RENDERED: NOVEMBER 22, 2013; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-002313-MR

ROBERT LEE CONNER — APPELLANT

v.

APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE CRAIG Z. CLYMER, JUDGE
ACTION NO. 11-CR-00166

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: CAPERTON, COMBS, AND DIXON, JUDGES.

CAPERTON, JUDGE: Robert Lee Conner appeals from his conviction and sentence of eighteen years' imprisonment for first-degree trafficking in a controlled substance and for being a persistent felony offender in the second degree. After a thorough review of the parties' arguments, the applicable law, and the record, we find no reversible error and, accordingly, affirm.

The facts that give rise to this appeal were testified to at a jury trial. On March 2, 2011, Conner went to the police[1] and was subsequently placed in jail. While in jail, Conner made two phone calls to his girlfriend, Uvander Hunter. Officer Justin Cromwell of the Paducah Police Department listened to the recorded conversations and grew suspicious about what he heard therein.

The first call was made on March 2 after Conner was booked into custody. During the talk, Hunter asked Conner about the location of a bag of "white clothes." Conner did not initially understand what Hunter meant, but he eventually referred to the "white clothes" as "stuff stuff." Officer Cromwell believed that Conner and Hunter were using code words.

Conner told Hunter the "stuff stuff" was located on the bottom of the brown shelf in Winky's kitchen. He said she would find it inside a black sock. Officer Cromwell did not believe that Conner would keep white clothes inside of a black sock. Conner told Hunter he hoped she could "make a move on the stuff."[2] Officer Cromwell thought the statement indicated that Conner wanted to get rid of whatever was in the sock. Conner and Hunter talked about raising cash for bond money.

In the second call, made on March 3, Conner asked Hunter if she had "made a move on those things" the previous night. She responded that someone was watching her and she needed to take a different route home. Conner told

[1] According to the parties, Conner went to the police on a criminal matter different from that on appeal before us.

[2] We presume that Conner's statements asking Hunter to "make a move" on "stuff" was his attempt to get Hunter to sell the crack cocaine contained in the sock that was found.

Hunter she needed to "make a move on something." He said he would take $1,500 for both of the items in question. Conner again indicated that "those things" were inside the black sock in Winky's kitchen cupboard. Coupled with the talk about bond money, Officer Cromwell thought Conner was suggesting that things needed to be sold and money needed to be made for Conner to get out of jail. Officer Cromwell determined the items inside the black sock were worth a significant sum of money and not something Hunter wanted to be caught possessing or selling.

After listening to the second phone call, Officer Cromwell went to meet with Conner's Aunt Glenda. Glenda informed the officers that "Winky" was Tammy Conner, and told them where she lived. When Winky arrived home, she gave the officers permission to search her house.

Once inside the house, Officer Cromwell followed the directions that Conner had given Hunter over the phone. Inside a black sock on a brown shelf, Officer Cromwell found two bags containing 62 smaller individually wrapped baggies of crack cocaine. The 62 bags weighed approximately 18 grams combined.

Officers escorted Conner from jail to the police department for questioning. Conner told Officer Cromwell the cocaine belonged to a person from Atlanta named Torino. Conner admitted that he asked Hunter "make a move on it."

In the third call, made after Conner met with the police on March 3, Conner talked to both Winky and Hunter. He said that he was holding the cocaine

for someone else and that he did not know how much there was. He told Winky he put the sock there before visiting the police on March 2. Conner was charged with and convicted of first-degree trafficking in a controlled substance - cocaine, greater than or equal to four grams - and of second-degree persistent felony offender. He received a sentence of eighteen years. It is from this conviction and sentence that Conner now appeals.

On appeal, Conner presents three arguments, namely: (1) the trial court erred when it did not grant Conner's motion for a directed verdict of acquittal on the charge of trafficking in a controlled substance; (2) the trial court erred when it did not grant Conner's motion for a lesser included instruction for solicitation to trafficking; (3) the trial court erred when it did not grant Conner's motion for a mistrial after the jury heard Conner had a "P.O." on one of the jail call tapes.

The Commonwealth responds: (1) it was not clearly unreasonable for a jury to find Conner guilty and, therefore, the trial court properly refused to grant a directed verdict; (2) Conner was not entitled to an instruction on solicitation; and (3) there was no manifest necessity for a mistrial where a brief reference to a "P.O." in an audiotape went unnoticed and Conner waived his claim of error when he refused the trial court's offer to admonish the jury. After our review of the parties' arguments, we conclude that the dispositive issue on appeal is whether Conner was entitled to a jury instruction for criminal solicitation to trafficking.

At the outset, we note that our review of a trial court's rulings with respect to jury instructions is for abuse of discretion. *Cecil v. Commonwealth*, 297

S.W.3d 12, 18 (Ky. 2009), citing *Ratliff v. Commonwealth*, 194 S.W.3d 258, 274 (Ky. 2006). The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999) (citing 5 Am.Jur.2d *Appellate Review* § 695 (1995)).

As stated in *Manning v. Commonwealth*, 23 S.W.3d 610, 614 (Ky. 2000):

> A trial court is required to instruct on every theory of the case reasonably deducible from the evidence. *Ragland v. Commonwealth*, Ky., 421 S.W.2d 79, 81 (1967); *Callison v. Commonwealth*, Ky.App., 706 S.W.2d 434 (1986) (In a criminal case, it is the duty of the court to prepare and give instructions on the whole law. This general rule requires instructions applicable to every state of [the]
>
> case covered by the indictment and deducible from or supported to any extent by the testimony.)

Manning at 614. However, the trial court's duty to instruct "does not require an instruction on a theory with no evidentiary foundation." *Houston v. Commonwealth,* 975 S.W.2d 925, 929 (Ky. 1998), citing *Barbour v. Commonwealth,* 824 S.W.2d 861, 863 (Ky. 1992), *overruled on other grounds*, *McGinnis v. Commonwealth*, Ky., 875 S.W.2d 518 (1994*); Neal v. Commonwealth*, Ky., 303 S.W.2d 903 (1957). *See also* Kentucky Rules of Criminal Procedure (RCr) 9.54. Moreover, "An instruction on a lesser-included offense should be given if the evidence is such that a reasonable juror could doubt

that the defendant is guilty of the crime charged, but conclude that he is guilty of the lesser-included offense." *Webb v. Commonwealth*, 904 S.W.2d 226, 229 (Ky. 1995), citing *Luttrell v. Commonwealth*, Ky., 554 S.W.2d 75, 78 (1977).

At issue, KRS 218A.010(49) defines trafficking as " 'Traffic,' except as provided in KRS 218A.1431, means to manufacture, distribute, dispense, sell, transfer, or possess with intent to manufacture, distribute, dispense, or sell a controlled substance;…"

KRS 506.030 defines criminal solicitation as:

> (1) A person is guilty of criminal solicitation when, with the intent of promoting or facilitating the commission of a crime, he commands or encourages another person to engage in specific conduct which would constitute that crime or an attempt to commit that crime or which would establish the other's complicity in its commission or attempted commission.
> (2) A criminal solicitation is a:
> (a) Class C felony when the crime solicited is a violation of KRS 521.020 or 521.050;
> (b) Class B felony when the crime solicited is a Class A felony or capital offense;
> (c) Class C felony when the crime solicited is a Class B felony;
> (d) Class A misdemeanor when the crime solicited is a Class C or D felony;
> (e) Class B misdemeanor when the crime solicited is a misdemeanor.

We disagree with Conner that solicitation to trafficking was a lesser included offense to trafficking. As discussed in *Commonwealth v. Day*, 983 S.W.2d 505, 509 (Ky. 1999), the Kentucky Supreme Court overruled *Farris v. Commonwealth,* 836 S.W.2d 451, 454 (Ky. App 1992) to the extent that it held that

criminal facilitation is a lesser included offense when the defendant is charged with trafficking in a controlled substance. Given that facilitation is an inchoate crime, as is solicitation, we turn to whether Conner could have requested an instruction on a separate, uncharged crime. *See Wyatt v. Commonwealth*, 219 S.W.3d 751, 759 (Ky. 2007) (discussing inchoate crimes and KRS 506.110).

At issue:

> An instruction on a separate, uncharged, but [not lesser included] crime—in other words, an alternative theory of the crime—is required only when a guilty verdict as to the alternative crime would amount to a defense to the charged crime, i.e., when being guilty of both crimes is mutually exclusive." *Hudson*, 202 S.W.3d at 22, *Cf. Sanborn v. Commonwealth*, 754 S.W.2d 534 (Ky.1988).

Fields v. Commonwealth, 219 S.W.3d 742, 750 (Ky. 2007).[3]

KRS 506.110 makes solicitation to trafficking mutually exclusive of a trafficking conviction:

> (1) A person may not be convicted on the basis of the same course of conduct of both the actual commission of a crime and:
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> (a) A criminal attempt to commit that crime; or
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> (b) A criminal solicitation of that crime; or
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> (c) A criminal facilitation of that crime; or
>
> (d) A conspiracy to commit that crime, except as provided in subsection (2) of this section.
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> (2) A person may be convicted on the basis of the same course of conduct of both the actual commission of a crime and a conspiracy to commit that crime when the conspiracy from which the consummated crime resulted had as an objective of the conspiratorial relationship the commission of more than one (1) crime.

[3] We note if the same act may constitute either of two offenses, the grand jury may elect to indict on either and the other is not considered a lesser included offense. *Davidson v. Commonwealth*, 436 S.W.2d 495 (Ky. 1968); *Taylor v. Commonwealth*, 384 S.W.2d 333 (Ky. 1964); *Commonwealth v. Tobin*, 140 Ky. 261, 130 S.W. 1116 (1910).

> (3) A person may not be convicted of more than one (1) of the offenses defined in KRS 506.010, 506.030, 506.040 and 506.080 for a single course of conduct designed to consummate in the commission of the same crime.

Sub judice, the jury listened to a phone conversation wherein Conner urged Hunter to sell the "stuff stuff." The jury could quite reasonably believe that with the intent of promoting or facilitating the commission of a crime, Conner commanded or encouraged Hunter to engage in trafficking. This alternative theory of the crime, being a separate, uncharged crime mutually exclusive by operation of KRS 506.110 of the substantive crime Conner was convicted of, would have resulted in an instruction on solicitation to trafficking if requested by Conner. However, our review of the record shows that Conner never requested a solicitation instruction based on a separate, uncharged crime.

Recently our Kentucky Supreme Court addressed preservation of error regarding jury instructions:

> We are satisfied that under these circumstances Appellant did not fairly and adequately raise his objection to the instructions to the trial court. As such, we agree with the Commonwealth that this error is not properly preserved. *Chumbler v. Commonwealth*, 905 S.W.2d 488, 499 (Ky.1995) (defendant did not adequately preserve for appellate review the issue of whether the complicity instruction presented to jury was improper where, although defendant tendered alternative instruction, she did not make specific objection to complicity instruction given by the trial court, and did not state specifically grounds on which she believed the court's instruction was improper); *Luckett v. Commonwealth*, 550 S.W.2d 517, 520 (Ky.1977) ("Appellant's failure to properly object constituted a waiver of his right to later complain.");

> *Commonwealth v. Duke*, 750 S.W.2d 432, 433 (Ky.1988) ("It is the duty of counsel who wishes to claim error to ... object stating the specific basis for objection so that the trial judge will be advised on how to instruct.")

Smith v. Commonwealth, 370 S.W.3d 871, 875-76 (Ky. 2012). We believe that this error was not properly preserved for our review; accordingly, we decline to reverse on this basis.

Briefly, we address Conner's remaining arguments. First, Conner makes the argument that the court erred by denying his motion for a directed verdict and instructing the jury on trafficking in a controlled substance.

In assessing whether Conner was entitled to a directed verdict, on appellate review "the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal." *Commonwealth v. Benham,* 816 S.W.2d 186, 187 (Ky. 1991). When confronted with a motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserve to the jury questions as to the credibility and weight to be given to such testimony. *Paulley v. Commonwealth*, 323 S.W.3d 715, 722 (Ky. 2010).

At trial, the Commonwealth presented evidence to the jury that the amount of crack cocaine and the manner of packaging were indicative of trafficking. The jury could reasonably believe that Conner intended to sell the crack cocaine and that he retained control over the drugs because he was the only one that knew where they were hidden. As discussed in *Pate, infra,* constructive possession is sufficient under KRS Chapter 218A:

> Additionally, we have held that "possession" for purposes of KRS Chapter 218A includes both actual and constructive possession. "To prove constructive possession, the Commonwealth must present evidence which establishes that the contraband was subject to the defendant's dominion and control." Appellant secreted the tank in a box behind Alicia Gregg's trailer; its location apparently known only to Appellant, Kathy Pate, and Alicia Gregg. Clearly this situation allowed Appellant to exercise a high degree of control over the tank. His control of the tank did not need to be exclusive.

Pate v. Commonwealth, 134 S.W.3d 593, 598-99 (Ky. 2004) (internal footnotes omitted).

Sub judice, Conner was the only person who knew the location of the contraband and thus he exercised a high degree of control over it. Thus, it would not be unreasonable for a juror to find Conner guilty of trafficking; the trial court did not err in failing to direct a verdict for Conner.

Last, Conner argues that the trial court erred when it did not grant his motion for a mistrial after the jury heard Conner had a "P.O." on one of the jail call tapes. We believe this issue to be decided by *Matthews v. Commonwealth,* 1635 S.W.3d 11 (Ky. 2005), *infra.*

At trial, the jurors were played a redacted portion of Conner's phone calls in which Hunter told Conner she would talk to his "P.O." Counsel immediately approached the bench and requested a mistrial as the jury effectively learned that Conner was a convicted felon on probation or parole. The court overruled the motion for a mistrial and counsel declined the court's offer to admonish the jury. In so doing, the court noted that he had not heard the reference to a "P.O." and did not know if the jury had heard it or not. After sentencing Conner, the court polled the jury and none of the jurors answered that they had heard anything that would make them believe that Conner had a criminal record or was on probation or parole. None of the jury had understood the reference to "P.O."

Concerning a motion for a mistrial:

> A trial court only declares a mistrial if a harmful event is of such magnitude that a litigant would be denied a fair and impartial trial and the prejudicial effect could be removed in no other way. Stated differently, the court must find a manifest, urgent, or real necessity for a mistrial. The trial court has broad discretion in determining when such a necessity exists because the trial judge is "best situated intelligently to make such a decision." The trial court's decision to deny a motion for a mistrial should not be disturbed absent an abuse of discretion.

Matthews v. Commonwealth, 163 S.W.3d at 17 (internal footnotes omitted).

Our appellate courts presume that juries will follow the admonition of a trial court and that the admonition will cure an evidentiary error.[4] *Johnson v.*

[4] There are two circumstances where we do not presume that an admonition would cure an evidentiary error:

Commonwealth, 105 S.W.3d 430, 441 (Ky. 2003). We believe that as in *Matthews* the proper remedy in this case was an admonition and when Conner refused said admonition, the trial court was not required to give Conner extraordinary relief simply because he refused the offer of another legally sufficient remedy. The trial court's refusal to grant a mistrial was not an abuse of discretion. *See Matthews* at 18.

In light of the foregoing, we affirm.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

Jack Conway
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> There are only two circumstances in which the presumptive efficacy of an admonition falters: (1) when there is an overwhelming probability that the jury will be unable to follow the court's admonition and there is a strong likelihood that the effect of the inadmissible evidence would be devastating to the defendant, or (2) when the question was asked without a factual basis and was "inflammatory" or "highly prejudicial."

Johnson at 441 (internal citations omitted).

Sub judice, neither circumstance was present given the difficulty the trial court had hearing the one reference to a "P.O." *See Lanham v. Commonwealth*, 171 S.W.3d 14, 32 (Ky. 2005) (a solitary and vague reference to criminal activity, was not prejudicial in light of the other evidence presented and thus, was held harmless error.).