RENDERED: DECEMBER 13, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001360-MR

WADE ALVIN STEVENSON, JR. APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. TRAVIS, JUDGE
ACTION NO. 15-CR-01126

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, JONES, AND NICKELL,[1] JUDGES.

ACREE, JUDGE: Appellant, Wade Stevenson, appeals from the Fayette Circuit Court's August 1, 2017, judgment and ten-year sentence for second-degree

[1] Judge C. Shea Nickell concurred in this opinion prior to being sworn in as a Justice with the Supreme Court of Kentucky. Release of this opinion was delayed by administrative handling.

burglary, tampering with physical evidence, and being a first-degree persistent felony offender. After careful consideration, we affirm.

FACTS AND PROCEDURE

On October 16, 2015, Stevenson was arrested on State Street in Lexington. Stevenson was charged with entering the residence of Steven Stickrod, Jacob Hornback, Zach Cruso, Michael Cho, and Ben Molax, and stealing keys, a wallet, and shoes that belonged to Stickrod.

On November 23, 2015, a Fayette County grand jury indicted Stevenson. He was charged with second-degree burglary, tampering with physical evidence, and being a first-degree persistent felony offender.

On October 25, 2016, Stevenson filed four *pro se* motions. The first was a motion for bond reduction, which the trial court dismissed on October 26, 2016. The second was a motion alleging ineffective assistance of counsel based on a conflict of interest between himself and his court-appointed attorney. The third was a joint motion challenging jurisdiction. The fourth and final motion was to dismiss claiming he was denied his right to a speedy trial.

On November 22, 2016, Stevenson filed two additional *pro se* motions moving the trial court to suppress the physical evidence obtained by the Lexington Police Department and to dismiss his counsel. The trial court promptly

responded to Stevenson's motion for bond reduction but did not respond to any of his other *pro se* motions.

On May 25, 2017, a jury trial was conducted. Stickrod testified first for the Commonwealth. He stated that on the night in question he resided at 136 State Street in Lexington with four other roommates. He was a junior attending the University of Kentucky.

Stickrod testified that the night in question was a Thursday, which is typically a party night for UK students. He stated he did not party that night but stayed home and went to bed at a reasonable hour. He was asleep, he said, in his bed in his room. He also said his roommates were not partying and were also all asleep. The practice at this residence was to leave the interior doors of the house unlocked at night, and this included the door to Stickrod's bedroom.

At 3:30 AM, he was awakened by keys being shuffled around on the nightstand next to his bed. He testified he initially thought it was his roommates moving his car for him, parking at that residence being an issue. Stickrod stated he first looked up, still half asleep, and thought his roommate Zach Cruso was in his room.

Stickrod said, "What are you doing, Zach?" The individual walked toward the end of Stickrod's bed and he again said, "What are you doing?" He said he had not yet mentally processed that "there was somebody burglarizing me."

The individual responded and said, "My bad, bro." Stickrod then stated he could tell by the height and voice of the individual that it was not any of his roommates.

Stickrod stated the individual bolted out of his room and then the backdoor, both of which he left open. Stickrod then got out of bed and found his keys and wallet were missing. He then went to his roommate, Michael Cho and said, "Let's get your keys, let's go get him, let's find this guy."

Stickrod and Cho went out the back door and planned to use Cho's car to search for the individual but there were vehicles blocking Cho's car. Stickrod said he looked toward the street and saw a man standing there. Stickrod identified Stevenson in the courtroom as the man he saw standing across the street. Stickrod testified Stevenson was then wearing a jacket and jeans, but he could not tell the specific color clothing worn by the person in his room due to lack of lighting.

Stickrod and Cho approached Stevenson and questioned him regarding Stickrod's possessions. At first, Stevenson denied everything and said he knew nothing about Stickrod's possessions. Stickrod then stated he began to recognize Stevenson after conversing with him as the individual he saw in his bedroom. Stickrod testified that Stevenson was wearing the same type clothing and sounded the same as the individual in his room so he said: "I will give you 5 minutes to give my stuff back and I will not call the cops."

Stevenson continued to say he did not have Stickrod's possessions, so Stickrod called the 9-1-1 dispatch. Stickrod stated Cho was speaking to Stevenson while he was on the phone with dispatch.

After making the phone call, but while still on the phone, Stickrod said Stevenson offered to help him locate his personal possessions. Stevenson said he would show them where he thought he put Stickrod's wallet. Stickrod and Cho proceeded to follow Stevenson between houses along State Street looking behind trashcans. Stickrod testified they looked behind several trashcans, but did not locate his wallet.

Stickrod stated they were making their way toward the end of State Street toward South Limestone. As they were approaching the end of State Street, Stickrod testified that Stevenson swiftly threw keys into a bush, perpendicular to the direction in which they were walking. Stickrod testified that he did not immediately walk toward the keys because he did not want to risk having Stevenson escape his sight. While this was happening, Stickrod was still on the phone with dispatch. After Stevenson threw the keys, Officers Michael Hagen and Michelle Patton of the Lexington Police Department arrived.

The Commonwealth then played a portion of Stickrod's 9-1-1 call as evidence. The Commonwealth also introduced a map of the State Street area and

asked Stickrod to point out on the map where events occurred that he just described in his testimony.

Stickrod next stated that one of the officers located his keys in the bush where he earlier saw Stevenson throw them. Stickrod confirmed the keys recovered belonged to him. He also stated one of the officers located his wallet behind a trashcan at a house on State Street. He stated both his debit and credit card were missing from his wallet and were not recovered.

Finally, Stickrod testified that once the police arrived both he and Stevenson were questioned by the officers simultaneously. Stickrod further stated that he neither made threats to Stevenson nor did he touch him during the time they were speaking.

Officer Hagen testified next. He stated he was a patrol officer in the west sector, which runs from Nicholasville Road to North Broadway. He testified he was on patrol on October 15, 2015, from 10:00 PM to 8:00 AM.

He was called by dispatch to 136 State Street for a burglary and theft report. Dispatch described the alleged offender as an African-American male wearing a gray University of Kentucky jacket or sweatshirt and jeans. Dispatch informed him that an individual matching that description was walking toward South Limestone Street from State Street. Hagen also used the map of State Street to explain events that occurred at that location.

Hagen testified that on the day in question he was with his beat partner, Officer Patton, who was in a separate vehicle behind Hagen. Hagen stated both he and Patton pulled into the parking lot off State Street where they located the individual described by dispatch.

Hagen testified that Stickrod and two other housemates were present. He further said that, as he pulled up to the parking lot, Stevenson appeared to drop something out of his right hand into the bushes that were along the parking lot. Hagen testified that Stickrod's keys were recovered from that same area.

Hagen asked Stevenson for identification and questioned him regarding the incident. Hagen testified he was wearing recording equipment and the Commonwealth played a portion of the recording in which Hagen and Stevenson discussed why Stevenson was in the area and where he lived.

The Commonwealth used the recording to refresh Hagen's memory because he did not immediately recall the versions Stevenson gave of events that night. Hagen said Stevenson did not have Stickrod's shoes on his person when he and Patton arrived on the scene. Hagen also testified that Stevenson said Stickrod threatened him and Stevenson wanted to file charges against Stickrod for assault.

Hagen recounted that Stevenson claimed a "little Asian guy" ran across the street, grabbed him, attacked him, and tried to take his shoes. Hagen

testified he saw no injuries on Stevenson and, therefore, had no factual basis for charging Stickrod or Cho with assault.

Hagen next stated Stickrod's keys were located in bushes in back of the parking lot. He said they also found Stickrod's wallet without the debit card or credit card somewhere between the parking lot and Stickrod's residence.

On cross examination, Hagen stated neither he nor his partner found Stickrod's wallet or keys on Stevenson's person. Hagen also testified that the credit and debit cards were never found and that no pictures were taken of the place where keys or wallet were found. Hagen further stated there was no DNA evidence taken from 136 State Street from any of the door knobs that Stevenson allegedly used to enter and exit the residence.

Officer Patton testified next. Patton used the map of the State Street area to explain her entry onto State Street and the subsequent events that took place.

Patton stated she turned left into a parking lot once on State Street where she saw Stevenson and Stickrod. Patton testified that Stevenson tossed some items away as she pulled up. She stated Hagen made first contact with Stevenson and then she went to investigate the items tossed by Stevenson. When pressed for details, Patton said she saw and heard Stevenson throw a pair of shoes and keys as she was exiting the vehicle.

Patton testified she first questioned Stickrod who told her that Stevenson took his wallet and keys from his bedroom on 136 State Street. Patton stated Stickrod led her along the route which Stevenson and he walked earlier and they were able to locate his wallet between one of the houses behind a trashcan.

Photographs of Stickrod's wallet and keys were taken but not at the location in which they were found and only to book them into evidence. Patton stated she found no factual basis justifying assault charges against Stickrod. She also stated that Stickrod's version of the events matched the scene as she saw it.

On cross examination, Patton testified it might have been possible to dust the back-door knob at 136 State Street and recover fingerprints but he did not. Such fingerprinting, she said, is not entirely definitive due to potential difficulties from weather and the material of the door knob.

Patton also testified she did not file a separate report concerning this incident from that filed by Hagen. She also acknowledged her observation that Stevenson threw keys into the bushes did not make it into report, although she testified that she did relay that information to Hagen.

Finally, Stevenson testified in his own defense. He stated that on the night in question the University of Kentucky played Auburn University in football. He recounted that the game took place on a Thursday night, which was rare so there was a lot of partying taking place.

He stated he attended various tailgate and other parties that evening and left the last party between 3:00 AM and 3:30 AM Friday morning. He stated he planned to walk to the Speedway gas station to get some cigarettes, to go to Tolly Ho restaurant afterward, and then go home.

Stevenson then testified he was walking down State Street toward Speedway when three guys got his attention by yelling at him. He stated that, from what he could tell, they were looking for something. He said he was wearing an older pair of shoes at the time but carrying a more expensive pair of tennis shoes to protect them. The three individuals noticed he was carrying the shoes and began questioning him about the size of the shoes and about a missing wallet and keys.

Stevenson stated the three individuals physically put their hands on him, so he went in the opposite direction from which they had come, toward South Limestone. He said he felt threatened and that the three individuals tried to grab and detain him. Stevenson testified they followed him and kept asking him about the shoes.

Stevenson testified he threw the shoes behind him to buy himself more time to proceed to an area of the street where there was more lighting. It was Stevenson's belief the individuals were after his shoes. It was at that point, that Officers Hagen and Patton arrived.

Stevenson said he counted ten officers who arrived on the scene. He testified he was placed in handcuffs and immediately detained. He was then searched and questioned but the officers did not recover any of Stickrod's items on his person.

Stevenson subsequently denied all charges brought against him. He denied entering 136 State Street, taking Stickrod's keys or wallet, and throwing those items away at any point.

On cross-examination, Stevenson stated he did not have a job at the time of the incident. He also stated he did not actually watch the football game and spent the entire evening partying.

When asked for a precise account of that day and evening, Stevenson stated he was living with his girlfriend off Newtown Pike, but they had ended their relationship earlier that day. He stated he left her house at 4:00 PM or 5:00 PM that day and went to St. Joseph's Hospital on Harrodsburg Road to use the telephone.

He said he stayed there until about 9:00 PM, walked down Waller Avenue, and arrived at campus around midnight or 1:00 AM at which point he started partying. Stevenson and the Commonwealth agreed the game was at 4:00

PM on October 16, 2015.[2] Stevenson then stated that from 1:00 AM Friday morning until 3:30 AM he was partying with friends and playing cornhole. Stevenson concluded cross-examination by admitting he was a convicted felon.

The jury deliberated and found Stevenson guilty of second-degree burglary, tampering with physical evidence, and being a first-degree persistent felony offender. On August 1, 2017, the trial court entered a judgment against Stevenson and sentenced him to serve ten years in prison. Stevenson appealed.

STANDARD OF REVIEW

If properly preserved, we review the trial court's evidentiary rulings for an abuse of discretion. *Matthews v. Commonwealth*, 163 S.W.3d 11, 19 (Ky. 2005). We employ this standard because "the trial court's unique role as a gatekeeper of evidence requires on-the-spot rulings on the admissibility of evidence," a less than simple task. *Clark v. Commonwealth*, 223 S.W.3d 90, 95 (Ky. 2007). The test for abuse of discretion is whether the trial judge's decision "was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). We review unpreserved errors for palpable error resulting in manifest injustice. RCr[3] 10.26.

[2] Fans of the University of Kentucky might dispute the time based on the UK website which said kickoff was at 7:00 PM. See, http://www.ukathletics.com/news/kentucky-hosts-auburn-in-thursday-night-contest-10-13-2015.

[3] Kentucky Rules of Criminal Procedure.

ANALYSIS

Stevenson presents three arguments on appeal. He claims: (1) the trial court erred by failing to consider his *pro se* motions for new counsel and for a speedy trial; (2) he was entitled to a directed verdict of acquittal on each count; and (3) the law enforcement officers who testified improperly expressed their opinions of Stevenson's guilt and of a belief in Stickrod's version of events.

A. Motions for New Counsel and a Speedy Trial

First, Stevenson asserts the trial court failed to safeguard his Sixth Amendment right to counsel because it was aware of his allegations of a conflict of interest but failed to conduct any inquiry or investigation.

Stevenson's argument is founded upon the existence in the record of several pretrial, *pro se* letters styled as "Motions" sent generally to the Fayette Circuit Clerk's office. The trial court responded to similarly styled letters concerning Stevenson's bond, but never to the plethora of other *pro se* motions sent to the clerk's office by Stevenson. Upon receipt, the Fayette Circuit Clerk's office designated these letters as motions and entered them into the record, giving them the appearance of proper *pro se* motions.

We disagree that these letters sufficiently conform to the local and state rules of procedure entitling them to be ruled upon. However, we shall address the substance of the arguments nevertheless.

1. Motions for New Counsel

First, we analyze Stevenson's claim that the trial court failed to safeguard his Sixth Amendment right to counsel because it was aware of his allegations of a conflict of interest but failed to conduct any inquiry or investigation. We begin by noting, "while the defendant's right to counsel is fundamental, there is no categorical right to the choice of specific counsel." *Turner v. Commonwealth*, 544 S.W.3d 610, 622 (Ky. 2018); *see also Commonwealth v. Maricle*, 10 S.W.3d 117, 121 (Ky. 1999), *Wheat v. United States*, 486 U.S. 153, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988). "[A] defendant who is represented by a public defender or appointed counsel does not have a constitutional right to be represented by any particular attorney, and is not entitled to the dismissal of his counsel and the appointment of substitute counsel except for adequate reasons or a clear abuse by counsel." *Henderson v. Commonwealth*, 636 S.W.2d 648, 651 (Ky. 1982).

Stevenson argues the proper procedure to be followed pertaining to a defendant's concerns with his legal representation is to allow the defendant to fully describe in detail his objections about his attorney and to allow the attorney to respond to the allegations. *Deno v. Commonwealth*, 177 S.W.3d 753, 759-60 (Ky. 2005). We disagree to the extent the defendant indicates he has a right to a hearing upon a request for new counsel.

To be entitled to substitute counsel, Stevenson must allege sufficient grounds. "[A] defendant who has been appointed counsel is not entitled to have that counsel substituted *unless adequate reasons are given*." *Deno*, 177 S.W.3d at 759. "Adequate and sufficient cause for removal of counsel has been variously defined by the federal courts and includes (1) complete breakdown of communications between counsel and defendant, (2) conflict of interest, and (3) legitimate interests of the defendant are being prejudiced." *Baker v. Commonwealth*, 574 S.W.2d 325, 327 (Ky. App. 1978). The determination of whether to grant a motion to substitute counsel lies within the sound discretion of the trial court. *Pillersdorf v. Dep't of Public Advocacy*, 890 S.W.2d 616, 621 (Ky. 1994).

Here, Stevenson sent a letter to the Fayette Circuit Clerk's office titled "Motion of Ineffective Counsel" on October 25, 2016 which included the following allegations concerning his counsel: "(1) Counsel has neglected to provide a defense; (2) Defendant feels that counsel truly is not working on his behalf; (3) There is a conflict of interest . . . therefore Defendant request [sic] that Counsel is terminated immediately." This motion made no specific allegation as to his counsel's conflict of interest.

The following month, Stevenson sent another letter titled "Motion to Dismiss Counsel" containing more specific allegations. He said:

> (1) [Counsel] has failed to supply the Defendant with particular pre-trial materials which are essential to the defense of this cause before the Court; discovery material including but not limited to; [sic] Police reports, depositions of the witness, a bill of particulars relevant to an alibi, and any fingerprints of [sic] lab reports relevant to the criminal investigation; (2) The Counsel in question has made statements aimed at deterring this cause to be tried by a Jury, and possible consequences of doing so; (3) The defendant feels that he will not be rendered adequate assistance of Counsel.

Stevenson's letters are *ex parte* communications. His letters were addressed to the Fayette Circuit Clerk's office and neither addressed nor delivered to the Commonwealth Attorney's office. This violates the local Fayette Circuit Court Rules, Rule 6. This rule states:

> The notice [to the prosecutor] of a motion in a criminal case, other than a motion for probation, shock probation or prerelease probation, shall specify the date, time and place for the hearing thereof. Motions for probation, shock probation or prerelease probation shall not be noticed for a hearing but such motions shall be heard at the convenience of the court or the court may rule upon the motion without a hearing.

Substantively, there are no factual underpinnings to support Stevenson's argument. Stevenson's non-specific allegations of conflict of interest leave the circuit court nothing upon which to rule.

We are not saying a hearing is never needed when a criminal defendant complains of his appointed counsel. Where the defendant's particularized allegations raise a legitimate question regarding appointed counsel,

the circuit court always has the discretion of conducting a hearing to consider the question. Even then, however, the hearing does not always need to be as extensive as that provided in *Deno*, in which the trial court properly questioned both the lawyer and defendant. A true "breakdown in communications" was alleged in *Deno* with the defendant accusing his lawyer of lying to him and not keeping him informed about his case. *Deno*, 177 S.W.3d at 759. Here, all Stevenson alleges is generic conflict and apparent friction but not total breakdown in communications.

So long as the trial court allows the defendant to state on the record the reasons he seeks substitution of counsel, the trial court may exercise discretion, in light of those averments, to determine how extensive the hearing needs to be, if any hearing at all is to be had.

Finally, we note our disposal of this argument does not deprive Stevenson of a remedy. He may still properly file an RCr 11.42 motion to assert a claim of ineffective assistance of counsel.

2. Motion for a Speedy Trial

Next, we examine Stevenson's assertion he was denied a speedy trial. The federal and state constitutions guarantee criminal defendants the right to a speedy trial. U.S. CONST. amend. VI.; KY. CONST. § 11; *Goncalves v. Commonwealth*, 404 S.W.3d 180, 198 (Ky. 2013). What constitutes a "speedy trial" is fact specific and is not subject to a clearly designated time frame. "When a

speedy trial violation is raised on appeal, a reviewing court must consider four factors to determine if a violation occurred: (1) the length of the delay; (2) the reasons for the delay; (3) the defendant's assertion of his right to a speedy trial; and (4) prejudice to the defendant." *Goncalves*, 404 S.W.3d at 198 (citations omitted).

Here, Stevenson was indicted on November 23, 2015. On April 19, 2016, the trial court entered an order that set trial for August 23, 2016. When Stevenson violated conditions of his release, new charges were brought against him. This disrupted the timing of the scheduled trial. The trial court entered an order setting pretrial conference for September 8, 2016 and status hearing for September 16, 2016, delaying the initial trial date.

On October 19, 2016, the trial court ordered the trial set for February 14, 2017. This date conflicted with a surgery date set for Stevenson's counsel, so the trial was re-set for May 25, 2017. Stevenson's trial was conducted on that date.

Stevenson failed to show that the delay was prejudicial. The United States Supreme Court has identified three relevant interests that "the Sixth Amendment's speedy trial right was designed to protect: (1) to prevent oppressive pretrial incarceration, (2) to minimize anxiety and concern of the accused; (3) and to limit the possibility that the defense will be impaired." *Stacy v. Commonwealth*, 396 S.W.3d at 787, 798 (Ky. 2013) (citing *Barker v. Wingo*, 407 U.S. 514, 532, 92

S.Ct. 2182, 2193, 33 L.Ed.2d 101 (1972)). Of the interests enumerated, "the last is the most serious." *Id.* (citations omitted).

In his motion to dismiss Stevenson identified no specific grounds that might lead the court to believe any of the three interests outlined above were implicated. Based on the information contained in the record and the dearth of grounds for prejudice in the motion, we find no error by the trial court.

B. Directed Verdict

Stevenson argues the evidence presented against him at trial was circumstantial and it was unreasonable for the jury to have returned a verdict against him. We disagree.

The standard relating to a directed verdict motion was set forth in *Commonwealth v. Benham*, in which the Kentucky Supreme Court stated:

> On motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony.

816 S.W.2d 186, 187 (Ky. 1991). "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." *Id.*

At trial, an abundance of evidence was presented against Stevenson, and it was more than enough to overcome a directed verdict. The fact that some, even most of the evidence was circumstantial is irrelevant. Long ago, the Supreme Court said an appellant would be "incorrect to imply that a different standard of review is required in evaluating whether or not a directed verdict should have been granted in cases involving circumstantial evidence, for this Court clearly stated, in *Commonwealth v. Sawhill*, Ky., 660 S.W.2d 3, 4 (1983), that '[s]uch is not correct.'" *Commonwealth v. Collins*, 933 S.W.2d 811, 815 (Ky. 1996).

Stevenson was not entitled to a directed verdict.

C. Admission of Improper Opinion Evidence

Finally, Stevenson argues the trial court erred by admitting opinion evidence from the police officers regarding Stevenson's guilt because "they believed Mr. Stickrod's version of events." (Appellant's brief, p. 11). The Commonwealth characterizes the officers' testimony differently, arguing their opinion about the veracity of the complaining witness's report of the crime did not express their opinion of Stevenson's guilt or innocence; furthermore, any error in allowing such testimony was harmless because it did not affect the outcome of the case. We agree with the Commonwealth.

The Commonwealth asked Officers Hagen and Patton, during their respective testimonies, if Stickrod's version of the events matched the scene as they found it. Both officers answered in the affirmative. The effect of the answer was to confirm that what they did not observe but recorded (events described by witnesses) was not contradicted by the physical environment they did observe personally (streets and buildings, topography, vegetation, visibility, etc.).

Stevenson claims the question should not have been asked and that Hagen and Patton were prohibited from answering the question because it constitutes testimony that a defendant is guilty of the charged crime. *Tamme v. Commonwealth*, 973 S.W.2d 13, 32, (Ky. 1998) ("Regardless, a witness generally cannot testify to conclusions of law.").

Stevenson concedes this argument is not preserved. He made no objection to either officers' testimony concerning the respective versions of the events at trial. Stevenson asks for palpable error review under RCr 10.26.

> Under Criminal Rule 10.26, an unpreserved error may only be corrected on appeal if the error is both palpable and affects the substantial rights of a party to such a degree that it can be determined manifest injustice resulted from the error. For error to be palpable, it must be easily perceptible, plain, obvious and readily noticeable. The rule's requirement of manifest injustice requires showing . . . [a] probability of a different result or error so fundamental as to threaten a defendant's entitlement to due process of law.

Young v. Commonwealth, 426 S.W.3d 577, 584 (Ky. 2014) (citations and internal quotation marks omitted).

It would stretch logic somewhat to say the officers actual testimony reflected the officers' opinion as to Stevenson's guilt or innocence. However, this Court acknowledges "[t]he issue of guilt or innocence is one for the jury to determine, and an opinion of a witness which intrudes on this function is not admissible, even through a route which is, at best, 'back door' in nature." *Nugent v. Commonwealth*, 639 S.W.2d 761, 764 (Ky. 1982). *Nugent* presents an example.

"In *Nugent*, the witness specifically stated that he thought Nugent killed the victim" and the Supreme Court held "the witness's testimony was not rationally based on his perception." *Commonwealth v. Wright*, 467 S.W.3d 238, 249 (Ky. 2015). The question asked of the officers in Stevenson's case sought testimony rationally based, at least in part, on the officers' perceptions of the scene.

In *Bussey v. Commonwealth*, a police officer testified to his "conclusion that there had to have been some type of misconduct or [he] would not have received a complaint." 797 S.W.2d 483, 485 (Ky. 1985). The Court determined this testimony was inadmissible because the officer was commenting on the victim's credibility not because the officer was commenting on the defendant's guilt. *Id.*

The Supreme Court distinguished these cases in the unanimous opinion of *Commonwealth v. Wright*, *supra*. In *Wright*, a witness who had negotiated a cocaine purchase with a third party testified against Wright, saying "Wright monitored the transaction 'like he was . . . part of it.'" *Wright*, 467 S.W.3d at 248. Just as Stevenson argues here, the defendant in Wright said a witness "invaded the province of the jury by expressing an opinion regarding [the defendant's] guilt . . . ." *Wright*, 467 S.W.3d at 248. The Supreme Court held the witness "was simply testifying about what she observed and drawing inferences based on her life experience. Therefore, we discern no error in the admission of [the] testimony." *Id.* at 249.

We conclude the officers' testimony in this case is more akin to that of the witness in *Wright*. Especially under palpable error review, we are not convinced that either Hagen or Patton's testimony swayed the jury's decision such that, absent the testimony, there is a reasonable possibility that the jury would have reached a different outcome. Ample eyewitness testimony was available to the jury upon which guilt could be fixed. We are convinced that outcome would not have changed if neither officer had been asked the question. Finding no manifest injustice, there is no palpable error here warranting reversal.

CONCLUSION

Based on the foregoing analysis, we affirm the August 1, 2017, judgment and sentence of the Fayette Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Brandon Neil Jewell
Assistant Public Advocate
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Andy Beshear
Kentucky Attorney General

Perry T. Ryan
Assistant Attorney General
Frankfort, Kentucky