

RENDERED: JANUARY 11, 2013; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2010-CA-001439-MR

LARRY NAPIER

APPELLANT

v. APPEAL FROM POWELL CIRCUIT COURT  
HONORABLE FRANK A. FLETCHER, JUDGE  
ACTION NO. 09-CR-00146

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: COMBS, KELLER AND STUMBO, JUDGES.

STUMBO, JUDGE: Appellant, Larry Napier, appeals from a judgment finding him guilty of first-degree trafficking in a controlled substance and sentencing him to ten years of imprisonment. He argues that the trial court erred by: (1) refusing to instruct the jury on criminal facilitation; (2) inviting a non-unanimous verdict through its instruction of trafficking in a controlled substance; and (3) reading the Commonwealth's evidence to the jury during the penalty phase. We affirm.

On June 20, 2008, Drug Enforcement Agency (DEA) agent Randy Gilbert and confidential informant Ira Morris traveled to the residence of Morris's aunt, Sandra Johnson, in Powell County, Kentucky, to conduct an undercover drug transaction. Morris was equipped with a digital audio recorder and was given \$2200 by Agent Gilbert to purchase the drugs from the initial target of the investigation, Regina Scott. After Scott advised Agent Gilbert and Morris that she could not supply any drugs, Napier, who was present at the residence, volunteered that he could procure Oxycodone tablets. Napier negotiated the price of the pills with Agent Gilbert and Morris and it was agreed that Napier would sell them 22 pills at the price of \$90 per pill with Napier receiving an additional \$180 for his efforts.

Napier stated that he did not have the pills on his person and that he would have to go and get them. Morris accompanied Napier in Napier's vehicle to a residence in Montgomery County, Kentucky. Napier went inside the residence while Morris waited in the vehicle. Napier and a man identified as William Rice returned to the vehicle. Rice directed Morris to give the money to Napier. Napier and Rice then returned to the residence. Napier returned to the vehicle and delivered the pills to Morris. Napier stated that he had counted the pills three times and provided Morris with his phone number for future transactions. When Napier and Morris returned to Johnson's residence in Powell County, Morris turned the drugs over to Agent Morris, who then gave Johnson \$30 as previously agreed for

setting up the deal. Agent Gilbert and Morris then drove back to the DEA office in Lexington.

Analysis of the pills confirmed them to be Oxycodone. Because of the ongoing investigation and to protect Morris, Napier was not immediately arrested. On September 29, 2009, a Powell County Grand Jury charged Napier with one count of first-degree trafficking in a controlled substance. Napier filed a motion to dismiss for improper venue arguing that the alleged offense took place in Montgomery County and a motion to transfer venue to Montgomery County, which the trial court denied. On May 11, 2010, the Powell Circuit Court conducted a jury trial on the charge against Napier. The jury found Napier guilty of one count of first-degree trafficking in a controlled substance and recommended a sentence of ten years of imprisonment. The trial court entered judgment accordingly on June 9, 2010. This appeal followed.

Napier first argues that the trial court erred by refusing to instruct the jury on criminal facilitation.

Our Supreme Court has recently explained the duty of the trial court to instruct the jury as follows:

A trial court is required to instruct the jury on every theory of the case that is reasonably deducible from the evidence. This applies to lesser-included offenses as well as affirmative defenses: “[T]he entitlement to an affirmative instruction is dependant [sic] upon the introduction of some evidence justifying a reasonable inference of the existence of a defense.”

*Fredline v. Commonwealth*, 241 S.W.3d 793, 797 (Ky. 2007)(Internal citations omitted). Rulings upon matters concerning jury instructions are reviewed for abuse of discretion. *Ratliff v. Commonwealth*, 194 S.W.3d 258, 274 (Ky. 2006).

KRS 506.080(1) states:

A person is guilty of criminal facilitation when, acting with knowledge that another person is committing or intends to commit a crime, he engages in conduct which knowingly provides such person with means or opportunity for the commission of the crime and which in fact aids such person to commit the crime.

“Facilitation reflects the mental state of one who is ‘wholly indifferent’ to the actual completion of the crime.” *Thompkins v. Commonwealth*, 54 S.W.3d 147, 150-51 (Ky. 2001) quoting *Perdue v. Commonwealth*, 916 S.W.2d 148, 160 (Ky. 1995). Our Supreme Court discussed the difference between trafficking in a controlled substance and facilitation to trafficking in a controlled substance as follows:

The offenses of trafficking in or possession of a controlled substance require proof that the defendant, himself, knowingly and unlawfully committed the charged offense. KRS 218A.1412; KRS 218A.1415. The offense of criminal facilitation requires proof that someone other than the defendant committed the object offense and the defendant, knowing that such person was committing or intended to commit that offense, provided that person with the means or opportunity to do so. KRS 506.080(1).

*Houston v. Commonwealth*, 975 S.W.2d 925, 930 (Ky. 1998).

Napier’s theory of the case was that he knew a drug dealer and did nothing more than introduce the dealer to Morris and provide Morris with the opportunity

to purchase drugs. The evidence showed that Napier did more than simply introduce Morris to a drug dealer. Napier arranged the transaction, negotiated the price, transported Morris, counted the pills, and profited from his efforts. The evidence did not reflect the mentality of one “wholly indifferent” to the completion of the crime. This Court has held that a defendant who testified that he was merely the middleman in a drug transaction was an active participant and was not entitled to a facilitation instruction. *Dillman v. Commonwealth*, 257 S.W.3d 126, 130 (Ky. App. 2008). We conclude that the trial court properly refused to instruct the jury on facilitation.

Napier next argues that the instruction on trafficking in a controlled substance invited a non-unanimous verdict because it offered alternative theories that the offense occurred in either Powell or Montgomery County. He concedes that this error is unpreserved and requests palpable error review.

RCr 10.26 states that a “palpable error which affects the substantial rights of a party may be considered by ... an appellate court on appeal, even though insufficiently preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.” Under this rule, “the required showing is probability of a different result or error so fundamental as to threaten a defendant’s entitlement to due process of law.” *Martin v. Commonwealth*, 207 S.W.3d 1, 3 (Ky. 2006).

“A defendant may be convicted under an instruction containing alternate theories of liability and is not deprived of a unanimous verdict if the alternative

theories are supported by the evidence.” *Bedell v. Commonwealth*, 870 S.W.2d 779, 781 (Ky. 1993). “Only slight evidence is necessary to sustain venue because venue does not affect the guilt or innocence of the accused.” *Id.*

The record contains sufficient evidence to support the instruction on trafficking. The evidence showed that the transaction began in Powell County and continued or completed in Montgomery County. We find no manifest injustice.

Finally, Napier argues that the trial court erred by reading the Commonwealth’s evidence to the jury during the penalty phase. Again, this error is not preserved for review and we review under the palpable error standard.

During the penalty phase, the trial court accepted certified copies of prior judgments against Napier as Commonwealth’s exhibits 3 and 4. The court then stated to the jury:

Okay. Ladies and Gentlemen, the Commonwealth has two exhibits here they’re admitting. And this is going to be the evidence for the Commonwealth. They’re not going to call any witnesses, but they’re going to refer to them in their closing argument. And I’ll read those to you now briefly, or summarize them, and then so you’ll know.

This is the evidence for the Commonwealth. Here is a judgment and sentence on a plea of guilty in the Powell Circuit Court of Mr. Napier, dated May 23, 2007, where Mr. Napier was sentenced to five years. Probated, but he was given credit for 297 days he served. That’s, I guess, almost nine months, I suppose.

And here’s a judgment and sentence on plea of guilty by Mr. Napier to flagrant nonsupport. Mr. Napier pled guilty, and that was in... January of ’04. He got 30 days credit and five years probated.

Assuming, *arguendo*, that the trial court erred by the reading the exhibits to the jury, we cannot conclude that any such error rises to the level of manifest injustice. The trial court simply read from the documents the jurors were already entitled to read for themselves. In the full context of the court's statements, we cannot conclude that the court attempted to influence the jury's view of the evidence.

Accordingly, the judgment of the Powell Circuit Court is affirmed.

ALL CONCUR.

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