

**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**NOT TO BE PUBLISHED OPINION**

**THIS OPINION IS DESIGNATED “NOT TO BE PUBLISHED.” PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.**

Supreme Court of Kentucky

FINAL

2006-SC-000157-MR

DATE 9-13-07 EWA/GT/HP/C.

JUSTIN KIRK

APPELLANT

ON APPEAL FROM SIMPSON CIRCUIT COURT  
HONORABLE WILLIAM R. HARRIS, JUDGE  
NO. 04-CR-000155

V.

COMMONWEALTH OF KENTUCKY

APPELLEE

**MEMORANDUM OPINION OF THE COURT**

**AFFIRMING**

Appellant, Justin Kirk, was convicted by a Simpson County jury of trafficking in a controlled substance in the first degree, second offense, and of being a persistent felony offender in the first degree and was sentenced to twenty-six (26) years in prison. Appellant now appeals to this Court as a matter of right. Ky. Const. § 110(2)(b). For the reasons set forth herein, we affirm Appellant's convictions.

On October 16, 2003, police conducted video surveillance at 508 Brevard Street in Franklin, Kentucky. Appellant was caught on this video selling \$40 worth of crack cocaine to an undercover officer. The entire transaction was recorded on videotape. Appellant was arrested, indicted, and ultimately convicted of the crimes set forth.

In his sole assignment of error, Appellant requests palpable error review of certain police testimony. RCr 10.26. The testimony was that the police either knew Appellant from prior dealings or were able to discover Appellant's identity through photographs. Appellant claims that such testimony violated KRE 404(b) by implying that Appellant had committed previous criminal activity since police knew him or was able to obtain his picture. He further argues that even if such evidence was admissible, he was entitled to notice pursuant to KRE 404(c).

Manifest injustice requires a finding by this Court that "the defect in the proceeding was shocking or jurisprudentially intolerable." Martin v. Commonwealth, 207 S.W.3d 1, 4 (Ky. 2006). "When an appellate court engages in a palpable error review, its focus is on what happened and whether the defect is so manifest, fundamental and unambiguous that it threatens the integrity of the judicial process." Id. at 5.

In this case, Sergeant Scott Wade testified that he was the one who set up surveillance of the area where Appellant was videotaped selling drugs. He testified that he recognized Appellant early in the surveillance because he had "contacts" with Appellant in the past and had seen him on multiple occasions. Detective Jerry Smith, the undercover agent who bought the drugs from Appellant, testified that he didn't know Appellant from past dealings, but that Detective Wade pointed Appellant out to him and had shown him pictures of Appellant prior to the controlled buy. Finally, Detective Jackie Hunt testified that he also witnessed the drug transaction. He had rented a house near the surveillance location as part of the investigation. During his investigation, Detective Hunt saw Appellant, at the surveillance location often. He testified he

learned Appellant's identity prior to the drug transaction in this case by showing pictures of Appellant to local police officers, officers of the court, and probation and parole.

KRE 404(b) states that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person . . . [but] may, however, be admissible (1) if offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." The Commonwealth contends that the officers' testimony regarding how they became familiar with Appellant was admitted not to prove Appellant's character for prior dealings with police, but rather to establish his identity, as well as to explain the fact he was videotaped.

The crux of Appellant's case was whether Appellant was the person videotaped in the drug transaction. Since, Appellant had not been arrested immediately after the transaction; his counsel argued that that police could have conclusively identified the drug dealer if they had made an arrest at the time of sale. Thus, details regarding the officers' familiarity with and/or ability to identify Appellant were relevant and probative to buttress their identity of him.

In any event, even if the testimony was error or erroneously admitted without proper notice pursuant to KRE 404(c), such error simply does not amount to manifest injustice. The evidence of guilt was overwhelming in this case. Two separate videotapes of the transaction were admitted at trial.<sup>1</sup> Three police

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<sup>1</sup> The first video was submitted by Sergeant Wade and showed the transaction from across the street. The second video was submitted by Detective Smith and showed the transaction from Smith's vehicle as he approached Appellant in the vehicle and engaged in the transaction.

officers testified that they personally witnessed the transaction and recognized Appellant as the drug seller. Moreover, the officers' reference to photographs and prior dealings was vague and non-specific.<sup>2</sup> In light of these circumstances, we find no manifest, fundamental, or blatant defect which threatened the integrity of the judicial process. Brooks v. Commonwealth, 217 S.W.3d 219, 225 (Ky. 2007) ("To prove palpable error, Appellant must show the probability of a different result or error so fundamental as to threaten his entitlement to due process of law.") Accordingly, Appellant is not entitled to a new trial.

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

All sitting. Lambert, C.J.; Cunningham, Minton, Noble, Schroder and Scott, JJ., concur.

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<sup>2</sup> We disagree with Appellant's contention that his involvement with previous criminal activity was clearly implied by the officers' reference to photographs, which the jury surely assumed were nothing other than "mug" shots, and prior contacts. We do not find such inferences inescapable or blatantly apparent from the officers' testimony.

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