

RENDERED: AUGUST 22, 2008; 10:00 A.M.  
NOT TO BE PUBLISHED

Commonwealth of Kentucky  
Court of Appeals

NO. 2007-CA-000397-MR

BRIAN A. ACTON

APPELLANT

v. APPEAL FROM MUHLENBERG CIRCUIT COURT  
HONORABLE DAVID H. JERNIGAN, JUDGE  
ACTION NO. 06-CR-00145-002

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
REVERSING

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BEFORE: ACREE, DIXON AND TAYLOR, JUDGES.

DIXON, JUDGE: Brian A. Acton appeals from a judgment of conviction and sentence of imprisonment from the Muhlenberg Circuit Court upon a jury verdict finding him guilty of complicity to first degree promoting contraband and being a persistent felony offender in the first degree. After thoroughly considering the record before us, we reverse Acton's conviction.

In early 2006, while incarcerated at Green River Correctional Complex, Acton and two other inmates planned to smuggle marijuana into the prison. Utilizing contacts the men had outside the prison, they arranged for marijuana to be concealed in a box of books shipped to the prison's law library. Prison authorities intercepted the box and the scheme failed.

In August 2006, a Muhlenberg County grand jury indicted Acton and his co-defendants on one count of engaging in organized crime (KRS 506.120) and as persistent felony offenders (KRS 532.080). On January 23, 2007, Acton and one co-defendant, Jermaine Ford, were tried jointly. At the close of all evidence, the trial court granted a directed verdict in favor of Acton and Ford as to the charge of engaging in organized crime. Over the vigorous objections of defense counsel, the judge granted the Commonwealth's motion to instruct the jury on complicity to first degree promoting contraband as a lesser-included offense of engaging in organized crime. The jury found Acton and Ford guilty of complicity to promoting contraband and, in the penalty phase, found them to be first degree persistent felony offenders. Thereafter, the trial court sentenced Acton to thirteen years' imprisonment pursuant to the recommendation of the jury. This appeal followed.

Acton raises several issues on appeal; however, we will address only one argument, as it is dispositive. Acton contends the trial court committed reversible error by instructing the jury on complicity to promoting contraband because it is not a lesser-included offense of engaging in organized crime. We agree.

“Under KRS 505.020(2), ‘[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. . . .*’” *Hudson v. Commonwealth*, 202 S.W.3d 17, 20 (Ky. 2006). “Stated otherwise, if the lesser offense requires proof of a fact not required to prove the greater offense, then the lesser offense is not included in the greater offense, but is simply a separate, uncharged offense.” *Colwell v. Commonwealth*, 37 S.W.3d 721, 726 (Ky. 2000).

Accordingly, we must compare the language of the two statutes. KRS 506.120, Engaging in Organized Crime, states in part:

- 1) A person, with the purpose to establish or maintain a criminal syndicate or to facilitate any of its activities, shall not do any of the following:
  - (a) Organize or participate in organizing a criminal syndicate or any of its activities;
  - (b) Provide material aid to a criminal syndicate or any of its activities, whether such aid is in the form of money or other property, or credit;
  - (c) Manage, supervise, or direct any of the activities of a criminal syndicate, at any level of responsibility;
  - (d) Knowingly furnish legal, accounting, or other managerial services to a criminal syndicate;
  - (e) Commit, or conspire or attempt to commit, or act as an accomplice in the commission of, any offense of a type in which a criminal syndicate engages on a continuing basis[.]

\* \* \*

(3) As used in this section “criminal syndicate” means five (5) or more persons collaborating to promote or engage in any of the following on a continuing basis:

\* \* \*

e) Illegal trafficking in controlled substances as prohibited by KRS Chapter 218A[.]

In the case at bar, the trial court found the evidence insufficient to sustain the charge of engaging in organized crime. As a result, the court instructed the jury on complicity to first degree promoting contraband as a lesser-included offense.

KRS 520.050(1), Promoting Contraband in the First Degree, states in relevant part:

(1) A person is guilty of promoting contraband in the first degree when:

(a) He knowingly introduces dangerous contraband into a detention facility or a penitentiary; or

(b) Being a person confined in a detention facility or a penitentiary, he knowingly makes, obtains, or possesses dangerous contraband.

Acton argues, and the Commonwealth does not contend otherwise, that the promoting contraband statute clearly requires proof of facts not required to prove the greater offense. Engaging in organized crime requires participation in the organization of a criminal syndicate for an illegal purpose, such as trafficking in a controlled substance. KRS 506.120; *Hill v. Commonwealth*, 125 S.W.3d 221, 233 (Ky. 2004). In contrast, promoting contraband requires possession of

dangerous contraband<sup>1</sup> by an inmate in a detention facility. KRS 520.050; *Tyler v. Commonwealth*, 805 S.W.2d 126, 127 (Ky. 1991).

We conclude that promoting contraband is not a lesser-included offense of engaging in organized crime; rather, it is a lesser uncharged offense. “The fact that the evidence would support a guilty verdict on a lesser uncharged offense does not establish that it is a lesser included offense of the charged offense.” *Houston v. Commonwealth*, 975 S.W.2d 925, 929 (Ky. 1998). “It is the rule that an indictment must name the offense charged, and that conviction can be had only for the offense named.” *Lovelace v. Commonwealth*, 193 Ky. 425, 236 S.W. 567, 568 (1922). Consequently, the trial court committed reversible error by instructing the jury on an uncharged offense over Acton’s objection.

For the reasons stated herein, the judgment of conviction and sentence of the Muhlenberg Circuit Court is reversed.

ALL CONCUR.

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<sup>1</sup> “‘Dangerous contraband’ means contraband which is capable of use to endanger the safety or security of a detention facility or persons therein, including, but not limited to, dangerous instruments as defined in KRS 500.080, any controlled substances, any quantity of an alcoholic beverage, and any quantity of marijuana, and saws, files, and similar metal cutting instruments[.]” KRS 520.010(3).

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