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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2004-CA-001192-MR

ROBERT CURTIS CAHILL, III — APPELLANT

v.

APPEAL FROM FULTON CIRCUIT COURT
HONORABLE WILLIAM LEWIS SHADOAN, JUDGE
ACTION NO. 03-CR-00065

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

** ** ** ** **

BEFORE: JOHNSON, KNOPF, AND VANMETER, JUDGES.

KNOPF, JUDGE: Robert Cahill, III, appeals from a judgment of the Fulton Circuit Court, entered May 13, 2004, convicting him of tampering with anhydrous ammonia with intent to manufacture methamphetamine by complicity;[1] and third-degree criminal

[1] KRS 250.4892, 250.991, 502.020.

trespass by complicity.[2] He was sentenced to sixteen years in prison and a $250.00 fine, respectively. He contends that the trial court erred by denying his motion for a directed verdict with respect to his alleged intent to promote the manufacture of methamphetamine, by misinstructing the jury, and by failing to separate one of the Commonwealth's witnesses. Because we agree that the jury instructions were fatally flawed, we reverse in part and remand.

During the late afternoon or evening of August 16, 2003, Cahill; his girlfriend, Mary Collins; and his friend, Kenneth Gourley, drove in Collins's car from Cahill's Dyersburg, Tennessee, home into Fulton County, Kentucky. There, according to Collins, they "stumbled upon" the premises of Speed Ag Services, LLC, an agricultural supply business located on Middle Road near the intersection of Kentucky highway 239. Having seen Speed Ag's storage tanks of anhydrous ammonia, the trio proceeded to Wal Mart, where one of the men (Collins did not know which) obtained a black rubber hose. After dark, Cahill drove them back to Speed Ag. The men then exited the car with the hose. Collins remained behind and claimed that she did not see what they did.

Not long thereafter, however, a Fulton County detention-center officer who informally patrolled Speed Ag's

[2] KRS 511.080, 502.020.

premises during off hours noticed Collins's car and came to investigate. He found the car backed between two of the rows of anhydrous ammonia tanks and saw Collins apparently asleep in the front passenger seat. He radioed for assistance and was soon joined by officers from the Fulton County Sheriff's Department. One of the officers roused Collins, who admitted that her companions, Cahill and Gourley, had apparently run into the adjacent corn field when the first officer approached. The officers found a portion of the black hose crudely coupled to one of the anhydrous ammonia tanks by means of duct tape and a soda bottle. They called to Cahill and Gourley, but not until they threatened to "loose the dogs" did Cahill emerge from the cornfield and submit to arrest. According to one of the arresting officers, deputy sheriff Zickefoose, Cahill admitted that they were there to steal "anhydrous," but claimed that they had never done it before. Gourley was apprehended a few hours later at a residence about a mile-and-a-half away where he had asked to use the phone. His disheveled appearance and unlikely story about car trouble made the owner suspicious enough to call a neighbor, who apparently called the police. The next morning, one of the officers searched the cornfield and found a container, like a restaurant's soft drink dispenser, that still held a small amount of liquid with a strong smell of ammonia.

This container matched a lid the officers had found the night before near the tampered-with tank.

Cahill and Gourley were charged with having violated KRS 250.4892 which makes it unlawful for any person "to tamper with equipment, containers, or facilities used for the storage, handling, transporting, or application of anhydrous ammonia." Under KRS 250.991, violation of KRS 250.4892 is a Class D felony, "unless it is proven that the person violated KRS 250.4892 with the intent to manufacture methamphetamine . . . in which case it is a Class B felony for the first offense and a Class A felony for each subsequent offense." The Commonwealth alleged that Cahill and Gourley had the aggravating intent to manufacture methamphetamine, and, apparently because the Commonwealth did not know which of the two had attached the hose to the anhydrous ammonia tank, it alleged that both of them had violated KRS 250.4892 by complicity; i.e., that "with the intention of promoting or facilitating the commission of the offense," both had "aid[ed], counsel[ed], or attempt[ed] to aid [the other] in planning or committing the offense."[3] They were tried together in February 2004. As noted above, the jury found both of them guilty of the aggravated tampering charge and of third-degree criminal trespass. Cahill was sentenced in accord

[3] KRS 502.020.

with the jury's recommendation to sixteen years in prison.[4] He contends on appeal that the Commonwealth failed to prove that either he or Gourley intended to manufacture methamphetamine and thus that he was entitled to a directed verdict of acquittal on the aggravated charge. We disagree.

"On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt."[5] A person is presumed to intend the logical and probable consequences of his acts, so that intent may be inferred from the act itself, the circumstances surrounding it, and the person's knowledge.[6]

Here, as Cahill notes, the police did not find in Collins's car or on the persons of Cahill and Gourley any of the other chemicals or equipment commonly used in the manufacture of methamphetamine. Without such evidence, Cahill argues, the jury could not determine whether he and Gourley intended to use the stolen anhydrous ammonia themselves or to trade or to sell it to someone else.

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[4] Gourley was sentenced to ten years in prison. This Court affirmed his conviction in an unpublished opinion, Gourley v. Commonwealth, 2004-CA-001196-MR (July 29, 2005).

[5] Beaty v. Commonwealth, 125 S.W.3d 196, 203 (Ky. 2003) (citing Commonwealth v. Benham, 816 S.W.2d 186 (Ky. 1991), internal quotation marks omitted).

[6] Harper v. Commonwealth, 43 S.W.3d 261 (Ky. 2001); Davis v. Commonwealth, 967 S.W.2d 574 (Ky. 1998).

Two of the testifying officers, however, had received special training in methamphetamine interdiction, and both testified that, while a black market for anhydrous ammonia exists and while people sometimes trade anhydrous ammonia for the finished product, it was far more common in their experience for thieves to use stolen anhydrous ammonia in their own manufacturing operation. Collins testified, moreover, that she was not sure whether Cahill and Gourley intended to "cook" methamphetamine themselves or to supply some other manufacturer, indicating that Cahill and Gourley had knowledge of the manufacturing process. This evidence was sufficient, we believe, to permit a reasonable inference that Cahill and Gourley tampered with Speed Ag's anhydrous ammonia tank with the intent to manufacture methamphetamine. The trial court did not err, therefore, by denying Cahill's motion for a directed verdict on the aggravated charge.

Cahill next contends that the trial court erred by failing to include the element of intent in its guilt-by-complicity jury instructions. We agree.

The trial court's instruction number two provided as follows:

> You will find the Defendant, Robert Curtis Cahill, III, guilty of Complicity to Tampering With Anhydrous Ammonia Equipment with Intent to Manufacture Methamphetamine, under this Instruction if, and only if, you

> believe from the evidence beyond a reasonable doubt all of the following:
> A. That in this county on or about the 16th day of August, 2003 and before the finding of the indictment herein, Kenneth Saber Gourley knowingly tampered with anhydrous ammonia equipment used for storage, handling, transporting or application of anhydrous ammonia;
> B. That Kenneth Saber Gourley did so with the intent to procure said anhydrous ammonia to manufacture methamphetamine; AND
> C. That the Defendant, Robert Curtis Cahill, III aided and assisted Kenneth Saber Gourley to tamper with anhydrous ammonia equipment by providing means and/or opportunity to tamper with anhydrous ammonia equipment.

As noted above, however, to be guilty by complicity under KRS 502.020(1), it was not enough for Cahill merely to have aided and assisted Gourley; he must have done so "with the intention of promoting or facilitating the commission of the offense." The trial court's instruction therefore lacked a part D, something like the following: That in aiding and assisting Gourley, it was Cahill's intention that Gourley tamper with the anhydrous ammonia equipment for the purpose of manufacturing methamphetamine.[7] Addressing a similarly deficient instruction in Harper v. Commonwealth,[8] our Supreme Court ruled that intent is an essential element of guilt by complicity under KRS 502.020(1) and held that "where intent is an essential element

[7] Harper v. Commonwealth, 43 S.W.3d 261 (Ky. 2001) (citing Justice Cooper's specimen instruction in 1 Cooper, *Kentucky Instructions to Juries (Criminal)* § 10.06 (Anderson 1999)).

[8] *supra.*

of the offense, failure to instruct on it is reversible error."[9] We agree with Cahill, therefore, that the trial court's failure to instruct on the essential element of his intent entitles him to a new trial.[10]

This is so notwithstanding the fact, as the Commonwealth points out, that Cahill did not object to the instructions as given. He did, however, tender instructions that included an intent element and thus, arguably at least, satisfied RCr 9.54, which provides that "[n]o party may assign as error the giving or the failure to give an instruction unless the party's position has been fairly and adequately presented to the trial judge by an offered instruction." In Harper, moreover, not only had the appellant not objected to the erroneous instructions, but they were "word-for-word identical to the complicity instructions [she] tendered."[11] Nevertheless, the error was deemed reversible. The same error here requires the same result.

Having determined that Cahill is entitled to relief, we shall comment on his other allegations of error only to the

[9] Harper v. Commonwealth, 43 S.W.3d at 264.

[10] Although the trial court's instruction number five, the third-degree trespassing instruction, also omitted the intent element, Cahill has not sought relief on that ground. Our ruling, therefore, does not affect his conviction for that crime.

[11] Harper v. Commonwealth, 43 S.W.3d at 268 (Justice Cooper concurring).

extent that they bear on issues apt to arise at a new trial. First, the trial court did not err by refusing to instruct the jury on the lesser offenses of tampering and trespassing by facilitation. Under KRS 506.080(1) a person may be held guilty of a crime by 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.

Whereas complicity requires that the defendant intend that the crime be committed, "[f]acilitation reflects the mental state of one who is wholly indifferent to the actual completion of the crime."[12]

An instruction on a lesser-included offense is appropriate, of course, if, but only if, "on the given evidence a reasonable juror could entertain a reasonable doubt of the defendant's guilt of the greater charge, but believe beyond a reasonable doubt that the defendant is guilty of the lesser offense."[13] Here, the evidence that Cahill did not merely drive the car but got out of it with Gourley near the anhydrous ammonia tanks, that he exhibited a sense of wrongdoing by

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[12] Thompkins v. Commonwealth, 54 S.W.3d 147, 150 (Ky. 2001) (citations and internal quotation marks omitted).

[13] Thompkins v. Commonwealth, 54 S.W.3d at 151 (citation and internal quotation marks omitted).

fleeing into the cornfield, and that he admitted upon arrest that "we" had come to steal anhydrous ammonia precluded a finding that he was indifferent to the completion of the crime and so likewise precluded a guilt-by-facilitation instruction.

The trial court did not err by providing a separate verdict form for each principal offence and each lesser-included offence. Although apparently that practice is common, the court may want to take some precaution against the sort of juror confusion associated with it addressed by our Supreme Court in McGinnis v. Wine.[14]

We are not prepared to say that the trial court erred by instructing the jury in Cahill's case to consider his complicity and in Gourley's case to consider his complicity, thus seeming to suggest that there was no principal actor. We would note, however, that our Supreme Court has approved a combination instruction to address cases in which it is not clear whether the defendant acted as a principal or an accomplice.[15]

Finally, we agree with Cahill that the court erred by allowing deputy Zickefoose, one of the Commonwealth's witnesses, to remain in the courtroom as bailiff after the defendants had

[14] 959 S.W.2d 437 (Ky. 1998).

[15] Caudill v. Commonwealth, 120 S.W.3d 635 (Ky. 2003); Halvorsen v. Commonwealth, 730 S.W.2d 921 (Ky. 1986). *See* 1 Cooper, *Kentucky Instructions to Juries* § 10.07 (Anderson 1999).

invoked the witness-separation rule, KRE 615. Aside from three narrow exceptions, none of which applied to officer Zickefoose, this rule is mandatory.[16] There are due-process implications, moreover, to permitting the bailiff, an officer of the impartial court, to serve or to appear to serve as an agent of the state.[17] Officer Zickefoose should have been excluded from the courtroom along with the other witnesses.

In sum, although the Commonwealth presented sufficient evidence to permit a finding that Cahill intended to manufacture or to promote or facilitate the manufacture of methamphetamine, the jury instructions erroneously omitted that element from the findings the jury was required to make and permitted the jury to convict him based solely on its conclusions regarding Gourley's intentions. Our Supreme Court has held that the failure to instruct on an essential element of the offense is reversible error. Accordingly, we reverse that portion of the May 13, 2004, judgment convicting Cahill of tampering with anhydrous ammonia equipment with the intent to manufacture methamphetamine and remand the matter to the Fulton Circuit Court for a new trial.

ALL CONCUR.

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[16] Mills v. Commonwealth, 95 S.W.3d 838 (Ky. 2003).

[17] Gonzales v. Beto, 405 U.S. 1052, 92 S.Ct. 1503, 31 L.Ed.2d 787 (1972); Agnew v. Leibach, 250 F.3d 1123 (7th Cir. 2001); Coots v. State, 826 S.W.2d 955 (Tex.App. 1992).

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