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Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-002336-MR

JAYSON RAY HARRIS — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA R. GOODWINE, JUDGE
ACTION NO. 10-CR-00585

COMMONWEALTH OF KENTUCKY — APPELLEE

AND

NO. 2012-CA-000024-MR

NATHANIEL TYRONE BARNES — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA R. GOODWINE, JUDGE
ACTION NO. 10-CR-00585

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, MAZE AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Co-defendants Jayson Ray Harris and Nathaniel Tyrone Barnes appeal their convictions following trial. Harris argues that the trial court erred by failing to sever his trial from that of Barnes. Barnes argues that the trial court erred by failing to instruct the jury on facilitation and entrapment.

The Commonwealth arranged for Lance Burton, a confidential informant who was facing his own trafficking charges, to perform an undercover buy from Barnes. On March 18, 2010, Burton called Barnes to arrange a purchase of cocaine. Barnes agreed to sell Burton two ounces of crack cocaine for $2,300. Burton and Barnes agreed to meet outside a Home Depot. Barnes arrived at the location with his girlfriend, Olivia Major. Major went inside the Home Depot while Barnes conducted the transaction with Burton. The police interrupted the buy after Barnes showed the cocaine to Burton. Officers found the crack cocaine in Barnes's pockets.

According to the Commonwealth, after Barnes was arrested, Major agreed to cooperate with the police. Major told Detective Curtsinger that she had been with Barnes when he received the cocaine from "J-Man" at a gas station. She identified Harris as "J-Man" from a photo that the police showed her. The police arranged for Major to call Harris and tell him that Barnes needed more cocaine.

After Harris was called by Major, police surveillance identified Harris's rented car pulling into the garage of a residence leased by Adrianne Parker, Harris's alleged girlfriend, and leaving shortly thereafter. Harris then drove to the Home Depot.

When Harris arrived at the Home Depot, the police blocked in his vehicle but Harris fled on foot. He was captured near a creek where the police found a torn and empty baggie. Later, Parker's residence was searched pursuant to a warrant and the search uncovered drugs, paraphernalia and cash.

On May 11, 2010, Harris and Barnes were jointly indicted as follows: count one: first-degree trafficking in a controlled substance (Harris and Barnes for the cocaine Barnes tried to sell Burton); count two: first-degree trafficking in a controlled substance (Harris for the drugs found at Parker's residence); count three: tampering with physical evidence (Harris for the empty baggie indicating he had disposed of drugs); count four: possession of drug paraphernalia (Harris for paraphernalia found at Parker's residence); count five: second-degree fleeing or evading police (Harris for running from the police outside the Home Depot); count six: possession of marijuana (Barnes); count seven: first-degree persistent felony offender (PFO-1) (Harris); and count eight: PFO-1 (Barnes). Later, the indictment was amended to change count eight to second-degree persistent felony offender (PFO-2).

At trial, the evidence was overwhelming that Barnes had trafficked in cocaine. However, a major issue during the trial was whether Barnes was acting in

concert with Harris or acting on behalf of his friend Sean "Biggs" Bigelow and, therefore, less responsible for his actions. Barnes attempted to establish he was only guilty of facilitating the sale of cocaine between Burton and Bigelow. Bigelow waived his Fifth Amendment rights to testify on Barnes's behalf.

The Commonwealth claimed that Harris was the source of Barnes's cocaine based upon Major's statements to police at the Home Depot. However, at trial, Major recanted these statements and testified she did not remember what she had told the police or what happened at the Home Depot because she was extremely intoxicated at the time.

Bigelow and Burton both testified that Burton called Bigelow several times trying to purchase some cocaine from Bigelow and that Bigelow referred Burton to Barnes. Burton testified he was not aware of Barnes as a source of drugs before talking to Bigelow.

The accounts from Burton and Bigelow differed as to what Barnes's role was in the transaction. Burton testified that Bigelow referred him to Barnes as an alternative source of drugs. Burton testified that Barnes made all the arrangements with him for the sale of the cocaine and their recorded phone conversations were introduced at trial.

Bigelow testified he was Barnes's source and Barnes was doing him a favor when Barnes delivered the drugs to Burton. Bigelow testified he knew Burton from when they had previously used drugs together and wanted to help Burton when Burton called him about cocaine. Bigelow testified that Burton

sounded desperate to buy cocaine. Bigelow testified he purchased the cocaine for Burton from another source and was passing the cocaine on to help Burton. He testified he could not meet with Burton because he had to go to work, but asked his close friend Barnes to deliver the drugs. After Barnes agreed, Bigelow gave Barnes's number to Burton.

Major testified regarding the arrangements between Barnes and Bigelow, claiming that she had a better memory about what happened earlier in the day because she was less intoxicated at that time. Major testified that Bigelow requested that Barnes do him a favor by delivering cocaine to one of his friends. According to Major, Barnes was not going to get any money out of the deal, but was just doing a favor for Bigelow. Burton and Major agreed that Burton was the one who called Barnes to arrange the deal.

At the close of the Commonwealth's case, Harris moved for a directed verdict on counts one, two and three. The motion was granted as to count three, tampering with physical evidence.

Barnes requested a jury instruction on facilitation based upon Bigelow's and Major's statements that Barnes was not the instigator of the drug deal and just doing a favor for Bigelow. Barnes requested a jury instruction on entrapment based upon Burton initiating the contact with Barnes and Bigelow's statements about being the source of the cocaine. The court denied these proposed instructions, determining even if the evidence regarding Bigelow's involvement were believed, the evidence established Barnes had trafficked and the evidence did

not establish Barnes had no propensity to commit the crime or what his motivations were in helping Bigelow.

Harris received a mixed verdict. Harris was acquitted on count one: trafficking in a controlled substance first degree (based upon the cocaine Barnes had) and count four: possession of drug paraphernalia. The jury found Harris guilty of count two: trafficking in a controlled substance first degree (based upon the evidence found at Parker's house); count five: second-degree fleeing or evading the police; and count seven: PFO-1. Harris was sentenced to ten-years' imprisonment enhanced to thirteen.

The jury found Barnes guilty as charged on all counts against him: trafficking in a controlled substance first degree, possession of marijuana and PFO-2. The jury recommended the minimum sentence of five-years' imprisonment on trafficking but could not decide on a recommendation on PFO-2. The Commonwealth recommended the minimum enhancement to ten years. On December 21, 2011, Barnes was sentenced in accordance with that recommendation.

Harris argues the trial court erred by refusing to sever his trial. He argues his convictions were the result of guilt by association when he was tried together with Barnes.

Joinder is permissible for defendants charged in the same indictment who are alleged to have participated in the same act or transaction or same series of acts or transactions constituting the offense or offenses. RCr 6.20; *Burdell v.*

Commonwealth, 990 S.W.2d 628, 633 (Ky. 1999). Generally, defendants who are jointly indicted should be tried together and joint trials are preferred. *Bratcher v. Commonwealth*, 151 S.W.3d 332, 340 (Ky. 2004); *Burdell*, 990 S.W.2d at 633.

Under RCr 9.16 the trial court shall order separate trials of defendants if it appears that a defendant will be prejudiced by joinder for trial. The defendant must establish that "joinder would be so prejudicial as to be 'unfair' or 'unnecessarily or unreasonably hurtful.'" *Ratliff v. Commonwealth*, 194 S.W.3d 258, 264 (Ky. 2006) (quoting *Commonwealth v. Rogers*, 698 S.W.2d 839, 840 (Ky. 1985)). The trial court has broad discretion to determine whether the risk of prejudice requires severance and we will not overturn the trial court's decision absent a clear showing of an abuse of discretion. *Epperson v. Commonwealth*, 809 S.W.2d 835, 838 (Ky. 1990).

Antagonistic defenses alone do not require severance. *King v. Commonwealth*, 276 S.W.3d 270, 274 (Ky. 2009). "That different defendants alleged to have been involved in the same transaction have conflicting versions of what took place, or the extent to which they participated in it, vel non, is a reason for rather than against a joint trial." *Ratliff*, 194 S.W.3d at 264 (quoting *Ware v. Commonwealth*, 537 S.W.2d 174, 177 (Ky. 1976)).

Harris failed to establish improper joinder. The Commonwealth alleged that Barnes and Harris were both guilty of the count one trafficking charge and Harris's fleeing and tampering with evidence charges resulted from his aborted attempt to bring Barnes more cocaine. This is a sufficient connection for joinder.

Harris failed to show prejudice from the trial court failing to sever the trials based upon Barnes's bad acts or the admission of evidence pertaining solely to Barnes. A generalized concern for the taint of a co-defendant's deeds is insufficient to show prejudice. *Brown v. Commonwealth*, 914 S.W.2d 355, 357 (Ky.App. 1996). The fact that evidence will be admitted at trial that only pertains to one defendant does not establish the prejudice needed for separate trials. *Humphrey v. Commonwealth*, 836 S.W.2d 865, 868-869 (Ky. 1992).

Rather than being prejudiced, Harris appears to have benefited from the joint trial. By having a joint trial, the jury heard Bigelow's testimony on behalf of Barnes that provided evidence of an alternative source for the cocaine found on Barnes, justifying Harris's acquittal on count one. Had Harris's trial proceeded first, there is no reason to believe that Bigelow would have waived his Fifth Amendment right in order to testify on Harris's behalf. Therefore, the evidence regarding the conflicting versions of Barnes's source for the cocaine was a reason for a joint trial. *Ratliff*, 194 S.W.3d at 264. Accordingly, we determine that the trial court properly denied the motion to sever and affirm.

Barnes argues the failure of the trial court to instruct the jury on facilitation and entrapment denied him a right to present his case. He argues the evidence regarding his delivery of the cocaine on Bigelow's behalf supported an instruction on facilitation as a lesser included offense to trafficking because Bigelow was an uncharged principal on this charge.

"We review *de novo* alleged legal errors regarding jury instructions." *Carmical v. Bullock*, 251 S.W.3d 324, 328 (Ky.App. 2007). A court need only instruct a jury on a lesser-included offense when it is warranted by the evidence. *Dixon v. Commonwealth*, 263 S.W.3d 583, 586 (Ky. 2008). "An instruction on a lesser included offense is 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." *Neal v. Commonwealth*, 95 S.W.3d 843, 850 (Ky. 2003).

Under KRS 506.080(1):

> 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.

To be guilty of facilitation, Barnes must have known that Bigelow was going to commit a crime, but be indifferent as to whether it was in fact carried out. *Chumbler v. Commonwealth*, 905 S.W.2d 488, 499 (Ky. 1995). However, under the evidence presented at trial, Barnes was the person who committed the crime of trafficking, rather than Bigelow. The uncontroverted evidence was that Barnes transferred the cocaine to Burton. Transfer of a controlled substance qualifies as trafficking. KRS 218A.010. Contradictory evidence was only offered as to whether Barnes conducted the transaction on his own behalf or on behalf of Bigelow and whether Bigelow or Harris was his source.

The act of transferring drugs, even on behalf of another and without profiting from the transaction, makes a defendant an active participant in and subject to conviction for the crime of drug trafficking. *Commonwealth v. Day*, 983 S.W.2d 505, 506, 508 (Ky. 1999); *Dillman v. Commonwealth*, 257 S.W.3d 126, 128, 130 (Ky.App. 2008). Thus, if the jury believed the evidence most favorable to Barnes, this evidence supported his conviction for trafficking. Once Barnes had the cocaine and was communicating with Burton, he was in charge of the transaction and controlled its terms making him a principal to the offense, not an accomplice or facilitator. *See Day*, 983 S.W.2d at 509, n.2. Accordingly, under the evidence presented, a jury could not reasonably believe Barnes was a mere facilitator. Therefore, the trial court did not err by denying Barnes an instruction on facilitation.

Barnes argues he was entitled to a jury instruction on entrapment. Barnes argues he was a college student who had no preexisting intent to commit the crime prior to being solicited by the confidential informant. He claims that all criminal intent existed with the police and informant, who called first Bigelow and then Barnes with the purpose of asking them to commit a crime so they could be arrested.

KRS 505.010 provides:

> (1) A person is not guilty of an offense arising out of proscribed conduct when:
>
> (a) He was induced or encouraged to engage in that conduct by a public servant or by a person acting in

> cooperation with a public servant seeking to obtain evidence against him for the purpose of criminal prosecution; and
>
> (b) At the time of the inducement or encouragement, he was not otherwise disposed to engage in such conduct.
>
> (2) The relief afforded by subsection (1) is unavailable when:
>
> (a) The public servant or the person acting in cooperation with a public servant merely affords the defendant an opportunity to commit an offense[.]

Morrow v. Commonwealth, 286 S.W.3d 206, 209 (Ky. 2009), interprets KRS 505.010 as establishing a two-prong test, that the defendant was induced and lacked predisposition. Satisfaction of both prongs is needed for entitlement to the entrapment defense. *Morrow*, 286 S.W.3d at 209.

The defendant has the burden of producing or identifying probative evidence that he was induced to commit a crime he was not otherwise predisposed to commit before the burden shifts to the Commonwealth to prove beyond a reasonable doubt that the defendant was predisposed to engage in the criminal act before being induced by the government or its agent. *Saxton v. Commonwealth*, 315 S.W.3d 293, 301-302 (Ky. 2010); *Morrow*, 286 S.W.3d at 210; *Day*, 983 S.W.2d at 508 (Ky. 1999). The mere solicitation to purchase illegal drugs by a police officer or confidential informant is not sufficient to constitute illegal entrapment. *Shanks v. Commonwealth*, 463 S.W.2d 312, 314 (Ky. 1971).[1]

[1] Although *Shanks* predates the adoption of KRS 505.010, it can properly be relied upon because KRS 505.010 codifies entrapment law as it existed in our Commonwealth prior to its enactment. *Johnson v. Commonwealth*, 554 S.W.2d 401, 402 (Ky.App. 1977).

Barnes failed to show he was induced to commit the crime of trafficking by the government. Burton's mere solicitation of him is insufficient to show inducement or that Barnes was lured into committing the crime. Instead, Barnes's willing compliance shows he was ready to commit the crime. *Wyatt v. Commonwealth*, 219 S.W.3d 751, 757 (Ky. 2007). Therefore, Barnes was not entitled to an instruction on facilitation. Because neither of Barnes's requested instructions were warranted by the evidence, we affirm.

Accordingly, we affirm the Fayette Circuit Court's convictions of Harris and Barnes.

ALL CONCUR.

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