

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2009-CA-001859-MR

JEROME C. DODSON

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE JAMES M. SHAKE, JUDGE  
ACTION NO. 08-CR-001346

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING IN PART,  
VACATING IN PART,  
AND REMANDING

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BEFORE: CAPERTON AND DIXON, JUDGES; LAMBERT,<sup>1</sup> SENIOR JUDGE.

DIXON, JUDGE: Jerome C. Dodson appeals a judgment of conviction and sentence rendered by the Jefferson Circuit Court following a jury trial. We affirm in part, vacate in part, and remand for additional proceedings.

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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 KRS 21.580.

In July 2007, Jerome C. Dodson leased an apartment, unit 205, at the Bayview Condos in Louisville, Kentucky. Prior to signing the lease, Dodson had visited unit 205 as a guest of the previous tenant, Otis Sledge. Dodson primarily resided in Detroit, Michigan, where he operated an automobile towing company, and he traveled to Louisville a few times per month for his business. The apartments at Bayview were individually owned, and unit 205 was owned by Calvin Marcus, a Florida resident. Marcus's friend, Judy Wurtman, managed the rental of unit 205 on behalf of Marcus.

On October 11, 2007, Detective William Bower of the Louisville Metro Police Department sought a search warrant for Dodson's apartment based on information received from Cassandra Conners, who told police she had transported a large quantity of ecstasy from Detroit to Louisville and delivered it to unit 205. Conners advised police that three black males were at the apartment and \$130,000 in cash was subsequently delivered. Conners stated that she and two other individuals, Kahari Wright and Santos Sanders, had stolen a truck and parked it in the Bayview Condos parking lot. In the search warrant affidavit, Detective Bower stated that detectives conducted surveillance on the complex, located the stolen truck and learned that Dodson was the lessee of unit 205. Bower stated that detectives had previously received an anonymous complaint regarding unit 205 involving heavy traffic all night and stolen motorcycles in the unit's garage. Bower further acknowledged that Conners, Santos, and Wright had consistently given detectives verifiable information regarding numerous items of stolen

property. The search warrant was issued and executed by officers on the evening of October 11.

Dodson was not home when officers arrived; accordingly, officers contacted Judy Wurtman to gain entry into the apartment. Wurtman unlocked the door for the officers, and the subsequent search revealed items of drug paraphernalia, approximately seven grams of heroin, and a 9mm handgun.

In April 2008, a Jefferson County Grand Jury indicted Dodson on charges of 1) trafficking in a controlled substance (heroin) while in possession of a firearm; 2) possession of a handgun by a convicted felon; and 3) possession of drug paraphernalia while in possession of a firearm. The Commonwealth ultimately dismissed the charge of possession of a handgun by a convicted felon, and a jury trial commenced on the remaining charges in May 2009.

On the morning of trial, Dodson filed a “Motion to Quash,” essentially asking the court to suppress the evidence seized due to alleged errors in the search warrant. The trial court heard argument from counsel on the issue, but denied the motion without a formal evidentiary hearing. At trial, the Commonwealth presented testimony from several police officers involved in the search of Dodson’s apartment. The testimony showed that items such as a “kilo press,” a “seal and save,” and digital scales were found in the apartment and believed to be items of drug paraphernalia. The testimony also indicated the loaded handgun was found on a windowsill in the bedroom, behind the headboard of Dodson’s bed. Further, officers testified that the package of heroin was

discovered in the pocket of a leather coat, which was located in a closet in the living room. The Commonwealth's expert witness, Sgt. Bryan Nunn, testified regarding his training and experience in drug trafficking cases. Sgt. Nunn correlated the evidence found in Dodson's apartment to its potential use in a drug trafficking operation. Sgt. Nunn also testified drug dealers sometimes kept a weapon near the bed for protection in the event of an attempted home invasion or drug-related robbery. Four witnesses testified on behalf of Dodson and presented a defense theory that the heroin and the handgun belonged to Otis Sledge, the former resident of Dodson's apartment.

The jury acquitted Dodson of the trafficking charge and returned guilty verdicts on the charges of possession of heroin while in possession of a firearm and possession of drug paraphernalia. The jury recommended a sentence of six and one-half years' imprisonment, and the trial court sentenced Dodson accordingly.

Dodson now appeals his conviction, contending 1) he was entitled to a directed verdict as to firearm enhancement; 2) palpable error occurred when language was omitted from the firearm enhancement jury instructions; 3) the court erred by denying Dodson's motion to suppress without a hearing; and 4) Dodson was entitled to a mistrial due to prejudicial statements in the Commonwealth's closing argument.

## I. Directed Verdict

Dodson asserts the Commonwealth failed to meet its burden of proof on the issue of firearm enhancement pursuant to KRS 218A.992; consequently, Dodson contends he was entitled to a directed verdict of acquittal. We disagree.

“On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal.” *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991).

KRS 218A.992 provides for penalty-enhancement when a “person who is convicted of any violation of this chapter who, at the time of the commission of the offense and in furtherance of the offense, was in possession of a firearm[.]” The “in furtherance of” language was added to the statute following *Commonwealth v. Montaque*, 23 S.W.3d 629 (Ky. 2000), where the Kentucky Supreme Court held that there must be a nexus between the underlying offense and the possession of the firearm. *Id.* at 632. The *Montaque* Court explained as follows:

[W]hen it cannot be established that the defendant was in actual possession of a firearm or that a firearm was within his or her immediate control upon arrest, the Commonwealth must prove more than mere possession. It must prove some connection between the firearm possession and the crime.

*Id.* at 632-33 (internal footnote and citation omitted).

In the case at bar, Dodson asserts that the Commonwealth failed to prove that he, while committing the offense of possession of heroin, possessed a firearm

“in furtherance of” that offense. Victor Hensley testified for the defense, stating that in July or August 2007, he had offered to purchase the 9mm handgun from Otis Sledge. Dodson notes that he was not in the apartment when the search occurred, and he points out that the gun and the heroin were located in different areas of the house. He asserts that, because the firearm and the contraband were not in close proximity, there was no connection between the two items. We disagree.

Sgt. Nunn testified regarding the prevalence of home invasions of narcotics traffickers as a means of obtaining money or drugs. Sgt. Nunn asserted his opinion that drug dealers rely on readily accessible firearms to protect themselves in the event of a home invasion or attempted robbery. Sgt. Nunn further testified that seven grams was “a lot” of heroin for the Louisville area, with a street value of at least \$4000.<sup>2</sup>

Dodson diminishes Sgt. Nunn’s testimony by pointing out the jury acquitted him of trafficking in heroin. However, viewed in the light most favorable to the Commonwealth, Sgt. Nunn’s testimony was sufficient for reasonable jurors to infer that, even if Dodson was not trafficking in heroin, he nonetheless possessed valuable narcotics in his home, which could warrant possessing a firearm to protect himself and his heroin. After careful review, we believe the trial court properly denied Dodson’s motion for a directed verdict on this issue.

## II. Jury Instructions

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<sup>2</sup> Sgt. Nunn testified that the seven grams of heroin constituted approximately 210 individual doses, which could be sold for \$20 to \$40 per dose.

Dodson asserts the jury instructions were clearly erroneous as to the firearm enhancement because the court failed to include the “in furtherance of” language required by KRS 218A.992. Dodson concedes this alleged error was not preserved and requests review as palpable error pursuant to RCr 10.26.

The jury instruction stated:

INSTRUCTION NO. 1B – ILLEGAL POSSESSION OF  
A CONTROLLED SUBSTANCE IN THE FIRST  
DEGREE (HEROIN) WHILE IN POSSESSION OF A  
FIREARM

If you do not find the Defendant, Jerome C. Dodson, guilty under Instructions No. 1 or 1A, you will find him guilty under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

A. That in Jefferson County, Kentucky, on or about the 11th day of October, 2007, the Defendant had in his possession a quantity of Heroin;

B. That the Defendant knew the substance so possessed by him was Heroin;

AND

C. And while in the commission of this offense, the Defendant was in possession of a firearm.

If you find the Defendant guilty under this Instruction, you will state so by your verdict and no more.

The verdict form utilized similar language, and it allowed the jury to convict Dodson based on a finding that “the Defendant was in possession of a firearm when he committed the offense.”

KRS 218A.992 specifically requires possession of a firearm at the time of the commission of the offense and in furtherance of the offense. In *Campbell v. Commonwealth*, 260 S.W.3d 792 (Ky. 2008), the Kentucky Supreme Court approved the use of “in furtherance” language in a KRS 218A.992 instruction. The Court noted that the “language properly tracks the statute and, certainly, is more than adequate to fulfill the requirement that a nexus between the firearm possession and the drug offense be shown.” *Id.* at 805. In contrast, the jury instructions at bar did not require that the jury find a nexus between the firearm possession and the possession of a controlled substance; instead, the jury was able to find Dodson guilty based on merely possessing a firearm at the same time he committed the offense of possessing heroin. We believe the court’s failure to instruct the jury on an essential element of the offense – the “nexus” requirement” – was clearly erroneous. However, since this error is unpreserved, we must determine whether it affected Dodson’s substantial rights resulting in manifest injustice. RCr 10.26.

The evidence at trial was conflicting as to whether there was a connection between the firearm and heroin; consequently, the jury was required to determine whether a nexus was established -- whether Dodson possessed a firearm “in furtherance of the offense when he committed the offense.” *See Cooper and Cetrulo, Kentucky Instructions to Juries, Criminal* § 12.08 5th ed. (2009). Under the instructions provided, the jury was not required to make such a finding, and we believe that resulted in manifest injustice. *See Stewart v. Commonwealth*, 306



S.W.3d 502, 509 (Ky. 2010) (palpable error where jury instructions omitted an essential element necessary to convict of an enhanced offense).

Considering the facts of this case, we conclude the erroneous instruction constituted palpable error under RCr 10.26. Accordingly, we vacate and remand Dodson's conviction for possession of a controlled substance (heroin) while in possession of a firearm.

### III. Motion to Suppress

On the morning of trial, Dodson filed a "Motion to Quash and Brief in Support," challenging the validity of the search warrant. Dodson contended Cassandra Conners did not exist and that the information in the affidavit was unreliable. After hearing arguments from counsel, the trial court denied the motion, concluding the issuing judge properly found probable cause and that Dodson had not shown the warrant affidavit contained deliberate or reckless false statements pursuant to *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978).

Pursuant to RCr 9.78, the court was obligated to hold an evidentiary hearing on the motion to suppress; however, the failure to hold a hearing is subject to harmless error review. *Hunt v. Commonwealth*, 304 S.W.3d 15, 27 (Ky. 2009).

At the outset, we address whether the search warrant was valid on its face. In *Beemer v. Commonwealth*, 665 S.W.2d 912 (Ky. 1984), the Kentucky Supreme Court adopted the "totality of the circumstances" test for reviewing a search warrant affidavit:

The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the ‘veracity’ and the ‘basis of knowledge’ of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a ‘substantial basis for . . . conclud[ing]’ that probable cause existed.

*Id.* at 914-15, quoting *Illinois v. Gates*, 462 U.S. 213, 238-39, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983). We further note, “Probable cause does not require certainty that a crime has been committed or that evidence will be present in the place to be searched.” *Moore v. Commonwealth*, 159 S.W.3d 325, 329 (Ky. 2005). Finally, appellate “review of a search warrant must give great deference to the warrant-issuing judge's findings of probable cause and should not be reversed unless arbitrarily exercised.” *Id.*

In the case at bar, Dodson asserts that the information contained in the affidavit was unreliable and did not support a finding of probable cause. We disagree.

The affidavit stated that the officer had previously received valid information from Conners, Santos, and Wright regarding stolen vehicles. Conners provided detailed information to the detective regarding her personal involvement in a drug transaction in unit 205 and gave information regarding a stolen vehicle in the parking lot of the apartment complex, which the police located. In providing

information to the police, Connors admitted her own direct involvement in criminal activities.

“In cases involving identifiable informants who could be subject to criminal liability if it is discovered that the tip is unfounded or fabricated, such tips are entitled to a greater ‘presumption of reliability’ as opposed to the tips of unknown ‘anonymous’ informants (who theoretically have ‘nothing to lose’).”

*Commonwealth v. Kelly*, 180 S.W.3d 474, 477-78 (Ky. 2005). Furthermore, “[s]tatements against the informant's penal interest also increase the degree of veracity that a court may attribute to the statements.” *Lovett v. Commonwealth*, 103 S.W.3d 72, 78 (Ky. 2003).

After careful review, we conclude the totality of the circumstances established a fair probability that evidence of illegal activity would be found in Dodson’s apartment; consequently, we agree with the trial court “that the magistrate had a ‘substantial basis for . . . conclud[ing]’ that probable cause existed.” *Beemer*, 665 S.W.2d at 915.

Although we have concluded the warrant was valid on its face, we must address Dodson’s allegations regarding the truthfulness of the information contained in the affidavit. Specifically, Dodson asserts that Cassandra Connors did not exist and the information was generally unreliable.

In *Commonwealth v. Smith*, 898 S.W.2d 496, 503 (Ky. App. 1995), this Court stated,

To attack a facially sufficient affidavit, it must be shown that (1) the affidavit contains intentionally or recklessly false statements, and (2) the affidavit, purged of its falsities, would not be sufficient to support a finding of probable cause. The same basic standard also applies when affidavits omit material facts. An affidavit will be vitiated only if the defendant can show that the police omitted facts with the intent to make, or in reckless disregard of whether the omission made, the affidavit misleading and that the affidavit, as supplemented by the omitted information, would not have been sufficient to support a finding of probable cause.

When a movant challenges the veracity of the information supplied by the affiant,

There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained. Allegations of negligence or innocent mistake are insufficient.

*Franks v. Delaware*, 438 U.S. at 171-72, 98 S. Ct. at 2684.

Here, we agree with the trial court that Dodson failed to provide any evidence to support his speculative assertions regarding the truthfulness of the affidavit. “Conjecture without evidence will not be considered[;]” accordingly, Dodson failed to demonstrate the affidavit contained false statements, and we need not further address the issue. *Hayes v. Commonwealth*, 320 S.W.3d 93, 102 (Ky. 2010). The trial court’s failure to hold an evidentiary hearing constituted harmless error.

#### IV. Closing Argument

Dodson contends the trial court erred by denying his motion for a mistrial due to prejudicial statements made during the Commonwealth's closing argument. Specifically, Dodson points to two incidents during closing when the Commonwealth stated that an "unbiased judge" authorized a search of Dodson's apartment because narcotics trafficking was occurring. Dodson asserts the Commonwealth's statements implied that a judge had already determined Dodson was guilty of drug trafficking and then sent the police to the apartment.

"A trial court has discretion in deciding whether to declare a mistrial, and its decision should not be disturbed absent an abuse of discretion." *Clay v. Commonwealth*, 867 S.W.2d 200, 204 (Ky. App. 1993).

We are mindful that "[a] prosecutor may comment on tactics, may comment on evidence, and may comment as to the falsity of a defense position." *Slaughter v. Commonwealth*, 744 S.W.2d 407, 412 (Ky. 1987). In the case at bar, a recurring element of Dodson's defense strategy was to imply the police acted improperly in conducting the search of his apartment; as a result, we believe the prosecutor's comments were not improper. We conclude the court did not abuse its discretion by denying Dodson's request for a mistrial.

In conclusion, we vacate and remand Dodson's conviction for firearm enhancement, and we affirm his conviction in all other respects.

For the reasons stated herein, the judgment of the Jefferson Circuit Court is affirmed in part, vacated in part, and remanded for proceedings consistent with this opinion.

CAPERTON, JUDGE, CONCURS.

LAMBERT, SENIOR JUDGE, DISSENTS.

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