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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-001239-MR

JIM LATTNER — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL, JR., JUDGE
ACTION NO. 04-CR-00742

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: SCHRODER, JUDGE; KNOPF AND ROSENBLUM, SENIOR JUDGES.[1]

SCHRODER, JUDGE: Jim Lattner appeals from a judgment of the Fayette Circuit Court convicting him of illegal possession of a controlled substance in the first degree and persistent felony offender in the first degree. Following a jury verdict, the court sentenced Lattner to 10 years' imprisonment. Lattner alleges three trial errors on appeal. We affirm.

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

On April 30, 2004, Lattner was charged with trafficking in a controlled substance in the first degree after being arrested while attempting to sell drugs to Gladys Stevenson. Earlier that day, the Lexington police served a search warrant on the home of Stevenson. During the search, police found drugs and paraphernalia. Stevenson admitted to selling drugs and agreed to cooperate with police by placing a recorded phone call to her drug supplier, Lattner, seeking to buy drugs from him. Unaware of the ruse, he agreed. When Lattner arrived, Lexington police moved in and arrested him. As Lattner was handcuffed, a police officer observed him drop two baggies of crack cocaine.

On June 9, 2004, Lattner was indicted for trafficking in a controlled substance in the first degree and persistent felony offender in the second degree.[2] On September 8, 2004, the Commonwealth moved to amend the indictment to persistent felony offender in the first degree. This was apparently granted by the trial court, although the record does not include a written order. On April 12, 2005, Lattner was found guilty of illegal possession of a controlled substance in the first degree (a lesser included offense of trafficking) and persistent felony offender in the first degree. On May 20, 2005, the trial court,

[2] KRS 218A.1412 and 532.080, respectively.

pursuant to the jury's recommendation, sentenced Lattner to ten years' imprisonment.

On appeal Lattner argues that the trial court erred by finding that he "opened the door" to cross-examination regarding prior drug use, refusing to give a facilitation instruction, and permitting the Commonwealth to amend the indictment. Such additional facts as may be necessary to an understanding of the legal issues will be presented as each issue is discussed.

Lattner first argues that the trial court erred by permitting the Commonwealth to cross-examine him regarding whether he ever used drugs, because he had not "opened the door" to such a question on direct. This issue is not properly preserved for appellate review. Defense counsel did not object to the question during trial. An objection to alleged improprieties that occurred during the trial cannot be made after the jury verdict. Patrick v. Commonwealth, 436 S.W.2d 69, 74 (Ky. 1968).

The general rule is that a party must make a proper objection to the trial judge and request a ruling on that objection, or the issue is waived. See Commonwealth v. Pace, 82 S.W.3d 894 (Ky. 2002). See also Bell v. Commonwealth, 473 S.W.2d 820 (Ky. 1971). However, an appellate court may consider an issue that was not preserved if it deems the error to be a

palpable one which affected the defendant's substantial rights and resulted in manifest injustice. RCr 10.26.

On cross-examination, the Commonwealth referred to Lattner's testimony on direct to the effect that he had had problems in past relationships because the girls were mixed up with drugs. Appellant explained that he had a "big heart" and that "I try to save the world when I can." The Commonwealth asked, "You testified that you don't approve of drugs, right?". Appellant replied "No, I don't". The Commonwealth then asked about his earlier testimony that he hung out with drug users. Appellant's response included that his choices of women were wrong. The Commonwealth again asked appellant whether he approved of drug use and he responded that he did not. The Commonwealth asked to approach the bench, at which time it informed the court that it believed Lattner had "opened the door" for the Commonwealth to introduce his prior conviction for possession of drugs, for impeachment purposes. Lattner's counsel objected on grounds that it was the Commonwealth's cross-examination that had "led him through the door", that the Commonwealth could not "open its own door". The Commonwealth argued that Lattner had also made statements on direct implying that he disapproved of drugs. The trial court found that Lattner had set up that he was an "innocent lamb type guy." The Commonwealth then proposed asking "have you ever used drugs?".

Lattner's counsel stated, "that's fine." The Commonwealth subsequently asked the question, "have you ever used them [drugs]?", without objection from Lattner. Lattner testified that he had used drugs in the 1970's, but had been clean for close to five years.

Because Lattner did not object to the question at trial nor request a ruling by the judge on this issue, the error is unpreserved, and as we find no palpable error, we are unable to consider the issue on appeal. Even if Lattner had properly preserved this issue, our decision would be the same. Prior to Lattner's testimony, his girlfriend, Keisha Cotton, called by the defense, testified that Lattner was "very much opposed to drugs". Further, Lattner placed his character in issue with his direct testimony as well, wherein he portrayed himself as opposed to drug use. Accordingly, we conclude that appellant did "open the door" for inquiry by the Commonwealth as to his drug use. See, Johnson v. Commonwealth, 105 S.W.3d 430, 441 (Ky. 2003). Thus, the question, "have you ever used them [drugs]?," was proper under the facts of this case.

Lattner next contends that the trial court erred by denying his request for a criminal facilitation instruction. Lattner's defense at trial was that the drugs were not his, and at the time of his arrest he was only there to take Stevenson somewhere to buy drugs for herself. Accordingly, Lattner

contends that he was entitled to a facilitation instruction. We disagree.

KRS 505.020(2) defines lesser-included offenses and states, in pertinent part, as follows:

> A defendant may be convicted of an offense that is included in any offense with which he is formally charged. An offense is so included when:
>
> (a) It is established by proof of the same or less than all the facts required to establish the commission of the offense charged; or
>
> (b) It consists of an attempt to commit the offense charged or to commit an offense otherwise included therein; or
>
> (c) It differs from the offense charged only in the respect that a lesser kind of culpability suffices to establish its commission; or
>
> (d) It differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property or public interest suffices to establish its commission.

KRS 506.080(1) 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.

The trial court declined to give the facilitation instruction on grounds that facilitation would have required Stevenson to have

actually committed the crime of trafficking. We agree that the trial court properly denied appellant's request for the instruction, although on different grounds. In Houston v. Commonwealth, 975 S.W.2d 925 (Ky. 1998), the Kentucky Supreme Court held that facilitation is not a lesser-included offense of trafficking. The Court stated:

> The offenses of trafficking in or possession of a controlled substance require proof that the defendant, himself, knowingly and unlawfully committed the charged offense. The offense of criminal facilitation requires proof that someone other than the defendant committed the object offense and the defendant, knowing that such person was committing or intended to commit that offense, provided that person with the means or opportunity to do so. Thus, criminal facilitation requires proof not of the same or less than all the facts required to prove the charged offenses of trafficking in or possession of a controlled substance, but proof of additional and completely different facts. *A fortiori*, it is not a lesser included offense when the defendant is charged with committing either of the object offenses.

Id. at 930 (citations omitted). In the present case, the appellant was charged solely with the offense of trafficking. Per Houston, as facilitation is not a lesser included offense of trafficking, the trial court did not err in not giving a facilitation instruction.

Finally, Lattner contends that the trial court erred

by permitting the Commonwealth to amend the indictment against him by motion. Lattner's argument is without merit.

On June 9, 2004, Lattner was indicted for persistent felony offender (PFO) in the second degree. At a status hearing on September 3, 2004, at which both Lattner and his attorney were present, he had no objection to the Commonwealth's stated intention of amending the indictment by motion from PFO in the second degree to PFO in the first degree. At another status hearing on September 9, 2004, Lattner's counsel again agreed with the Commonwealth stating, "we specifically waive any legal arguments we might have against [amending the indictment] . . ."

The Commonwealth's motion to amend the indictment was filed on September 8, 2004, and was granted on September 10, 2004, without objection from Lattner's counsel. Apparently, no written order granting the motion was prepared by the trial court. On September 13, 2004, while free upon bond, Lattner was arrested on a new charge of trafficking. On September 15, 2004, Lattner entered a plea of guilty to the June 9, 2004, charges, with the PFO in the first degree amended back to PFO in the second degree for the purposes of the plea. Prior to sentencing, Lattner moved to withdraw the guilty plea. Lattner's motion was granted. Thereafter, Lattner's counsel withdrew from representing him. Legal Aid was appointed to represent Lattner, although the first appointed counsel also

withdrew. A second Legal Aid counsel then represented Lattner at trial.

Lattner argues that the record does not have a written order from the trial judge granting the Commonwealth's motion to amend. Also, Lattner argues that the record does not indicate that he or his new counsel knew of the amended indictment. Consequently, Lattner contends that his constitutional rights were violated and he is entitled to a new trial. We disagree.

At a status hearing on March 18, 2005, Lattner's counsel agreed that the Commonwealth had moved to amend the indictment and she was aware of it. Lattner's counsel offered no objection. Lattner properly waived any objection to amending the indictment and affirmatively agreed to it. We conclude that Lattner knowingly and intelligently waived any objection to the amendment and, finding no palpable error, we decline to grant relief on this issue.

For the foregoing reasons, the judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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