

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000110-MR

BRIAN LIGHTNER

APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE GREGORY BARTLETT, JUDGE
ACTION NO. 06-CR-00373

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION AND ORDER
AFFIRMING

** ** * * * * *

BEFORE: STUMBO AND TAYLOR, JUDGES; HENRY,¹ SENIOR JUDGE.

HENRY, SENIOR JUDGE: On October 25, 2006, a Kenton County jury found

Brian Lightner guilty of one count of Complicity to First-Degree Trafficking in a

Controlled Substance and recommended that he be sentenced to serve 7 ½ years in

¹ Senior Judge Michael L. Henry, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

the penitentiary. He was sentenced in accordance with the jury's recommendation on December 4, 2006, and a final judgment and sentence of conviction was entered on December 12, 2006. Lightner brings two issues before us on appeal. He requests that we remand the case to the circuit court to correct an error in the final judgment, and he argues that the circuit court erred in failing to instruct the jury on the lesser-included offense of facilitation. We affirm.

A glance at the record discloses that Lightner is indeed correct that the final judgment contains a clerical error. The jury foreperson signed the verdict form on the line indicating that the jury found Lightner guilty of complicity to first-degree trafficking in a controlled substance, but the final judgment adjudges Lightner guilty of first-degree trafficking in a controlled substance. The Commonwealth concedes the error but disagrees that remand is necessary, citing Kentucky Rules of Criminal Procedure (RCr) 10.10, which provides that such clerical errors may be corrected while an appeal is pending with leave of the appellate court. We agree, and grant leave to the Kenton Circuit Court to correct the final judgment to conform to the jury's verdict.

Lightner's substantive argument is that the trial court erred when it denied his requested instruction on criminal facilitation to traffic in a controlled substance. After a careful examination of the evidence presented at trial we are of the opinion that the jury was properly instructed. Lightner's contention here is that

a reasonable juror could infer from the evidence that rather than being an active participant in the crime, Lightner merely knew that Aaron Schneider intended to make a sale of cocaine and knowingly provided Schneider with the means or opportunity to do so; *see* Kentucky Revised Statutes (KRS) 506.080(1). Because Lightner did not put on any evidence he must rely for his facilitation theory upon what the jury might deduce from the Commonwealth's case. Crucial to his theory is that the jury would completely discount the testimony of Aaron Schneider regarding Lightner's involvement in the transaction. If Schneider was to be believed, Lightner provided two-thirds of the cocaine sold in the transaction, one-third of which he already had and one-third of which Lightner obtained from a third party while Schneider waited in the car. The police observed the two in Lightner's vehicle, with Lightner at the wheel during their travels leading up to the transaction. In Lightner's view the fact that Schneider had accepted a plea bargain and agreed to testify against him was sufficient both to destroy Schneider's credibility and to lead the jury to conclude, albeit without any direct proof, that the events might have happened another way.

“An instruction on a lesser included offense requiring a different mental state from the primary offense is unwarranted unless there is evidence supporting the existence of both mental states.” *Taylor v. Commonwealth*, 995 S.W.2d 355, 362 (Ky. 1999). The fact that the jury might have disbelieved Schneider's testimony is not evidence that Lightner had the mental state required for a facilitation instruction, but would go instead to a finding that he was innocent.

White v. Commonwealth, 178 S.W.3d 470, 490 (Ky. 2005). “Such an approach would require that a facilitation instruction be given in every case where the defendant is charged with complicity. But such an approach is improper and a lesser-included offense instruction is available only when supported by the evidence.” *Id.* Accordingly we find no error in the instructions.

It is hereby ordered that the Kenton Circuit Court is granted leave to correct the final judgment herein so that it conforms to the verdict of the jury. In all other respects the judgment is affirmed.

ALL CONCUR.

ENTERED: May 30, 2008

/s/ Michael L. Henry
SENIOR JUDGE, COURT OF APPEALS

BRIEF FOR APPELLANT:

Crystal L. Ford
Ft. Wright, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Jason B. Moore
Assistant Attorney General
Frankfort, Kentucky