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NOT TO BE PUBLISHED OPINION

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RENDERED: JANUARY 25, 2007
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2005-SC-000307-MR

DATE Feb 15, 07 [illegible] D.C.

CHARLES W. STRATTON — APPELLANT

V.

APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE JULIE REINHARDT WARD, JUDGE
04-CR-00469

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

A Campbell Circuit Court jury convicted Charles W. Stratton of complicity to first-degree trafficking in a controlled substance (cocaine, second offense), first-degree trafficking in a controlled substance (cocaine, second offense) and possession of marijuana. At the conclusion of the guilt phase, the Commonwealth, in order to simplify the sentencing phase, moved to dismiss the possession count as it was a misdemeanor offense and the sentence would run concurrently with the felony sentences. The trial court granted the motion. In accordance with the jury's recommendation, the trial court sentenced Stratton to 20 years in prison on the two remaining counts to be served consecutively. Thus, he appeals to this Court as a matter of right. Ky. Const. § 110(2)(b).

Stratton raises two issues on appeal. First, he argues that the trial court erred in denying his motion to instruct the jury on criminal facilitation. Second, he argues that

the trial court erred in allowing the prosecutor to ask Stratton if the other witnesses were lying when their version of the events at issue differed from his.

Upon review, we reject Stratton's contention that the evidence supported an additional jury instruction on criminal facilitation. And even though we agree that the trial court erred in allowing the prosecutor to ask Stratton if other witnesses were lying, we hold that this error is harmless. Thus, we affirm the judgment of conviction and sentence.

I. Factual and Procedural History

On July 8, 2004, an agent with the Northern Kentucky Drug Strike Force (NKDSF) arranged for a controlled buy from Stratton using a confidential informant, Steven Burke. According to the arrangement, Burke was to purchase a half-gram of cocaine for $50, and the purchase was to take place at Stratton's residence. When Burke arrived at Stratton's residence, however, Stratton was leaving with a friend. Stratton informed Burke that his girlfriend, Beth Gabbard, had "it" and that he would be right back. The NKDSF tape-recorded this conversation and the ensuing purchase of a half-gram of cocaine from Gabbard.

At trial, Burke alleged that "it" was a half-gram of cocaine, which he purchased for $50. But Stratton alleged that Burke came by his house to pick up $40 that Burke had left at his home for safekeeping the night before.

Four days later, on July 12, 2004, the NKDSF arranged for another controlled buy from Stratton using Burke. This time, Burke simply showed up at Stratton's home as he was unable to reach him by telephone. He found Stratton at home, however, and purchased another half-gram of cocaine from him for $50. This purchase was also tape-recorded.

About a month and a half after the two purchases, the NKDSF obtained a search warrant and searched Stratton's home. During the search, they found two sets of hand scales, a tray containing marijuana residue, rolling papers, and a single marijuana plant growing in the flowerbed in the back yard.

The Campbell County Grand Jury indicted Stratton on two counts of first-degree trafficking in a controlled substance and one count of cultivating marijuana, under five plants. Two weeks before trial, however, the grand jury amended the indictment in at least three ways. First, as to the July 8, 2004, trafficking count, it amended the indictment to state that Stratton acted as an accomplice in the commission of the crime. Second, as to both trafficking counts, it amended the indictment to add that Stratton had previously been convicted of a drug trafficking offense in a 1991 Campbell County case. Third, as to the count of cultivating marijuana, it amended the indictment to possession of marijuana.

The case against Stratton proceeded to trial. At the conclusion of the evidence, Stratton's counsel requested a jury instruction on facilitation to first-degree trafficking on the count stemming from July 8, 2004. The trial court denied Stratton's request for a facilitation instruction. The jury convicted Stratton of complicity to first-degree trafficking, first-degree trafficking and possession of marijuana. Stratton received a 20 year sentence on the complicity and trafficking convictions to run consecutively for a total of 40 years.

II. Did the trial court err in denying Stratton's motion to instruct the jury on criminal facilitation?

Because the evidence presented at trial supported only two theories -- (1) that Stratton was an active participant in trafficking cocaine and intended that Gabbard sell

cocaine to Burke on July 8, 2004, or (2) that he did not act as an accomplice with Gabbard in her commission of this offense -- the trial court did not err in denying Stratton's motion to instruct the jury on criminal facilitation.

The relevant part of the statute criminalizing complicity, KRS KRS 502.020(1), reads:

> A person is guilty of an offense committed by another person when, with the intention of promoting or facilitating the commission of the offense, he:
> (a) Solicits, commands, or engages in a conspiracy with such other person to commit the offense; or
> (b) Aids, counsels, or attempts to aid such person in planning or committing the offense;
> . . .

In slight contrast, the statute criminalizing facilitation, KRS 506.080(1), reads:

> 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 distinction between the applicability of the two statutes depends on the defendant's mental state. See White v. Commonwealth, 178 S.W.3d 470, 489 (Ky. 2005).

> Under either statute, the defendant acts with knowledge that the principal actor is committing or intends to commit a crime. Under the complicity statute, the defendant must intend that the crime be committed; under the facilitation statute, the defendant acts without such intent. Facilitation only requires provision of the means or opportunity to commit a crime, while complicity requires solicitation, conspiracy, or some form of assistance. "Facilitation reflects the mental state of one who is 'wholly indifferent' to the actual completion of the crime."

Thompkins v. Commonwealth, 54 S.W.3d 147, 150-51 (Ky. 2001) (citing Skinner v. Commonwealth, 864 S.W.2d 290, 298 (Ky. 1993) and quoting Perdue v.

Commonwealth, 916 S.W.2d 148, 160 (Ky. 1995), cert. denied, 519 U.S. 855, 117 S. Ct. 151, 136 L. Ed. 2d 96 (1996)).

An instruction on facilitation (as a lesser-included offense of complicity) "is appropriate if and only if on the given evidence a reasonable juror could entertain reasonable doubt of the defendant's guilt on the greater charge, but believe beyond a reasonable doubt that the defendant is guilty of the lesser offense." Skinner, 864 S.W.2d at 298. An instruction on a lesser included offense requiring a different mental state from the primary offense is unwarranted, however, unless there is evidence supporting the existence of both mental states. See Taylor v. Commonwealth, 995 S.W.2d 355, 362 (Ky. 1999).

Turning to the evidence in this case, Burke testified that he called Stratton and arranged to purchase cocaine from Stratton at Stratton's residence. When he arrived, Stratton was leaving, and he yelled to Burke that Gabbard had it. Burke purchased a half-gram of cocaine from Gabbard for $50. Gabbard testified that she sold cocaine to Burke on July 8, 2004, because Stratton told her to. According to her, Stratton told her where the cocaine was, and she gave the $50 that Burke gave her to Stratton when he returned home. But Stratton claimed that he had no knowledge that Burke was coming to his house to purchase cocaine, and he did not know that Gabbard sold cocaine to Burke after he left. Stratton did not claim that he knew at any time on July 8, 2004, that Gabbard intended to sell cocaine to Burke. To the contrary, he testified that he believed that Burke was coming to his house to pick up the $40 that he had left at his house the night before.

This evidence supported only two theories: (1) that Stratton was an active participant in trafficking cocaine and intended that Gabbard sell cocaine to Burke on

July 8, 2004, or (2) that he did not act as an accomplice with Gabbard in her commission of this offense. It did not support a middle-ground violation of the facilitation statute. See White v. Commonwealth, 178 S.W.3d at 490-91 (rejecting a "splitting the difference" approach that would effectively require that a facilitation instruction be given in every case in which the defendant is charged with complicity, instead relying on affirmative evidence of defendant's mental state).

Citing Taylor v. Commonwealth, 995 S.W.2d at 361, Stratton argues that the trial court must prepare and give jury instructions regarding each theory of the case supported by the testimony to any extent without regard to how preposterous or unbelievable that testimony may be. Stratton contends that the evidence presented was that Stratton aided Gabbard by providing her with cocaine to sell to Burke. Noticeably absent from Stratton's argument, however, is any discussion of affirmative evidence that would demonstrate the requisite mental state for facilitation -- that he was wholly indifferent to Gabbard's actual completion of the crime. There is none. Accordingly, as discussed above, the trial court was correct in denying Stratton's request for a facilitation instruction.

III. Did the trial court err in allowing the prosecutor to ask Stratton if the other witnesses were lying when their version of the events at issue differed from his?

The trial court erred in allowing the prosecutor to ask Stratton if other witnesses were lying; however, we hold that this error is harmless.

This second claim of error concerns the prosecutor's questioning of Stratton on re-cross-examination. The prosecutor asked him if Gabbard was lying when her testimony of the events of July 8, 2004, differed from his. Stratton's counsel objected. Despite counsel's objection, the trial court allowed the questioning and did not direct the

prosecutor to rephrase. The prosecutor resumed questioning regarding Gabbard, and then asked if Burke was lying when his testimony of both controlled buys differed from Stratton's. Stratton was forced to answer in response that both Gabbard and Burke were lying.

Stratton argues that the law is clear that a witness should not be required to characterize the testimony of another witness as lying. He is correct. See Moss v. Commonwealth, 949 S.W.2d 579, 583 (Ky. 1997); Caudill v. Commonwealth, 120 S.W.3d 635, 662 (Ky. 2003). The reason that such a characterization is improper is that it "places the witness in such an unflattering light as to potentially undermine his entire testimony. Counsel should be sufficiently articulate to show the jury where the testimony of the witnesses differ without resort to blunt force." Moss, 949 S.W.2d at 583.

Stratton is incorrect, however, in his assertion that the trial court's allowance of this type of testimony over counsel's contemporaneous objection constitutes reversible error as additional analysis is still required. A judgment will not be reversed for an error in the admission of evidence or defect in any ruling unless it appears that the substantial rights of the defendant were prejudiced; otherwise, the error must be disregarded as harmless. RCr 9.24. The test for harmless error is "whether on the whole case there is a substantial possibility that the result would have been any different." Commonwealth v. McIntosh, 646 S.W.2d 43, 45 (Ky. 1983).

Here, Stratton does not argue that there is a substantial possibility that the result would have been any different in this case.

Nonetheless, having reviewed the trial, we conclude that no substantial possibility exists that the outcome would have been different had the trial court not

allowed the prosecutor's questions. On Stratton's direct examination, he essentially testified that Burke and Gabbard were not credible. As to Burke, Stratton volunteered that he did not know how he could say that he bought cocaine in his house. And as to Gabbard, Stratton theorized that she testified as she did because they [presumably the Commonwealth] had made threats to her. Stratton further stated that Gabbard would "say anything" because she was a "people pleaser." Later in his direct testimony, Stratton commented that Burke and Gabbard's testimony was "funny" because they could remember the events of the days of July 8 and July 12, 2004, but they could not remember what happened at night on those dates. Stratton further maligned Burke by accusing him of making advances on Gabbard and stating that Burke's mission was to go get high.

On cross-examination, Stratton was extremely contentious, at one point even asking the prosecutor what she offered Gabbard to write a statement (introduced in evidence) implicating both herself and Stratton. (This inquiry came after Gabbard's testimony that she had not received any promises from the Commonwealth in exchange for her testimony). In short, while the prosecutor should not have resorted to asking Stratton to characterize Gabbard's and Burke's testimony as lies on re-cross-examination, we believe that any error in allowing the prosecutor to do so was harmless as Stratton had already openly attacked their credibility on direct and cross-examination. In the end, however, the jury chose to believe them over him.

We affirm the judgment of conviction and sentence of the Campbell Circuit Court.

All Concur.

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