

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2007-CA-0001471-MR

JOSHUA LEE TERRY

APPELLANT

v. APPEAL FROM SIMPSON CIRCUIT COURT  
HONORABLE JANET J. CROCKER, JUDGE  
ACTION NO. 06-CR-00018

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: ACREE AND NICKELL, JUDGES; LAMBERT,<sup>1</sup> SENIOR JUDGE.

NICKELL, JUDGE: Joshua Lee Terry (“Terry”) appeals the judgment of the Simpson Circuit Court sentencing him to an enhanced term of fourteen years following a jury trial convicting him of trafficking in a controlled substance in the

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<sup>1</sup> Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

first degree<sup>2</sup> and being a persistent felony offender in the second degree.<sup>3</sup> For the reasons that follow, we affirm.

Terry's indictment resulted from a drug buy in which he sold crack cocaine to a confidential informant named Carrie<sup>4</sup> Hargis ("Hargis"). The buy came about when Hargis contacted Franklin City Police Sergeant Scott Wade ("Sgt. Wade") offering to make buys from drug dealers in return for her boyfriend's release from jail. Hargis had purchased drugs from Terry previously. On December 6, 2005, Sgt. Wade patted down Hargis for contraband. Finding none, he outfitted her with a digital recording device which he activated at 6:40 p.m. and placed in her pocket; marked three \$20.00 bills with his initials in the upper left corner, photocopied the marked bills and gave them to Hargis after she signed a receipt for them; and then drove Hargis to Terry's residence at the corner of Kentucky and High Streets in Franklin, Kentucky. Sgt. Wade watched Hargis enter Terry's home and return to his vehicle two minutes later with a quantity of cocaine. At that point, officers entered Terry's home, arrested him, secured the premises, and waited for Sgt. Wade to obtain a warrant to search Terry's residence. When Terry was searched, the three marked \$20.00 bills Sgt. Wade had given to

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<sup>2</sup> Kentucky Revised Statutes (KRS) 218A.1412, a Class C felony.

<sup>3</sup> KRS 532.080(2).

<sup>4</sup> Both the Brief for Appellant and the Brief for Appellee spell Hargis's first name as "Kerry." However, documents in the court record list the spelling of her name as "Carrie."

Hargis to make the buy were found in the front right pocket of the sweat pants Terry was wearing.

A warrant authorizing a search of Terry's home was signed at 7:22 p.m. and the search occurred shortly thereafter. The search of the home revealed a white powder that appeared to be cocaine on both the kitchen table and the kitchen floor; \$2,900.00 in cash in one chest of drawers in Terry's bedroom along with Terry's social security card and the title to a vehicle that had been purchased for cash; \$576.00 in cash in a second chest in Terry's bedroom along with a piece of cardboard listing names and dollar amounts; three wireless camera systems; a set of brass knuckles; and a box of .380 caliber ammunition. At trial, when specifically asked by the court whether he objected to the introduction of the cameras, brass knuckles or ammunition, defense counsel responded, "No objection."

Sgt. Wade was the first witness to testify for the Commonwealth at trial. He introduced the three wireless camera systems, none of which had been installed, and explained their significance. Without objection, Sgt. Wade testified such devices, in his experience, are used by drug dealers to watch police movement and evade arrest. He also testified, without objection, that while no firearm was found during the search of Terry's person or his residence, the presence of ammunition in the home suggested possession or ownership of a firearm at some time. Sgt. Wade also testified, again without objection, that drug dealers occasionally carry guns and brass knuckles.

Terry's defense to the single count of trafficking in a controlled substance in the first degree was twofold: (1) the cocaine found in his home belonged to someone else and (2) the police framed him. Joseph Tanner, the forensic drug chemist who analyzed the suspected cocaine, positively identified it as such. Thereafter, on cross-examination, defense counsel engaged in the following exchange with Tanner:

Defense Counsel: If there was a police officer who had an ax to grind, and he sent you some cocaine that really had nothing at all to do with this case, you wouldn't – you wouldn't be able to tell that from just the cocaine, would you?

Tanner: No, I wouldn't.

Defense Counsel: Okay, and we don't have any idea that that happened. But all you really know is that is cocaine.

Tanner: Yes.

Defense Counsel: No idea who it belongs to, where it came from.

Tanner: That's true.

Terry testified in his own defense. He began by stating he disagreed with much of the testimony presented by the Commonwealth the previous day. He adamantly denied having any marked money on him at the time of his arrest. He testified that if the three marked \$20.00 bills were found in the \$137.00 he had in his pants pocket, someone put it there after he was searched. Terry acknowledged the brass knuckles were in a can with other collectible knives but denied he used

them to protect himself while dealing drugs. He admitted the ammunition<sup>5</sup> was his but said he did not own a handgun at the time of the buy/search. He explained his girlfriend bought the security cameras for him because the pit bull puppies he was breeding were being stolen and she thought he could use the cameras to catch the thief.

On cross-examination, Terry again denied having the marked money in his pocket immediately after completing the drug sale. At that point, the Commonwealth showed him the marked money and the following exchange occurred:

Prosecutor: Is it your testimony that if Officer Wade said that that came from your pocket that he's lying?

Terry: \$60.00 with "SW" on it, marked money. He's lying when he said it came out of my pocket, yes.

Prosecutor: So, so what you want the jury to believe is that Officer Wade after he got the money out of your pocket he switched out the money.

Terry: He could have easily switched it out, or, he could have wrote "SW" on the \$20.00 bills that was in my pocket.

Prosecutor: OK. Is that your belief, or that's what you want the jury to believe?

Terry: I truly believe that. I truly do.

Prosecutor: OK. So you believe Sgt. Wade wanted to

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<sup>5</sup> Terry's girlfriend, Jennifer Davenport, testified the ammunition was hers and the brass knuckles were found in her belongings.

frame you for drug trafficking.

Terry: Pretty much. Yeah, I do.

When asked why Sgt. Wade would risk his job and career to pursue innocent people, Terry said he and his friends had encountered Sgt. Wade previously and had heard he wanted to be promoted to the drug task force. Terry claimed Sgt. Wade had stopped him and several of his friends just because of their appearance and the vehicles they drove. Thereafter, Terry stated Sgt. Wade “lied so many times yesterday – you caught him in a lie.” Terry went on to label Hargis “a habitual liar” and said her motive to lie was her desire to free her boyfriend from jail. Terry also stated Officer Ben Brown (“Officer Brown”) lied when he testified he saw Terry swipe his arm across the kitchen table causing the white powder substance to fall to the floor. He characterized Officer Brown as Sgt. Wade’s “buddy” and “friend” and stated there were plenty of lies told the previous day by the police officers.

In closing argument, defense counsel reiterated his client “feels like the police officers have told some lies, and I agree that at the very least they have said some things that are inconsistent. Said some things that -- that if someone isn’t lying, they’re at least confused about the events of December 6, 2005.” Later, he argued the police had tried to “cover up” who really possessed the cocaine found on the kitchen table and said Terry’s belief that police officers wanted to frame him was logical.

Jurors found Terry guilty of trafficking in a controlled substance in the first degree. They recommended an enhanced sentence of fourteen years upon finding him to be a persistent felony offender in the second degree. The trial court sentenced him in conformity with the jury's verdict. This appeal follows.

On appeal, Terry advances two claims, neither of which is preserved for our review. As a result, he requests palpable error review pursuant to RCr<sup>6</sup> 10.26. "A palpable error is one which affects the substantial rights of a party and relief may be granted for palpable errors only upon a determination that a manifest injustice has resulted from the error." *Partin v. Commonwealth*, 918 S.W.2d 219, 224 (Ky. 1996). For an error to be palpable it must have been "easily perceptible, plain, obvious and readily noticeable." *Burns v. Level*, 957 S.W.2d 218, 222 (Ky. 1998) (citing Black's Law Dictionary (6th ed. 1995)). As a reviewing court, we "must conclude that a substantial possibility exists that the result would have been different in order to grant relief." *Partin, supra*, 918 S.W.2d 224 (citing *Jackson v. Commonwealth*, 717 S.W.2d 511 (Ky.App. 1986)).

Terry's first claim is that he was denied due process by the Commonwealth's introduction of the brass knuckles, three surveillance cameras, and ammunition. He argues these items were unrelated to the trafficking charge, irrelevant, more prejudicial than probative and should have been excluded under KRE<sup>7</sup> 404(b). We disagree.

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<sup>6</sup> Kentucky Rules of Criminal Procedure.

<sup>7</sup> Kentucky Rules of Evidence.

KRE 404(b) limits the admissibility of evidence of “other crimes, wrongs, or acts.” This rule is inapplicable to the facts under review because possession of the three highlighted items is not a crime and was not alleged to be illegal by the Commonwealth. Furthermore, the items were relevant to the Commonwealth’s case since they constitute “tools of the trade.” *Clay v. Commonwealth*, 867 S.W.2d 200, 203 (Ky.App. 1993). Sgt. Wade testified wireless cameras have been used by drug dealers to monitor police activity and drug dealers often carry brass knuckles. Additionally, “ammunition is a recognized tool of the drug-dealing trade.” *U.S. v. Gamble*, 388 F.3d 74, 77 (2<sup>nd</sup> Cir. (N.Y.) 2004.). *See also U.S. v. Goliday*, 145 Fed.Appx. 502, 506-7 (6<sup>th</sup> Cir. (Ohio) 2005).

Not only did Terry fail to object to the introduction of any of these items, he explained why they were found in his home. Apart from this evidence, there was sufficient other proof from which jurors could find Terry guilty. Therefore, introduction of the wireless cameras, ammunition and brass knuckles did not rise to a level of manifest injustice affecting Terry’s substantial rights and did not prejudice his ability to have a fair trial.

Terry’s other claim is that during cross-examination, the prosecutor improperly compelled him to label Hargis and numerous police officers as “liars” and then commented on Terry’s theory of the case during closing argument. Following our Supreme Court’s lead in *Moss v. Commonwealth*, 949 S.W.2d 579,



583 (Ky. 1997) we will not reverse Terry's conviction on this ground because it was not preserved and does not amount to palpable error.

When reviewing an allegation of prosecutorial misconduct, we "must focus on the overall fairness of the trial and may reverse only if the prosecutorial misconduct was so improper, prejudicial, and egregious as to have undermined the overall fairness of the proceedings." *Brewer v. Commonwealth*, 206 S.W.3d 343, 349 (Ky. 2006). Misconduct rises to the level of reversible error only when (1) it is flagrant or the proof of guilt is less than overwhelming; (2) the defense counsel objects; and (3) the trial judge fails to cure the error by sufficiently admonishing the jury. *Barnes v. Commonwealth*, 91 S.W.3d 564, 568 (Ky. 2002).

Generally, a "witness should not be required to characterize the testimony of another witness, particularly a well-respected police officer, as lying," *Moss*, 949 S.W.2d at 583, but this case represents one of those scenarios in which it was invited and therefore permissible. When Terry took the stand on direct examination, his attorney's first question was, "Did you agree with all the testimony that you heard yesterday." Terry responded, "No sir." Thereafter he accused someone of planting the marked money on him. On cross-examination, he claimed he was being framed by the police and alleged Hargis wanted to set him up to win her boyfriend's release from jail. We have set out a portion of the Commonwealth's cross-examination of Terry in the recitation of facts in this opinion. A review of that colloquy clearly shows no one "forced" or "badgered" Terry to say any of the Commonwealth's witnesses had lied. He made those

statements freely and of his own accord. Having watched the video record of the cross-examination of Terry, we cannot say the prosecutor was “unfair, insulting, intimidating, or abusive,” as mentioned in *Howard v. Commonwealth*, 227 Ky. 142, 12 S.W.2d 324, 329 (1928). Here, the prosecutor did not exceed the wide latitude allowed on cross-examination, he merely explored why Terry thought he had been framed by the police and characterized the defense theory, showing jurors the differences in both versions of the evidence, as he is permitted to do. *See Commonwealth v. Mitchell*, 165 S.W.3d 129, 132 (Ky. 2005); *Soto v. Commonwealth*, 139 S.W.3d 827, 836 (Ky. 2004); *Young v. Commonwealth*, 25 S.W.3d 66, 74-5 (Ky. 2000).

Additionally, we find no merit in Terry’s complaint that the Commonwealth wrongly summarized his theory of the case during closing argument. The prosecutor’s comments were an “invited response” to Terry’s closing argument in which defense counsel said his client thought police officers had lied on the witness stand and tried to cover up facts. *Foley v. Commonwealth*, 953 S.W.2d 924, 940 (Ky. 1997) (citing *United States v. Young*, 470 U.S. 1, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985)). Defense counsel also endorsed Terry’s theory of a police frame-up as being “logical.” Based on the latitude allowed during a prosecutor’s cross-examination and closing argument, and the fact that the jury did not impose the maximum sentence allowed by law, the Commonwealth’s statements were not improper, prejudicial, or egregious so as to have undermined the overall fairness of the proceedings. Further, our review of the record leads us

to conclude there is no substantial probability the outcome in this would have been any different absent the alleged instance of prosecutorial misconduct. *Slaughter v. Commonwealth*, 744 S.W.2d 407, 411-412 (Ky. 1987).

For the reasons set forth herein, the judgment of the Simpson Circuit Court is affirmed.

ALL CONCUR.

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