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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2005-CA-000116-MR

LEN SMITH — APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE WILLIAM L. GRAHAM, JUDGE
INDICTMENT NO. 03-CR-00155

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: BARBER, HENRY, AND KNOPF, JUDGES.

KNOPF, JUDGE: On August 20, 2003, a Franklin County grand jury returned an indictment charging Len Smith with trafficking in a controlled substance, first offense,[1] possession of a controlled substance, first offense,[2] and with being a persistent felony offender in the first and second degree.[3] Following a trial, the jury found Smith guilty on the trafficking charge and of being a

[1] KRS 218A.1412; a class C felony.

[2] KRS 218A.1415; a class D felony.

[3] KRS 532.080.

persistent felony offender in the second degree. The jury fixed Smith's sentence at a total of ten years' imprisonment, which the trial court imposed. Finding no error, palpable or otherwise, we affirm.

The charges against Smith arose from an incident which occurred on July 30, 2003. Detective Brian Willhoite of the Frankfort Police Department testified that he observed Smith sitting on the steps of an abandoned building with Daniel Simpson. Detective Willhoite noted that the area was known for high drug activity, so he positioned himself to listen to Smith and Simpson's conversation without being seen. Detective Willhoite testified that he overheard Smith telling Simpson that there were police officers in the area and for Simpson to give him the money. He also overheard Smith saying that he had "the dope right here in my hand", while Simpson was saying "let me see it."

At that point, Detective Willhoite emerged and ordered both men to the ground. He later found a small amount of unpackaged cocaine and a $50.00 bill on the ground near to where Smith had been lying. At trial, Simpson testified that Smith had offered to sell him the cocaine. Smith denied possessing or selling cocaine, asserting that Simpson had approached him looking to buy when Detective Willhoite arrested them.

The indictment charged that Smith "knowingly and unlawfully sold a quantity of cocaine, . . . to Daniel D. Simpson". In response to Smith's motion for a directed verdict at the close of trial, the Commonwealth stated that it had proven trafficking and possession with intent to traffic cocaine. The trial court concluded that the definition of trafficking includes possession with intent to traffic, and instructed the jury accordingly. The court also denied Smith's request to instruct the jury on attempted trafficking and attempted possession.

On appeal, Smith first argues that the trial court improperly instructed the jury on a theory of the trafficking charge which significantly differed from the charge in the indictment. Smith also contends that this instruction improperly allowed the jury to find guilt without a unanimous verdict. Smith concedes that he did not raise these objections at trial, but he submits that the Commonwealth's broadening of the theories of the offense late in the trial constituted palpable error affecting his substantial rights.

Because Smith failed to object to the jury instructions at trial, we must review this alleged ground for reversal under the palpable error standard in RCr 10.26. A palpable error is one that affects the substantial rights of a party resulting in manifest injustice. In order to find

palpable error occurred an appellate court must believe there is a substantial possibility that the outcome would have been different had the error not occurred.[4]

In Robards v. Commonwealth,[5] the Kentucky Supreme Court held that under RCr 6.16, an indictment may be amended to conform to the evidence where no additional or different offense is charged and the substantial rights of the party are not prejudiced.[6] A mere variance between the allegations in the indictment and the jury instructions is not prejudicial unless the defendant was misled by the indictment or surprised by the evidence presented at trial.[7] Smith makes no showing that he was misled by the indictment or that he was unfairly prejudiced by the alternative theories of trafficking presented by the Commonwealth.

Likewise, we find no merit to Smith's argument that the instruction denied him the right to a unanimous verdict. When the jury is presented with alternate theories of guilt in an instruction, the Commonwealth does not have to show that each

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[4] Partin v. Commonwealth, 918 S.W.2d 219, 224 (Ky. 1996). *See also* Schoenbachler v. Commonwealth, 95 S.W.3d 830, 836 (Ky. 2003).

[5] 419 S.W.2d 570 (Ky. 1967).

[6] Id. at 573.

[7] Washington v. Commonwealth, 6 S.W.3d 384, 386-87 (Ky.App. 1999).

juror adhered to the same theory. Rather, the Commonwealth has to show that it has met its burden of proof under all of the alternate theories presented in the instruction. Once that is shown, it becomes irrelevant which theory each individual juror believed.[8] The fact that the Commonwealth presented evidence of several different theories of trafficking did not jeopardize Smith's right to a unanimous verdict.

Moreover, there was sufficient evidence to support a conviction under either theory. Contrary to Smith's argument, the trial court properly found that that definition of trafficking includes possession with intent to traffic, and therefore the evidence did not warrant an instruction on attempted trafficking. KRS 218A.010(34) defines to "traffic" as "to manufacture, distribute, dispense, sell, transfer, *or possess with intent to manufacture, distribute, dispense or sell a controlled substance." (Emphasis added)*. Under this definition, possession of cocaine with demonstrated intent to sell is sufficient to prove trafficking. There was sufficient evidence to prove these elements, even though the sale was not completed. And because the offense of trafficking may be

[8] Burnett v. Commonwealth, 31 S.W.3d 878, 883-84 (Ky. 2000); *see also* Ice v. Commonwealth, 667 S .W.2d 671, 677 (Ky. 1984); and Wells v. Commonwealth, 561 S .W.2d 85, 87-88 (Ky. 1978).

completed by possession with intent to sell, the evidence did not warrant an instruction for attempted trafficking.

Smith also asserts that he was entitled to an instruction for attempted possession of cocaine. He asserts that the jury could have believed that he was attempting to purchase cocaine, rather than trying to sell it to Simpson. However, a defendant is entitled to instruction on a lesser included offense 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.[9] In this case, there was no evidence that Smith attempted to buy the cocaine from Simpson. Detective Willhoite and Simpson both testified to the contrary, and Smith emphatically stated that he attempted neither to buy nor to sell cocaine. Consequently, the trial court did not err by declining to instruct on attempted possession.

Accordingly, the judgment of conviction by the Franklin Circuit Court is affirmed.

ALL CONCUR.

[9] Clifford v. Commonwealth, 7 S.W.3d 371, 376-77 (Ky. 1999).

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