

**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**NOT TO BE PUBLISHED OPINION**

***THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.***

Supreme Court of Kentucky **FINAL**

2005-SC-000388-MR

DATE 11-9-06 E.A. Gentry, Jr.

TOMMY G. LAMBERT, JR.

APPELLANT

V.

ON APPEAL FROM KNOX CIRCUIT COURT  
HONORABLE RODERICK MESSER, JUDGE  
NO. 04-CR-00076-001

COMMONWEALTH OF KENTUCKY

APPELLEE

**MEMORANDUM OPINION OF THE COURT**

AFFIRMING

On March 4, 2004, Appellant, Tommy Gene Lambert, Jr., entered "John Rays," a business in Knox County and robbed the proprietor, Ray Messer. Appellant selected a \$3.00 item for purchase and paid Messer with a \$5.00 bill. Messer retrieved a wad of bills, about \$130.00, from his pocket to give Appellant change. Appellant roughly grabbed the money from Messer's hands, causing Messer to fall down and injure his hand on a metal table. Appellant fled the scene with the money.

Because Appellant had introduced himself to Messer while shopping at John Rays on a prior occasion, Messer knew Appellant's identity and was able to provide the sheriff with his name and address. The sheriff located Appellant and brought him to the hospital where Messer was being treated for the cut on his hand. Messer verified that Appellant's was the perpetrator of the crime. Consequently, Appellant was indicted on charges of first degree robbery and being a persistent felony

offender in the first degree. Upon a jury verdict Appellant was convicted of both offenses. In accordance with the jury's recommendation, Appellant was sentenced to twenty years imprisonment. He appeals to this court as a matter of right.<sup>1</sup>

Appellant's sole claim of error concerns the prosecutor's questioning of Appellant on cross-examination. Both Messer and the sheriff testified to certain statements made at the hospital when Messer identified Appellant. When Appellant's testimony differed with that of Messer and the sheriff, the prosecutor asked Appellant if Messer and the sheriff were lying. Appellant contends that the prosecutor's attempt to cause Appellant to characterize these two witnesses' testimonies as lies requires reversal of his convictions.

We first note that no contemporaneous objection was made to the prosecutor's questions, rendering the issue unpreserved.<sup>2</sup> However, Appellant asserts that the prosecutor's improper questioning constituted palpable error.<sup>3</sup> The Commonwealth concedes error in the solicitation of testimony that requires characterization of other witnesses' testimony as lies, but argues that the error was harmless.<sup>4</sup> We disapprove of the tactics of the prosecutor, but conclude that the error was not palpable.

Appellant's reliance on Howard v. Commonwealth<sup>5</sup> and Moss v. Commonwealth<sup>6</sup> is misplaced. Howard, indeed, established that asking a witness to characterize another witness's testimony as a lie exceeds the proper bounds of cross-

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<sup>1</sup> Ky. Const. § 110(2)(b).

<sup>2</sup> RCr 9.22.

<sup>3</sup> RCr 10.26.

<sup>4</sup> RCr 9.24.

<sup>5</sup> 227 Ky. 142, 12 S.W.2d 324 (1928).

<sup>6</sup> 949 S.W.2d 579 (Ky. 1997).

examination. However, in that case, the error was preserved by contemporaneous objection, and there were numerous other errors which, cumulatively, deprived Howard of a fair trial. In Moss, this Court reaffirmed the standard for proper cross-examination as set out in Howard and further stated:

A witness should not be required to characterize the testimony of another witness, particularly a well-respected police officer, as lying. Such a characterization places the witness in such an unflattering light as to potentially undermine his entire testimony. Counsel should be sufficiently articulate to show the jury where the testimony of the witnesses differ without resort to blunt force.<sup>7</sup>

However, in Moss, we also stated that “Appellant’s failure to object and our failure to regard this as palpable error precludes relief.”<sup>8</sup> Thus, we explicitly rejected the contention that such an error was palpable. However, in another case where the error was preserved, a deeper analysis would be required to determine whether the error was prejudicial or harmless. Nevertheless, in this case Moss is dispositive.

Accordingly, Appellant’s convictions are affirmed.

All concur.

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<sup>7</sup> Id. at 583.

<sup>8</sup> Id. at 583.

**COUNSEL FOR APPELLANT:**

Donna L. Boyce  
Appellate Branch Manager  
Department of Public Advocacy  
Suite 302, 100 Fair Oaks Lane'  
Frankfort, KY 40601

**COUNSEL FOR APPELLEE:**

Gregory D. Stumbo  
Attorney General of Kentucky  
Room 118, Capitol Building  
Frankfort, KY 40601

Gregory C. Fuchs  
Assistant Attorney General  
Criminal Appellate Division  
Office of the Attorney General  
1024 Capital Center Drive  
Frankfort, KY 40601-8204