

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-001558-MR

J.B. SIMPSON, III

APPELLANT

v. APPEAL FROM KNOX CIRCUIT COURT
HONORABLE GREGORY A. LAY, JUDGE
ACTION NO. 00-CR-00067

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BARBER, JUDGE; HUDDLESTON AND PAISLEY, SENIOR JUDGES.¹

PAISLEY, SENIOR JUDGE: J.B. Simpson, III appeals from his conviction of first degree trafficking in a controlled substance, first offense, and of being a persistent felony offender in the second degree. He argues that the trial court erred when it refused his request for a criminal facilitation instruction and when it refused to grant a mistrial after the confidential informant testified that Simpson's brother had killed the informant's cousin. Finding no error, we affirm.

¹ Senior Judges Joseph R. Huddleston and Lewis G. Paisley sitting as Special Judges by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Kentucky State Police Sergeant Kenneth Layne, a member of the department's drug enforcement section, contacted Scotty Brown, a confidential informant, to make a drug buy from a person known as J.B. Simpson, III. Brown had been used previously as a confidential informant and was paid \$100 for each arranged drug buy. On August 19, 1999, Layne met Brown, searched his person and his vehicle to make sure that he had no drugs, and equipped him with a recording device. Layne then followed Brown to a local Burger King restaurant.

Layne remained in his car approximately ten to twelve yards from Brown's vehicle. Brown beeped Simpson and, when Simpson returned the call, told him that he had the money for the cocaine. Simpson arrived shortly thereafter and the two men talked in Simpson's pickup truck for three to four minutes. During that time, Brown showed Simpson the money and he can be heard on the audio tape counting out the \$1,500. Simpson can then be heard to say that he did not have any drugs but would "go get it". He then left the parking lot while Brown remained at the Burger King. Simpson returned to the Burger King with a passenger who Brown identified as Jason. While Simpson remained in the car, Brown handed Jason the \$1,500 cash and Jason gave him the cocaine. Upon completion of the transaction, Jason and Brown left together.

In August 2000, Simpson was indicted for trafficking in a controlled substance in the first degree and persistent felony offender in the second degree but was not apprehended until 2003. Jason was not indicted and did not testify at trial.

Simpson preserved his initial contention that the trial court should have instructed the jury on facilitation by tendering a facilitation instruction to the trial court. RCr 9.54(2). If facilitation is a lesser included offense of trafficking, an instruction would have been required 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." *Commonwealth v. Day*, 983 S.W.2d 505 (Ky. 1999). However, as Simpson concedes, in accordance with *Houston v. Commonwealth*, 975 S.W.2d 925 (Ky. 1998), criminal facilitation is not a lesser included offense of trafficking, and, therefore, an instruction as a lesser included offense is not required. Nevertheless, he argues that because a reasonable jury could find that he was a mere facilitator of the crime, he was entitled to a facilitation instruction.

Facilitation is a lesser included offense of complicity and requires the same elements, except that the state of mind for its commission is less culpable. *Houston*, supra at

930. For the commission of both, the defendant acts with the knowledge that the principal is committing or intends to commit a crime. Complicity, however, requires that the defendant intend that the crime be committed while facilitation does not require such intent and, in fact, the defendant is "wholly indifferent" as to whether the principal actually completes the crime. *Thompkins v. Commonwealth*, 54 S.W.3d 147, 150 (Ky. 2001)

Simpson was not indicted on a charge of complicity but only as the principal actor. He did not request a complicity instruction.² He contends that facilitation, while not a lesser-included offense of trafficking, is a lesser offense and that he was entitled to an appropriate instruction.

The law concerning instructions on uncharged lesser offenses was recently clarified in *Hudson v. Commonwealth*, 202 S.W.3d 17 (Ky. 2006), where the court revisited the language in *Sanborn v. Commonwealth*, 754 S.W.2d 534 (Ky. 1988) suggesting that an "instruction on a separate, uncharged, but 'lesser' offense is required whenever the evidence could conceivably support the charge...." Noting that *Sanborn* was a plurality opinion which limited its precedential value, the court stated:

An instruction on a separate, uncharged, but
"lesser" crime-in other words, an
alternative theory of the crime-is required

² In *Houston*, the appellant did not request a complicity instruction so that the court declined to address whether a conviction for complicity can be obtained under an indictment charging a defendant only as a principal. *Id.* at 930.

only when a guilty verdict as to the alternative crime would amount to a defense to the charged crime, i.e. when being guilty of both crimes is mutually exclusive. This is a subtle distinction that the broad language in *Sanborn* does not necessarily make. *Id.* at 22.

Since trafficking requires that the defendant himself commit the crime, Simpson is correct that if he was found guilty of facilitation he could not have been found guilty of trafficking. Thus, under *Hudson*, we agree that under certain fact scenarios, a facilitation instruction would be appropriate as a lesser uncharged crime.

The facts presented in this case, however, simply do not warrant a facilitation instruction. Although a trial court is required to instruct on every theory of the case that is supported by the evidence, there is no duty to instruct on a theory that lacks an evidentiary foundation. *Meadows v. Commonwealth*, 178 S.W.3d 527, 532 (Ky.App. 2005). Appellant did not testify or otherwise present a defense. The entire theory of facilitation, therefore, necessarily depends on the Commonwealth's evidence which overwhelmingly establishes that Brown initially contacted Simpson and arranged a drug buy. Brown went to the location and met Simpson who agreed to go get the drugs. Simpson then left and returned with Jason and the drugs. Although Jason actually exchanged the drugs for the money, Simpson and Jason left the parking lot together. In

reviewing the evidence, if the jury believed that it was Simpson on the tape and that he was accurately identified by Brown and Layne, the jury could not reasonably conclude that Simpson was "wholly indifferent" to the sale of the cocaine and, as Simpson suggests, had merely given Jason a ride to the Burger King. Conversely, if the jury entertained reasonable doubt that it was Simpson on the tape or mistakenly identified by Layne and Brown, then it would have found him not guilty of trafficking. There are no facts upon which it could reasonably be found that Simpson was guilty of facilitation. An instruction was, therefore, not warranted.

The final error alleged is the trial court's failure to declare a mistrial after Brown testified that his cousin was killed by drugs sold by Simpson's brother in Bell County. Although the court admonished the jury that the comment was stricken from the record and was to be disregarded, it declined to grant a mistrial.

The trial court has broad discretion in determining whether an admonition can cure an erroneous admission of evidence or if a mistrial is necessary. *Gosser v. Commonwealth*, 31 S.W.3d 897, 906 (Ky. 2000). A mistrial should be granted only when there is a manifest necessity for such action and when the error is of such a character and magnitude that a fair and impartial trial will be denied unless a mistrial is granted.

Combs v. Commonwealth, 198 S.W.3d 574 (Ky. 2006). This court will not disturb the trial court's decision unless there was an abuse of discretion. *Id.*

The trial court's admonition sufficiently cured any possible prejudice. Brown did not implicate Simpson in an unrelated crime or other prior bad conduct so that the prejudice to Simpson was minimal. Arguably Brown's statement concerning Simpson's brother could have been viewed as a possible ulterior motive for Brown's testimony against Simpson and the credibility of his testimony. We find no error in the trial court's refusal to grant a mistrial.

The judgment is affirmed.

ALL CONCUR.

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