IMPORTANT NOTICE

NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

RENDERED: FEBRUARY 23, 2006
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2004-SC-1076-MR DATE 3-16-06 Ellen Gowin D.C.

CLARENCE RICE APPELLANT

V. APPEAL FROM KENTON CIRCUIT COURT
HON. GREGORY BARTLETT, JUDGE
INDICTMENT NO. 04-CR-00469

COMMONWEALTH OF KENTUCKY APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

The Appellant, Clarence Rice, was convicted of first-degree trafficking in a controlled substance (second offense) and persistent felony offender, first-degree. He was sentenced to twenty years imprisonment and appeals to this court as a matter of right. Ky. Const. § 110(2)(b).

The Appellant alleges that the trial court erred (1) in denying his motion to suppress evidence seized in a warrantless search of his automobile post-arrest, (2) in allowing Sergeant Stevens to testify as an expert, despite the Commonwealth's failure to give adequate notice, (3) by allowing the prosecution to define reasonable doubt during voir dire, (4) by refusing to instruct the jury on facilitation, (5) by overruling his motion for directed verdict on the count of first-degree trafficking on insufficiency of the evidence, and (6) in admitting testimony

regarding a loaded pistol clip found in his glove compartment because the prejudicial effect of such testimony vastly outweighed its probative value.

After reviewing the record, we affirm Appellant's convictions.

FACTS

On January 25, 2004, Officer Michael Taylor (Taylor) of the Elsmere Police Department saw the Appellant, Clarence Rice, leave the Elsmere Minit-Mart and get into the passenger side of his 1989 red Cadillac, which at the time, was being driven by Troy Brown. Taylor knew Rice and at the time believed there was an outstanding warrant for him. Taylor then pulled behind Rice's vehicle, got out and knocked on the passenger-side window of Rice's vehicle. Rice rolled down his window and Taylor informed him he believed there was an outstanding warrant for his arrest. Rice responded that he did not believe there was. Taylor then called dispatch to confirm and was notified that there was an active warrant for Rice.

He then informed Rice that the warrant was current and asked him to step out of the vehicle. Rice rolled up his window, spoke to the driver and put his left hand in his pocket. At this point, Taylor testified he saw the tip of a plastic baggie in Rice's left hand which was partially in his pants pocket. Rice then opened the door and fled.

Taylor pursued him on foot for approximately one and a half blocks until Rice gave himself up. He was then arrested and searched, but no contraband was found in his possession. He was then placed in another cruiser and taken to the Elsmere police station.

Taylor then retraced his flight path to see if Rice had divested himself of any contraband during the flight. Finding nothing, he returned to the Minit-Mart where Officer Girdler had arrived and secured the scene, including Rice's vehicle. At this time the driver, Troy Brown, was outside the vehicle. Taylor then called to have the vehicle towed off the Minit-Mart parking lot.

Prior to the tow truck's arrival, Taylor searched the vehicle and discovered two baggies – a "corner-cut baggie" inside the other - containing a total of 5.14 grams of crack cocaine. It was located on the rear, passenger-side floor board of the car. He also discovered a pistol clip containing five 9mm bullets in the glove compartment. The car was later towed.

Prior to trial, the trial court overruled Appellant's motion to suppress the evidence. Thereafter, on October 8, 2004, a Kenton County jury found Rice guilty of trafficking in a controlled substance, first-degree, second offense. During the sentencing phase, Rice was found to be a first-degree persistent felony offender and sentenced to twenty years in the state penitentiary.

I. THE SEARCH OF APPELLANT'S AUTOMOBILE WAS LAWFUL AS A SEARCH INCIDENT TO AN ARREST AND AS A SEARCH OF AN AUTOMOBILE BASED UPON PROBABLE CAUSE.

The Appellant argues that the search was unreasonable and therefore violated the Fourth Amendment of the United States Constitution, as well as Section 10 of the Kentucky Constitution. We disagree.

The facts of the search are not in dispute and have been previously set out. Although the trial court did verbally mention from the bench that there was "sort of a combination" of different theories justifying the search, the trial court's written order did not use one exception to bolster another in order to uphold the

search. Instead, it found three separate and independent grounds for justifying the search.

In Thornton v. United States, 541 U.S. 615, 124 S.Ct. 2127, 158 L.Ed.2d 905 (2004), the Supreme Court held that an officer can search the passenger compartment of a vehicle incident to a lawful arrest of a "recent occupant." In acknowledging this rule to be a natural extension of New York v. Belton, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981), the Supreme Court held that the "Belton Rule" applied even when the officer made initial contact with the arrestee after the arrestee had left the vehicle. The Appellant here makes the same argument as was made in Thornton and Belton, to the effect that the right to search the vehicle terminates once the arrestee no longer has access to the vehicle in order to access weapons or effect destruction of evidence.

"[U]nder the strictures of petitioner's proposed 'contact initiation' rule, officers who do so will be unable to search the car's passenger compartment in the event of a custodial arrest, potentially compromising their safety and placing incriminating evidence at risk of concealment or destruction. The Fourth Amendment does not require such a gamble." Thornton, 541 U.S. at 621-22, 124 S.Ct. at 2131. Moreover, "the right to search an item incident to arrest exists even if that item is no longer accessible to the defendant at the time of the search. So long as the defendant had the item within his immediate control near the time of his arrest, the item remains subject to search incident to an arrest." Northrop v. Trippett, 265 F.3d 372, 379 (6th Cir. 2001)(citation omitted). As many commentators have noted, the rule under Belton and Thornton is no longer based upon the fact that the arrestee might grab a weapon or evidentiary item

from his car. See Myron Moskovitz, A Rule in Search For a Reason: An Empirical Re-examination of Chimel and Belton 2002 Wis. L. Rev. 657, 675 (2002); David M. Silk, When Bright Lines Break Down: Limiting New York v. Belton 136 U. Pa. L. Rev. 281, 290-291(1987).

In Clark v. Commonwealth, 868 S.W.2d 101 (Ky. App. 1993), it was stated that searches incident to legal arrest "provide, in correlation to automobiles, that where there is probable cause to support a custodial arrest, that same probable cause justifies a search of the entire automobile passenger compartment." Id. at 107 (citing Commonwealth v. Ramsey, 744 S.W.2d 418, 419 (Ky. 1987); New York v. Belton, 453 U.S. 454, 460-63,101 S.Ct. 2860, 2864-66, 69 L.Ed.2d 768 (1981)). "[S]ection 10 of the Kentucky Constitution provides no greater protection than does the Federal Fourth Amendment." Lafollette v. Commonwealth, 915 S.W.2d 747, 748 (Ky. 1996).

In light of the outstanding warrant for Appellant's arrest, which officer Taylor had just confirmed, the Appellant's flight and the "baggie" which Taylor saw in Rice's hand just before his flight and the further fact that Appellant had not thrown the contraband away during his flight, sufficient justification existed for searching the Appellant's vehicle as soon as practical after the arrest and the search of the flight path. If nothing else, Thornton recognizes that the distance one moves from a vehicle, prior to arrest, is not a factor in the determination of the legality of the search, under circumstances such as existed in this case.

Thus, the arrest and search of the Appellant's vehicle under these circumstances was proper, notwithstanding that he fled the vehicle. Thus, the trial court ruled properly that the evidence seized should not be suppressed.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING AN OFFICER TO TESTIFY THAT THE AMOUNT OF THE DRUGS IN RICE'S POSSESSION WERE INDICATIVE OF TRAFFICKING.

Sergeant Stephens of the Northern Kentucky Drug Strike Force testified at trial as an expert witness regarding trafficking. He testified that "hard core users" of crack cocaine were addicted and will seek to get high continuously. Typically, these users could only afford hits between $20 and $40 dollars at a time and would buy from .01 to .03 grams of crack. Larger "rocks" of crack weighed 3.5 grams to 4 grams and would range in price from $100 dollars to $150 dollars per gram. Smaller rocks could be broken off from the larger ones and sold at prices ranging between $10 and $30, depending upon the size of the rock. He also testified that dealers often had "corner cut bags" to hold small rocks of crack for sale. In the instant case, the bag found in Appellant's car contained 5.14 grams of crack cocaine and had a smaller "corner cut bag" with a single rock inside an outer bag with the rest of the crack. Sergeant Stephens performed no tests, scientific or otherwise, and made no written reports in connection with the case.

Appellant objected to Sergeant Stephens's testimony on the grounds that no notice had been given that Sergeant Stephens would be called as an expert or as to the substance of his testimony. The trial court overruled the objection on the grounds that RCr 7.24(1) does not require notice or disclosure of witnesses. The trial court based its ruling in part on the fact that it could not have been too surprising that the Commonwealth would call an expert to testify about the difference between a drug user (possessor) and a drug trafficker. In fact, the Commonwealth noted that an expert is always called in possession versus

trafficking cases. Commenting on the Appellant's allegations of *surprise* as to this issue, the trial court noted: "Defense attorneys can't play stupid."

The Defendant argues that the absence of such disclosures violated his right to meaningfully confront witnesses against him according to the Sixth Amendment of the United States Constitution and that the fact of non-disclosure is a factor to be considered on the prejudicial scale in KRE 403 evaluations.

However, in times past, the Commonwealth was under no duty to give information to the accused as to what proof would be introduced, except such as was conveyed through the charge set out in the indictment. See Patterson v. Commonwealth, 66 S.W.2d 513, 515 (Ky. 1933), overruled in part by Jett v. Commonwealth, 436 S.W.2d 788 (Ky. 1969); see also, Lewis v. Commonwealth, 190 Ky. 160, 227 S.W. 149, 150 (1920). Today however, criminal discovery is controlled primarily by RCr 7.24 and 7.26, along with RCr 6.22 and RCr 5.16(3). RCr 7.24(1) provides, in relevant part:

> Upon written request by the defense, the attorney for the Commonwealth shall . . . permit the defendant to inspect and copy . . . any relevant . . . (b) results or reports of physical or mental examinations, and of scientific tests or experiments made in connection with the particular case . . . .

RCr 7.26 deals with witness statements, which is not relevant here since there were no such statements or reports from this witness. Neither is RCr 6.22 or RCr 5.16(3) relevant to the considerations herein. Moreover, witness lists are not required under RCr 7.24(1) and may not be compelled. Lowe v. Commonwealth, 712 S.W.2d 944, 945 (Ky. 1986) see also, King v. Venters, 596 S.W.2d 721 (Ky. 1980).

Trained police officers, relying on their personal experience, routinely testify that certain quantities of drugs are more consistent with dealing, rather than personal use. See Sargent v. Commonwealth, 813 S.W.2d 801 (Ky. 1991); Kroth v. Commonwealth, 737 S.W.2d 680 (Ky. 1987). "[I]t is difficult to imagine that Quinn's counsel, an experienced attorney, would fail to realize that the government would offer testimony that the amount of crack cocaine found in Quinn's car was more consistent with distribution than with possession for personal use." Quinn v. United States, 230 F.3d 862, 866 (6th Cir. 2000). Quinn upheld the trial court's admission of the same type of evidence, even though FRCP 16(a)(1)(b) requires that a summary of any expert testimony be given to the opposing party in criminal cases. FRCP 16(a)(1)(b), unlike RCr 7.24(1), is not restricted to only "results or reports of physical or mental examinations, and of scientific tests or experiments made in connection with a particular case." Since the witness's testimony did not deal with "physical or mental examinations, and of scientific tests or experiments made in connection with a particular case," there was no requirement of disclosure under RCr 7.24(1). In that no statement or report existed, RCr 7.26(1) was inapplicable.

"The rules of civil procedure shall be applicable in criminal proceedings to the extent not superseded by, or inconsistent with, [the] rules of criminal procedure." RCr 13.04. However, "it is patently clear from a reading of RCr 7.24 that the rule was designed to govern pretrial discovery in criminal trials." Robinson v. Commonwealth, 86 S.W.3d 54, 57 (Ky. App. 2002). Thus CR 26.02(4) is inapplicable.

The Appellant relies upon Vires v. Commonwealth, 989 S.W.2d 946 (Ky. 1999), for his argument that, RCr 7.24 notwithstanding, the Commonwealth is obligated to provide the defense with the substance of *all experts opinions*. Vires, however, dealt with the opinions of a Kentucky State Police accident reconstructionist based upon a physical site examination.[1] In fact, the officer did not do an accident reconstruction but merely testified to physical site facts, which had been disclosed to the defense through the photographs and the police investigative report. With the disclosure of the relevant site photography having been made, Vires was decided on the basis that the officer "did not rely upon any undisclosed premise as a basis for his conclusion." Vires, 989 S.W.2d at 948.

In this case however, Sergeant Stephens's testimony did not involve a physical site examination and the points which the testimony addressed, the amount of the crack cocaine and the existence of the "corner cut bag," were disclosed to, and known by, the Appellant. Thus, Vires is inapplicable to the facts in this case.

Moreover, Sergeant Stephens testified in this case and was on the stand, subject to cross-examination. The confrontation clause guarantees a defendant the right to confront witnesses against him and his right to cross-examination. It does not guarantee that his cross-examination will be successful, in whatever way, or to whatever extent, a defendant might wish. See Delaware v. Fensterer, 474 U.S. 15, 20, 106 S.Ct. 292, 295, 88 L.Ed.2d 15 (1985).

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[1] Vires assumed that the RCr 7.24(1)(b) reference to "results or reports of physical or mental examinations" referred to physical site examinations, rather than just medical physical or mental examinations. It did not, however, decide this question.

Simply put, the issue faced by Appellant was one that Appellant knew would be an issue in this type of case and his right to confront the issue and his right to cross-examine the opposing witnesses were not impinged by the rulings of the court.[2]

III. THE PROSECUTION IMPROPERLY DEFINED REASONABLE DOUBT DURING VOIR DIRE.

During voir dire, the prosecutor commented on the standards of reasonable doubt, stating:

> Beyond a reasonable doubt. I didn't grow up in the Matlock era, but apparently my parents did and they are huge fans of it. I can't tell you what beyond a reasonable doubt is. I can't define it. I can tell you it is not beyond a shadow of a doubt, as Matlock used to say that it was.

At this point the defense made an objection, which was overruled by the trial court. The prosecutor, however, continued her comments on reasonable doubt as follows:

> When we talk about reasonable doubt, we can just talk about doubts in general. Who's married? We have a lot of married people here. Before you got married did you have some doubts about whether or not you wanted to get married? Probably? I am not married. The entire thing just scares me to death. I would have a lot of doubts that I am not even sure are reasonable. Despite the fact that you still have doubts, did you still get married anyways? They were reasonable, that's alright. So when you think about reasonable doubt, *that's what I want you to think about it.* (Emphasis added). There's no way that you can prove to an absolute certainty that your marriage was going to be perfect, that you guys were going to get along all the

[2] Rice had the opportunity to cross-examine the officer during his expert qualification outside the presence of the jury, but did not undertake to ask any such questions.

> time, that you would never fight, that at no point would you have to sleep on the couch, you couldn't do that. *That's beyond a reasonable doubt.* (Emphasis added).

Having already objected to this line of comment, Rice made no further objection to the prosecution's continuing comments.

In Commonwealth v. Callahan, 675 S.W.2d 391, 393 (Ky. 1984), we held it improper for counsel to give any definition of "reasonable doubt at any point in the trial." The comment criticized in Callahan was as follows:

> The burden is on the Commonwealth to prove Mr. Callahan and Mr. Pack guilty beyond a reasonable doubt. You may ask yourself exactly what does that mean. My interpretation of that is that if there is any doubt in your mind at all, it doesn't matter how much doubt. I mean if it's just a little bit, then you have to find my client not guilty.

Id. at 392.

Again in Marsch v. Commonwealth, 743 S.W.2d 830, 832-34 (Ky. 1988), we reversed for improper comments concerning the meaning of reasonable doubt. In Marsch, we noted:

> [t]he Commonwealth engaged at length in a discussion of reasonable doubt. He asked Kirk if he equated "beyond a shadow of a doubt" with "reasonable doubt." *He provided an example using himself as a hypothetical witness to an accident and suggested to the prospective juror that his hypothetical testimony would satisfy the 'reasonable doubt' standard, but might not eliminate any possibility of doubt.* Finally, the attorney for the Commonwealth explained that there was a significant distinction between being convinced beyond a reasonable doubt and being convinced beyond all or a shadow of a doubt.

Id at 832 (emphasis added).

Then in Sanders v. Commonwealth, 801 S.W.2d 665, 671 (Ky. 1990), we again reviewed a prosecutor's voir dire comments.

> In a criminal trial, do you realize that the Commonwealth has the burden of proving the defendant guilty beyond a reasonable doubt, that does not mean beyond all doubt or a shadow of a doubt? Would any of you all hold the Commonwealth to a higher standard of proof than the reasonable doubt standard?

Id. at 671.

Having some question as to whether or not the foregoing comment was even error, we affirmed the conviction noting:

> Assuming, without deciding, that an error would have occurred had objection been raised and overruled, we are wholly unconvinced, considering the circumstances, that absent this putative error the defendant may not have been found guilty of a capital crime, or the death penalty may not have been imposed.

Id. at 671.

We noted in Sanders that a remark, similar to the one above, which we had also reviewed in Callahan, "did not constitute any attempt to define reasonable doubt." Id. at 671, n.4.

In Caudill v. Commonwealth, 120 S.W.3d 635, 675 (Ky. 2003), we affirmed the conviction, although the prosecutor made the statement that "just because there is a question or some unanswered part of the case, that [doesn't mean] there is automatically reasonable doubt." We held that such comment "did not impermissibly define reasonable doubt." Id. at 675 (citing Callahan, 675 S.W.2d 391(Ky. 1984). Moreover, as in Sanders, "we [were] wholly unconvinced, considering the circumstances, that absent this putative error the [appellants] may not have been found guilty of a capital crime, or the death penalty may not have been imposed." Id. at 675-76.

Then again in Johnson v. Commonwealth, _ _ _ S.W.3d _ _ _, _ _ _WL 3500288, *3-4 (Ky. 2005), we affirmed a conviction where the prosecutor made the following comment:

> Let's try an interactive thing. Let me get a show of hands. How many have heard the term "Beyond a shadow of a doubt"?
>
> [Prospective jurors respond.]
>
> I think it's safe to say everybody raised their hand. Not surprisingly because this week, especially since I've mentioned it, you'll see it on the TV or you'll hear it on the radio, or you'll read it in the newspaper, or you'll read it in a novel or a book or something--beyond a shadow of a doubt. Now listen carefully. There ain't no such thing in the criminal justice system in the United States of America. That's one of the myths that has arisen. *Nobody has to prove anything beyond a shadow of a doubt.*

In affirming in Johnson, we held:

> [T]he prosecutor in this case simply informed the jury that the Commonwealth did not have to prove its case beyond a shadow of a doubt and that the proper standard was proof beyond a reasonable doubt. He offered no hypothetical to explain "beyond a reasonable doubt" and did not engage in a lengthy discussion of the standard. Furthermore, the prosecutor . . . told the jury that he could not define "reasonable doubt."

Id. at *9.

We further stated: "Additionally, even if one is convinced that the statement by the prosecutor in this case constituted error, that error was harmless." Id. at *10. It was significant to us that every juror on the panel in Johnson raised their hand when asked whether or not they were familiar with the term "beyond a shadow of doubt."

probative evidence and beyond a reasonable doubt.'" Taylor v. Kentucky, 436 U.S. 478, 485-86, 98 S.Ct. 1930, 56 L.Ed.2d 468 (1978)(citation deleted). Allowing counsel to define the term "reasonable doubt" would dilute the standard. The analogy offered by counsel in this case did just that and was error.

The Commonwealth argues, however, that this issue is not preserved as the Appellant did not renew his objection to the prosecutor's subsequent comments. We disagree. Under RCr 9.22, when an appropriate objection is made to a particular line of inquiry, it is sufficient to preserve the issue for review as to that line of inquiry upon the grounds of the objection previously made. Osborne v. Commonwealth, 867 S.W.2d 484, 491-92 (Ky. App. 1993).

> We have previously noted counsel's . . . objection to the relevancy of the testimony. Counsel then noted that he felt bound by Kentucky law and statutory authority to concede the admissibility of the evidence. Hence, he did not make a contemporaneous objection each time the evidence was introduced. We are inclined to conclude that, under the circumstances and given counsel's reasonable interpretation of case law, his comments should be deemed [an] . . . adequate objection.

Id. at 491- 92.

To place a burden upon counsel to object on the same grounds each and every time the particular line of inquiry resumes would be wasteful of the court's time and resources, as well as disrespectful of the court's rulings.

The above notwithstanding, RCr 9.24 commands that, "the court . . . must disregard any error . . . in a proceeding that does not affect the substantial rights of the parties." Thus, even errors of a constitutional magnitude are subject to harmless error analysis. Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705, 24 A.L.R.3d 1065 (1967). See also Jackson v. Commonwealth,

717 S.W.2d 511(Ky. App. 1986). "What [this] really boils [down] to is that if upon a consideration of the whole case this court does not believe there is a substantial possibility that the result would have been any different, the irregularity will be held nonprejudicial." Abernathy v. Commonwealth, 439 S.W.2d 949, 952 (Ky.1969), *overruled on other grounds by* Blake v. Commonwealth, 646 S.W.2d 718 (Ky. 1983).

In this case Officer Taylor saw the tip of the clear plastic baggie extending from the Appellant's left hand, which was partially in his pants pocket. The Appellant then fled, was caught and his vehicle searched. The officers then found the baggie containing the 5.14 grams of crack cocaine with the smaller, corner cut bag with a single rock of crack, inside the outer bag. It was located in the floor behind the passenger's seat, from which Appellant had fled. No one had been sitting in the rear seat of the vehicle at the time.

Upon these facts, the Appellant was convicted of trafficking in a controlled substance first-degree, second offense. Given the evidence, the jury verdict would have been no different had the remarks regarding reasonable doubt not been made. Thus, the error was harmless.

IV. THERE WAS NO EVIDENCE TO SUPPORT A FACILITATION INSTRUCTION

The Appellant argues he was entitled to a facilitation instruction. "Although a trial judge has a duty to prepare and give instructions on the whole law of the case, including any lesser included offenses which are supported by the evidence . . . *that duty does not require an instruction on a theory with no evidentiary foundation* . . . ." Houston v. Commonwealth, 975 S.W.2d 925, 929

(Ky. 1998)(emphasis added). Here the trial court determined there was no evidence to support the instruction and refused to give it.

In fact, there was no evidence of any kind that the driver of the car (Troy Brown) had possessed the crack cocaine found behind Appellant's car seat. The evidence was that Appellant possessed it – a portion of the bag was seen in his hand at the time his hand was partially in his pocket, just before he fled.

This aside, if a jury could have possibly inferred the driver was the possessor of the cocaine, there was no evidence that Rice knew that Brown possessed it and that he was attempting to facilitate the offense. The court committed no error in this regard.

V. APPELLANT WAS NOT ENTITIELD TO A DIRECTED VERDICT

The Appellant next argues he was entitled to a directed verdict of acquittal on the first-degree trafficking charge due to insufficiency of the evidence. Not having preserved the error, he asks that it be reviewed under the "palpable error" rule, RCr 10.26. To be reviewable under the palpable error rule, there must be error in the first instance, even though unpreserved. Here there was simply no error regarding sufficiency of the evidence. The standard on appeal is whether, under the evidence at hand, it would be clearly unreasonable for a jury to find guilt. Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991). That is clearly not the case.

Appellant was confronted in the passenger seat of his own car. The officer saw the tip of the plastic baggie in Appellant's hand, which was partially in his pants pocket. When the officer moved to get a better view, he lost sight of Appellant's left hand momentarily and thus Appellant had the opportunity to place

the baggie in the floor behind his car seat. He fled, was apprehended, the car was searched, and the baggies and the drugs were found. The officer verified that Appellant hadn't thrown anything away during the pursuit. This is sufficient evidence that Appellant was the one who placed the baggies behind the car seat before he fled. See Burnett v. Commonwealth, 31 S.W.3d 878, 881 (Ky. 2000).

Thus, given the quantity of the drugs found (5.14 grams of crack) and the "corner cut baggie," along with Sergeant Stephens's testimony regarding the amounts normally possessed by users versus traffickers, it was plainly reasonable for the jury to infer the drugs were possessed with the intent for sale. There being no error, there can be no "palpable error."

VI. EVIDENCE THAT A LOADED PISTOL CLIP WAS FOUND IN THE APPELLANT'S CAR WAS ADMISSIBLE

Lastly, the Appellant argues that the trial court erred in admitting evidence that the officers found a pistol clip with five 9mm bullets in the Appellant's glove compartment, in that it was unduly prejudicial under KRE 403. The issue was preserved based upon Appellant's timely objection to the evidence.

Sergeant Stephens, in his testimony about the different indicia between users and traffickers, testified that dealers often carry weapons to protect their drugs or cash. The pistol clip with the bullets was found in the glove compartment of the Appellant's vehicle, although no weapon was located. However, Officer Girdler, who arrived on the scene approximately 10-15 seconds after Officer Taylor had radioed he was in foot pursuit of Appellant, testified that when he arrived, Troy Brown, the driver of Appellant's vehicle, was out of the car and talking on a payphone at the Minit-Mart. Officer Girdler, upon his arrival, patted down Mr. Brown and found no weapons. The opportunity existed,

however, for the pistol to have been secreted away – had one been there. That aside, the existence of the clip in Appellant's vehicle is circumstantial evidence that a pistol, which the clip fits, exists – wherever its location. Thus, evidence of the finding of the clip was relevant circumstantial evidence that there had been a pistol in the Appellant's vehicle at one time or another. This itself was relevant under Sergeant Stephens's testimony on the different indicia between users and traffickers.

However, the evidence must also past the test of KRE 403. KRE 403 provides that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of undue prejudice." However, in using the rule, "[w]e must look at the evidence in the light most favorable to its proponent, 'maximizing its probative value and minimizing its prejudicial effect.'" Sutkiewicz v. Monroe County Sheriff, 110 F.3d 352, 360 (6th Cir. 1997). "An appellate court should reverse a trial court's ruling under KRE 403, only if there has been an abuse of discretion." Thompson v. Commonwealth, 147 S.W.3d 22, 36 (Ky. 2004).

In this case there was an issue as to whether or not the Appellant was guilty of possession or guilty of trafficking. Sergeant Stephens testified that traffickers generally have weapons they use to protect their drugs or cash. Evidence of a loaded clip in the Appellant's car was some evidence that he had, or did have at sometime or another, a weapon in his vehicle. In that there was no evidence that he had ever used the weapon, or had ever used any weapon inappropriately, and given the fact that a substantial number of people have weapons, the prejudicial effect of this evidence would be minimal. It would,

however, still remain relevant, under the evidence presented, for whatever value it had, as to whether or not he was a possessor or trafficker of the cocaine found in his possession. Thus, the trial court did not abuse its discretion in allowing entry of this evidence.

For the reasons aforesaid, the judgment and sentence of the trial court is affirmed.

Graves, Johnstone, Roach, Scott and Wintersheimer, JJ., concur. Lambert, C.J., and Cooper, J., dissents, for the reasons set forth in his dissenting opinion in Johnson v. Commonwealth, ___ S.W.3d ___, ___ (slip op. at 8-11), 2005 WL 3500288 (Ky. 2005), i.e, that it was reversible error to permit the prosecutor to define "reasonable doubt."

COUNSEL FOR APPELLANT

Shannon Dupree
Assistant Public Advocate
Department of Public Advocacy
100 Fair Oaks Lane, Suite 302
Frankfort, Kentucky 40601

COUNSEL FOR APPELLEE

Gregory D. Stumbo
Attorney General of Kentucky

James C. Shackleford
Criminal Appellate Branch
1024 capital Center Drive
Frankfort, KY 40601