>Allen v. Commonwealth</u> , 286 S.W.3d 221 (Ky. 2009)	7
<u>Schoenbachler v. Commonwealth</u> , 95 S.W.3d 830 (Ky. 2003).....	7
IV. Sherri Klups expressed improper opinion testimony regarding guilt,	7
<u>Wright v. Commonwealth</u> Slip Opinion pg. 7-9.....	7
<u>Tamme v. Commonwealth</u> , 973 S.W.2d 13 (Ky.1998)	8
<u>Adcock v. Commonwealth</u> , 702 S.W.2d 440 (Ky. 1986).....	8
<u>Young v. Commonwealth</u> , 50 S.W.3d 148 (Ky. 2001)	8
<u>Nugent v. Commonwealth</u> , 639 S.W.2d 761 (Ky. 1982)	8
<u>Bussey v. Commonwealth</u> , 797 S.W.2d 483 (Ky. 1990).....	8
<u>Funk v. Commonwealth</u> , 842 S.W.2d 476 (Ky. 1992).....	8

V. It was error for the jury to use the prosecutor’s laptop	8
<u>Crews v. Commonwealth</u> , 2021-SC-000596-MR, 2013 WL 6730041	9
<u>Cantrell v. Kentucky Unemployment Insurance Commission</u> , 450 S.W.2d 235 (Ky. 1970)	9
<u>Fugate v. Commonwealth</u> , 993 S.W.2d 931 (Ky. 1999)	9
<u>Randolph v. Commonwealth</u> , Ky., 716 S.W.2d 253 (1986).....	9
<u>Ordway v. Commonwealth</u> , 391 S.W.3d 762 (Ky. 2013)	9
RCr 9.36(1)	9
<u>Alexander v. Louisiana</u> , 406 U.S. 625 (1972)	10
U.S. Const. Amend. V	10
<u>California v. Trombetta</u> , 467 U.S. 479 (1984).....	10
<u>Chambers v. Mississippi</u> , 410 U.S. 284 (1973)	10
<u>Allen v. Commonwealth</u> , 286 S.W.3d 221 (Ky. 2009)	10
<u>Ernst v. Commonwealth</u> , 160 S.W.3d 744 (Ky. 2005).....	10
<u>Martin v. Commonwealth</u> , 207 S.W.3d 1 (Ky. 2006)	10
CONCLUSION	10

The Commonwealth says it “disagrees with Appellee/Cross-Appellee’s repeated argumentative characterization of the actions of the trial court as improper in his Counterstatement...” Commonwealth’s Response Brief, pg. 1. This contains erroneous assertions. First, Mr. Wright is the Appellee/Cross-**Appellant**, not an “Appellee/Cross-Appellee.” Second, Mr. Wright stated that a police officer’s testimony was improper three times, not that the actions of the trial court were improper. Third, this was not argumentative but was factual. The Court of Appeals found that the referenced testimony of the officer was improper and the Commonwealth does not contest those findings.

The Commonwealth also notes that Sean Records’ testimony was proffered by the defense. Commonwealth’s Response Brief, pg. 1. Mr. Wright acknowledged this in his Brief. Mr. Wright’s Opening Brief, pg. 6. Moreover, this in no way changed the fact that he was required to offer truthful testimony.

ARGUMENT

I.

Mr. Wright was entitled a directed verdict of acquittal.

The evidence the Commonwealth and the Court of Appeals can point to as evidence upon which the jury could have inferred guilt is the testimony from a drug-addicted informant that Mr. Wright went to and from the kitchen at the same time as Sean Records when Sean Records got the cocaine and that he made a comment about the cocaine having been in the freezer after she asked why it was cold.

Under KRS 502.020, in pertinent part:

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;

According to the Court of Appeals, the jury could have inferred Mr. Wright was guilty “based on the informant’s testimony that Wright provided information as to why the crack cocaine was a cold temperature and may have assisted Records in retrieving the crack cocaine while in the kitchen together.” Wright v. Commonwealth, Slip Opinion pg. 7.

According to the Commonwealth, the jury could have inferred such because Sherri Klups testified “... that she heard Wright and Records talking to each other in the kitchen, baggies being handled and the freezer door being opened...” and her testimony that “Wright and Records left together when she asked to see the cocaine and when they returned together with the cocaine and she inquired about its condition it was Wright who answered ‘that we had stuck it in the freezer’...” Commonwealth’s Response Brief, pg. 2 (citations omitted).

Regarding Ms. Klups saying she thought she heard Mr. Wright and Sean Records talking, she testified she thought she could hear them talking on the other side of the curtain but she could not distinguish anything said; that is, she had no personal knowledge as to what was said. She also said she heard baggies being handled and a freezer or refrigerator door open; however, she had no personal knowledge that Mr. Wright had anything to do with that and admitted that it is possible that Sean Records was the only one in the kitchen messing with baggies. VR No. 1: 3/11/11; 11:56:20-11:57:10, 1:53:11-1:53:22, 1:58:29-1:58:49.

According to Mr. Wright's alleged comment as to why the crack cocaine was cold, Sherri Klups testified that Mr. Wright said "that they had put it in the freezer," at another point she testified Mr. Wright had rather said "we had stuck it in the freezer . . .," and at another point that Mr. Wright had rather said "it had been put in the freezer to cool down." VR No. 1: 3/11/11; 12:01:38-12:01:51, 1:57:30-1:57:40, 12:02:27-12:02:40.

The jury had to resort to suspicion or conjecture regarding what happened in the kitchen and why Mr. Wright made the alleged comment. Such is not sufficient evidence that he intended to promote or facilitate the commission of the offense and that he solicited, commanded, or engaged in a conspiracy with Sean Records to commit the offense or aided, counseled, or attempted to aid Sean Records in planning or committing the offense. See Trowel v. Commonwealth, 550 S.W.2d 530, 532 (Ky. 1977); Adkins v. Commonwealth, 230 S.W.2d 453, 455 (Ky. 1950).

II.

Reversal was required because Officer Arnsperger improperly interpreted an audio recording of the drug transaction that jurors had difficulty understanding.

The error was palpable:

The Commonwealth claims this error was not palpable. Commonwealth's Response Brief, pg. 5. However, Officer Arnsperger interpreting the audio recording at issue and telling the jury that Mr. Wright clearly made incriminating statements on the recording was palpable (i.e., clear) error. This has repeatedly been made clear by this Court.

KRE 602 is a basic rule of evidence that a witness may not testify to a matter unless the witness has personal knowledge of the matter. In accordance with such, this

Court has explicitly “held that a lay witness ‘may not *interpret* audio or video evidence, as such testimony invades the province of the jury, whose job is to make determinations of fact based upon the evidence.’” Morgan v. Commonwealth, 421 S.W.3d 388, 392 (Ky. 2014) quoting Cuzick v. Commonwealth, 276 S.W.3d 260, 265–66 (Ky.2009) (emphasis in original). Not only was this holding stated in Morgan and Cuzic, but this was also recognized in Gordon v. Commonwealth, 916 S.W.2d 176, 179–180 (Ky.1995) (“... it is apparent that the witness purported to interpret the tape recording rather than testify from his recollection. This was in error.”); See also Sanborn v. Commonwealth, 754 S.W.2d 534, 540 (Ky. 1988) (Improper to give a jury the prosecutor’s interpretation of inaudible portions of a recording).

The error warranted reversal:

The Commonwealth says “[n]one of the cases cited by Wright state that this claim of error results in a manifest injustice.” Commonwealth’s Response Brief, pg. 5. However, the opposite is just as true; that is, none of the cases cited state that this claim of error **does not** result in a manifest injustice. In any event, the Commonwealth’s assertion is irrelevant because whether such an error resulted in a manifest injustice was not an issue in those cases and because such an inquiry “is heavily dependent upon the facts of each case.” Ernst v. Commonwealth, 160 S.W.3d 744, 758 (Ky. 2005) citing United States v. Young, 470 U.S. 1, 16 (1985).

Regarding the facts of this case, according to the Court of Appeals, the jury could have inferred Mr. Wright was guilty “based on the informant’s testimony that Wright provided information as to why the crack cocaine was a cold temperature and may have assisted Records in retrieving the crack cocaine while in the kitchen together.” Wright v.

Commonwealth, Slip Opinion pg. 7. This was not overwhelming evidence of guilt. If it were even close to such, surely the Commonwealth would have characterized it as such.

Mr. Wright's statement about the cocaine having been in the freezer was critical in this case. The jury believed that what he said "word for word" made "a big difference" and needed to keep listening to the section of the tape where Mr. Wright allegedly said something about the cocaine having been in the freezer because the tape was not clear. VR No. 1: 3/11/11; 3:4524-3:45:50.

It is likely jurors could not understand what was actually said on the recording and thus relied on Officer Arnsperger's interpretation because an "officer's testimony often carries a special aura of reliability." State v. King, 219 P.3d 642, 646 (Wash. 2009) (quoting State v. Kirkman, 155 P.3d 125 (Wash. 1997)). See also Ordway v. Commonwealth, 391 S.W.3d 762, 777 (Ky. 2013) (Improper opinion testimony from an experienced and respected police officer was devastating to the defense.)

As such, Officer Arnsperger's interpretation of the tape in which he told jurors he could "clearly, clearly" hear Mr. Wright on the recording and that Mr. Wright "clearly on the tape starts to explain how **they** put [the drugs] in the freezer..." did result in a manifest injustice. Meaning, given the specific facts of this case and how critical that one statement was to the jury, this did seriously affect the fairness of the proceedings (Ernst, 160 S.W.3d at 758), it did threaten Mr. Wright's entitlement to due process of law, (Allen v. Commonwealth, 286 S.W.3d 221, 226 (Ky. 2009)), and there is a substantial possibility that the result in the case would have been different but for the error. (Schoenbachler v. Commonwealth, 95 S.W.3d 830, 836 (Ky. 2003)). This is especially

true when considered along with the fact that Officer Arnsperger also improperly told jurors Sherri Klups was credible (see below).¹

III.

Officer Aaron Arnsperger improperly bolstered and vouched for informant Sherri Klups' reliability and credibility at trial.

The Commonwealth seems to concede that this was a palpable error but argues that reversal is not required because this Court did not reverse Fairrow's conviction in Fairrow v. Commonwealth, 175 S.W.3d 601 (Ky. 2005). Commonwealth's Response Brief, pg. 6. Whether the same error resulted in a manifest injustice in Fairrow is irrelevant because the inquiry "is heavily dependent upon the facts of each case." Ernst v. Commonwealth, 160 S.W.3d 744, 758 (Ky. 2005) citing United States v. Young, 470 U.S. 1, 16 (1985).

Officer Arnsperger improperly told jurors that Sherri Klups was credible. She seemed to try to tell jurors that Mr. Wright made incriminating statements when the transaction was recorded—as determined by the Court of Appeals and as pointed out in Argument Section III in Mr. Wright's Opening Brief. Wright v. Commonwealth, Slip Opinion, pg. 10-12, Mr. Wright's Opening Brief, pg. 14-21. However, the statements on the recording of this incident were not clear. Moreover, Officer Arnsperger also improperly interpreted the audio recording of the drug transaction and told jurors that Mr. Wright clearly made incriminating statements on the tape—as determined by the Court of Appeals and as stated in Mr. Wright's Opening Brief in Argument Section II and in the

¹ See Funk v. Commonwealth, 842 S.W.2d 476, 483 (Ky. 1992) (even if individual errors are not, in and of themselves, sufficient to require a reversal, the cumulative effect of the prejudice from multiple errors can require reversal).

Argument Section above in this Reply Brief. Wright v. Commonwealth, Slip Opinion pg. 7-9, Mr. Wright's Opening Brief, pg. 10-14.

Again, Mr. Wright's alleged statement about the cocaine having been in the freezer was critical in this case. The jury believed that what he said "word for word" made "a big difference." VR No. 1: 3/11/11; 3:4524-3:45:50.

In a case with such underwhelming evidence of guilt as this one, individually and cumulatively,² the aforementioned errors resulted in a manifest injustice. That is, given the specific facts of this case and how critical that one alleged statement was to the jury, these errors did seriously affect the fairness of the proceedings (Ernst, 160 S.W.3d at 758), they did threaten Mr. Wright's entitlement to due process of law, (Allen v. Commonwealth, 286 S.W.3d 221, 226 (Ky. 2009)), and there is a substantial possibility that the result in the case would have been different but for the errors. (Schoenbachler v. Commonwealth, 95 S.W.3d 830, 836 (Ky. 2003)).

IV

Sherri Klups expressed improper opinion testimony regarding guilt, the meaning of what Mr. Wright said and Mr. Wright's mental state.

The Court of Appeals acknowledges that it was Sherri Klups' **opinion** that Mr. Wright sold her drugs (when Sean Records actually did so), and that Mr. "Wright's comment about the drugs being in the freezer was meant to ease her concerns, and that Wright monitored the transaction." Wright v. Commonwealth, Slip Opinion, pg. 13.

² See Funk v. Commonwealth, 842 S.W.2d 476, 483 (Ky. 1992) (even if individual errors are not, in and of themselves, sufficient to require a reversal, the cumulative effect of the prejudice from multiple errors can require reversal).

Again, a witness should not attempt to interpret what another witness meant by what he said and a witness may not testify to the mental impressions of another. Tamme v. Commonwealth, 973 S.W.2d 13, 33-34 (Ky.1998) (citing Adcock v. Commonwealth, 702 S.W.2d 440, 442 (Ky. 1986)); Young v. Commonwealth, 50 S.W.3d 148, 170 (Ky. 2001). Moreover, these opinions were the basis of her purported opinion that Mr. Wright was guilty—which was also improper. Nugent v. Commonwealth, 639 S.W.2d 761, 764 (Ky. 1982) and Bussey v. Commonwealth, 797 S.W.2d 483, 485-486 (Ky. 1990). Again, these errors were palpable and, especially when combined with the other errors, resulted in a manifest injustice.³

V.

It was error for the jury to use the prosecutor's laptop in the deliberation room to listen to the audio recording of the drug deal.

The Commonwealth again quibbles over who actually took the prosecutor's laptop into the jury room, whether the recorded statements were testimonial, and about how the jury had already listened to the recording. Commonwealth's Response Brief, pg. 8, 9.

Mr. Wright maintains the arguments he has made hitherto. However, even if inadequately preserved, the bottom line regarding this issue is that the jury had unfettered access to the prosecutor's laptop in the privacy of the deliberation room and in fact used the prosecutor's laptop in the privacy of the deliberation room. The prosecutor even conceded the laptop may have inadmissible evidence and expressed concern that the jury

³ See Funk v. Commonwealth, 842 S.W.2d 476, 483 (Ky. 1992) (even if individual errors are not, in and of themselves, sufficient to require a reversal, the cumulative effect of the prejudice from multiple errors can require reversal).

might access some of it, even unintentionally. VR No. 1: 3/11/11; 3:43:25-3:45:20, 4:49:40. The jury was not given an admonition not to access such information.⁴ This was palpably wrong. “Common sense must not be a stranger in the house of the law.” Cantrell v. Kentucky Unemployment Insurance Commission, 450 S.W.2d 235, 237 (Ky. 1970).

The Commonwealth concedes that there is a risk that jurors used the laptop to access inadmissible evidence or other improper information. Commonwealth’s Response Brief, pg. 9. This case should be reversed in part because the Commonwealth should not be allowed to create such a risk without fear of a reversal on appeal. Also, this risk is similar to the risk involved when a juror who should have been stricken for cause sits on a jury. Reversal is required in such situations, in part, due to that risk. See Fugate v. Commonwealth, 993 S.W.2d 931, 939 (Ky. 1999) (“Composition of the jury is always vital to the defendant in a criminal prosecution and doubt about unfairness is to be resolved in his favor. Randolph v. Commonwealth, Ky., 716 S.W.2d 253, 255 (1986). Consequently, it was reversible error to refuse to strike the three jurors for cause.”); see also Ordway v. Commonwealth, 391 S.W.3d 762, 780 (Ky. 2013) (A juror shall be excused for cause when there is reasonable ground to believe that the prospective juror cannot render a fair and impartial verdict.) (citing RCr 9.36(1)).⁵ Such a risk, as in this case, is fundamentally unfair and due process mandates fundamental fairness at trial.⁶

⁴ In an unpublished case, this Court found that an admonition from the trial court not to navigate outside of authorized files was sufficient to cure any possible error when the jury used the prosecutor’s laptop without objection. Crews v. Commonwealth, 2021-SC-000596-MR, 2013 WL 6730041. However, there was an objection in this case and no such admonition. Also, due to the risks involved, people need to be told to stop doing this.

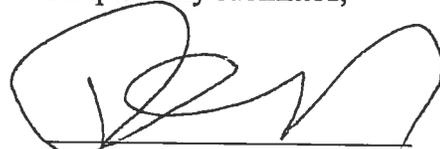
⁵ Of course, there are certain practical requirements that now must be met for a reversal to occur in such situations: the defense must have used a peremptory challenge to strike the juror and, in fact, used all of its peremptory challenges. Id. Apart from the abovementioned risk of unfairness, another reason for reversal

Even if unpreserved, allowing the jury to use and have unfettered access to the prosecutor's laptop in the privacy of the deliberation room was palpably wrong and resulted in a manifest injustice because it threatened Mr. Wright's entitlement to due process of law (Allen v. Commonwealth, 286 S.W.3d 221, 226 (Ky. 2009)), the error seriously affected the fairness of the proceedings (Ernst v. Commonwealth, 160 S.W.3d 744, 758 (Ky. 2005)), and the error was shocking or jurisprudentially intolerable (Martin v. Commonwealth, 207 S.W.3d 1, 3 (Ky. 2006)).

CONCLUSION

For the reasons set forth herein and in Mr. Wright's Appellee/Cross-Appellant Brief, this case must still be reversed and remanded to the Pendleton Circuit Court.

Respectfully submitted,



Brandon Neil Jewell
Assistant Public Advocate
Department of Public Advocacy
100 Fair Oaks Lane, Suite 302
Frankfort, Kentucky 40601
(502) 564-8006

in such cases is because a defendant was unable to fairly use his or her peremptory strikes in such cases. Id.

⁶ See Alexander v. Louisiana, 406 U.S. 625 (1972) (Due process clause incorporates the U.S. Const. Amend 5 right to a fair trial to the states.); California v. Trombetta, 467 U.S. 479, 485 (1984) and Chambers v. Mississippi, 410 U.S. 284, 294 (1973) (Due process clause affords criminal defendants "fundamental fairness.").

APPENDIX

<u>Tab Number</u>	<u>Item Description</u>	<u>Record Location</u>
1	<u>Crews v. Commonwealth,</u> 2021-SC-000596-MR, 2013 WL 6730041	

2013 WL 6730041

Only the Westlaw citation is currently available.

Unpublished opinion. See KY ST
RCP Rule 76.28(4) before citing.

Supreme Court of Kentucky.

Edward Lee CREWS, Appellant
v.

COMMONWEALTH of Kentucky, Appellee.

No. 2012–SC–000596–MR. | Dec. 19, 2013.

Synopsis

Background: Defendant was convicted in the Circuit Court, Fayette County, Kimberly N. Bunnell, J., of robbery in the first degree, complicity to fraudulent use of credit cards over \$500.00 within a six month period, and of being a persistent felony offender (PFO) in the first degree. Defendant appealed.

Holdings: The Supreme Court held that:

[1] *Batson* protections do not extend to potential jurors with physical disabilities;

[2] any error in trial court's allowing witnesses to testify regarding defendant's identity as the robber was harmless;

[3] officer's misrepresentation to defendant as to whether he needed an attorney during custodial interrogation violated *Miranda*;

[4] officer did not improperly comment on defendant's invocation of his right to remain silent;

[5] defendant's "mug shot" photograph was relevant and admissible;

[6] jury's use of prosecutor's laptop computer to view video recordings was not palpable error;

[7] evidence supported robbery conviction; and

[8] trial court's failure to instruct jury on complicity was palpable error.

Affirmed in part, reversed in part, and remanded.

Minton, C.J., Abramson and Keller, JJ., concurred in result only.

West Headnotes (11)

[1] Jury

↳ Peremptory Challenges

Batson protections, precluding a potential juror's race or gender from being used as a basis for a peremptory challenge, do not extend to potential jurors with physical disabilities.

Cases that cite this headnote

[2] Criminal Law

↳ Arrest and Identification, Evidence Relating To

Any error in trial court's allowing victim to testify regarding defendant's identity as the robber was harmless in robbery prosecution, where jury had the opportunity to observe the surveillance videos, another witness identified defendant as the person on the surveillance videos, and victim's identification of defendant at trial was ambiguous.

Cases that cite this headnote

[3] Criminal Law

↳ Counsel

Officer's responding, "Nah," to defendant's question after receiving *Miranda* warnings, "Yeah, uh, well do you think I need an attorney?" was a misrepresentation to induce waiver of *Miranda* rights, thus requiring suppression of defendant's subsequent statements; it was obvious beyond question that defendant indeed needed a lawyer under the circumstances, and it would defy common sense to believe that detective did not know defendant needed a lawyer.

Cases that cite this headnote

[4] **Criminal Law**

☞ Post-Arrest Silence; Custody

Officer's testimony, that when defendant was asked about a robbery, the interview "turned south," meaning that defendant "just wasn't cooperative and indicated that he didn't want to talk anymore. And when they say that, it's over," did not improperly comment on defendant's invocation of his right to remain silent; officer merely testified as to how and why the interview concluded.

Cases that cite this headnote

[5] **Criminal Law**

☞ Pictures of Accused or Others; Identification Evidence

Defendant's "mug shot" photograph was relevant and admissible in robbery prosecution to show defendant's appearance near the time of the robbery; identity was a contested issue, and there was no indication that the photograph was introduced in an improper or unduly prejudicial manner.

Cases that cite this headnote

[6] **Criminal Law**

☞ Issues Related to Jury Trial

Jury's use of prosecutor's laptop computer to view video recordings outside the supervision of the parties and the trial judge was not palpable error in robbery prosecution, notwithstanding that prosecutor's computer may have contained inadmissible evidence; trial court instructed the jury that, when the first video footage concluded, they were to knock on the door and an official would enter and cue the second video, judge instructed jurors not to navigate outside the authorized files, and there was no indication there any improper juror conduct occurred or that defendant suffered actual prejudice. Rules Crim.Proc., Rule 10.26.

1 Cases that cite this headnote

[7] **Robbery**

☞ Identity of Accused

Evidence supported finding that defendant was the person who took victim's purse, thus supporting conviction for robbery in the first degree; victim testified that she recognized defendant's eyes as those of her attacker, witness testified that he witnessed defendant running across the parking lot where robbery occurred, defendant's companion identified defendant as the man on surveillance videos and testified that defendant left her in the car during the robbery and then came running out to her as she was attempting to leave, companion testified that defendant had possession of stolen credit cards and desired to make purchases with them, and jurors were able to independently determine whether defendant was the man present in the surveillance videos.

Cases that cite this headnote

[8] **Robbery**

☞ First Degree; Armed Robbery

Victim's testimony regarding defendant's use of physical force and the physical injuries she sustained was sufficient to support defendant's conviction for robbery in the first degree. KRS 515.020(1)(a).

Cases that cite this headnote

[9] **Robbery**

☞ Intent

A conviction of robbery in the first degree does not require intent to cause physical harm; rather, it merely requires a showing that physical injury was caused as a result of the theft. KRS 515.020(1)(a).

Cases that cite this headnote

[10] **Robbery**

☞ Grade or Degree of Offense

Defendant was not entitled to instruction on theft by unlawful taking in prosecution for robbery in the first degree, where defense theory was that of mistaken identity, and there was no evidence at

trial promoting theory that victim was uninjured.
KRS 515.010, 515.020.

Cases that cite this headnote

[11] **Criminal Law**

↔ Elements of Offense and Defenses

Trial court's failure to instruct jury to find that defendant committed any of the affirmative acts required under the complicity statute, or to instruct jury on definition of complicity, was palpable error in prosecution for complicity to fraudulent use of credit cards; it was only through the principle of complicity that defendant could be found guilty of fraudulent use of credit cards, only reference to complicity or anything resembling the elements of complicity appeared in the heading of the instruction, and for the jury to have incorporated the definition of complicity by inference, the jury would have had to possess some personal knowledge of the elements of complicity. KRS 502.020; Rules Crim.Proc., Rule 9.54(2).

1 Cases that cite this headnote

On Appeal from Fayette Circuit Court, No. 11–CR–00072–001; Kimberly N. Bunnell, Judge.

Attorneys and Law Firms

Kate L. Benward, Assistant Public Advocate, Counsel for Appellant.

Jack Conway, Attorney General, Heather Michelle Fryman, Assistant Attorney General, Counsel for Appellee.

MEMORANDUM OPINION OF THE COURT

*1 On September 26, 2010, Appellant, Edward Lee Crews, attacked Charlotte Cutter in a Kroger grocery store parking lot by grabbing her purse, which was firmly clutched in her hands. A struggle for the purse ensued, causing the elderly Ms. Cutter to be knocked to the pavement. Refusing to relinquish her purse without a fight, Ms. Cutter and Crews engaged in a tug-of-war, each desperately grasping separate handles of the purse. Eventually, a zipper gave way. Crews then grabbed Ms. Cutter's wallet out of the purse and fled.

The wallet contained several of her credit cards. As a result of the struggle, Ms. Cutter sustained an injury to her finger, as well as multiple bruises and abrasions. Some of these injuries were treated by first responders shortly after the incident. Ms. Cutter immediately described her attacker to the police and reported her credit cards as stolen. Another Kroger patron, Michael Knight, witnessed a man running across the store parking lot and later identified that man as Appellant, Edward Lee Crews.

Unauthorized charges appeared on Ms. Cutter's credit card statements the morning after the robbery. She reported this information to Detective Matthew Sharp, the lead investigator on her case. After further investigation, the surveillance video from the local Walmart showed a woman making purchases with a credit card matching the last four numbers given to Walmart's loss prevention team by Detective Sharp. There was also a male suspect on the video. Some portions of the surveillance videos from both Kroger and Walmart and still shot photos developed from them were broadcast on the local television segment, Crime Stoppers. As a result of the broadcast, Detective Sharp received phone calls from citizens identifying the suspects in the videos as Carria Harris and Crews. Soon thereafter, Harris voluntarily admitted to the police that she was the woman on the surveillance videos and that the man with her was Appellant, Edward Lee Crews.

Harris testified to this at trial. She also stated that she and Crews had left Kroger together that night, but that Crews told her he needed to go back into the store. She waited for him in the car. After briefly falling asleep, Harris grew impatient and began to leave without him. As she drove away, Crews ran out of Kroger and got into the car. He informed Harris that if she would drive him to Walmart, she could "buy a few things." Crews then gave her the stolen credit cards, with which she made purchases at Walmart.

Crews was later arrested and indicted. A Fayette Circuit Court jury found Crews guilty of robbery in the first degree; complicity to fraudulent use of credit cards over \$500.00 within a six month period; and of being a persistent felony offender ("PFO") in the first degree. The jury recommended a sentence of twelve years for the first-degree robbery conviction, enhanced to twenty years by the PFO conviction; and five years for the complicity to fraudulent use of credit cards conviction, enhanced to ten years by the PFO conviction. The trial court sentenced Crews in accord with the jury's recommendation that the two sentences be served concurrently, for a total sentence of twenty years

imprisonment. Crews now appeals his judgment and sentence as a matter of right pursuant to the Ky. Const. § 110(2)(b). Several issues are raised and addressed as follows.

Batson Motion

*2 [1] For his first assignment of error, Crews contends that the trial court erred by denying his *Batson* motion after the Commonwealth removed a qualified juror because he was hearing-impaired. See *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). When determining whether the trial court erred in applying *Batson*, we review under the clearly erroneous standard. *Gray v. Commonwealth*, 203 S.W.3d 679, 691 (Ky.2006).

Near the beginning of voir dire, Juror 4058, who was Caucasian, informed the trial court that he was having difficulty hearing. In response, the trial judge had the venireman fitted with a hearing aid issued through the Administrative Office of the Courts. The record demonstrates that this device seemed to improve the juror's hearing. However, the Commonwealth exercised one of its peremptory strikes to remove Juror 4058.

The U.S. Supreme Court expanded its holding in *Batson* to prohibit challenging potential jurors with peremptory strikes based on gender. See *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994). Crews invites this Court to further expand *Batson* to apply to potential jurors with physical disabilities. We decline. The physically disabled are not a protected class for purposes of Equal Protection or Due Process Clauses of the Fourteenth Amendment. E.g., *City of Cleburne, Tex. v. Cleburne Living Center et al.*, 473 U.S. 432, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985); *Bd. of Trustees of University of Alabama v. Garrett*, 531 U.S. 356, 121 S.Ct. 955, 148 L.Ed.2d 866 (2001). Cases involving physical disabilities, such as hearing loss, are subject to mere rational basis review. *Id.* Therefore, since “[p]arties may [] exercise their peremptory challenges to remove from the venire any group or class of individuals normally subject to ‘rational basis’ review[.]” we find no error in the present case. See *J.E.B.*, 511 U.S. at 143.

We may not expand the protections of our federal Constitution absent a directive from the U.S. Supreme Court to do so. Moreover, we also decline to expand the protections of our own Kentucky Constitution to recognize the physically disabled as a class requiring heightened scrutiny review. See

§§ 2, 7, 11. Accordingly, the trial court's denial of Crews's *Batson* motion was not clearly erroneous.

In-Court Identifications

For his next argument, Crews asserts that the trial court erred by denying his two separate motions to suppress the identification of Crews by two witnesses, Charlotte Cutter and Michael Knight. Crews specifically maintains that the in-court identifications by these two witnesses were tainted by impermissible out-of-court identification procedures. We review the trial court's findings of fact on a motion to suppress for clear error, and the admissibility of evidence under an abuse of discretion standard. *King v. Commonwealth*, 142 S.W.3d 645, 649 (Ky.2004). Under this standard, we will not disturb the trial court's ruling unless it was “arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky.1999).

*3 The constitutionality of a challenged pre-trial identification procedure requires a two-step analysis. *King*, 142 S.W.3d at 649 (Ky.2004). First, the court determines if the procedure was unduly suggestive. *Id.* Second, if the procedure is determined to be unduly suggestive, the identification may still be admissible if “under the totality of the circumstances the identification was reliable[.]” *Id.* (quoting *Neil v. Biggers*, 409 U.S. 188, 199, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972)).

Charlotte Cutter

[2] Prior to trial, Crews motioned the court to suppress any testimony by Ms. Cutter identifying Crews as her attacker. In his motion, Crews asserted that Ms. Cutter's identification was first tainted by her exposure to a photo of Crews on the television segment, Crime Stoppers. Subsequent to this exposure, Detective Sharp presented Ms. Cutter with a photo lineup which included a picture of Crews. Ms. Cutter was unable to identify Crews.

The detective then showed her an individual picture of Crews and told her that Kroger personnel had observed the man in the photo following her around inside the store prior to the robbery. Ms. Cutter then identified the man in the still photos as her assailant, stating that she specifically recognized his clothing. Based upon this evidence, the trial judge sustained Crews's suppression motion, finding that the identification

procedure used by Detective Sharp was unduly suggestive. The court did not continue its analysis under *Biggers*.

At trial, however, things took a new twist. Prior to Ms. Cutter being called to testify, the attorney for Crews approached the bench and stated that he wished to question the witness about the photo lineup. An extended discussion took place at the bench. The trial judge opined that this tactic by Crews's attorney opened the door for admission of the whole pre-trial identification process. The court, in essence, ruled that it would be unfair to allow Crews to pick and choose part of the process without allowing the Commonwealth to present the complete picture. Therefore, the trial court reversed its ruling as to the in-court identification. Even so, Ms. Cutter did not positively identify Crews, stating only that she recognized his eyes. Crews's counsel did not even bother to question Ms. Cutter on cross-examination about the photo identification.

It appears that Crews's attorney waived the in-court identification issue by requesting to introduce the pre-trial photo lineup. Even so, if there was error on behalf of the trial court's ruling, it was harmless beyond a reasonable doubt. See *Wilson v. Commonwealth*, 695 S.W.2d 854, 858 (Ky.1985) (citing *Chapman v. California*, 386 U.S. 18, 87, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)). The jury had the opportunity to observe the surveillance videos from which the disputed still shots were taken. Further, Carria Harris identified Crews as the person on the surveillance videos. Based on this evidence, as well as Ms. Cutter's ambiguous identification of Crews at trial, any error in allowing Ms. Cutter to testify regarding the identity of her attacker was harmless beyond a reasonable doubt.

Michael Knight

*4 At trial, the prosecutor informed defense counsel and the judge that she was going to ask Mr. Knight to identify Crews as the man he saw running across the Kroger parking lot on the night of the incident. Crews objected, noting that Mr. Knight had never been shown a photo line-up. It was revealed, however, that Mr. Knight was shown a single photo of Crews at the prosecutor's office prior to trial. The trial court determined that this concerned the weight and credibility of Mr. Knight's testimony and, therefore, allowed Mr. Knight to identify Crews at trial. During his testimony, Mr. Knight also acknowledged that he had been shown a photo of Crews in the prosecutor's office prior to trial.

Both parties argue on appeal that the analysis here is the same as the identification issue involving Ms. Cutter. Similarly,

the record reveals that the trial court failed to conduct the appropriate *Biggers* analysis. However, this error was harmless beyond a reasonable doubt for the same reasons articulated regarding the identification by Ms. Cutter. See *id.*

Fifth Amendment Violations

Crews asserts two errors in violation of his Fifth Amendment rights. Both allege that the trial court erroneously denied his motions to suppress the statements he made to the investigating detectives. Each will be discussed individually. "When reviewing a trial court's denial of a motion to suppress, we utilize a clear error standard of review for factual findings and a *de novo* standard of review for conclusions of law." *Jackson v. Commonwealth*, 187 S.W.3d 300, 305 (Ky.2006) (citing *Welch v. Commonwealth*, 149 S.W.3d 407, 409 (Ky.2004)).

Miranda Warnings

[3] First, Crews maintains that the trial court erred in denying his motion to suppress because he unequivocally asserted his right to counsel prior to the interview, yet was denied counsel. See *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Following his arrest, Crews was interviewed by Detective Matthew Sharp, wherein Detective Sharp properly read Crews his *Miranda* rights prior to the interview and asked Crews if he understood those rights. Crews replied: "Yeah, uh, well do you think I need an attorney?" Sharp responded, "Nah." Sharp then proceeded to interview Crews. At trial, the recorded interview was not introduced into evidence. Rather, Detective Sharp testified concerning the information revealed during the interview. Specifically, Detective Sharp testified only that Crews admitted some knowledge of "credit card stuff," and that the female accompanying him on the night of the incident was also involved. Crews either denied or gave no incriminating statements concerning the robbery.

"[N]ot every use of the word *lawyer* or *attorney* by a suspect is an invocation of the right to counsel. *Bradley v. Commonwealth*, 327 S.W.3d 512, 515 (Ky.2010)." "Instead, precedent clearly holds that the police must cease interrogating a suspect only if the suspect clearly and unambiguously asserts his or her right to counsel." *Id.* at 515-16 (internal citations omitted).

*5 However, it is obvious beyond question that Crews indeed needed a lawyer under these circumstances. It would defy common sense to believe that Detective Sharp did not know Crews needed a lawyer. Very recently, in the case of *Leger v. Commonwealth*, we held that lying to persons being interrogated in order to induce them to waive their rights under *Miranda* is not permitted. 400 S.W.3d 745 (Ky.2013). We cannot distinguish the misrepresentation of informing a criminal defendant who is being interrogated that his statements would remain confidential, as in *Leger*, from misrepresenting to Crews that he did not need a lawyer. Accordingly, we hold that the confession should have been suppressed under our *Leger* ruling.

Since no incriminating statements were made by Crews regarding the robbery, the error was harmless beyond a reasonable doubt as to that charge. As will be subsequently discussed, we are reversing Crews's conviction for complicity to fraudulent use of credit cards. In any retrial on that charge, the statement taken by Detective Sharp after Crews asked if he needed a lawyer should be suppressed.

Silence

[4] Crews further asserts that the trial court erred in allowing Detective Sharp to testify at trial about Crews's invocation of his right to remain silent. Detective Sharp testified that the interview with Crews was very brief and that when asked about the robbery, the interview "turned south." When the Commonwealth asked Detective Sharp what he meant by "turned south," Sharp told the jury: "[Crews] just wasn't cooperative and indicated that he didn't want to talk anymore. And when they say that, it's over." Defense counsel objected to Detective Sharp testifying to his conclusion that Crews was uncooperative, which was sustained by the trial court. At a bench conference, a second defense attorney representing Crews further objected that the Commonwealth had elicited testimony about Crews's invocation of his right to remain silent. This objection was overruled. The trial court allowed Detective Sharp to testify that the interview was terminated because of the nature of the proceedings. The Commonwealth continued its line of questioning, wherein Detective Sharp again stated that the interview with Crews became confrontational and that Crews indicated he no longer wanted to talk.

The Commonwealth is prohibited from introducing evidence or commenting in any manner on a defendant's silence once that defendant has been informed of his rights and taken into custody. *E.g., Doyle v. Ohio*, 426 U.S. 610, 96 S.Ct. 2240, 49

L.Ed.2d 91 (1976); *Hunt v. Commonwealth*, 304 S.W.3d 15, 35–36 (Ky.2009). See also *Miranda*, 384 U.S. at 468 n. 37.

In the present case, there was no impermissible comment on Crews's silence. See *Hunt*, 304 S.W.3d at 35–36. Moreover, "not every isolated instance referring to post-arrest silence will be reversible error." *Wallen v. Commonwealth*, 657 S.W.2d 232, 233 (Ky.1983) (noting that the usual situation requiring reversal is where the prosecutor has repeated and emphasized post-arrest silence as a prosecutorial tool). Here, Detective Sharp merely testified as to how and why the interview concluded. We find no error in admitting Detective Sharp's trial testimony.

Head Shot Photo

*6 [5] Crews next argues that the trial court erred in admitting into evidence Commonwealth's Exhibit # 5, a head shot photo of Crews. He alleges that the photo constituted a "typical mug shot pose" and was both irrelevant and unduly prejudicial. KRE 401; KRE 402; KRE 403. We have adopted a three-prong test to determine the propriety of introducing mug shot type photos at trial:

- (1) the prosecution must have a demonstrable need to introduce the photographs;
- (2) the photos themselves, if shown to the jury, must not imply that the defendant had a criminal record; and
- (3) the manner of their introduction at trial must be such that it does not draw particular attention to the source or implications of the photographs.

Williams v. Commonwealth, 810 S.W.2d 511, 513 (Ky.1991) (citing *Redd v. Commonwealth*, 591 S.W.2d 704, 708 (Ky.App.1979)).

The Commonwealth contends that the photo was introduced at trial to show how Crews's hair appeared near the time of the robbery. During cross-examination of Marsha Crews, Crews's wife, the Commonwealth showed her the head shot and asked if it was an accurate description of her husband's appearance at the time of the incident. She replied that it looked like him; however, she qualified her answer by stating, "He had more hair back then." Crews objected to this statement, but the objection was overruled. The trial court agreed with the Commonwealth that the photo was relevant

because the witnesses' descriptions of Crews were at issue during trial. Therefore, because identity was a contested issue, the first prong adopted from *Redd* is satisfied. The second and third prongs are also satisfied. Crews fails to argue, and the record does not indicate, that the photo was introduced in an improper or unduly prejudicial manner. Accordingly, we find no error.

Jury's Use of Laptop During Deliberations

[6] Crews now argues that the trial court erred by allowing the jury to improperly view evidence during deliberations. More specifically, the jury was allowed to view DVDs on a laptop provided by the Commonwealth. This issue is unpreserved. We may reverse only if the alleged error is palpable. RCr 10.26.

During deliberations, the jury requested to view the Kroger and Walmart surveillance recordings. In response, the trial court allowed the jury to use the prosecutor's laptop to view the videos. The judge reasoned that it would be easier for the jurors to see the videos in the courtroom than in the jury room. Only members of the jury were present in the courtroom when the videos were viewed. Before the use of the laptop and viewing, the trial judge admonished the jury not to navigate outside of the authorized files.

We have recently held that any examination by the jury of recorded testimonial evidence must be played in open court with the parties and their attorneys present. *McA tee v. Commonwealth*, No.2011-SC-000259-MR, at *7 (Ky. Sept.26, 2013). Therefore, the use of the laptop in those cases is amply supervised and regulated by the court.

*7 However, when the jury wishes to exclusively view non-testimonial type DVD recordings outside the supervision of the court, as occurred here, the type of device used to play the recordings becomes critical. The risk is obvious. In its cloistered deliberations, the jury might access inadmissible evidence on an unclean laptop.

Two DVDs containing the surveillance video footage were properly admitted as Commonwealth's Exhibits # 1 and 2. As an evidentiary matter, they were available for the jurors' review. RCr 9.72; *Johnson v. Commonwealth*, 34 S.W.3d 563 (Ky.2004). Apparently, the prosecutor's laptop was the only device immediately capable of playing the videos.

Crews fails to demonstrate the occurrence of improper conduct by the jurors or any actual prejudice resulting from the jurors' limited use of the laptop. The mere fact that jurors had limited access to the laptop does not create the presumption that they used it for an improper purpose. See *Tamme v. Commonwealth*, 973 S.W.2d 13, 26 (Ky.1998). In fact, the trial court specifically instructed the jury that, when the Kroger video footage concluded, they were to knock on the door and an official would enter and cue the Walmart video. The jurors were allowed to pause frames and navigate within the authorized files without outside assistance. However, as previously noted, the judge instructed the jurors not to navigate outside of the authorized files. We find that this admonition was sufficient to cure any possible error. See *Johnson v. Commonwealth*, 105 S.W.3d 430, 441 (Ky.2003) (a jury is presumed to have followed an admonition).

The equipment available to play DVDs introduced into evidence will undoubtedly vary across the Commonwealth. In a perfect world, all DVDs intended to be introduced into evidence will be converted into a format playable in a clean and regular DVD player available to the jury. But we do not live in a perfect world. In sum, the rule of law is not discarded by simply employing pragmatic measures, so long as such measures are properly mitigated and accompanied by a proper admonition from the trial judge. Thus, we find no error requiring reversal.

Directed Verdict

Crews next alleges that the trial court erred in denying his motion for a directed verdict of acquittal for the offense of robbery in the first degree. We will reverse the trial court's denial of a motion for directed verdict "if 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) (citing *Commonwealth v. Sawhill*, 660 S.W.2d 3 (Ky.1983) (emphasis added)).

[7] The record establishes that the Commonwealth presented sufficient evidence that would allow a jury to reasonably convict Crews. First, the victim testified that she recognized Crews's eyes as those of her attacker. Second, Mr. Knight testified that he witnessed Crews running across the parking lot. Third, Harris identified Crews as the man on the surveillance videos. She testified that Crews left her in the car during the robbery and then came running out

to her as she was attempting to leave. Harris also testified that Crews had possession of the credit cards and desired to make purchases with them. Finally, the jurors were able to independently determine whether Crews was the man present in the surveillance videos. Although this evidence may have been circumstantial, "it is well settled that a jury may make reasonable inferences from such evidence." *Dillingham v. Commonwealth*, 995 S.W.2d 377, 380 (Ky.1999) (citing *Blades v. Commonwealth*, 957 S.W.2d 246, 250 (Ky.1997)); see also *Sawhill*, 660 S.W.2d at 4.

*8 [8] Crews specifically argues that the Commonwealth presented insufficient evidence to establish that physical force was directed at the victim, Ms. Cutter, or that physical injury resulted. The Commonwealth did not present any photographic evidence of Ms. Cutter's injuries, and the only testimonial evidence presented regarding these injuries came from Ms. Cutter herself. We determine that this was sufficient to allow the jury to weigh the credibility of her testimony, even in the absence of additional evidence. See *Ewing v. Commonwealth*, 390 S.W.2d 651, 653 (Ky.1965); see also *Hubbard v. Commonwealth*, 932 S.W.2d 381, 383 (Ky.App.1996).

[9] Moreover, a conviction of robbery in the first degree does not require intent to cause physical harm. *Ray v. Commonwealth*, 550 S.W.2d 482, 484–85 (Ky.1977). Rather, it merely requires a showing that physical injury was caused as a result of the theft. *Id.*; KRS 515.020(l)(a). Reviewing the evidence as a whole, it was not clearly unreasonable for the jury to convict Crews of robbery in the first degree. We find that the trial court did not err in denying Crews's motion for a directed verdict of acquittal.

Jury Instructions

Crews alleges two errors involving jury instructions. First, he argues that he was entitled to a jury instruction on the offense of theft by unlawful taking, and that the trial court erred by failing to instruct on that offense. Second, he asserts that the instruction for complicity to fraudulent use of credit cards erroneously omitted essential elements of the offense of complicity. Each will be discussed in turn.

Theft by Unlawful Taking

[10] Crews contends that the evidence presented at trial did not establish that physical force was used against the body of

Ms. Cutter, as required by KRS 515.010 and KRS 515.020. Crews claims that force was used to grab Ms. Cutter's purse, but was never directed towards her person. Therefore, he maintains that he was entitled to a theft by unlawful taking instruction because of the alleged absence of physical force or the threat of physical force. This issue is preserved.

The trial court is not required to instruct the jury on a theory with no evidentiary foundation. *Neal v. Commonwealth*, 95 S.W.3d 843, 850 (Ky.2003); see also *Bartley v. Commonwealth*, 400 S.W.3d 714, 731 (Ky.2013) (the trial court is only required to instruct the jury on lesser-included offenses when requested and justified by the evidence).

Crews did not provide any evidence at trial promoting the theory that Cutter was uninjured. Rather, he argued that this was a case of mistaken identity. For example, Crews sought to prove at trial that he could not physically run due to recent hip surgery and, therefore, could not have been the man who had committed the robbery. We agree with the Commonwealth that if the jury believed Crews's theory that someone else committed the crime, then the offense of theft by unlawful taking simply does not apply. Thus, the trial court did not err by denying Crews's request for a theft by unlawful taking instruction.

Complicity to Fraudulent Use of Credit Cards

*9 In his final statement of error, Crews argues that this instruction did not require the jury to find that Crews committed any of the affirmative acts required under the complicity statute, nor did it require the jury to find that he committed those acts with the intention of promoting or facilitating the offense. KRS 502.020. Crews did not properly preserve this issue for appeal by objecting to the instruction that was presented to the jury or by tendering his own instruction to the trial court. RCr 9.54(2). However, we will apply palpable error review. *Martin v. Commonwealth*, 409 S.W.3d 340, 346–47 (Ky.2013) (applying palpable error review to Appellant's unpreserved argument that a jury instruction was not given correctly); RCr 10.26. "In order to demonstrate an error rises to the level of a palpable error, the party claiming palpable error must show a 'probability of a different result or [an] error so fundamental as to threaten a defendant's entitlement to due process of law.'" *Allen v. Commonwealth*, 286 S.W.3d 221, 226 (Ky.2009) (quoting *Martin v. Commonwealth*, 207 S.W.3d 1, 3 (Ky.2006)).

Jury instructions are reviewed "as a whole to determine whether they adequately inform the jury of relevant

considerations and provide a basis in law for the jury to reach its decision.”*Smith v. Commonwealth*, 370 S.W.3d 871, 880 (Ky.2012) (internal citations omitted). There is no evidence, and the Commonwealth does not allege, that Crews himself fraudulently passed the credit cards to the Walmart cashier. In this case, it is only through the principle of complicity that Crews could be found guilty of fraudulent use of credit cards.

Jury Instruction No. 4A, as to Count 2, complicity to fraudulent use of a credit card, states in pertinent part:

- A. That in this county on or about September 26, 2010 and before the finding of the Indictment herein, [Crews] obtained money, goods, services, or anything else of value by use of a credit card issued to Charlotte Cutter, OR that Carria Harris obtained money, goods, services, or anything else of value by use of a credit card issued to Charlotte Cutter, with [Crews] intending that Carria Harris do so [.]

(Emphasis added).

In *Smith v. Commonwealth*, we held that, “[i]n viewing the second-degree assault instruction in its totality, when read in combination with the complicity definitional instruction, we believe the charge properly informed the jury of the elements necessary to convict Appellant of second-degree assault, including the relevant intent requirements.”*Id.* (emphasis added). Although noting that the instruction could have been phrased better, we found no error requiring reversal in *Smith* because part of the disputed instruction substantially mirrored the definition of complicity. *Id.* Accordingly, “by inference, the jury was directed to incorporate the definition of complicity into the main instruction.”*Id.*

[11] In the present case, complicity is not defined in the main instruction, a secondary instruction, or even in the definition section of the instructions. The only reference to complicity or anything resembling the elements of complicity appears in the heading of the instruction. Similarly, the record provides no additional evidence that the trial court informed the jury of the definition of complicity consistent with KRS 502.020. For the jury to have incorporated the definition of complicity by inference in the present case, the jury would have had to possess some personal knowledge of the elements of complicity, since nothing in the instructions remotely resembles KRS 502.020. *Cf. Smith*, 370 S.W.3d at 880. The instructions, therefore, erroneously failed to require that Crews *affirmatively acted with the intention of promoting or facilitating* the commission of the offense. *See* KRS 502.020; *see also Crawley v. Commonwealth*, 107 S.W.3d 197, 200 (Ky.2003). As worded, the instruction does not even state elements of a crime upon which a jury could have convicted Crews. We conclude that this error was palpable and requires reversal of the judgment as to the conviction for complicity to fraudulent use of a credit card.

Conclusion

*10 For the foregoing reasons, we affirm Crews's conviction of first-degree robbery and reverse Crews's conviction of complicity to fraudulent use of a credit card—\$500.00 or more but less than \$10,000.00 within a six (6) month period. We, therefore, remand this case to the trial court for further proceedings consistent with this opinion.

CUNNINGHAM, NOBLE, SCOTT, and VENTERS, JJ., concur. MINTON, C.J.; ABRAMSON and KELLER, JJ., concur in result only.

