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**SUPREME COURT GRANTED DISCRETIONARY REVIEW:
DECEMBER 12, 2007
(FILE NO. 2007-SC-0505-DG)**

Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-001645-MR

DAVID MORROW — APPELLANT

v.

APPEAL FROM MCCREARY CIRCUIT COURT
HONORABLE PAUL E. BRADEN, JUDGE
ACTION NO. 03-CR-00066-002

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: TAYLOR AND WINE, JUDGES; PAISLEY,[1] SENIOR JUDGE.

PAISLEY, SENIOR JUDGE: This appeal is from a judgment of the McCreary Circuit Court. Morrow was found guilty by a jury of one count of complicity to commit first degree trafficking in a controlled substance and was sentenced to serve six years

[1] Senior Judge Lewis G. Paisley, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

imprisonment. He brings three issues to this Court for review: whether an instruction on entrapment should have been provided to the jury; whether the denial of a request for a directed verdict of acquittal was improper; and whether he was entitled to a jury instruction on mere presence. After a review of the trial record, we affirm the conviction and sentence.

Morrow testified that a confidential police informant, Henry Tapley, repeatedly contacted him about drug transactions. He wanted Morrow or Morrow's brother Ernie, a co-defendant, to sell him narcotics. Morrow testified that he always insisted he would never be involved in dealing drugs.

At approximately 3:00 p.m. on March 28, 2003, Morrow and Ernie each arrived at Tapley's home in separate vehicles at approximately the same time. Tapley met them in the driveway and led them both to an area where a video camera could record any drug transactions. Morrow almost immediately left the room while Ernie proceeded to sell Tapley narcotics. Morrow returned a short time later and was asked to divide 600 by 35. Tapley had $600 of police provided money to use to purchase drugs and the price of the narcotic was $35 per pill. The brothers each left in their respective vehicles. Tapley had used $595 to purchase 17 pills at $35 each and provided the drugs and the remaining $5 to the police.

Ernie testified that Morrow had absolutely nothing to do with the drug transaction. An audio tape was then played and admitted into evidence that contained a conversation between Ernie and police where he told them that he was to deliver the

drugs to Tapley at Morrow's request. The brother then testified that he did not remember the conversation because it was at a time when he was heavily medicated. The jury found Morrow guilty and he was sentenced to serve six years imprisonment. This appeal followed.

I. Entrapment

We first turn to the trial court's denial of the Appellant's request for an entrapment instruction. Morrow chose to testify in his own defense and testified under oath that, although he was present, he was not complicit in the drug transaction that took place. In addition, Ernie, his co-defendant, after pleading guilty, testified that Morrow had nothing to do with the drug transaction. We have been unable to find any published opinion from our appellate courts that adequately addresses this issue. Under these circumstances, we have considered our unpublished opinion, *Howard v. Commonwealth,* 2003-CA-002659, 2004 WL 2827715 (Ky.App. 2004), and although it may not be used as binding precedent, we find it's reasoning persuasive. CR 76.28(4)(c).

> A trial court is obligated to instruct the jury on the whole law of the case. *Cannon v. Commonwealth,* 777 S.W.2d 591 (Ky. 1989). However, the court need not instruct the jury regarding theories or defenses not supported by the evidence adduced at trial. *See Thompkins v. Commonwealth,* 54 S.W.3d 147 (Ky. 2001); *Houston v. Commonwealth,* 975 S.W.2d 925 (Ky. 1998).
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> The defense of entrapment necessarily requires an admission that the defendant engaged in criminal behavior. *Farris v. Commonwealth,* 836 S.W.2d 451 (Ky.App. 1992), *overruled on other grounds, Houston v. Commonwealth,* 975 S.W.2d 925 (Ky. 1998), and *Commonwealth v. Day,* 983 S.W.2d 505 (Ky. 1999).

Morrow relies on the United States Supreme Court case of *Mathews v. United States,* 485 U.S. 58, 108 S.Ct. 883, 99 L.Ed.2d 54 (1988) for the proposition that a criminal defendant can deny the offense and still be entitled to an entrapment instruction. That case deals with a federal prosecution and is not constitutionally based. *Id.* at 66. It is therefore not binding on the states and we decline to follow it. We find the language of Justice White's dissent compelling:

> After all, a criminal trial is not a game or a sport. "[T]he very nature of a trial [i]s a search for truth." *Nix v. Whiteside,* 475 U.S. 157, 166, 106 S.Ct. 988, 994, 89 L.Ed.2d 123 (1986) (citation amended). This observation is particularly applicable to criminal trials, which are the means by which we affix our most serious judgments of individual guilt or innocence. It is fundamentally inconsistent with this understanding of criminal justice to permit a defendant to win acquittal on a rationale which he states, under oath, to be false. "Permitting a defendant to argue two defenses that cannot both be true is equivalent to sanctioning perjury by the defendant." See Note, Entrapment and Denial of the Crime: A Defense of the Inconsistency Rule, 1986 Duke L.J. 866, 883-884.
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> Finally, even if the Court's decision does not result in increased perjury at criminal trials, it will – at the very least – result in increased confusion among criminal juries. (footnote omitted.) The lower courts have rightly warned that jury confusion is likely to result from allowing a defendant to say "I did not do it" while his lawyer argues "he did it, but the government tricked him into it." See*, e.g., United States v. Dorta,* 783 F.2d 1179, 1182 (CA4 1986). Creating such confusion may enable some defendants to win acquittal on the entrapment defense, but only under the peculiar circumstances where a jury rejects the defendant's own stated view of the facts. We have not previously endorsed defense efforts to prevail at trial by playing such "shell games" with the jury; rather, we have written that "[a] defendant has no entitlement to the luck of a lawless decisionmaker." *Strickland v. Washington,* 466 U.S. 668, 695, 104 S.Ct. 2052,

> 2068, 80 L.Ed.2d 674 (1984). Nor, it should be added, is there any entitlement to a baffled decisionmaker.

Mathews v. United States, 485 U.S. 58, 72-73, 108 S.Ct. 883, 891-892, 99 L.Ed.2d 54 (1988) (White, J., dissenting). Entrapment presupposes the commission of a crime. *United States v. Russell,* 411 U.S. 423, 435, 93 S.Ct. 1637, 1644, 36 L.Ed.2d 366 (1973). A jury could not logically conclude that a defendant failed to commit the crime and yet had been entrapped. *Mathews,* at 63. Absent a constitutional or statutory mandate we believe it more prudent to take steps to minimize and not encourage perjured testimony. *Mathews,* at 72 (White, J., dissenting).

A defendant may use entrapment as a defense when the offense arises out of proscribed conduct. KRS 505.010. In order for there to be entrapment, there must be an offense and proscribed conduct. The entrapment defense is not available when a defendant denies the underlying offense or any proscribed conduct. Morrow was not entitled to an entrapment instruction. There was no error.

II. Directed Verdict

Morrow next argues that the trial court erred when it failed to grant a directed verdict of acquittal. We disagree. The test on appellate review is whether it would be clearly unreasonable for a jury to convict when reviewing the evidence as a whole. *Commonwealth v. Benham,* 816 S.W.2d 186 (Ky. 1991). The record in this case provides sufficient evidence for a jury to convict. It was not clearly unreasonable for a jury to consider this evidence and come to a conclusion that Morrow was guilty. The trial judge correctly allowed the jury to decide this matter. There was no error.

III. Mere Presence Instruction

The final allegation of error involves Morrow's tendered jury instruction directing a finding of not guilty if the jury believed he was merely present at the scene of the drug transaction. The complicity instruction actually presented to the jury required them to find that Morrow aided or assisted his brother in the drug transaction. The requested defense of mere presence is implied in that instruction. There is no authority for a "mere presence" instruction. Had the jury determined Morrow was merely present and did not aid or assist in the actual crime, a not guilty verdict would have been appropriate. There was no error.

Morrow received a fundamentally fair trial. None of his federal or state constitutional rights were violated. The decisions of the trial judge were not arbitrary, unreasonable or unfair. The judgment is affirmed.

WINE, JUDGE, CONCURS.

TAYLOR, JUDGE, CONCURS IN RESULT ONLY.

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