

Commonwealth Of Kentucky

Court of Appeals

NO. 2001-CA-001962-MR

DANIELLE BAVOL

APPELLANT

v. APPEAL FROM WHITLEY CIRCUIT COURT
HONORABLE JERRY D. WINCHESTER, JUDGE
ACTION NO. 00-CR-00034-003

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: COMBS AND DYCHE, JUDGES; AND POTTER, SPECIAL JUDGE¹.

POTTER, SPECIAL JUDGE. This is an appeal from a judgment entered by the Whitley Circuit Court after a jury convicted appellant of first-degree possession of a controlled substance. Appellant contends that the trial court erred by instructing the jury regarding complicity. For the reasons stated hereafter, we affirm.

Appellant and two passengers were the occupants of a vehicle which was stopped by a police officer who observed the

¹Senior Status John Woods Potter sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

vehicle weaving from lane to lane. During a consensual search, a pistol was found under the front passenger seat, and cocaine was found both in the center console and wrapped in pants on the back seat. Further, one of the passengers had \$5,210.00 in cash on his person. Appellant and her passengers were charged with first-degree trafficking in a controlled substance. A jury found appellant guilty of possession of cocaine, and she was sentenced to five years' imprisonment. This appeal followed.

Appellant contends that the trial court erred by instructing the jury on complicity, as there was no evidence to support such an instruction. However, even if that is true, in these particular circumstances any such error was harmless.

KRS 502.020(1) provides in pertinent part that a person engages in complicity and is liable for the conduct of another if,

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; or
- (c) Having a legal duty to prevent the commission of the offense, fails to make a proper effort to do so.

Here, the record shows that the only instructions given to the jury regarding conspiracy, trafficking or possession were the following:

INSTRUCTION NO. 1

FIRST-DEGREE TRAFFICKING IN A CONTROLLED
SUBSTANCE

You will find the Defendant guilty of First-Degree Trafficking in a Controlled Substance under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

- A. That in this county on or about April 15, 2000, and before the finding of the Indictment herein, she had in her possession a quantity of cocaine;
- B. That she knew the substance so possessed by her was cocaine;

AND

- C. That she had the cocaine in her possession with the intent of selling, distributing and/or dispensing it to another person.

INSTRUCTION NO. 2

FIRST-DEGREE POSSESSION OF A CONTROLLED
SUBSTANCE

If you do not find the Defendant guilty under Instruction No. 1, you will find the Defendant guilty of First-Degree Possession of a Controlled Substance under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

A. That in this county on or about April 15, 2000, and before the finding of the Indictment herein, she had in her possession a quantity of cocaine;

AND

B. That she knew the substance so possessed by her was cocaine.

INSTRUCTION NO. 3

Complicity - Means that a person is guilty of an offense committed by another person when, while acting knowingly with regards to the result of another's conduct, he solicits, commands, or engages in a conspiracy with such other person to engage in that conduct, or aids, counsels, or attempts to aid such person in planning or committing such conduct.

Our review of the record shows that the concept of complicity was not raised in the commonwealth's opening or closing statement, and that the commonwealth did not otherwise argue that appellant should be convicted as anything other than a principal in the charges against her. Moreover, it is clear from a reading of the instructions that despite the definition set out in Instruction No. 3, the concept of complicity was never tied into the instructions pertaining to the trafficking or possession charges against appellant. Instead, the instructions merely permitted the jurors to convict appellant of first-degree trafficking or first-degree possession of cocaine, either of which required a finding that appellant was in

possession of cocaine as a principal. In other words, despite the complicity instruction, the jurors were not given the option of convicting appellant for complicity in the trafficking or possession of cocaine. It follows, therefore, that even if the trial court erred by defining the term "complicity" in Instruction No. 3, that instruction was extraneous to the charges against appellant and any error in this regard was harmless. RCr 9.26. Cf. Skinner v. Commonwealth, Ky., 864 S.W.2d 290, 299 (1993) (defendant who was found guilty under more stringent burglary instruction was not prejudiced by unclear and overbroad complicity instruction).

The court's judgment is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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