RENDERED: FEBRUARY 5, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-002279-MR

TABATHA LYNN UTTERBACK — APPELLANT

v.

APPEAL FROM POWELL CIRCUIT COURT
HONORABLE FRANK ALLEN FLETCHER, JUDGE
ACTION NO. 08-CR-00075

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: LAMBERT AND THOMPSON, JUDGES; KNOPF,[1] SENIOR JUDGE.

LAMBERT, JUDGE: Tabitha Utterback directly appeals from the Powell Circuit Court's judgment convicting her of first-degree promoting contraband and first-

[1] Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

degree unlawful transaction with a minor, for which she received a ten year sentence. After careful review of the record, we affirm.

On May 7, 2008, Utterback was indicted for promoting contraband in the first degree and for unlawful transaction with a minor in the first degree. Utterback was tried before a jury on October 21, 2008.

At trial, Brian Trent, Utterback's son, testified that he was twenty years old and had one brother, J.U., a minor. Brian testified that he was working at Pizza Hut in Winchester, Kentucky on April 2, 2008, when his mother came in to work her shift. J.U. rode to work with Utterback, and Trent was to take J.U. to a relative's house on his way home. Utterback gave Trent a bag and said it contained a magazine and a razor to take to his stepfather, Utterback's husband, at the Powell County Jail. Trent did not examine the bag or anything inside the bag and instead got in his car with J.U. to drive to the jail. Utterback had also given Trent some money to take to her husband, Archie Utterback.

Trent left Pizza Hut and went directly to the jail, arriving there around 4:00 p.m. Trent told J.U. that he did not want to get out of the car and sent J.U. into the jail with the bag. J.U. came back to the car to get the commissary money, and he then took that into the jail. Trent saw J.U. give both the bag and the money to the same jail staff member. Trent testified that he did not know the bag his mother had given him contained a radio, marijuana, and hydrocodone and testified that J.U. did not know this either. After stopping at the jail, Trent took J.U. to a relative's house.

Deputy Jailer Sue Cunningham testified that she was a deputy jailer at the Powell County Jail and was working there on April 2, 2008. She stated that Archie Utterback was an inmate there on that date and that Archie's son, J.U., brought some items to Archie on that date. She inventoried the items given to her and found a radio and a brochure for mail order shoes in a plastic bag. J.U. said he wanted to leave the items for Archie, then left and returned with some money for his father. Cunningham stored the items. Later, Deputy Jailer Amy Anderson checked the radio and found five white pills and a small amount of marijuana inside.

Deputy Jailer Amy Anderson testified that she was working at the Powell County Jail on April 2, 2008, and that Archie Utterback was an inmate at that time. Anderson received a radio from Deputy Jailer Sue Cunningham, not in its original package, that had glue around the screw holes. Deputy Anderson opened the radio and saw the pills and a small bag of marijuana inside. Deputy Anderson then secured the evidence in a lock box.

Chief Deputy Jailer Darla Pasley was working at the Powell County Jail on April 2, 2008. She obtained the radio, pills, and marijuana from the lock box and gave them to Sheriff Matthews of the Powell County Sheriff's Office. Sheriff Matthews began to investigate Utterback's case on April 3, 2008. Sheriff Matthews interviewed Utterback, who initially told him that neither she nor her sons had been at the jail or taken anything to Archie Utterback on the day in question.

Matthews interviewed Trent, who said that his mother had given him a plastic bag with a radio, razor head, and a magazine and told him to take J.U. with him to deliver the bag to the Powell County Jail. Trent said that he did not know there were drugs in the radio or bag, but if so, his mother had placed them there. Sheriff Matthews re-interviewed Utterback, who then said that she had lied during her first interview because she was scared. Utterback claimed that she did not want to do what she had done, but that Archie had talked her into doing it. Sheriff Matthews played a tape of Utterback's second statement for the jury at trial.

In her second statement, Utterback testified that she was married to Archie Utterback, who was in the Powell County Jail for trafficking in hydrocodone. Utterback stated that she had two children, Brian Trent, who was Archie's stepson, and J.U., who was Archie's son. Utterback said that Archie had called her and said he needed something for his nerves and told her that someone would drop off pills to her in a parking lot. She stated that she purchased the radio, took the radio apart, put the drugs inside, reassembled the radio, and gave it to the boys with a shaver adapter and some money. Utterback then let the boys take the radio and the money to the jail. Utterback stated that the two boys did not know anything about the drugs inside the radio.

In her defense, Utterback claimed that Archie was pressuring her into getting him the drugs and that she finally gave in and got them for him. At trial, Utterback moved for a directed verdict and the Court denied the motion. Utterback

requested a jury instruction for criminal facilitation for promotion of contraband on the theory that she facilitated Archie Utterback, not her sons. The Court declined to give the facilitation instruction.

The jury found Utterback guilty on Count I, promoting contraband in the first degree and guilty on Count II, unlawful transaction with a minor in the first degree. The jury sentenced Utterback to one year on Count I and ten years on Count II and recommended concurrent sentences. Utterback was sentenced to ten years' imprisonment on November 5, 2008, and now appeals from this judgment to this Court.

Utterback argues that the trial court erred by denying her motion for a directed verdict because the Commonwealth failed to prove all the necessary elements of KRS 530.064(1), unlawful transaction with a minor in the first degree. Utterback argues that the Commonwealth failed to prove that the victim, J.U., agreed to act in a criminal manner and that the victim's agreement occurred because Utterback encouraged the minor to do so.

On appeal, the test for whether the trial court should have granted a directed verdict is: "under the evidence as a whole, it would be clearly unreasonable for the jury to find guilt." *Commonwealth v. Sawhill*, 660 S.W.2d 3, 5 (Ky. 1983). We agree with the Commonwealth that the evidence supports a conviction for unlawful transaction with a minor in the first degree and that the trial court appropriately denied Utterback's motion for a directed verdict.

KRS 530.064(1)(b) states, "A person is guilty of unlawful transaction with a minor in the first degree when he or she knowingly induces, assists, or causes a minor to engage in . . . illegal controlled substances activity other than activity involving marijuana." The Court in *Young v. Commonwealth*, 968 S.W.2d 670 (Ky. 1998) defined the key terms of KRS 530.064, finding that to "induce" a minor means that there was a "successful persuasion; that the act has been effective and the desired result obtained." *Id.* at 672. The Court further stated that to complete the offense the minor must consent to and actively participate in the activity. *Id.*

Utterback argues that because J.U. did not know the activity he was participating in was illegal, he did not consent to and actively participate in the activity. Utterback cites the cases of *Young, supra* and *Combs v. Commonwealth*, 198 S.W.3d 574 (Ky. 2006) for the proposition that J.U. did not "consent" to engage in the unlawful transaction and therefore she was not guilty of unlawful transaction with a minor.

We disagree with Utterback's reasoning and agree with the Commonwealth that neither the statute nor the two interpreting cases require that the minor know of the criminal nature of his conduct.

In *Young*, the defendant was charged with unlawful transaction with a minor in the first degree for asking children less than twelve years of age to engage in sex with him, or with each other. *Young*, 968 S.W.2d at 671. All of the children refused to engage in anything and no sexual activity occurred. *Id.* at 671-672. The

Court found that while evidence was insufficient to support a charge of unlawful transaction, the record did support the defendant's convictions for attempt to commit unlawful transaction in the first degree. *Id.* at 674. The Court held that the statute requires that the desired result be obtained and that the minor has to consent and actively take part in the illegal activity. The Court did **not** state that the minor had to have actual knowledge that the activity was illegal.

Similarly, in *Combs*, the evidence reflected that the defendant touched the intimate parts of an eight year old girl on multiple occasions and that she did not want him to do so. *Combs*, 198 S.W.3d at 577. The defendant also masturbated in the girl's presence and tried to get her to touch him, which she refused to do. *Id.* The Court referred to its earlier analysis in *Young* and found that by not wanting to participate in the sexual activity and by refusing to do so, the minor girl had not conducted any activity that violated the unlawful transaction statute. The Court found that the defendant could have been convicted of sexual abuse in the first degree for touching the child or convicted of attempted unlawful transaction in the first degree. *Id.* at 578.

The instant case is different from *Young* and *Combs* because J.U. actually consented to participate in the transaction and completed the illegal transaction. J.U. was persuaded to participate in the offense of unlawful transaction when Utterback initiated a chain of events culminating in J.U. delivering the drugs to the jail. *Young* and *Combs* interpret the portion of 530.064(1)(b) which requires a successful persuasion of a minor to participate in

illegal activity and neither case requires that the minor know of the unlawful activity. Instead, both cases require that the minor actually participate in the activity. In the instant case, J.U. did not know of the illegal activity, but he actually participated and successfully completed the illegal task, which is all the statute and interpreting case law requires. KRS 530.064 protects minors from manipulation by unscrupulous adults who would seek to dupe unknowing children into helping them commit crimes. If the child were required to know of the illegal activity, the statute would not adequately protect those unknowing children.

The Commonwealth proved that Utterback knowingly induced, assisted, or caused J.U. to illegally transport illegal drugs into the jail. The elements of the offense were proven beyond a reasonable doubt, and it was not clearly unreasonable for the jury to convict Utterback. Accordingly, the trial court appropriately denied Utterback's motion for a directed verdict.

Utterback next argues that she was entitled to a jury instruction on criminal facilitation of promoting contraband in the first degree under the theory that she only facilitated her husband, Archie, in bringing the drugs into the jail. Again, we agree with the Commonwealth that the trial court correctly denied Utterback's request for an instruction on criminal facilitation of promoting contraband in the first degree.

The standard for instructing on a lesser included offense is well established:

> Although a trial judge has a duty to prepare and give instructions on the whole law of the case, including any lesser included offenses which are supported by the evidence, *Swain v. Commonwealth*, 887 S.W.2d 346, 348 (Ky. 1994), that duty does not require an instruction on a theory with no evidentiary foundation. *Barbour v. Commonwealth*, 824 S.W.2d 861, 863 (Ky. 1992), *overruled on other grounds*, *McGinnis v. Commonwealth*, 875 S.W.2d 518 (Ky. 1994); *Neal v. Commonwealth*, 303 S.W.2d 903 (Ky. 1957). An instruction on a lesser included offense is required only if, considering the totality of the evidence, the jury might have a reasonable doubt as to the defendant's guilt of the greater offense, and yet believe beyond a reasonable doubt that he is guilty of the lesser offense. *Wombles v. Commonwealth*, 831 S.W.2d 172, 175 (Ky. 1992).

Houston v. Commonwealth, 975 S.W.2d 925, 929 (Ky. 1998).

Utterback was indicted under Count I as an accomplice to her minor child pursuant to KRS 520.050 and KRS 502.020 for promoting contraband in the first degree when she "aided, counseled, or attempted to aid her minor child in the planning or committing of introducing dangerous contraband into the Powell County Jail." At trial, Utterback unsuccessfully sought a lesser included instruction for criminal facilitation to promoting contraband under KRS 506.080(1), which provides:

> A person is guilty of criminal facilitation when, acting with knowledge that another person is committing or intends to commit a crime, he engages in conduct which knowingly provides such person with means or opportunity for the commission of the crime and which in fact aids such person to commit the crime.

Complicity, for which Utterback was indicted, is distinguished from facilitation by intent. *See Dixon v. Commonwealth*, 263 S.W.3d 583, 586-587 (Ky. 2008). Further, the Court elaborated:

> As we have explained, the chief difference between complicity and facilitation is intent: '[u]nder the complicity statute, the defendant must intend that the crime be committed; under the facilitation statute, the defendant acts without such intent.' Thus, we have described facilitation as 'reflect[ing] the mental state of one who is 'wholly indifferent' to the actual completion of the crime.'
> . . .
>
> We reject any notion that a facilitation instruction must always accompany a complicity instruction. Rather, a lesser-included instruction, such as facilitation, may be given 'only when supported by the evidence.' And since facilitation and complicity require different mental states, an instruction on facilitation is necessary only if the evidence supports the existence of both mental states.

Id. (Internal citations omitted).

Applying the above principles to the facts of Utterback's case, there is no doubt that she did not qualify for a lesser included instruction on criminal facilitation to promoting contraband. Utterback undertook a series of deliberate steps to introduce dangerous contraband into the Powell County Jail. After conferring with her husband, who was incarcerated at that facility, she bought a radio, picked up drugs, and placed the drugs inside the radio. Then, Utterback instructed her sons to take the items to the jail. Clearly, Utterback aided and assisted her child in the introduction of dangerous contraband into a detention facility. Because she intended that a crime be committed, the evidence in no way

supports the idea that Utterback was wholly indifferent to the actual commission of the crime or was merely a facilitator providing the means or opportunity to commit the crime. Instead, Utterback was an active participant and the major player in a plan to use her own children to smuggle illegal substances into the jail.

Utterback argues that she was just facilitating her husband in sneaking the drugs into the jail and merely provided him the means and opportunity to commit the crime of promoting contraband. However, Utterback was not charged under that theory of the law. Instead, the indictment plainly charged Utterback as an accomplice to her child. She was neither charged nor convicted of working with her husband to promote contraband, and the effort to shift the focus to her husband is misplaced. Even viewing the facts from the perspective of Utterback helping her husband, the evidence overwhelmingly indicates that she was not just a facilitator providing the means or opportunity to commit the crime, but an active participant who engaged in a detailed and deliberate course of conduct with definite intent to commit the offense.

Given that Utterback was highly involved and intended the commission of the offenses for which she was charged, she was not entitled to a facilitation instruction and the trial court did not commit error in denying her request.

The Powell Circuit Court did not err in denying Utterback's motion for a directed verdict or in denying her request for a facilitation instruction.

Therefore, we affirm the judgment and conviction entered by the Court on November 5, 2008.

ALL CONCUR.

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