RENDERED: June 26, 1998; 2:00 p.m.
NOT TO BE PUBLISHED

NO. 97-CA-1293-MR

CELIA D. HOOSIER — APPELLANT

v.

APPEAL FROM TODD CIRCUIT COURT
HONORABLE TYLER L. GILL, JUDGE
ACTION NO. 96-CR-0027

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
REVERSING AND REMANDING

* * * * *

BEFORE: HUDDLESTON, JOHNSON and MILLER, Judges.

JOHNSON, JUDGE: Celia D. Hoosier(Hoosier) appeals from a final judgment entered on April 23, 1997, in the Todd Circuit Court which convicted her of trafficking in a controlled substance in the first degree in violation of Kentucky Revised Statutes (KRS) 218A.1412 and sentenced her to prison for a term of five years. The issue on appeal is whether the trial court committed reversible error by allowing a police officer to testify concerning a controlled drug buy conducted outside of his presence. Having concluded that error did occur and that this error affected the substantial rights of Hoosier, we must reverse and remand.

On January 25, 1996, the Pennyrile Area Narcotics Task Force (Task Force) was involved in the investigation of illegal drug trafficking in Guthrie, Todd County, Kentucky. That afternoon Task Force Detective James Acquisto (Detective Acquisto) attached a transmitter to Vicki Whitaker (Whitaker), a confidential informant, provided her with a recorded $20 bill, and told her to drive to the Squib area of Guthrie and make cocaine buys from whomever would sell the drug to her. Detective Acquisto testified that neither Whitaker nor her vehicle were searched for cocaine prior to her leaving to make the buy. Whitaker had worked with Detective Acquisto previously and was paid $150 for each buy she made regardless of whether she could identify the seller.

As Whitaker drove to Guthrie, she spoke into the transmitter giving her location, what she was seeing and what she was doing. Detective Acquisto was not in the immediate area where Whitaker was to make the controlled buys and was unable to see Whitaker; however, he listened to her over the transmitter and recorded the transmissions on a cassette tape. After she allegedly made two purchases of crack cocaine, Whitaker met Detective Acquisto at a pre-arranged location and gave him two rocks of crack cocaine. Whitaker told Detective Acquisto that "Shawn's sister" sold her a rock of crack cocaine for $20. With this information, Detective Acquisto subsequently identified Hoosier as being Shawn Hoosier's sister. Hoosier was indicted on

June 4, 1996, for trafficking in a controlled substance in the first degree.

On August 26, 1996, Hoosier filed a motion to dismiss the indictment which the trial court denied. On October 26, Hoosier moved the trial court to enter an Alford[1] plea on the Commonwealth's offer of a two-year prison sentence on a plea of guilty to the offense of possession of cocaine. Hoosier told the trial court that she wanted to enter a guilty plea because she was afraid of going to trial; however, she maintained her innocence. The trial court refused to accept her guilty plea stating that it is not appropriate to accept a guilty plea based on the defendant's fear of going to trial because a guilty plea must be based on an admission of guilt.

Hoosier's first jury trial was conducted on November 8, 1996. Detective Acquisto, Hoosier's mother, Whitaker and a forensic chemist testified and the audiotape of the alleged cocaine buy was played. The trial resulted in a hung jury and the trial judge declared a mistrial.

Hoosier was retried and convicted on March 20, 1997. The evidence at the second trial was essentially the same as the first trial with the major exception of Detective Acquisto testifying to what he heard over the radio transmitter and providing some very specific details about the controlled buy. Detective Acquisto testified first for the Commonwealth, and he

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[1] **North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 167 (1970).**

told the jury that: (1) he was a narcotics detective; (2) he had worked 14 years as a police officer; and (3) he had been the lead investigator on approximately 800 drug investigations. Over Hoosier's objection, Detective Acquisto testified that he was "selective" in deciding whether to choose a person to work with him as a confidential informant and that he would "verify their honesty" by looking at the "motivation of the person." He testified as follows: "Part of my training is that to determine the motivation of a confidential informant is very important so that you know what the truth is and you can verify their honesty by knowing what their motivation is." He stated that Whitaker was motivated because she had had drug problems in her family and wanted to "get drug dealers off the streets of Guthrie, Kentucky." To the extent that Detective Acquisto's testimony vouched for the credibility of Whitaker, it was improper. LaMastus v. Commonwealth, Ky. App., 878 S.W.2d 32, 34 (1994).

When Detective Acquisto began to testify about Whitaker making a controlled buy, Hoosier objected to this testimony as inadmissible hearsay since Detective Acquisto had no personal knowledge of the events which occurred after Whitaker left his presence. The trial court, relying on the "verbal acts" exception to the hearsay rule, overruled the objection stating that this hearsay testimony was admissible since it explained why the officer did what he did and that it was merely cumulative. Detective Acquisto then testified, in pertinent part, as follows:

Detective Acquisto (DA): Yes sir. She [Whitaker] requested a twenty from Mr. Clardy which, in drug slang for the Guthrie area, in my experience, is a $20 piece of crack cocaine. He, uh, agreed to go get it and left. Came back once. Asked for the money which we, we had instructed her once not to front the money. In other words, give someone the money without getting the dope in exchange because they don't come back. We just get ripped off. Uh, again, she told, you know, to go get the drugs and she would not give him the money until he came back with the drugs. He left again. Very shortly thereafter, approximately three minutes thereafter, or in that time frame, Ms. Hoosier approached, uh, our informant Ms. Whitaker and, uh, Ms. Whitaker told her that, uh, Wayne had gone to get some drugs for her and, uh, asked Ms. Hoosier if she would get her her twenty and she said, yeah, she could. She goes, go get it and bring it back. She left and went into her trailer, and, uh, they arrived, Mr. Clardy and Ms. Hoosier, arrived back at the informant approximately at the same time and the informant purchased drugs from each person at the same time.

Commonwealth's Attorney (CA): Now, when, uh, Vicki was sent out to make the drug buy, or buys, uh, was she sent out to make one or more than one or what, uh, what were her instructions?

DA: Her instructions for this operation or any other operation for any informant that we use, especially in the Squib area is to buy drugs from whoever you can. Uh, it makes no difference if you know what their name is because we don't expect them to, in most cases anyway, we identify them later on through different means. Uh, it's very rare that you find a person that does know somebody's name, especially their first and last name.

CW: Was Vicki able to give you an identification?

DA: She identified, uh, Ms. Hoosier to us at first as being Shawn's [sic] Hoosier's

sister. And, uh, my notes indicate that I just put down blank Hoosier as a suspect at that time.

CW: And you were subsequently able then to fill that blank in?

DA: That's correct.

Detective Acquisto later testified as follows: "I consider this a pretty good case because we knew the person's last name." Hoosier's objection to this opinion testimony was sustained and the trial court admonished the jury "that statements of opinion are useless and you are to disregard the officer's statement of his opinion regarding whether this was a good case or not." Detective Acquisto was asked why Whitaker and her car were not searched prior to the controlled buy and he testified as follows: "We had no reason to believe that there was anything being done dishonest by the informant, whatsoever . . . ."

On cross-examination, Detective Acquisto was also asked what Whitaker had to do in order to be paid the $150 for a controlled buy, and he said "it's got to be, a, uh, as I say, in my opinion, a good buy." The trial court, sua sponte, admonished the jury to disregard this testimony and told Detective Acquisto he did not want to hear any more expressions of opinion.

During the redirect of Detective Acquisto, the Commonwealth asked him to play the audiotape of the transaction.[2]

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[2] **A transcript of the audiotape was given to Hoosier in response to a discovery request; however, contrary to the**

(continued...)

Much of the argument in this case revolves around the contents of the tape. The record only contains the videotaped record of the trial that recorded the replaying of the audiotape during the trial. After careful review, we conclude that, other than Whitaker's and Detective Acquisto's voices, the audiotape is largely unintelligible or inaudible. We can only assume that the jury heard what we heard on the audiotape.[3]

After Detective Acquisto concluded his testimony and the tape had been played, Whitaker took the stand and testified that she worked with Detective Acquisto "because people are fed up with drugs." Whitaker explained that her son was on drugs and because of her son's drug problem she had to raise his child. She stated that her son was in trouble with the law during the time she was working as an informant because he "skipped town" while on work release. She testified that her son's problems with the law did not play a role in her determination to become a confidential informant.

Contrary to the Commonwealth's assertion, Detective Acquisto's testimony concerning the controlled buy was not merely cumulative of Whitaker's testimony. In fact, as can be discerned from Whitaker's testimony below, Detective Acquisto's testimony

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(...continued)
position taken by the Commonwealth at oral argument, the jury was never given the transcript and the audiotape was not admitted into evidence--the jury only listened to the audiotape. The audiotape is not a part of the record on appeal.

[3] **The videotape recording was of excellent quality.**

provided much more detail about the controlled buy than Whitaker's testimony, which was much more general in nature. Whitaker testified, in pertinent part, as follows:

> Commonwealth's Attorney (CA): And what did you do? Just tell us what you did on that day.
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> Vicki Whitaker (VW): Well, I met with, uh, Pennyrile Narcotics agents that morning and, uh, around dinnertime I left to go out to make as many buys, you know, as I had, could make that day. So, uh, I made three buys. I went through Guthrie, went across the tracks in Guthrie and uh, I made, uh, a buy and I went back to them and I went back and made another buy and then I went back and made another buy. I'm sorry. I said that wrong. I made a buy and then I went back and made two more buys at one time.[4]
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> CA: So the tape that we listened to, you weren't in here but we listened to a tape, you made another buy that day?
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> VW: Yes sir.
>
> CA: Okay. Were you equipped with any recording device--a microphone or anything?
>
> VW: Yes sir. I was wired.
>
> CA: And you were aware of that going in?
>
> VW: Yes sir.
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> CA: Um, where did, where did, you make a buy? What street? Do you know that street, the location?

[4] On cross-examination, Whitaker stated that she spent $30 that afternoon--she bought a $10 piece of crack cocaine with her own money from another drug dealer and she bought a $20 piece from Hoosier with the money provided to her by Detective Acquisto.

VW: I went to the Dinner Bell Cafe. I made a buy there.

CA: Do you know that street that's on?

VW: I think it's the corner of Howell. I don't know, its been a while. I do, um, I'm, it’s right there on the main drag going through.

CA: Now Vicki, I want to get into particulars in just a minute; but I want you to tell the jury how it was you were able to go down there, uh, to the Dinner Bell Cafe and buy cocaine. Did you know the people you were buying from?

VW: I'm pretty well from Guthrie. I knew everybody around Guthrie.

CA: Did you yourself have any drug problems?

VW: I had drug problems about twenty years ago.

CA: Do you, do you, then know that people just from sight, or um--

VW: Yes sir, I do.

CA: And based on your experience they had no problem coming up to you and selling you cocaine?

VW: No sir, they didn't.

CA: Now, on that day that you said you made two buys, uh, how close in time were those two buys?

VW: Uh, let's see, I'd say about thirty minutes apart. Now I made two together.

CA: That's what, that's what I'm talking about.

VW: Okay. They were right there together. A minute, two minutes apart.

CA: Okay. Where were they made?

VW: They were made in front of Celia Hoosier's house, trailer, her mother's trailer.

CA: And who sold you cocaine?

VW: Wayne Clardy and Celie.

CA: And did you know Celia Hoosier at that time?

VW: Yes. I knew of, I knew, yes, I did. I knowed Celie for a long time.

CA: How did you know her?

VW: I used to work in two different stores in Guthrie, Kentucky.

CA: Did you know her as Celia Hoosier?

CA: How?

VW: Cecelia. But everybody calls her Celie.

CA: Now, on this tape, you refer to her as Shawn's sister, who is that?

VW: Celie Hoosier.

CA: I mean who's Shawn.

VW: Shawn Hoosier.

CA: And you know Shawn?

VW: Yes, I do.

CA: And did you know her to be his sister?

VW: Yes, I did.

CA: Where do they live or where did they live in January of '96.

VW: Well, I think Celie was living in the apartments but she stayed around her mother's trailer. Shawn, I always knew him from the trailer.

CA: And where was her mom's trailer?

VW: It's right across from the Dinner Bell Cafe.

CA: Do you know her mom's name? (No response). Do you see her in the courtroom?

VW: Yes sir.

CA: Can you point her out please?

VW: That's her. (Pointing).

CA: The lady sitting there behind her?

VW: Yes sir.

CA: And you know that to be her trailer across from the Dinner Bell?

VW: Yes.

CA: And did you now that prior to January the 25th of '96?

VW: Yes I did.

CA: And in referring to a person as Shawn's sister, can you point out to us who you are referring to? (Points to Hoosier).

CA: Do you have any doubt that this is the person who sold you a rock of cocaine on the 25th of January?

VW: There is no doubt in my mind that she is the person who sold it to me.

Following the testimony of the forensic chemist, the Commonwealth closed its case; and Hoosier's motion for a directed verdict was denied. The defense offered no evidence. The jury returned a guilty verdict on the single count of trafficking in

cocaine, first offense. The trial court sentenced Hoosier to the minimum prison sentence of five years.[5]

On March 25, Hoosier filed a motion for a judgment notwithstanding the verdict and a motion for a new trial. She argued that the jury based its decision on hearsay testimony and cumulative testimony since Detective Acquisto was permitted to testify as to what Whitaker had said and done even though Whitaker testified at trial. The trial court denied the motion. This appeal followed.

Hoosier argues that the trial court erred in allowing Detective Acquisto to testify to "investigative hearsay." Hoosier contends that there was no mention of drugs on the tape, only Whitaker asking for "a twenty"[6] and the only mention of cocaine or a twenty dollar rock was when Hoosier was not present and Whitaker spoke into the transmitter for Detective Acquisto's benefit.

Hoosier argues that before a police officer may testify to hearsay pursuant to the "verbal act" doctrine there must be an "issue in controversy." Sanborn v. Commonwealth, Ky., 754 S.W.2d 534, 541 (1988), Carter v. Commonwealth, Ky., 782 S.W.2d 597, 600

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[5] Nine members of the jury signed a note that was given to the trial court that read as follows: "We, the Jury, Reccomend [sic] that Celia Hoosier be given a lesser sentence than the one we were given to decide. We, the undersigned, suggest release after 18 months and with good behavior."

[6] This reference to the testimony is apparently based upon the transcript of the audiotape which the jury did not see. We cannot hear this language on the videotape of the trial.

(1989), and Daniel v. Commonwealth, Ky., 905 S.W.2d 76, 79 (1995). Hoosier points out that the Supreme Court of Kentucky has been exceedingly clear that "a police officer may testify about information furnished to him only where it tends to explain the action that was taken by the police officer as a result of this information and the taking of that action is an issue in the case." Sanborn, supra at 541 (emphasis original). She notes that no police actions were in issue in this case. She also contends that Detective Acquisto's testimony improperly bolstered Whitaker's credibility and improperly "amounted to a declaration that he believed the story told by" Whitaker. LaMastus, 878 S.W.2d at 34. See also Sharp v. Commonwealth, Ky., 849 S.W.2d 542, 545 (1993), and Hester v. Commonwealth, Ky., 734 S.W.2d 457, 458 (1987).

The Commonwealth concedes that Detective Acquisto's testimony was not admissible under the "verbal act" doctrine, but argues that the trial court's decision to allow Detective Acquisto's testimony was correct for the wrong reason. See Friend v. Rees, Ky.App., 696 S.w.2d 325, 326 (1985). The Commonwealth claims that the testimony was admissible under the present sense exception to the hearsay rule, Kentucky Rules of Evidence (KRE) 803(1). KRE 803(1) states as follows: "The following are not excluded by the hearsay rules, even though the declarant is available as a witness: (1) Present sense impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or

condition, or immediately thereafter." The Commonwealth argues that Whitaker's statements into the transmitter were her contemporaneous perceptions about what was transpiring as she drove into Guthrie and as she purchased cocaine--her present sense impression.

We have found only three cases in Kentucky which mention present sense impression: Jarvis v. Commonwealth, Ky., 1998 WL 19528 (1998), Slaven v. Commonwealth, Ky., 962 S.W.2d 845 (1998), and Cecil v. Commonwealth, Ky., 888 S.W.2d 669 (1994). As noted in Jarvis, supra:

> There is a dearth of case law in this Commonwealth concerning the present sense impression exception of KRE 803(1). The language of the rule makes clear that time is an important element of the exception. This is born out in the commentary to FRE 803(1), upon which KRE 803(1) is based. "The underlying theory of [FRE 803(1)] is that substantial contemporaneity of event and statement negative the likelihood of deliberate or conscious misrepresentation . . . . With respect to the time element, [FRE 803(1)] recognizes that in many, if not most, instances precise contemporaneity is not possible, and hence a slight lapse is allowable." Fed. R. Evid. 803, Advisory Committee's Note (emphasis in original).

According to Slaven, supra, a present sense impression must "describe an event as it is occurring" or "at the time she was perceiving it." Id. at 854.

While it is true that the statements on the audiotape were made as the events being described were allegedly happening, Whitaker was working for the police and was being paid for buying cocaine. This significantly reduces the reliability of her

descriptions and explanations--it is not as if she were a disinterested party contemporaneously describing an event. We believe that the circumstances surrounding the described events clearly distinguish the case at bar from Slaven and Cecil, where the persons making the statements were not agents of the Commonwealth and there was no financial incentive for making the statements. Thus, we do not believe this testimony could have been properly admitted as evidence under the present sense impression exception to the hearsay rule.

Hoosier also argues that Detective Acquisto's testimony improperly bolstered Whitaker's testimony. We agree. "The credibility of a witness' relevant testimony is always at issue . . . ." Sanborn, 754 S.W.2d at 545. Professor Lawson, The Kentucky Evidence Law Handbook, § 4.05 (1993), quotes United States v. Tate, 915 F.2d 400, 401 (8th Cir. 1990) (emphasis original) as follows: "The prosecution may not place the prestige of the government behind a witness, giving personal assurances of veracity . . . ."[7] In LaMastus, supra, a police officer, Brown, testified to what the victim had told him:

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[7] **We are to presume that, "[a]bsent bad faith, an admonition given by the trial judge can cure a defect in testimony." Alexander v. Commonwealth, Ky., 862 S.W.2d 856, 859 (1993). Therefore, any prejudice from Detective Acquisto having expressed his opinion regarding this being a "pretty good case" or "a good buy" was cured by the trial court's admonition. However, Detective Acquisto's opinion about the honesty of a confidential informant was allowed and the jury was not admonished in relation to this testimony.**

LaMastus initially contends that the testimony of Police Officer Brown, the Commonwealth's first witness, constituted extensive hearsay and prejudiced the jury. During trial, Brown started to relate what Mrs. Taft [the victim] had told him about the offense. LaMastus' counsel objected on hearsay grounds, and the trial judge sustained the objection. Brown then continued to explain the case facts, but soon testified again concerning Mrs. Taft's statements to him. LaMastus' counsel again objected, but the judge overruled the objection for the purpose of allowing Brown to "relate the nature of the complaint" to the jury. The judge then allowed Brown to discuss what Mrs. Taft had reported to him during the investigation leading to LaMastus' arrest, culminating with Brown stating, "She (pause) at that point in time, and with concern for her safety and the safety of her husband, I obtained a district court warrant . . . [for LaMastus' arrest]."

LaMastus argues that Brown's testimony constituted "investigative hearsay," the introduction of which has been repeatedly condemned by Kentucky courts. The Commonwealth counters that Brown merely testified as to what Taft later repeated. Because Taft testified and was available for crossexamination [sic], the Commonwealth claims that any error was harmless, citing Carter v. Commonwealth, Ky., 782 S.W.2d 597, (1989) cert. denied, 497 U.S. 1029, 110 S.Ct. 3282, 111 L.Ed.2d 791 (1990). We disagree.

Our Supreme Court dealt with a similar situation in Bussey v. Commonwealth, Ky., 797 S.W.2d 483 (1990). In Bussey, the victim of sexual abuse testified concerning his recollection of the offense. Then, during the Commonwealth's case in chief, four police officers were permitted to repeat the victim's version of the events. Id. at 484. Additionally, the trial court allowed one of the officers to testify as to his conclusion of whether the events had transpired as the victim had described. The officer was permitted to state,"Yes. I came to the conclusion that there had to have been some

type of misconduct or I would not have received a complaint." Bussey, 797 S.W.2d at 485.

In reversing the Bussey conviction, the Supreme Court cited Sanborn v. Commonwealth, Ky., 754 S.W.2d 534 (1988), for the rule that a police officer may testify about information furnished to him only where it tends to explain the action that was taken by the police officer and not to prove the facts told. Bussey, 797 S.W.2d at 486 (quoting Sanborn, supra, at 541). The Bussey court stated:

> The only witnesses to the occurrence of this crime were appellant and the Bussey brothers. To arrive at a conviction, it was necessary for the jury to believe the victim and disbelieve appellant. As such, the jury was required to determine the credibility of all fact witnesses. This process was flawed when four law enforcement witnesses were permitted to bolster the victim's testimony by repeating what he had told them.
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> * * *
>
> There is little doubt that Officer Shirley's statement amounted to a declaration that he believed the story told by the victim. In a number of cases, this has been held reversible error. [Citations omitted].
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> . . . .
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> In this case, the police officer testified that he believed the victim's report of the incident and determined on this basis to initiate further investigation by telling his captain . . . .
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> This Court has firmly rejected the admission of hearsay evidence under the so-called "investigative hearsay exception." Trial courts and counsel should understand that such evidence is not less hearsay because it comes from a

> police officer and that any conviction obtained through the use of such evidence is in jeopardy of reversal.

Id. at 485-86.

> In the case at bar [LaMastus], Officer Brown was permitted to testify concerning the facts of the case as told to him by the victim, Mrs. Taft. He then stated to the jury that, based upon those facts, he obtained an arrest warrant for LaMastus because of his concern for the Tafts' safety. Officer Brown's actions were not an issue in this case. Cf. Sanborn, 754 S.W.2d at 541. We believe that, according to Bussey, supra, Officer Brown's testimony improperly lent credence to Mrs. Taft's testimony and unfairly prejudiced the jury in her favor.
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> Furthermore, Carter, 782 S.W.2d 597 cited by the Commonwealth for the proposition that such testimony is harmless, is distinguishable from this case by the fact that the statements made in Carter did not directly name or implicate the defendant. Carter, 782 S.W.2d at 600. That is not the case here. Finally, the Commonwealth does not argue, nor do we find, that Brown's testimony qualified as an exception to the hearsay rule. See KRE 803-805. Consequently, we must reverse the conviction by the trial court.

LaMastus, 878 S.W.2d at 33-34.

The issue in LaMastus deals with the police testifying to the victim's version of the events and then expressing an opinion about the merits of the case. See also Bussey, supra, and Carter, supra. In the case sub judice, Detective Acquisto's testimony went beyond the police repeating the victim's testimony as in LaMastus, Bussey, and Carter. He not only repeated[8]

[8] **Since Detective Acquisto testified first, he could hardly** (continued...)

Whitaker's testimony but he also testified extensively about events to which Whitaker did not testify. We conclude that his testimony was not admissible even though Whitaker contemporaneously described the events as they allegedly happened. There were strong indices of unreliability, i.e., Whitaker worked for the police and was paid by them for buying drugs from willing sellers. No purpose was served by allowing Detective Acquisto to testify to the taped drug transaction other than to allow him to add details of the drug transaction and bolster the informant's credibility.

The Commonwealth argues that if the admission of Detective Acquisto's testimony regarding the transaction was error, it was harmless error. The harmless error doctrine can be explained as "whether on the whole case there is a substantial possibility that the result would have been any different." Commonwealth v. McIntosh, Ky., 646 S.W.2d 43, 45 (1983) (emphasis added). In this case, Detective Acquisto was the first witness for the Commonwealth. After giving a long list of his credentials in law enforcement concerning the investigation of drug cases, he explained the alleged drug transaction between Whitaker and Hoosier in much more detail than Whitaker did on the audiotape or at trial. The videotape recording of the audiotape

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(...continued)
have been repeating Whitaker's testimony, but for simplicity's sake we refer to it as repeating.

was largely inaudible and Whitaker simply testified that Hoosier sold her drugs.

The only substantial difference in the first trial which resulted in a hung jury[9] and the second trial which resulted in a conviction and a five-year prison sentence was the substance of Detective Acquisto's testimony.[10] We believe that this inadmissible testimony unfairly bolstered the credibility of the confidential informant in a case which hinged on witness credibility. We cannot say that this error was harmless.

The judgment of the Todd Circuit Court is reversed and this matter is remanded for further proceedings in accordance with this Opinion.

ALL CONCUR.

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[9] Hoosier claims that the hung jury was eleven to one in favor of acquittal. At the close of the first trial, Hoosier requested the trial court to ask the foreman the count of the jury's vote. The foreman replied that the split was eleven to one, but he did not state if that was in favor of acquittal or conviction.

[10] Hoosier's mother testified in the first trial that Hoosier was her daughter and Shawn was her son. Hoosier's mother attended the second trial and was identified by Whitaker.

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