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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000359-MR

JAMES ADKINS — APPELLANT

v.

APPEAL FROM OHIO CIRCUIT COURT
HONORABLE RONNIE C. DORTCH, JUDGE
ACTION NO. 07-CR-00033

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: MOORE AND WINE, JUDGES; HENRY, SENIOR JUDGE.

WINE, JUDGE: James Adkins ("Adkins") appeals to this court from his conviction in the Ohio Circuit Court for first-degree trafficking in a controlled substance and possession of drug paraphernalia. On appeal he argues that the trial court (1) improperly excluded "reverse 404(b)[1] evidence" by refusing to admit the indictment of an alleged alternative perpetrator, (2) abused its discretion by allowing him to publish his "key" piece of evidence to the jury only once, and (3)

[1] Kentucky Rule of Evidence 404(b).

erroneously omitted the word "unlawfully" from the jury instruction for the charge of first-degree trafficking, thus failing to instruct the jury on his defense. We reverse and remand on the third ground. However, we will address all issues as each is capable of repetition on retrial.

Background

On March 16, 2007, Sergeant Tracy Beatty ("Beatty") of the Ohio County Sherriff's Department went to the home of Adkins's brother to serve a warrant for Adkins's arrest on an unrelated charge. Beatty requested that Adkins come out of the residence. Adkins reluctantly came out of the residence and Beatty informed him that he had a warrant for his arrest. After arresting Adkins, Beatty noticed a bulge in Adkins's pocket. Beatty asked Adkins what the bulge was and Adkins replied that he did not know. Beatty then turned out Adkins's pocket and a white sock fell to the ground. Beatty testified that the sock contained two baggies containing a white crystalline substance and two devices commonly used to snort or smoke methamphetamine.

The substance was later determined by the Kentucky State Police Crime Lab to be methamphetamine. Tommy Oakes ("Oakes"), a crime lab technician, testified that one of the baggies contained 13.855 grams of methamphetamine and the other contained 2.574 grams of methamphetamine. Greg Huffman ("Huffman"), a detective with the Kentucky State Police Drug Enforcement Special Investigations Unit, testified that seventeen grams is "quite a bit" of methamphetamine. Huffman further testified that seventeen grams is more

than you would typically see in someone's possession for personal use, and that the drug was usually sold in increments of one to three grams.

An Ohio County jury found Adkins guilty of first-degree trafficking in a controlled substance and possession of drug paraphernalia. He was sentenced to five years for the trafficking conviction and twelve months for the possession of drug paraphernalia conviction. The sentences were to run concurrently for a total of five years. This appeal followed.

Analysis

A. Admissibility of Edge's Indictment

We begin by addressing Adkins's first ground for relief that the trial court erred by denying his request to introduce "reverse 404(b)" evidence. Specifically he contends that the trial court erred by refusing to admit the Commonwealth's indictment against Nathan Edge ("Edge"). Edge was a friend of Adkins's brother. Adkins contends that Edge was an alternative perpetrator in the crimes he was charged with committing, and therefore, Edge's indictment was relevant to his defense. The indictment charging Edge included one count of first-degree trafficking in a controlled substance (firearm enhanced), one count of first-degree possession of a controlled substance (firearm enhanced), one count of possession of drug paraphernalia (firearm enhanced), one count of second-degree fleeing or evading the police, one count of tampering with physical evidence, one count of resisting arrest, one count of possession or use of a radio that sends or receives police messages, and three counts of wanton endangerment.

We review evidentiary errors for abuse of discretion. *Anderson v. Commonwealth*, 231 S.W.3d 117, 119 (Ky. 2007). Thus, we will not reverse absent a finding that the "trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Id*.

Adkins claims that Edge dropped a sock full of drugs in his driveway on March 16, 2007 as he was getting into his pickup truck. Jeff Peach ("Peach") testified at trial that he was at a cookout at Adkins's house on the day in question. He testified that Edge stopped his truck at the end of the driveway as he was leaving the Adkins's brothers' house in order to fix a tarp over the back of the pick-up truck. Peach did not observe anything fall out of Edge's pocket. However, another witness, Julie McCarthy ("McCarthy"), testified that she was also at the cookout on March 16, 2007 and that she saw Edge knock a trash can over while speeding out of the driveway. She further testified that Edge stopped at the end of the driveway to fix a tarp covering the back of his pick-up truck. She saw something drop as Edge was getting back into his truck. She also testified that she observed Ethan, Adkin's young son, pick up a dirty syringe near the end of the driveway later that day. John Richardson ("Richardson"), another witness, stated that he heard Edge's tires spin as he left the property. However, Richardson did not personally observe Edge leave. Although he did not observe Edge leave, Richardson testified that he observed Ethan pick up a dirty syringe near the end of the driveway that day.

Adkins's defense is largely in agreement with McCarthy and Richardson's version of the events. He testified that he went to check the mailbox at the end of the driveway that day when his young son picked up a dirty syringe from the ground. Adkins had previously contacted the sheriff's department about finding used syringes in his driveway.[2] Adkins immediately removed the needle from the boy's hand and then observed something white lying on the ground. He testified that he picked up the object and discovered its contents. He further testified that he walked back to his brother's house[3] at that time and confronted him about the drugs, warning that he was going to report Edge to the police. The drugs were still in Adkins's pocket when Sgt. Beatty arrived shortly thereafter to arrest him.

Adkins sought to introduce the indictment against Edge as evidence supporting his theory that Edge had dropped the drugs in his driveway that day. Adkins argued that the indictment established motive.[4] The Commonwealth claimed that the only purpose for admitting the indictment would be to argue that Edge had trafficked drugs on other occasion(s) and thus, that the drugs must have belonged to him on that occasion. The Commonwealth posited that such evidence was properly excluded under KRE 404(b) because the defense's argument that the

[2] Adkins's phone records were introduced at trial to support this contention.

[3] Adkins's brother's house was located on the same plot of land. The two residences shared a common driveway.

[4] Opportunity was shown by the fact that Edge was on the property that day.

indictment establishes "motive" was nothing more than a subterfuge to show Edge's conformity with character based upon prior bad acts.

Our courts have held that a defendant has a right to produce evidence to show that a third party, an "alleged alternative perpetrator" ("aaltperp"), committed the crime for which the defendant was accused. *Beaty v. Commonwealth*, 125 S.W.3d 196, 208 (Ky. 2003). However, evidence is not admissible merely because it tends to show that an aaltperp committed the offense. *Id*. Indeed, evidence of motive or opportunity alone is insufficient to guarantee admissibility. *Id*. Moreover, the evidence must be relevant and survive the application of KRE 403 (meaning that its probative value cannot be substantially outweighed by "confusion of the issues, or misleading the jury, or . . . undue delay.") KRE 403.

The Kentucky Supreme Court, following the federal circuits, has held that the standard for "reverse 404(b)" evidence is lower than the standard for regular KRE 404(b) evidence. *Blair v. Commonwealth*, 144 S.W.3d 801, 810 (Ky. 2004). The reason for the lower standard is that the danger of prejudice that exists when the Commonwealth is introducing evidence against a criminal defendant does not exist when a criminal defendant is introducing evidence that an aaltperp committed an offense. *U.S. v. Stevens*, 935 F.2d 1380, 1404 (3rd Cir. 1991). While we recognize that the standard is lower, and that the indictment against Edge may have met the lower standard, a trial court is not obliged to admit every piece of evidence that may inculpate a third party. As our Supreme Court has said,

"evidence is not admissible simply because it would tend to prove that another person was the perpetrator." *Fields v. Commonwealth*, 274 S.W.3d 375, 401 (Ky. 2008). Rather, a criminal defendant's due process rights are not infringed by every limitation placed on the admission of such evidence. *Id*. A criminal defendant's constitutional rights are violated only where the exclusion of such evidence "significantly undermine[s] fundamental elements of the defendant's defense." *Id*., *quoting United States v. Scheffer*, 523 U.S. 303, 315, 118 S.Ct. 1261, 1267-68, 140 L.Ed.2d 413 (1998).

Here, the trial court exercised its discretion to exclude the indictment against Edge. Although the trial court excluded the indictment, Adkins presented ample other evidence to support his theory that Edge was the true owner of the drugs. Indeed Adkins and three other witnesses testified to Edge being at the house that day, two of whom testified that Edge dropped something on the driveway. Throughout the trial, defense counsel injected the idea that Edge had dropped the sock full of drugs in Adkins's driveway that day. Further, defense counsel published a statement by Chris Gilstrap ("Gilstrap"), who shared a jail cell with Adkins and Edge after Adkins's arrest. The published statement noted that Gilstrap overheard a conversation between Adkins and Edge wherein Edge made an admission that the drugs were his. Namely, Edge "thanked" Adkins for not "ratting him out" over the drugs he dropped at his house. Moreover, Adkins's counsel made his theory of the case clear in both opening and closing statements.

Thus, it does not appear that Adkins's position was significantly undermined by the exclusion of Edge's indictment. As such, we do not reverse on this ground.

B. Publication of Gilstrap's Statement to the Jury

We now address Adkins's allegation of error that the trial court impermissibly refused to allow him to publish Gilstrap's statement to the jury more than one time. Adkins argues that while the trial court had discretion to restrict the defense to one publication of the statement to the jury, such a restriction would also have had to been placed on the Commonwealth. However, we find Adkins's argument to be without merit as he never requested to publish the statement to the jury more than once. A party must make known to the trial court the action he desires. Kentucky Rules of Criminal Procedure ("RCr") 9.22. Indeed, here, Adkins received what he requested: publication of the statement to the jury. We will not dissect whether the trial court should have allowed further publication when same was never requested at trial.

C. Omission of the word "unlawful" from the jury instructions

Finally, we consider Adkins's argument that the trial court erred by denying his request to insert the word "unlawfully" into the instruction for trafficking in a controlled substance. The instructions read as follows:

> You will find the Defendant, James David Adkins, guilty of Trafficking in a Controlled Substance in the First Degree under this instruction, if and only if, you believe from the evidence beyond a reasonable doubt all of the following:

> 1.) That in this county on or about March 16, 2007, and before the finding of the Indictment herein, he had in his possession a quantity of methamphetamine
> AND
> 2.) That he knew the substance so possessed by him was methamphetamine
> AND
> 3.) That he had the methamphetamine in his possession with the intent to sell, distribute or dispense it to another person.

Adkins sought to have the word "unlawfully" inserted into the first subsection of the instruction, so that the instruction would read: "You will find the Defendant . . . guilty . . . if you believe . . . he ***unlawfully*** had in his possession a quantity of methamphetamine." Adkins argues that the word "unlawfully" was necessary in the instruction because his defense was that the drugs belonged to Edge and that he intended to turn them over to police. Adkins also argued that the word "unlawfully" appears in Kentucky Revised Statute ("KRS") 218A.1412, the applicable statute for trafficking in a controlled substance. KRS 218A.1412 reads in pertinent part:

> A person is guilty of trafficking in a controlled substance in the first degree when he knowingly and ***unlawfully*** traffics in: a controlled substance, that is classified in Schedules I or II which is a narcotic drug . . .

(emphasis added). Adkins argues that the entire theory of his defense was predicated upon the idea that he possessed the drugs lawfully, with the intent to turn them over to police. Further, he argues that the language in the instruction requiring that the defendant must have intended to "sell, distribute or dispense [the

drugs] to another person" was misleading as Adkins's defense was that he intended to give (or "dispense") the drugs to police.

The Commonwealth aptly points out that the jury instructions used in this case are identical to instructions that have been previously approved by our courts in trafficking cases. *See e.g., Burnett v. Commonwealth*, 31 S.W.3d 878 (Ky. 2000). Moreover, we recognize that the instructions mirror the model instruction found in Cooper's *Kentucky Instructions to Juries*. 1 Cooper, *Kentucky Instructions to Juries* §9.11B. However, the analysis does not end here.

It has been a long-standing principle in this Commonwealth that a defendant is entitled to an instruction on his theory of the case. *See, e.g., Gossett v. Commonwealth*, 90 S.W.2d 730, 731 (Ky. 1936); *Sexton v. Commonwealth*, 252 S.W.2d 415 (Ky. 1952); *Ragland v. Commonwealth*, 421 S.W.2d 79, 81 (Ky. 1967). Initially, the rule was "that an accused person is [always] entitled to have an affirmative defense submitted by a concrete instruction." *Scott v. Commonwealth*, 224 S.W.2d 458, 459 (Ky. 1949). However, the rule has been modified over the years so that an accused is entitled to have the jury instructed on a defense only where it "is reasonably deducible from the evidence." *Fredline v. Commonwealth*, 241 S.W.3d 793, 797 (Ky. 2007). Indeed, an instruction is only proper where there is "some evidence justifying a reasonable inference of the existence of a defense." *Grimes v. McAnulty*, 957 S.W.2d 223, 226 (Ky. 1997).

In the present case, one cannot deny that there was more than enough evidence introduced so that one might reasonably infer that the drugs were not

unlawfully in Adkins's possession. As previously noted in our analysis of the exclusion of Edge's indictment, extensive evidence was produced in this case that supported Adkins's defense that the drugs belonged to Edge and that he did not possess them unlawfully. Regardless of the court's opinion of the defendant's position, any theory of the case which is supported by the evidence must be submitted to the jury. *See Mishler v. Commonwealth*, 556 S.W.2d 676, 680 (Ky. 1977). Because the instructions failed to include any language which might encapsulate Adkins's defense, we reverse the judgment and sentence of the Ohio Circuit Court. *See, e.g., Mondie v. Commonwealth*, 158 S.W.3d 203, 209-210 (Ky. 2005) (failure to instruct the jury on a lawful defense is reversible error).

Conclusion

In consideration of the foregoing, we reverse the judgment and sentence of the Ohio Circuit Court and remand for a new trial.

ALL CONCUR.

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