

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002557-MR

JUNE HAMILTON

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL, JR., JUDGE
ACTION NOS. 06-CR-00316 & 06-CR-00316-002

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: COMBS, CHIEF JUDGE; MOORE AND VANMETER, JUDGES.

VANMETER, JUDGE: June Lamont Hamilton appeals from the Fayette Circuit Court's judgment sentencing him to ten years' imprisonment after a jury found him guilty of first-degree possession of a controlled substance, possession of drug paraphernalia, and being a first-degree persistent felony offender (PFO). Hamilton argues that the trial court erred by failing to instruct the jury on criminal facilitation to trafficking in a controlled substance, and by failing to grant a mistrial when the Commonwealth Attorney described the PFO proceedings as being "cut and dry." For the following reasons, we affirm.

Among the evidence presented at trial, the Commonwealth elicited testimony from Lexington Metro Police Department Officer Gerard Curtsinger, who executed a search warrant with other officers at Barbara Suter's residence on January 5, 2006. Suter, Hamilton, and Ron Snow were at the residence at the time of the search. Hanging on a chair in which Hamilton sat was a jacket, in the pocket of which was found a lighter case etched with the letters "R – O – N" and containing some 1.4 grams of crack cocaine. Hanging on a door was a second jacket which contained an I.D. and wallet belonging to Ronald Snow. The officers also found in the kitchen \$30 in cash, seventeen baggies which each contained a 0.2 gram rock of crack cocaine, more baggies, and a crack pipe. Officer Curtsinger testified that upon questioning Hamilton, Hamilton stated that he loved to smoke crack cocaine, had sold crack cocaine to support his habit, and had sold crack cocaine at the residence within the last three hours.

The Commonwealth also called as a witness Barbara Suter, who had previously pled guilty to first-degree trafficking in a controlled substance and possession of drug paraphernalia as a result of charges arising from the January 5 search. Suter testified that at the time of the search, she rented a room to Snow and dated Hamilton, who stayed at her residence on occasion. Earlier that day, Suter gave Hamilton money to buy drugs. He brought to the residence two grams of cocaine, which he "cooked up" into crack cocaine, using baking soda and water. Suter then cut up the crack cocaine and bagged it for sale. Suter testified that while Hamilton smoked crack, he did not sell it. She further testified that the jackets the officers found belonged to Snow. Indeed, Snow

wore the jacket that contained the crack cocaine when he made “runs,” i.e., drug deliveries.

After the Commonwealth closed its case, Hamilton testified that he arrived at Suter's residence about an hour before the police executed the search warrant. He also stated that the jacket containing the crack cocaine belonged to Snow. Hamilton admitted telling Curtsinger that he used crack cocaine but denied that he admitted selling the drug. He also denied buying or cooking cocaine for Suter on the day in question.

After the close of all of the evidence, the court instructed the jury on first-degree trafficking in a controlled substance and alternatively the lesser included offense of first-degree possession of a controlled substance. The court also instructed the jury on possession of drug paraphernalia. However, the court denied Hamilton's request that the jury be instructed on criminal facilitation to trafficking in a controlled substance. The jury found Hamilton guilty of first-degree possession of a controlled substance, possession of drug paraphernalia, and being a first-degree PFO. In accordance with the jury's recommendation, the trial court sentenced Hamilton to ten years' imprisonment. This appeal followed.

First, Hamilton argues that the trial court erred by failing to instruct the jury on the lesser included offense of criminal facilitation to trafficking in a controlled substance. We disagree.

A judge is required to instruct a jury on a lesser included offense “only if, considering the totality of the evidence, the jury might 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.” *Houston v. Commonwealth*, 975 S.W.2d 925, 929 (Ky. 1998). Further, “[t]he fact that the evidence would support a guilty verdict on a lesser uncharged offense does not establish that it is a lesser included offense of the charged offense.” *Id.* In *Houston*, the court held that criminal facilitation was not a lesser included offense of trafficking in or possession of a controlled substance “when the defendant is charged with committing either of the object offenses.” *Id.* at 930. Accordingly, the defendant “was not entitled to an instruction on criminal facilitation as a lesser included offense of the object offenses of trafficking in or possession of a controlled substance[.]” *Id.* at 931. As *Houston* is controlling in the matter now before us, the trial court did not err by failing to instruct the jury on criminal facilitation to trafficking in a controlled substance.

Next, Hamilton argues that the trial court erred by failing to grant his motion for a mistrial when, during the PFO phase of the trial, the prosecutor argued that it was “cut and dry that [Hamilton is] a persistent felony offender in the first degree.” We disagree.

As a mistrial is an extreme remedy, it “should be resorted to only when there is a fundamental defect in the proceedings which will result in a manifest injustice.” *Gould v. Charlton Co., Inc.*, 929 S.W.2d 734, 738 (Ky. 1996). Whether to grant a mistrial is within the trial court's discretion, and the ruling will not be disturbed absent an abuse of that discretion. *Woodard v. Commonwealth*, 147 S.W.3d 63, 68 (Ky. 2004).

Further, a “prosecutor is permitted wide latitude during closing arguments and is entitled to draw reasonable inferences from the evidence[.]” *Commonwealth v. Mitchell*, 165 S.W.3d 129, 132 (Ky. 2005) (citing *Lynem v. Commonwealth*, 565 S.W.2d 141 (Ky. 1978)). Since the Commonwealth here had clearly satisfied the elements required by KRS 532.080(3) to convict Hamilton of being a first-degree PFO, it was within the prosecutor's purview to argue that the matter was “cut and dry.” Accordingly, the trial court did not err by failing to grant Hamilton's motion for a mistrial.

The Fayette Circuit Court's judgment is affirmed.

ALL CONCUR.

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