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RENDERED: OCTOBER 29, 2009
NOT TO BE PUBLISHED

FINAL
DATE 11/19/09 Kelly Klaber D.C.

Supreme Court of Kentucky

2008-SC-000063-MR

SANDRA LYNN GREEN JACKSON — APPELLANT

V.

ON APPEAL FROM DAVIESS CIRCUIT COURT
HONORABLE HENRY M. GRIFFIN, JUDGE
NO. 06-CR-00676

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

REVERSING AND REMANDING

This is an appeal from a judgment wherein Appellant was convicted of one count of first-degree trafficking in a controlled substance, subsequent offense, one count of complicity to first-degree trafficking in a controlled substance, subsequent offense, and one count of possession of drug paraphernalia. Appellant argues that the two charges of trafficking in a controlled substance were unrelated and should have been severed, and that he was entitled to a facilitation instruction on the charge of complicity to trafficking in a controlled substance. We agree that the charges should have been severed and that Appellant was entitled to a facilitation instruction. Thus, we reverse and remand.

In 2006, James Johnson was working as an undercover confidential informant for the Owensboro Police Department making purchases of illegal drugs. On June 23, 2006, Johnson made a call to Stephanie Green for the purpose of purchasing crack cocaine from Stephanie. After getting no answer on Stephanie's cell phone, Johnson attempted to call her at what he thought was her residence, which was, in fact, the land line for the residence of her mother, Sandra Jackson. When Sandra answered, Johnson asked to talk to Stephanie. Sandra asked who was calling, and Johnson identified himself by his street name, Junior. Johnson then asked her if she wanted "this 50"[1] Johnson repeated the question. Sandra asked Johnson where he was, and he indicated he was in front of the Executive Inn. At that point, Sandra called for Stephanie. Sandra did not hand the phone to Stephanie, but asked her, "did she want the 50?" and if she was "going to go down there." Stephanie said that she wanted the 50, and Sandra told Johnson that Stephanie was going to meet him at the Quick Mart. Johnson called Sandra back in 15 or 20 minutes because Stephanie had not arrived yet. Sandra told Johnson that Stephanie was on her way.

When Stephanie arrived, Johnson asked her for a ride. Johnson got in the car and laid $50 down on the console. In return, Stephanie gave him 274 milligrams of crack cocaine. Stephanie drove Johnson to a destination a few blocks away and dropped him off. Sandra was not in the car when the

[1] Johnson testified that a "50" was street vernacular for $50.00 worth of crack cocaine.

transaction took place. Neither Stephanie nor Sandra were arrested immediately following this transaction.

In September 2006, the Owensboro Police Department decided to do a "trash pull" from Sandra Jackson's residence. On September 18, 2006, the police went to Sandra's home and took some of the trash bags that were set out by the curb. In searching the contents of the bags, the police found baggies that appeared to have cocaine residue. Based on that discovery and other information, the police obtained a warrant to search Sandra's home that same day.

When police arrived at the home, they located Sandra in the master bedroom, asleep in bed with her husband, Duwayne Jackson. The police had everyone in the house (Duwayne, Sandra, Sandra's mother, and Sandra's son) go to the living room. Officer Jeff Robey searched the master bedroom. He found an orange purse located on Sandra's side of the bed, hanging from a knob on the dresser, approximately two feet away from where she was sleeping. The following were found inside the purse: one large rock of crack cocaine; a cell phone; a digital scale; Sandra's checkbook; several receipts; and two letters – one addressed to Sandra and one addressed to Duwayne at the same address. A second purse, a white purse, was found on the floor of the master bedroom and contained Sandra's identification and $450. Robey also found a baggie with a corner missing and marijuana in the master bedroom.

A baggie containing 1.261 grams of powder cocaine was found in a drawer next to the kitchen sink. Two marijuana roaches were found in a

second bedroom, and two more were found in the garage. Numerous baggies with corners missing, one with white powder residue, were found in various places in the house.

Officer Robey interviewed Sandra and Duwayne Jackson after the search. Sandra denied that there was drug trafficking taking place in her house and could not explain all the baggies with missing corners found in the house. She likewise denied any knowledge about the cocaine found in the purse, although she admitted that the purse and the cell phone were hers. She stated that she had not carried the orange purse for a while. Duwayne admitted to police that he smoked cocaine and marijuana in the house and that the marijuana and the baggies found in the house were his. He denied, however, that the other drugs found in the house were his.

Sandra was indicted on: (1) one count of first-degree trafficking in a controlled substance, subsequent offense, for acting alone, jointly or in complicity with Stephanie Green to sell crack cocaine on June 23, 2006; (2) one count of first-degree trafficking in a controlled substance, subsequent offense, for acting alone, jointly or in complicity with Duwayne Jackson to traffic in crack cocaine on September 18, 2006; and (3) one count of possession of drug paraphernalia for acting alone, jointly or in complicity with Duwayne Jackson on September 18, 2006. Prior to trial, Sandra's counsel moved to sever the June 23rd offense from the September 18th offenses, arguing that they were unrelated. The trial court denied the motion, and all three charges were tried together on November 20, 2007.

The jury found Sandra guilty of all three charged offenses and recommended a sentence of fifteen (15) years on each count of trafficking in a controlled substance, subsequent offense, to be served consecutively, and twelve (12) months on the count of possession of drug paraphernalia. The trial court sentenced Sandra in accordance with the jury's recommendations for a total sentence of thirty (30) years. This matter of right appeal by Sandra followed.

DENIAL OF MOTION TO SEVER

Sandra argues that the trial court erred to her substantial prejudice when it failed to sever the June 23rd complicity to trafficking charge from the September 18th trafficking and possession of drug paraphernalia charges. Sandra maintains that the charges from the two separate dates were so unrelated in time, place and character that joinder was improper.

Two or more offenses may be charged in the same indictment if the offenses are "of the same or similar character or are based on the same acts or transactions connected together or constituting parts of a common scheme or plan." RCr 6.18. Joinder of offenses is proper so long as the defendant is not unduly prejudiced. RCr 9.16. The trial court enjoys broad discretion in regard to joinder and the decision will not be overturned absent a demonstration that this discretion was clearly abused. Violett v. Commonwealth, 907 S.W.2d 773, 775 (Ky. 1995). A significant factor in determining whether joinder of offenses for trial is unduly prejudicial is whether evidence of one of the offenses would

be admissible in a separate trial for the other offense. Spencer v. Commonwealth, 554 S.W.2d 355, 357 (Ky. 1977).

Although the charges joined in the present case were all drug-related, they were from two separate, unrelated sets of events almost three months apart. The June 23rd offense involved an actual sale of crack cocaine to the informant through Stephanie Green in Green's automobile. Sandra's involvement in this transaction was limited to her relaying information between the informant and Green regarding the transaction. The September 18th offenses did not involve the informant, Stephanie Green or even an actual sale of crack cocaine. The trafficking charge from that date was based on Sandra's possession of crack cocaine in her home with intent to sell (KRS 218A.010(40)).

As to whether evidence of the September 18th offenses would be admissible under KRE 404(b) in a trial of the June 23rd offense, the offenses were not sufficiently similar to demonstrate a modus operandi on Sandra's part. See Billings v. Commonwealth, 843 S.W.2d 890, 893 (Ky. 1992). Further, the evidence of the September 18th trafficking charge would not be probative of Sandra's intent to sell on June 23rd because there was no actual sale of cocaine on September 18th. See Walker v. Commonwealth, 52 S.W.3d 533, 536 (Ky. 2001). Because the offenses from the two separate dates were so unrelated in time and circumstances, we adjudge that it was unduly prejudicial to try them together and thus the trial court abused its discretion in refusing to grant the motion to sever. Accordingly, we reverse the judgment and remand to the trial court for further proceedings consistent with this opinion.

FAILURE TO INSTRUCT ON CRIMINAL FACILITATION

Sandra argues that the trial court erred relative to the June 23rd first-degree trafficking charge in failing to instruct on the lesser included offense of criminal facilitation to first-degree trafficking, in addition to the complicity instruction. Sandra did not seek a facilitation instruction at trial, thus the issue was not preserved. RCr 9.54(2). However, Jackson asks that we review the issue for palpable error pursuant to RCr 10.26. Because we are already reversing on the severability issue, we need not review the assignment of error for palpable error. It should also be noted that there is no authority in Kentucky to indicate that a trial court's failure to instruct on a lesser-included offense is palpable error, when no objection is made, or instruction offered. Clifford v. Commonwealth, 7 S.W.3d 371, 376 (Ky. 1999). Nevertheless, we shall review the argument for advisory purposes on remand.

It is the duty of the trial court to instruct the jury on every theory of the case deducible from the evidence. Fredline v. Commonwealth, 241 S.W.3d 793, 797 (Ky. 2007) (citing Manning v. Commonwealth, 23 S.W.3d 610, 614 (Ky. 2000)); RCr 9.54(1). "An instruction on a lesser-included offense is required only if, considering the totality of the evidence, the jury could 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." Baker v. Commonwealth, 103 S.W.3d 90, 94 (Ky. 2003) (citing Clifford, 7 S.W.3d at 377-78. A trial court's rulings on instructions are reviewed under an abuse of discretion standard. Ratliff v. Commonwealth, 194 S.W.3d 258, 274

(Ky. 2006) (citing Johnson v. Commonwealth, 134 S.W.3d 563, 569-70 (Ky. 2004)).

Facilitation is committed when the defendant acts with knowledge that the principal actor is committing or intends to commit a crime, but the defendant acts without the intent that the crime be committed. Thompkins v. Commonwealth, 54 S.W.3d 147, 150 (Ky. 2001). The statute charges that 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." KRS 506.080(1). The crime of facilitation reflects the mental state of one who is "wholly indifferent" to the actual completion of the crime. Perdue v. Commonwealth, 916 S.W.2d 148, 160 (Ky. 1995). If the defendant intends that the other person commit the crime, the offense is complicity under KRS 502.020(1), not facilitation. Thompkins, 54 S.W.3d at 150.

In addition to the evidence of the phone call from the informant to the Jackson residence, Stephanie Green and Sandra Jackson testified for the defense regarding the June 23rd sale of cocaine. Stephanie testified that she was charged with and pled guilty to selling crack cocaine to the informant on June 23, 2006. Stephanie testified that she had arranged the transaction with the informant earlier in the day on June 23rd, before she arrived at her mother's house, and that she had obtained the crack from an individual known as "Shorty." Stephanie stated that when the informant called her mother's

house and asked if she wanted "this 50," it sounded like he owed her $50, which she was glad about because she did not want her mother to know what she (Stephanie) was doing. According to Stephanie, Sandra did not receive any money from the sale of the cocaine to the informant, and Sandra's only involvement in the sale was relaying the phone message.

Sandra testified that when the informant called, he asked for Stephanie and told her to ask Stephanie if she wanted "this 50." Sandra claimed that she thought the caller owed Stephanie $50 and denied any knowledge of an impending drug deal, although she admitted on cross-examination that she knew what a "50" was in terms of selling crack cocaine. Sandra further denied giving Stephanie any instructions with regard to any drug transaction that day or receiving any money or benefit therefrom.

From our review of the evidence of Sandra's involvement in the June 23rd events, there was evidence that she had knowledge of an impending drug deal between the informant and Stephanie and that she intended for Stephanie to complete commission of the crime (make the sale of crack to the informant). However, there was likewise evidence that she was wholly indifferent to Stephanie's completion of the crime and was simply relaying information between the informant and Stephanie. Aside from relaying the information between the informant and Stephanie, Sandra did nothing to further completion of the crime. It was undisputed that she was not present in the car when the actual transaction was made, and according to Sandra's and Stephanie's testimony, she did not give Stephanie any advice or instructions

regarding the impending drug deal, nor did she receive any money or benefit therefrom. According to Stephanie's testimony, the drug deal was pre-arranged by her (Stephanie) and she did not get the crack from Sandra. In sum, the evidence was such that the jury could have a reasonable doubt as to Sandra's guilt of complicity to first-degree trafficking, and yet believe beyond a reasonable doubt that she was guilty of facilitation to first-degree trafficking. Hence, it was error to fail to submit a facilitation instruction to the jury.

KRE 404(b) EVIDENCE OF APPELLANT'S CRIMINAL HISTORY

Sandra argues that the trial court erred in failing to grant her motion for a mistrial following Officer Robey's testimony indicating that she had a prior jail file and a "previous history" with the police. The trial court conceded that the testimony was improper and offered to strike the testimony and give an admonition, which defense counsel refused. As we are reversing on the severability issue, we need not review this issue for reversible error. We would remind the parties that in referring to a defendant's past criminal history:

> Evidence of other crimes is generally inadmissible, though such evidence is admissible (1) if offered for a purpose other than proving a person's character in order to show action in conformity therewith, e.g., to prove motive, intent, opportunity, et cetera, or (2) if the evidence is "so inextricably intertwined with other evidence essential to the case...." [KRE 404(b)]. M.A.'s statement was not offered pursuant to nor does it fall under either exception, and, as such, the statement was inadmissible.

Matthews v. Commonwealth, 163 S.W.3d 11, 17 (Ky. 2005) (footnotes and citations omitted) (adjudging that witness' reference to defendant's prior imprisonment, while improper, did not warrant a mistrial).

For the reasons stated above, the judgment of the Daviess Circuit Court is reversed and the case is remanded to the trial court for further proceedings consistent with this opinion.

All sitting. Abramson, Noble, Schroder, and Venters, J.J., concur. Scott, J., dissents by separate opinion in which Minton, C.J.; and Cunningham, J., join.

SCOTT, JUSTICE, DISSENTING: I must respectfully dissent from my esteemed colleagues' opinion reversing and remanding on the grounds that Appellant's first trafficking in a controlled substance charge should have been severed from her second and that she was entitled to a facilitation instruction. I dissent because the first charge of trafficking would be admissible to prove Appellant's knowledge and intent as to the second charge. Therefore, the trial court did not abuse its discretion in denying Appellant's motion to sever the charges, nor did it commit palpable error in failing to give a facilitation instruction.

The majority opines that the trial court clearly abused its discretion by misjoining Appellant's first and second trafficking charges. Two or more offenses may be joined together "if the offenses are of the same or similar character or are based on the same acts or transactions connected together or constituting parts of a common scheme or plan." RCr 6.18. So long as the dictates of RCr 6.18 are met, joinder is proper unless "it appears that a defendant or the Commonwealth is or will be prejudiced by a joinder of offenses." RCr 9.16. "The trial judge has broad discretion in regard to joinder

and the decision of the trial judge will not be overturned in the absence of a demonstration of a clear abuse of discretion." Violett v. Commonwealth, 907 S.W.2d 773, 775 (Ky. 1995).

Appellant claims, and the majority agrees, that she suffered undue prejudice when the trial court refused to sever the two trafficking offenses. However, "[a] significant factor in identifying such prejudice is the extent to which evidence of one offense would be admissible in a trial of the other offense." Rearick v. Commonwealth, 858 S.W.2d 185, 187 (Ky. 1993) (citing Spencer v. Commonwealth, 554 S.W.2d 355, 357 (Ky. 1977)).

In the case at hand, evidence of the first trafficking charge would have been admissible in the second, and vice versa. In her defense for the second trafficking charge, Appellant claimed she did not know how a large rock of crack cocaine and digital scales got inside a purse found in her bedroom. That same purse also contained her cell phone and mail addressed to her. Evidence as to the first trafficking charge would be admissible in Appellant's trial for the second charge to show that she had knowledge of drugs and their dealings and an absence of mistake or accident pursuant to KRE 404(b)(1).[2] Likewise,

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[2] KRE 404(b) reads:

> (b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible:
>
> (1) If offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident; or

evidence of Appellant's second trafficking charge would have been admissible in the trial of her first charge. Appellant's defense of the first trafficking charge was that she did not know the caller (who turned out to be a police informant) was attempting to have Appellant's daughter, Stephanie, bring him $50 worth of crack cocaine, but rather, that she thought the caller was merely calling to tell Stephanie that he had $50 he owed her. Evidence from the second trafficking charge would be admissible in the trial of the first charge to show Appellant's intent, knowledge, and absence of mistake or accident pursuant to KRE 404(b)(1).

The majority's opinion states that the evidence of one of the offenses would not be admissible in the trial of the other, as they were not similar enough to demonstrate a modus operandi on the part of Appellant. While it is true that modus operandi can be used to help show identity, this is not the only method of admitting evidence of other crimes pursuant to KRE 404(b)(1). In the case at bar, the evidence of the first offense would not be admitted in the trial of the second to show the identity of the perpetrator, but rather, her knowledge, intent, or absence of mistake or accident. Just because the offenses were not similar enough to establish a modus operandi, that is no reason to say that the evidence would not have been otherwise admissible under KRE 404(b)(1).

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(2) If so inextricably intertwined with other evidence essential to the case that separation of the two (2) could not be accomplished without serious adverse effect on the offering party.

The majority also states that evidence of Appellant's second trafficking charge would not be probative of her intent to engage in the first act of trafficking because there was no actual sale of drugs involved with the second trafficking charge. However, both of the offenses involve Appellant's trafficking of crack cocaine. In the first offense, Appellant relayed information between her daughter and the informant, thus aiding in the arrangement of the sale of crack cocaine. The second offense involved items found in Appellant's house after the police executed a search warrant including crack cocaine, powder cocaine, digital scales, marijuana, and baggies with missing corners. Appellant's second trafficking charge, in which various drugs and paraphernalia were found in her house would be admissible to show her intent, knowledge, and absence of mistake or accident in her first trafficking charge, in which she denied she had any knowledge of the impending drug sale or intention to aid in its completion.

I, therefore, cannot agree that the trial court abused its discretion in denying Appellant's motion to sever the trafficking charges from one another. Because evidence of each of the crimes would have been admissible in the trial of the other pursuant to KRE 404(b)(1), no undue prejudice accrued to Appellant.

Furthermore, no manifest injustice occurred as a result of the trial court's failure to give a facilitation instruction regarding Appellant's first trafficking charge. Because Appellant failed to properly preserve the issue at trial by either requesting such an instruction or objecting to the instruction

given, we review only for palpable error pursuant to RCr 10.26.[3] There is no Kentucky authority "holding it to be palpable error to fail to instruct on a lesser included offense of that charged in the indictment." Clifford v. Commonwealth, 7 S.W.3d 371, 376 (Ky. 1999).

Moreover, had this issue been preserved for our review, the trial court did not abuse its discretion in failing to instruct the jury on facilitation. Ratliff v. Commonwealth, 194 S.W.3d 258, 274 (Ky. 2006) ("We review a trial court's rulings regarding instructions for an abuse of discretion.") (citing Johnson v. Commonwealth, 134 S.W.3d 563, 569-70 (Ky. 2004)). "A trial court is required to instruct the jury on every theory of the case that is reasonably deducible from the evidence." Fredline v. Commonwealth, 241 S.W.3d 793, 797 (Ky. 2007) (citing Manning v. Commonwealth, 23 S.W.3d 610, 614 (Ky. 2000)). A trial court need only instruct as to a lesser-included offense where, "considering the totality of the evidence, the jury could 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." Baker v. Commonwealth, 103 S.W.3d 90, 94 (Ky. 2003) (citing Clifford, 7 S.W.3d at 377-78).

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[3] RCr 10.26 reads:

> A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.

In the case at bar, the Commonwealth's theory of the case was that Appellant relayed information between her daughter and the informant with the intention that Stephanie commit the crime of selling crack cocaine to the informant (a theory consistent with the offense of complicity). KRS 502.020(1). Appellant's contention was that she knew nothing of the imminent drug deal, but rather that she thought the information she relayed between her daughter and the informant was in regard to $50 the informant owed her daughter. No evidence was presented by either side that Appellant's acts amounted to facilitation: that Appellant knew her daughter intended to sell crack cocaine to the informant and provided her with the means or opportunity to commit this crime by relaying information between her daughter and the informant, but *did not intend* that her daughter commit the crime (but was instead wholly indifferent to its actual completion). KRS 506.080(1); Perdue v. Commonwealth, 916 S.W.2d 148, 160 (Ky. 1995). Appellant's contention was that she had no knowledge of the drug transaction being planned by Stephanie and the informant. If Appellant had no knowledge that her daughter was about to commit a crime, she could not have facilitated it. Smith v. Commonwealth, 722 S.W.2d 892, 896-97 (Ky. 1987).

Since there was no evidence presented at trial to support an instruction as to facilitation in Appellant's first trafficking charge, the trial court did not abuse its discretion in failing to give such an instruction to the jury. Rather, based on the evidence, Appellant was either guilty of complicity or not guilty at all. Furthermore, Appellant's decision not to request an instruction on

facilitation or present any evidence that her conduct amounted to facilitation could have been a tactical move on her part.

It is for these reasons that I respectfully dissent from the majority's opinion reversing the trial court and remanding the case for further proceedings.

Minton, C.J., and Cunningham, J., join this dissent.

COUNSEL FOR APPELLANT:

Thomas More Ransdell
Assistant Public Advocate
Department Of Public Advocacy
100 Fair Oaks Lane, Suite 302
Frankfort, KY 40601

COUNSEL FOR APPELLEE:

Jack Conway
Attorney General

Susan Roncarti Lenz
Assistant Attorney General
Office of Attorney General
Criminal Appellate Division
1024 Capital Center Drive
Frankfort, KY 40601-8204