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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-002264-MR

JOSHUA SPIVEY — APPELLANT

v.

APPEAL FROM MADISON CIRCUIT COURT
HONORABLE JULIA HYLTON ADAMS, JUDGE
ACTION NO. 07-CR-00036

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; WINE, JUDGE, BUCKINGHAM,[1] SENIOR JUDGE.

COMBS, CHIEF JUDGE: Following his trial in Madison Circuit Court, Joshua E. Spivey appeals his conviction of conspiracy to traffic in a controlled substance, first degree. After our review, we affirm.

At the outset, we note that the briefs of both counsel contain numerous examples of unprofessional and inappropriate language; in some

[1] Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

instances, counsel engaged in personal attacks on one another. In another, a crude parody involving opposing counsel's name was inserted. In one instance, counsel referred to an opposing argument as "silly." One of the briefs also contains unnecessary and extraneous attempts at metaphors that do not constitute arguments of law. Sarcastic language and insidious innuendoes have no place in any legal document – be it briefs of counsel or opinions of a court. Since both sides have acted *in pari delicto,* we have declined to strike the briefs or to protract this appeal by ordering the filing of new briefs that conform with the basic tenets of professionalism. However, we trust that future admonition along these lines will never again be necessary.

On November 17, 2006, Dustin Hon, an undercover detective, arranged a purchase of one-eighth ounce of crack cocaine. By agreement, the sale was to take place at the home of a confidential informant (CI). However, Spivey did not have any drugs when he arrived at the specified location. He did have a supplier who would provide the drugs. The CI and Spivey met Detective Hon in a Kroger parking lot, and all three went into Detective Hon's car to meet with the supplier. While en route, Spivey spoke to his supplier both on his cell phone and from a pay phone. He told Detective Hon that the cocaine was weighed and ready.

When they arrived at the rendezvous with the supplier, Detective Hon gave Spivey three hundred dollars; Spivey then entered the supplier's vehicle. Within minutes, the Kentucky State Police and Richmond Police Department arrested Spivey and the supplier. At the time of the arrest, Spivey and the supplier

had not yet exchanged the money and the crack cocaine. Spivey was charged with conspiracy to traffic in a controlled substance in the first degree and was convicted by a jury on July 31, 2007. He now appeals that conviction.

Spivey's first two arguments are based on the theory that he was acting as a purchaser -- not a seller. In order to address both those arguments, we shall first review the elements of conspiracy to traffic in a controlled substance.

Kentucky Revised Statute(s) (KRS) 506.040 is Kentucky's criminal conspiracy statute, and it provides as follows:

> (1) A person having the intention of promoting or facilitating the commission of a crime is guilty of criminal conspiracy when he:
>
> (a) Agrees with one (1) or more persons that at least one (1) of them will engage in conduct constituting that crime or an attempt or solicitation to commit such a crime; or
>
> (b) Agrees to aid one or more persons in the planning or commission of that crime or an attempt or solicitation to commit such a crime.

Trafficking "means to manufacture, distribute, dispense, sell, transfer, or possess with intent to manufacture, distribute, dispense, or sell a controlled substance." KRS 218A.010(40). The statute further clarifies that to transfer is "to dispose of a controlled substance to another person **without consideration** and not in furtherance of commercial distribution." KRS 218A.010(41). (Emphasis added.) Thus, one can be guilty of trafficking even without profiting monetarily. A controlled substance is a drug in Schedules I through V, KRS 218A.010(5), and

cocaine is designated as a controlled substance under KRS 218A.070. See *Sanders v. Commonwealth*, 663 S.W.2d 216 (Ky. App. 1983).

Spivey's first contention is that the trial court erred by not granting him a directed verdict of acquittal because KRS 506.050(4) prohibits conviction for conspiracy where the defendant's conduct is an inevitable incident to the underlying crime. The relevant part of the statute upon which Spivey relies provides that:

> no person may be convicted of conspiracy to commit a crime when an element of that crime is agreement or when that crime is so defined that his conduct is an inevitable incident to its commission.

It is true that in order to distribute drugs, there must be someone who receives them. However, the charges against Spivey arose from **his agreement to transfer** the drugs to Detective Hon.

Kentucky's standard of review for a directed verdict questions whether "if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt." *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991). From the facts before it, a jury could have reasonably found that Spivey was guilty of conspiracy to traffic drugs. Kentucky courts have established that:

> intent may be inferred from actions because a person is presumed to intend the logical and probable consequences of his conduct and a person's state of mind may be inferred from actions preceding and following the charged offense.

Parker v. Commonwealth, 952 S.W.2d 209, 212 (Ky. 1997). Spivey demonstrated his intent to transfer the drugs to someone else when he arrived at the CI's home as a result of their arrangement. Although he did not have cocaine with him, he initiated steps to obtain it, never indicating that it was for his personal use. He met with Detective Hon, who was a stranger to him prior to the occasion. After Detective Hon gave Spivey the money to purchase the drugs, Spivey left his cell phone with Detective Hon as assurance that he would return with the cocaine.

Spivey argues that he did not necessarily plan to profit from the transaction. That contention is irrelevant. As discussed earlier, monetary gain is not a necessary element of trafficking. Because the rules of statutory construction dictate that a specific statute preempts a general one, Spivey's charge was governed by the more specific KRS 218A.010(40) and (41) and KRS 218A.1412 rather than by the more general KRS 506.050(4). *Boyd v. C&H Transp*., 902 S.W.2d 823, 824 (Ky. 1995). Therefore, we conclude that the trial court did not err by denying the motion for a directed verdict.

Spivey's second argument is that the trial court erred by not providing the jury with instructions for the lesser included offenses of conspiracy to possess cocaine and attempt to possess cocaine. He alleges that since he was merely a buyer of drugs in the transaction, the jury should have had the option of finding him guilty of possession.

Our standard of review governing jury instructions by a trial court is whether the court committed an abuse of discretion. *Ratliff v. Commonwealth*, 194

S.W.3d 258, 274 (Ky. 2006) (citations omitted). Our Supreme Court has defined *abuse of discretion* as conduct by a court acting arbitrarily, unreasonably, unfairly, or in a manner "unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

A trial judge has the duty to instruct a jury on the whole law of a criminal case, including "instructions applicable to every state of the case deducible or supported to any extent by the testimony." *Taylor v. Commonwealth*, 995 S.W.2d 355, 360 (Ky. 1999). The United States Supreme Court has directed that, "due process requires that a lesser included offense instruction be given *only* when the evidence warrants such an instruction." *Hopper v. Evans*, 465 U.S. 605, 611 (1982) (emphasis in original). Instructions on a lesser-included offense are 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." *Houston v. Commonwealth*, 975 S.W.2d 925, 929 (Ky. 1998).

Spivey alleges that he was merely a buyer in the transaction and that he might have planned on "sharing" the cocaine with Detective Hon. However, no such evidence was presented at trial. Rather, the evidence showed that Spivey agreed with both Detective Hon and the CI that he would obtain cocaine from a supplier on behalf of Detective Hon. As discussed above, Spivey's actions indicated an unequivocal intent to transfer a controlled substance. The trial court did not err by not declining to instruct the jury on attempt or conspiracy to possess.

Spivey next claims that the jury instructions issued by the court were so flawed that they amounted to a denial of due process. Two of his three arguments are based on his contention that his agreement with Detective Hon did not amount to trafficking – an argument that we have already considered and rejected. The third argument is that the jury instructions did not provide guidance for the jury to determine specifically whether an overt act occurred.

Under KRS 506.050, "no person may be convicted of conspiracy to commit a crime unless an overt act in furtherance of the conspiracy is alleged and proved to have been committed by one (1) of the conspirators." The jury instructions asked the jury to determine whether Spivey had taken "a substantial step in a course of conduct intended to culminate in the sale, distribution, dispensation, or transfer of a quantity of cocaine." The instructions defined *substantial step* as "an act or omission which leaves no reasonable doubt as to the defendant's intention to commit the crime which he is charged with attempting."

The Supreme Court has expressly held that substantial steps and overt acts are essentially synonymous. *Commonwealth v. Prather*, 690 S.W.2d 396, 397 (Ky. 1985). *Turner v. Commonwealth*, 328 S.W.2d 536, 539 (Ky. 1959), has addressed the sufficiency of jury instructions as follows: "Instructions are sufficient if when read together and considered as a whole they submit the law applicable to the facts in a form capable of being clearly and easily understood." We are satisfied that under the *Turner* test, the jury instructions were proper, and the trial court did not err by not using the statutory phrase "overt act" as it is

essentially interchangeable with the "substantial step" terminology utilized instead by the court.

Spivey's last allegation of error is that the trial judge should have granted his motion for a mistrial because two jurors fell asleep during the trial. Our Supreme Court has provided strong guidance on the extreme remedy of a mistrial as follows:

> a mistrial is an extreme remedy and should be resorted to only when there is a fundamental defect in the proceedings which will result in a manifest injustice. The occurrence complained of must be of such character and magnitude that a litigant will be denied a fair and impartial trial and the prejudicial effect can be removed in no other way.

Gould v. Charlton Co., Inc., 929 S.W.2d 734, 738 (Ky. 1996). The standard of review of a denial of a motion for mistrial is abuse of discretion. *Id.* at 741.

In the case before us, the trial court quickly halted proceedings as soon as defense counsel pointed out that two jurors were having difficulty staying awake. The trial court talked to the jurors and verified that they had not missed any testimony. After proceedings resumed, the court watched the jury diligently, stopping testimony in order to give the jurors a chance to stretch and refresh. We are satisfied from our review that the brief interlude of dozing amounted to only a few seconds and that it did not rise to the level of manifest injustice. Therefore, the trial court did not err in denying the motion for a mistrial.

We affirm the conviction.

WINE, JUDGE, CONCURS.

BUCKINGHAM, SENIOR JUDGE, CONCURS IN RESULT.

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