

RENDERED: JULY 29, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001494-MR

DALE SEON ADAMS

APPELLANT

v. APPEAL FROM DAVIESS CIRCUIT COURT
HONORABLE JOSEPH W. CASTLEN, III, JUDGE
ACTION NO. 09-CR-00055

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS AND LAMBERT, JUDGES; SHAKE,¹ SENIOR JUDGE.

LAMBERT, JUDGE: Dale Seon Adams has appealed from the judgment and sentence of the Daviess Circuit Court entered following a jury trial. Adams was found guilty on two counts of trafficking in a controlled substance and for being a persistent felony offender in the first degree and was sentenced to a total of twelve

¹ Senior Judge Ann O'Malley Shake sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

years in prison. The issue on appeal is whether the trial court improperly denied Adams's request for an instruction on criminal facilitation. Having carefully considered the record and the applicable law, we affirm.

In October 2008, officers from the Owensboro Police Department's street crimes unit, led by Detective Jason Winkler, set up and executed two controlled drug buys using a confidential informant (CI).² The CI had satisfied past drug charges by working with the police department, and she was paid \$150.00 per transaction for her role in the two buys that are the subject of this action. The CI knew Adams and identified him to the officers as a drug dealer. Prior to the operations, the officers searched the CI, equipped her with a wire to record any conversations, and provided her with funds to use to buy crack cocaine from Adams. The CI then initiated contact with Adams by calling the cellular phone of his girlfriend, Amber Douglas. On both days (October 24 and October 30, 2008), Adams and Ms. Douglas met the CI at a specific location and drove to another location in Ms. Douglas's van where Adams would obtain the drugs. Once they reached the destination where the drugs could be obtained, the CI gave her money to Adams, who exited the vehicle and entered the residence. Ms. Douglas and the CI would drive around the area and pick Adams up a few minutes later, when he would deliver the crack cocaine to the CI. The CI would then return to the officers and turn over the drugs she received to them. Police officers arrested Adams on December 23, 2008.

² We shall not use the confidential informant's name in this opinion to protect her identity.

On March 3, 2009, the Daviess County grand jury indicted Adams on four charges: three counts of trafficking in a controlled substance (KRS 318A.1412) and one count of possession of drug paraphernalia (KRS 218A.500(2)). Two of the three trafficking charges stated that Adams had acted alone or in complicity with Ms. Douglas. The third trafficking charge and the possession of drug paraphernalia charge arose from another incident on December 23, 2008, and those charges were severed prior to the trial in this matter. The grand jury later added the PFO I charge to the indictment based upon Adams's prior convictions for drug offenses.

Prior to the trial in this matter, the Commonwealth filed a notice that it was planning to introduce Kentucky Rules of Evidence (KRE) 404(b) evidence of other crimes through the testimony of Ms. Douglas regarding her on-going trafficking of crack cocaine with Adams between September and December 2008. The trial court initially granted this motion, finding that the proposed testimony demonstrated a pattern of conduct indicative of a plan or common scheme.

The matter was tried before a jury on May 20 and May 21, 2010. The Commonwealth presented testimony from the police officers involved in the controlled drug buys at issue in this case, as well as those involved with the collection and testing of the drugs. The Commonwealth also presented testimony from the CI and Ms. Douglas, who testified about the details of the drug transactions. Adams did not call any witnesses.

At the conclusion of the testimony, the trial court apparently discussed several issues with the Commonwealth Attorney and defense counsel regarding jury instructions and directed verdict issues, but either the court did not make a record of those discussions or the record was not certified for this appeal. Once the videotaped recording recommenced, the trial court indicated that it was denying Adams's renewed motion for directed verdict on the same basis as it previously denied the initial motion. The record does not reflect the basis for the motion or renewed motion for directed verdict, nor the trial court's reason for denial. The trial court also indicated on the record that it was removing the complicity instruction by agreement of the parties, but it was continuing to deny Adams's request for a facilitation instruction. Again, the record does not reflect the basis for Adams's request for this instruction, nor the reason for the trial court's denial. The trial court went on to state that had it permitted the facilitation instruction, it would have allowed the Commonwealth to reopen its case to introduce KRE 404(b) evidence; we presume via Ms. Douglas. The court ultimately instructed the jury on trafficking and the lesser offense of first-degree possession of a controlled substance.

The jury returned a verdict of guilty on each of the two counts of trafficking in a controlled substance. Following the penalty phase, the jury also found Adams guilty of being a PFO I. Based upon its verdicts, the jury recommended that Adams be sentenced to concurrent eight-year sentences, enhanced to twelve years by the PFO I conviction. On July 26, 2010, the trial

court entered the judgment and sentence in accordance with the jury's verdict.

This appeal follows.

Before we reach the merits of this appeal, we must consider that the record on appeal does not contain any of the discussions concerning jury instructions. Therefore, we are unable to ascertain either the basis of Adams's request for the facilitation instruction or the basis of the trial court's denial. It is well-settled that the appellant is responsible for ensuring that the record certified to this Court is complete.

[W]e have consistently and repeatedly held that it is an appellant's responsibility to ensure that the record contains all of the materials necessary for an appellate court to rule upon all the issues raised. And we are required to assume that any portion of the record not supplied to us supports the decision of the trial court.

Clark v. Commonwealth, 223 S.W.3d 90, 102 (Ky. 2007) (footnotes omitted). *See also Alkabala-Sanchez v. Commonwealth*, 255 S.W.3d 916, 920-21 (Ky. 2008); *Porter v. Harper*, 477 S.W.2d 778, 779 (Ky. 1972). We shall nevertheless address the merits of this argument as Adams has argued in his brief.

In his appellate brief, Adams contends that the trial court should have included an instruction on criminal facilitation, arguing that a reasonable jury could have found from the evidence that he merely facilitated the CI's purchase of the crack cocaine, but did not have a stake in the crime itself. The Commonwealth disagrees, arguing that his conduct in purchasing drugs from another dealer and

then transferring those drugs to the ultimate buyer is no different from a drug dealer who would purchase drugs from a supplier and resell the product.

In Kentucky, the trial court must instruct the jury on the whole law of the case supported by the testimony and evidence introduced at trial. *Houston v. Commonwealth*, 975 S.W.2d 925, 929 (Ky. 1998). “The determination of what issues to submit to the jury should be made based upon the totality of the evidence.” *Reed v. Commonwealth*, 738 S.W.2d 818, 822 (Ky. 1987). “Alleged errors regarding jury instructions are considered questions of law that we examine under a *de novo* standard of review.” *Hamilton v. CSX Transp., Inc.*, 208 S.W.3d 272, 275 (Ky. App. 2006).

We begin with the statutory definitions applicable in this case. KRS 506.080(1) defines criminal facilitation as follows:

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 LRC Commentary to KRS 506.080 explains that, “[t]o be guilty of the offense of facilitation, an individual must facilitate the commission of a crime that is actually committed.” The crime in this case is trafficking in a controlled substance, which the legislature defined in KRS 218A.1412:

(1) A person is guilty of trafficking in a controlled substance in the first degree when he knowingly and unlawfully traffics in: a controlled substance, that is classified in Schedules I or II which is a narcotic drug; a controlled substance analogue; lysergic acid

diethylamide; phencyclidine; a controlled substance that contains any quantity of methamphetamine, including its salts, isomers, and salts of isomers; gamma hydroxybutyric acid (GHB), including its salts, isomers, salts of isomers, and analogues; or flunitrazepam, including its salts, isomers, and salts of isomers.

“Traffic” is defined in KRS 218A.010(40) (now (42)) as “to manufacture, distribute, dispense, sell, transfer, or possess with intent to manufacture, distribute, dispense, or sell a controlled substance.” “Transfer,” in turn, is defined in KRS 218A.010 (41) (now (43)) as “to dispose of a controlled substance to another person without consideration and not in furtherance of commercial distribution.”

Adams bases his argument that he was entitled to a facilitation instruction on Ms. Douglas’s involvement on both occasions, in that the CI called Ms. Douglas’s phone and Ms. Douglas drove her van to pick up the CI as well as to the location where the drugs were retrieved. He points out that he was charged with trafficking in connection with another person, which he claims supports the theory that he merely facilitated the drug transaction, but was not the principal offender. Furthermore, Ms. Douglas was charged with and convicted of trafficking in a controlled substance as a result of the same events. In addition, he contends that the Commonwealth did not establish the requisite *mens rea* because there was insufficient evidence that he knowingly engaged in trafficking cocaine, although a jury could have found that his culpable mental state arose to the level of criminal facilitation.

In support of this argument, Adams cites to *Monroe v. Commonwealth*, 244 S.W.3d 69 (Ky. 2008), in which the jury found the defendant guilty of complicity to commit murder after the trial court declined her request to instruct on the lesser offense of facilitation. The Supreme Court differentiated the crimes of complicity and facilitation:

The primary difference between facilitation and complicity is the state of mind; complicity requires the complicitor to intend that the crime take place. Perhaps a clearer statement is that a complicitor must be an instigator, or otherwise invested in the crime, while a facilitator need only be a knowing, cooperative bystander with no stake in the crime.

Id. at 75 (internal quotation marks and citation omitted). The Supreme Court upheld the trial court's decision not to instruct on facilitation because there was no evidence to support it:

In this case, facilitation would require Appellant providing money to Emerson, knowing that he would use it to commit the crime, but without intention to promote the crime itself. Appellant was not entitled to the facilitation instruction because no reasonable juror could conclude that Appellant was involved and had knowledge, but was indifferent to whether Emerson committed the murder.

Id.

Adams also cited to *Houston, supra; Day v. Commonwealth*, 983 S.W.2d 505 (Ky. 1999); and *Dillman v. Commonwealth*, 257 S.W.3d 126 (Ky. App. 2008), which all addressed the propriety of a facilitation instruction in the context of drug trafficking charges. The *Houston* Court stated:

We have consistently held that criminal facilitation can be a lesser included offense of an indictment charging complicity, “because it has the same elements except that the state of mind required for its commission [knowledge] is less culpable than the state of mind [intent] required for commission of the other [complicity] offenses.”

Houston, 975 S.W.2d at 930, quoting *Luttrell v. Commonwealth*, 554 S.W.2d 75, 79 (Ky. 1977). In *Day*, the Supreme Court further stated that “[g]enerally, criminal facilitation is a lesser included offense when the defendant is charged with being an accomplice to an offense, not the principal offender.” *Day*, 983 S.W.2d at 509 n.2. The *Dillman* Court later upheld the trial court’s decision not to instruct the jury on facilitation due to an insufficient evidentiary foundation, noting that the defendant “was an active participant in the commission of drug trafficking[.]” not “a mere facilitator[.]” *Dillman*, 257 S.W.3d at 130.

We have thoroughly reviewed Adams’s argument, but we agree with the Commonwealth that he is not entitled to a facilitation instruction. While Adams was initially charged with acting either alone or in complicity with Ms. Douglas, the parties agreed that the trial court should not instruct the jury on complicity. He was therefore tried as a principal actor. Furthermore, Adams’s actions in the drug transactions do not support a facilitation instruction because he was not acting merely as a cooperative bystander. Rather, Adams took the money from the CI, went into the location where he obtained the cocaine, and then transferred the drugs to the CI. These are not the actions of a facilitator, but of a

trafficker. Accordingly, the trial court properly denied Adams's request for a facilitation instruction and did not commit any error in so instructing the jury.

For the foregoing reasons, the judgment and sentence of the Daviess Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Jeremy S. Rogers
Jason M. Nemes
Louisville, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Julie Scott Jernigan
Assistant Attorney General
Frankfort, Kentucky