RENDERED: MAY 16, 2008; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001209-MR

GARY LYNN FORD — APPELLANT

v.

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE JANET P. COLEMAN, JUDGE
ACTION NO. 05-CR-00138

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING IN PART, REVERSING IN PART,
AND REMANDING

** ** ** ** **

BEFORE: KELLER AND THOMPSON, JUDGES; GRAVES,[1] SENIOR JUDGE.

KELLER, JUDGE: A jury found Gary Lynn Ford (Ford) guilty of complicity to commit first-degree possession of a controlled substance; two counts of complicity to commit first-degree wanton endangerment; complicity to commit possession of marijuana; and complicity to commit possession of drug paraphernalia. The trial court issued a judgment consistent with the jury's findings and sentenced Ford to fifteen years' imprisonment. On appeal, Ford argues that the trial court erred when it included complicity to commit possession of a controlled substance in the first degree as a lesser included offense to complicity to criminal attempt to commit manufacturing

[1] Senior Judge John W. Graves sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky constitution and KRS 21.580.

methamphetamine; and that the trial court erred when it refused to instruct the jury on facilitation as lesser included offenses to the complicity charges. For the reasons set forth below, we affirm in part, reverse in part and remand.

FACTS

On February 8, 2005, Hardin County Deputies Dover and King went to Miller Lane to serve a warrant on a Mr. Telford, who lived in a trailer next to Rachel Gagle's (Gagle) trailer. The deputies also had several summonses that they intended to serve on Gagle's ex-husband, who they believed might have been living with Gagle. The deputies went to Telford's trailer first, but no one was there. Deputy Dover testified that he caught a scent of ether in the air while he was at Telford's trailer and suspected that someone might be engaged in criminal activity. The deputies then went to Gagle's trailer. Deputy Dover noticed that the smell of ether had intensified, and he told Deputy King to go to the front door while he went to the back door. When Deputy Dover arrived at the back of the trailer, Ford opened the back door and came out onto the porch. Deputy Dover noted an "overwhelming" smell of ether when Ford opened the door. Deputy Dover saw Gagle inside the trailer and called Deputy King for assistance. The deputies took Ford and Gagle into custody and called for additional assistance.

Eventually, Ford and Gagle were arrested and Officer Green and Deputy Allaman, who arrived to assist with the investigation, conducted a search of the trailer. During the search, the officers traced the odor of ether to wet clothing on the bedroom floor. Under the clothing they found a baking dish containing a pink dusty residue. The officers also observed a pinkish dusty residue on the wall and the clothing. In other parts of the trailer and in a shed on the property, the officers found a bottle containing a "green leafy substance" (later identified as marijuana) and pills; a backpack with funnels and large containers; empty and full pseudoephedrine packages; two cans of starting

fluid with holes punched in the bottom; portions of batteries that had been "torn apart"; cans of camping fuel and toluene; a can of carburetor cleaner; evidence that battery parts had been burned; a set of scales; stained coffee filters; and a Ziploc bag containing trace elements of a substance later identified as methamphetamine. Officer Green testified that, in his experience, a number of the preceding items are used in the manufacture of methamphetamine. In a later search, officers found a canister of anhydrous ammonia under the hood of a pick-up truck parked on the property.

The grand jury indicted Ford on March 29, 2005, on six counts: (1) complicity to commit possession of anhydrous ammonia in an unapproved container with the intent to manufacture methamphetamine; (2) complicity to criminal attempt to commit manufacturing methamphetamine; (3 & 4) complicity to commit first-degree wanton endangerment (two counts)[2]; (5) complicity to commit possession of marijuana; and (6) complicity to commit possession of drug paraphernalia.

At trial, Gagle testified that, on the evening of February 8, 2005, she, her daughter, Ford, and his daughter went to Wal-Mart, where she purchased items necessary to manufacture methamphetamine. The group then returned to Gagle's trailer and Ford began the process of manufacturing methamphetamine, a process that releases an odor of ether. When the police came to the trailer, Gagle began spraying air freshener to hide the odor, and Ford tried to hide the ingredients and materials he was using. Gagle testified that Ford advised her that "there is too much stuff" so he went outside to meet Deputy Dover at the back door.

Ford testified that he had only lived with Gagle for approximately one month before his arrest. According to Ford, a number of people had ready access to Gagle's trailer. He and Gagle, after being away from the trailer, would often return to

[2] At the time of the arrest, one of Gagle's children and Ford's daughter were present in the trailer. The charges of wanton endangerment arose from the children's presence in the trailer and exposure to the chemicals found in and around the trailer.

find evidence that someone else had been there and had been using illegal drugs. In particular, Ford testified that Junior Campbell (Campbell) was living in a "hunting cabin" on the property. The cabin did not have electricity or running water, and Gagle let Campbell use the shower and kitchen in her trailer.

According to Ford, when he, Gagle and the children returned from Wal-Mart on February 8, 2005, he went into the trailer and noticed a baking dish in the bedroom that had not been there when they left. He also noted evidence that someone had been cooking in the kitchen. Ford testified that he told Gagle to contact Campbell and to tell Campbell to get the baking dish and other "stuff" out of the trailer. Ford then went up to a horse barn on the property to clean stalls and care for the horses in the barn. When Ford returned to the trailer, the items he believed were Campbell's were still there. Shortly thereafter, the deputies arrived and Ford attempted to clean the baking dish and to hide Campbell's property. Ford also testified that he dumped an unknown chemical down the drain, which caused the odor of ether.

Prior to closing arguments, counsel engaged in lengthy discussion with the trial court regarding jury instructions. Ford argued before the trial court, as he does here, that facilitation should have been incorporated in the jury instructions as a lesser included offense to complicity. Furthermore, Ford argued that an instruction of possession of methamphetamine as a lesser included offense to complicity to criminal attempt to commit manufacturing methamphetamine was improper.

In addressing the arguments of counsel regarding jury instructions, the trial court stated that facilitation can be a lesser included offense to complicity. However, in order for facilitation to apply, there must be some action on the part of the defendant to forward the criminal activity. The trial court noted that Ford testified that when he saw the dish and other indicia of illegal drug activity, he told Gagle to contact

Campbell and to tell Campbell "to get his stuff" and remove it. The trial court found that this action by Ford was not sufficient to rise to the level of the action required to justify a facilitation instruction. As to the possession of methamphetamine as a lesser included offense to complicity to manufacture methamphetamine, the trial judge noted that the standard jury instructions included possession as a lesser included offense to manufacturing methamphetamine. Therefore, she concluded that inclusion of that instruction was appropriate.

As noted above, Ford appeals the inclusion of the possession instruction and the exclusion of the facilitation instructions. We will provide additional facts as necessary below when we address these issues raised by Ford.

STANDARD OF REVIEW

Alleged errors regarding jury instructions are questions of law and must be examined using a *de novo* standard of review. *Hamilton v. CSX Transportation, Inc.*, 208 S.W.3d 272, 275 (Ky. App. 2006). With this standard in mind, we will address the issues raised by Ford on this appeal.

ANALYSIS

A. Complicity to Commit Possession of a Controlled Substance as a Lesser Included Offense to Complicity to Criminal Attempt to Commit Manufacturing

Ford first argues that the trial court erred when it included complicity to commit possession of a controlled substance (possession) as a lesser included offense to complicity to criminal attempt to commit manufacturing methamphetamine (manufacturing). As he did before the trial court, Ford argues before us that he cannot be convicted of attempting to manufacture methamphetamine and possession of methamphetamine for two reasons. First, Ford admitted that the methamphetamine the

police found in the trailer was purchased from one of Gagle's friends; it was not the product of any manufacturing that may have occurred at the trailer. Second, Ford contends that because he was only charged with complicity to attempt to manufacture methamphetamine there could have been no completed product. The methamphetamine the police found was not the result of the attempted manufacturing process and, absent that connection, possession could not be a lesser included offense of the manufacturing. According to Ford, if the Commonwealth had wanted to charge him with possession, it should have done so. The Commonwealth should not have attempted to "back door" the charge by making it a lesser included offense to complicity to attempting to manufacture methamphetamine. The Commonwealth argues that, because possession is a lesser included offense to manufacturing methamphetamine, it must also be a lesser included offense to attempting to manufacture methamphetamine.

The primary case cited by both parties is *Beaty v. Commonwealth*, 125 S.W.3d 196 (Ky. 2003). In that case, Beaty was driving a car that contained a methamphetamine lab in the back seat and trunk. The car also contained other evidence of drug related activity, including a piece of aluminum foil containing methamphetamine residue. Beaty was charged with, and convicted of, manufacturing methamphetamine and possession of methamphetamine. In his appeal, Beaty argued, in pertinent part, that possession of methamphetamine was a lesser included offense of manufacturing methamphetamine and that his conviction of both manufacturing and possession constituted double jeopardy. The Commonwealth argued that a defendant could be convicted of manufacturing methamphetamine if he took a step in the manufacturing process but had not completed the process. Therefore, any methamphetamine in the defendant's possession would not be part of the

manufacturing process, and possession of that methamphetamine would be a separate offense.

The Supreme Court of Kentucky stated that the question was whether Beaty could be convicted of manufacturing methamphetamine and of possession of the methamphetamine he had manufactured. The Court held that he could not because conviction on both of those charges constituted double jeopardy. As noted by the Court "possession of the manufactured methamphetamine is an element of the offense of manufacturing" and thus a lesser included offense to manufacturing. *Beaty,* 125 S.W.3d at 212. The Court agreed with the Commonwealth that possession of methamphetamine could have legitimately been a separate charge if Beaty had been charged with possessing the equipment necessary to manufacture methamphetamine or if Beaty had been charged with taking steps toward manufacturing methamphetamine, and he had not completed the process. However, the Court noted that Beaty had been charged with and convicted of manufacturing methamphetamine. Under that charge, "possession of the manufactured methamphetamine is an element of the offense of manufacturing; and a conviction of a separate offense of possession would be double jeopardy." *Beaty*, 125 S.W.3d at 212. The Court noted that, on re-trial, the jury could find Beaty guilty of possession if the possession was connected to the residue on the aluminum foil, not to the already manufactured methamphetamine.

As noted above, the Commonwealth herein argues that possession of a controlled substance is a lesser included offense to complicity to attempt to manufacture methamphetamine. Based on *Beaty,* we disagree. As stated by the Court in *Beaty*, possession of methamphetamine is a lesser included offense of the manufacturing of methamphetamine since "possession of the manufactured methamphetamine is an element of the offense of manufacturing." *Id*. However, the attempt to manufacture

methamphetamine does not include the finished product. Because there would be no finished product, possession cannot be an element of attempt to manufacture methamphetamine. As the Court noted in *Beaty,* a separate charge of possession is appropriate if, as herein, the manufacturing process has not been completed. Furthermore, the Court noted that a separate possession charge would be appropriate if there was evidence of possession of methamphetamine that was not the product of the manufacturing. The Court did not state that possession is a lesser included offense to attempted manufacturing. In fact, the Court's analysis leads inexorably to the opposite conclusion.

For the foregoing reasons, we hold that the trial court erred when it included in the jury instructions complicity to commit possession of a controlled substance as a lesser included offense to complicity to criminal attempt to commit manufacturing methamphetamine. Because Ford was convicted and sentenced on the possession charge, the inclusion of possession as a lesser included offense to attempted manufacturing constituted reversible error and Ford's conviction of complicity to commit first-degree possession of a controlled substance is reversed.

B. Facilitation as a Lesser Included Offense to Complicity

As noted above, Ford requested a jury instruction on facilitation as a lesser included offense to the complicity charges. The trial court denied Ford's request. Initially, we note that based on our reversal of Ford's conviction of complicity to commit first-degree possession of a controlled substance, we are only concerned with Ford's convictions of two counts of complicity to commit first-degree wanton endangerment; complicity to commit possession of marijuana; and complicity to commit possession of drug paraphernalia.

We begin our analysis with the definitions of complicity and facilitation.

KRS 502.020(1) provides that a person is guilty of complicity if:

> 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.

KRS 506.080(1) provides that

> 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.

Because the definitions of complicity and facilitation are similar, the courts have had to address how the two interact on a number of occasions. As the Supreme Court of Kentucky noted in *Thompkins v. Commonwealth,* 54 S.W.3d 147 (Ky. 2001), the distinction between the two statutes depends on the defendant's state of mind.

> Under either statute, the defendant acts with knowledge that the principal actor is committing or intends to commit a crime. Under the complicity statute, the defendant must intend that the crime be committed; under the facilitation statute, the defendant acts without such intent. Facilitation only requires provision of the means or opportunity to commit a crime, while complicity requires solicitation, conspiracy, or some form of assistance. Facilitation reflects the mental state of one who is 'wholly indifferent' to the actual completion of the crime. [Citations omitted.]

Id. at 150.

While facilitation and complicity are similar, a jury instruction on facilitation as a lesser included offense to complicity

> is appropriate if and only if on the given evidence a reasonable juror could entertain 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.

Skinner v. Commonwealth, 864 S.W.2d 290, 298 (Ky. 1993).

Of the cases cited by the parties, *White v. Commonwealth*, 178 S.W.3d 470 (Ky. 2005) is the most instructive and closely on point. Therefore, we will address *White* in some detail.

Kenneth White (White) was charged with and convicted of complicity to murder Pulaski County Sheriff Sam Catron. At the time of his death, Sheriff Catron was running for re-election against a former deputy, Jeff Morris (Morris). The evidence established that Sheriff Catron was shot and killed by Danny Shelley (Shelley). Shelley and Morris both testified against White and implicated him in the planning of the murder. Both testified that White helped procure the getaway vehicle, bought the rifle shells used to kill Sheriff Catron, and suggested the place where Shelley should hide in order to kill Sheriff Catron. White testified that he had no involvement in the murder. However, he admitted that he had overheard both Shelley and Morris state that they wanted to kill Sheriff Catron.

At trial, White requested a jury instruction of facilitation as a lesser included offense to complicity. White argued to the trial court that the jury could believe the testimony of Morris and Shelley but might not believe that he was an active participant in the planning of the murder. The trial court denied White's request and the Supreme Court of Kentucky affirmed. In doing so, the Court noted that the evidence supported only two theories, that White

> was an active participant in planning the crime and intended that it be carried out, or that he was an innocent bystander who happened to be present when some of the instruments used in the crime were acquired. There was no evidence of a middle-ground violation of the facilitation statute.

White, 178 S.W.2d at 491.

With the Supreme Court's holding in *White* in mind, we will address the issues argued by Ford. We can easily determine that Ford was not entitled to a jury instruction on facilitation with regard to the charges of complicity to commit possession of marijuana and drug paraphernalia. Ford admitted the marijuana was his and that he paid for and instructed Gagle to purchase the methamphetamine. The containers holding the marijuana and methamphetamine, by definition, are paraphernalia. KRS 218A.500(1). Therefore, it is clear that Ford solicited, commanded, or engaged in a conspiracy with Gagle to purchase marijuana and methamphetamine and he was complicit in the possession of the marijuana and drug paraphernalia. The evidence before the jury would not have permitted a finding that Ford did not intend for those crimes to be committed, but that he was merely providing the means for those crimes to occur. Therefore, the trial court properly held that Ford was not entitled to a facilitation instruction on the marijuana and paraphernalia charges.

Next we turn to the charges and convictions of two counts of complicity to commit first-degree wanton endangerment. As set forth in the jury instructions, the jury found that Ford:

> A. [A]lone or in complicity with another, had "B.R." [and "C.F."] in a residence where there was an overwhelming odor of ether or other chemicals used for the process of manufacturing methamphetamine . . .
>
> B. that he thereby wantonly created a substantial danger of death or serious physical injury to "B.R." [and "C.F.]; AND
>
> C. that under the circumstances, such conduct manifested extreme indifference to the value of human life.

Gagle testified that she and Ford went to Wal-Mart with the express intent of purchasing ingredients to manufacture methamphetamine. According to Gagle, upon their return from Wal-Mart, Ford began the manufacturing process, which resulted in the chemical odor noted by the police.

Ford testified that he did not tell Gagle to purchase ingredients for methamphetamine at Wal-Mart, and that he did not know what she had purchased. When he and Gagle returned from Wal-Mart, Ford observed a number of items he believed belonged to Campbell, including a baking dish and a container or containers of chemicals. He told Gagle to contact Campbell and to have Campbell remove the items. Campbell had not removed the items before the police arrived; therefore, Ford attempted to hide and/or dispose of them. Ford argues that Campbell was manufacturing methamphetamine and that he simply provided Campbell with the means and the opportunity to do so. Therefore, he should have been entitled to a jury instruction on facilitation.

However, there is no evidence that Campbell was manufacturing methamphetamine, only speculation by Ford. In fact, Ford testified that any number of people freely came and went from the trailer, and he could not specifically identify Campbell as the February 8, 2005, intruder. Furthermore, there is no evidence that Ford provided Campbell with any of the chemicals or tools necessary to manufacture methamphetamine. In fact, Ford testified that none of those items were his. Therefore, as with *White*, the evidence pointed to one of two possibilities – Ford was either an active participant in the purchasing and use of the chemicals at issue or he was an innocent bystander. There is no middle-ground and, as with *White,* the trial court properly denied Ford's request for a jury instruction of facilitation as a lesser included offense to complicity to commit first-degree wanton endangerment.

CONCLUSION

Because possession of methamphetamine is not a lesser included offense to complicity to criminal attempt to commit manufacturing methamphetamine, we must reverse as to that conviction. However, discerning no error by the circuit court

regarding the requested facilitation instruction, we affirm as to the other convictions.

Therefore, we affirm in part, reverse in part, and remand.

ALL CONCUR.

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