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RENDERED: AUGUST 25, 2011
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2010-SC-000150-MR

EARL STRANGE APPELLANT

V.

ON APPEAL FROM POWELL CIRCUIT COURT
HONORABLE FRANK A. FLETCHER, JUDGE
NO. 09-CR-00157-002

COMMONWEALTH OF KENTUCKY APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant Earl Strange appeals from his convictions of two counts of trafficking in a controlled substance in the first degree. He was sentenced to twenty years' imprisonment, and he appeals to this Court as a matter of right. Ky. Const. § 110(b)(2). As to one of the two charges, Appellant argues that the trial court erred in denying a directed verdict and in failing to instruct the jury on criminal facilitation. Appellant also alleges numerous instances of prosecutorial misconduct. Finding no reversible error, we affirm.

I. BACKGROUND

The charges in this case arose from two controlled drug buys arranged by the Kentucky State Police through confidential informant Betty Campbell. The first transaction occurred on November 10, 2008. Campbell, working with

KSP Detectives Shawn Fearin and Donnie McGraw, agreed to purchase twenty Percocet pills for $600 from Appellant. In an audio recording that was played at trial, Campbell called Appellant and said, "I need to pick up twenty of them, like I told you." Appellant replied, "Well, come on."

The detectives wired Campbell with an audio/video recording device. They also gave her $600 in cash with recorded serial numbers. After a search of Campbell's person and her vehicle, the three drove to Appellant's mother's house, where the transaction was to take place. On the way, Campbell received a phone call from Appellant, telling her that he would be ten minutes late.

Campbell arrived at the home of Phyllis Hale, Appellant's mother. The two spoke while they waited for Appellant to arrive. At this point, a portion of the video recording was redacted, because Campbell and Hale spent several minutes discussing the fact that Appellant had charges related to marijuana in Georgia.

Appellant eventually arrived and asked, "How many do you want?" Campbell replied, "Twenty." Campbell can be heard counting out twenty pills, and then counting out $600.[1] Campbell returned to Detectives Fearin and McGraw and confirmed that she had made the purchase from Appellant. She turned over twenty 30-milligram Percocet pills.

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[1] The video recording equipment had a loose wire during the November 10, 2008 transaction, and much of the video did not record properly. However, the jury could hear the audio recording of the transaction. The various audio and video recordings are not part of the record before this Court, but were transcribed by the court reporter and made part of the trial transcript.

The second controlled buy occurred on November 25, 2008. Campbell again arranged to purchase twenty 30-miligram Percocet pills. In a recorded telephone call, Campbell said, "I need twenty of them, Earl Ray." A male voice, which Campbell identified as belonging to Appellant, responded, "I wish you wouldn't say my name like that. . . . This is Rog." They agreed to meet at Phyllis Hale's house. Detectives Fearin and McGraw once again searched Campbell, wired her with an audio/video recording device, and provided her with $600.

During the drive to the house, Appellant's wife Samantha called Campbell. The call was not recorded, but the substance of the call was that, because Samantha was in trouble and Appellant was not, she would make the deal and leave Appellant out of it.[2] However, when Campbell arrived at Hale's home, both Appellant and Samantha Strange were present. Campbell said, "I'm sorry. I shouldn't have said that, Roger. I'm sorry, Roger." Appellant responded, "Well, I don't know who you're around or nothing . . . and I don't want my name . . . . I'm paranoid anyway."

Later, Campbell can be heard counting out twenty pills and $600. She received twenty 30-milligram Percocet pills in a plastic baggie, which she turned over to the detectives. Campbell confirmed that she handed Appellant the money, and that he took the money and helped Samantha count the pills. She stated that she purchased the pills from Appellant.

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[2] Samantha Strange apparently had pending charges at this time.

At trial, the Commonwealth called Detective Fearin and Betty Campbell as witnesses, in addition to playing the various recordings of the two drug buys for the jury. The Commonwealth also called two drug analysis technicians, who testified that the pills Campbell purchased during both buys contained oxycodone, a Schedule II narcotic. Appellant's case consisted mostly of cross-examining the Commonwealth's witnesses. Appellant also attempted to call Samantha Strange as a witness; however, she asserted her Fifth Amendment right not to testify.[3]

Appellant was charged as a principal on both counts of first-degree trafficking in a controlled substance. The jury found Appellant guilty of both counts. During the penalty phase of the trial, the court admitted into evidence Appellant's prior convictions for criminal facilitation of second-degree burglary, first-degree possession of a controlled substance, second-degree possession of a controlled substance, second-degree criminal possession of a forged instrument, complicity to third-degree burglary, two counts of criminal trespass, and theft by unlawful taking. Appellant's nephew testified, as did Appellant. The jury recommended, and the trial court imposed, two ten-year sentences, to run consecutively for a total of twenty years' imprisonment. This appeal followed.

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[3] Earl and Samantha Strange were co-defendants with respect to the November 25, 2008 transaction. At the time of Appellant's trial, Samantha Strange had entered a plea of guilty, which had not yet been accepted by the circuit court.

II. NOVEMBER 25, 2008 TRANSACTION

Appellant raises two arguments related solely to the November 25, 2008 drug transaction. Appellant's wife Samantha was present for this transaction, and both of Appellant's arguments relate to her involvement.

A. Denial of Directed Verdict

Appellant argues that the trial court erred in not granting his motion for a directed verdict on the November 25, 2008 trafficking charge. "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) (citing *Commonwealth v. Sawhill*, 660 S.W.2d 3 (Ky. 1983)). In ruling on a motion for a directed verdict, the trial court must assume that the evidence for the Commonwealth is true. *Benham*, 816 S.W.2d at 187.

Campbell arranged the transaction over the phone with Appellant. When Campbell called Appellant by his name, he responded, "I wish you wouldn't say *my* name like that." (emphasis added). A few minutes later, Samantha Strange called Campbell and arranged the deal. However, when Campbell arrived, Appellant was present along with his wife. Campbell testified that Samantha "messed with the pills." But Campbell remained adamant that "Earl did the

deal." Samantha counted the pills, but Appellant helped her. On the video recording of the transaction, Appellant can be seen taking the money.[4]

"A person is guilty of trafficking in a controlled substance in the first degree when he knowingly and unlawfully traffics in: a controlled substance, that is classified in Schedules I or II which is a narcotic drug . . . ." KRS 218A.1412(1).[5] "'Traffic . . . means to manufacture, distribute, dispense, sell, transfer, or possess with intent to manufacture, distribute, dispense, or sell a controlled substance." KRS 218A.010(40).

Based on the evidence presented, viewed in the light most favorable to the Commonwealth, it was not clearly unreasonable for a jury to find that Appellant was guilty of first-degree trafficking in a controlled substance with respect to the November 25, 2008 transaction. The evidence established that Appellant arranged the drug transaction over the phone with Betty Campbell. He was present when the transaction took place. He helped count the pills, and he took the money. This is sufficient to establish that Appellant sold pills, which, according to the Commonwealth's proof, contained a Schedule II narcotic. The trial court did not err in denying a directed verdict on the charge.

[4] When Appellant moved for a directed verdict at trial, the trial court characterized the video of the November 25, 2008 transaction: "[F]rom what I viewed of the video . . . the money . . . was handed to Mr. Strange, and Mr. Strange is the one who took the pills . . . ." Appellant did not dispute this characterization of the video evidence. While the video recording of the transaction is unfortunately not part of the record on appeal, we are confident in the trial court's ability to properly characterize the video evidence.

[5] KRS 218A.1412 and KRS 218A.010 have been subsequently amended. All references are to the versions in effect at the time of the transactions at issue in this case.

B. Lack of Jury Instruction on Facilitation

Appellant argues that, with respect to the November 25, 2008 charge, he was entitled to a jury instruction on criminal facilitation. This issue is not preserved, as Appellant never requested a facilitation instruction at trial. Therefore, Appellant requests review for palpable error pursuant to RCr 10.26.

Where the defendant is charged only as a principal, and not under a theory of complicity, criminal facilitation is *not* a lesser included offense of trafficking. *Houston v. Commonwealth*, 975 S.W.2d 925, 930 (Ky. 1998). Nevertheless, a defendant is entitled to an instruction on a "lesser" uncharged crime, but only where the instruction is supported by the evidence, and "only when a guilty verdict as to the alternative crime would amount to a defense to the charged crime, *i.e.*, when being guilty of both crimes is mutually exclusive." *Hudson v. Commonwealth*, 202 S.W.3d 17, 22 (Ky. 2006).

To be guilty of first-degree trafficking in a controlled substance as a principal, Appellant had to personally commit the crime of trafficking. By contrast, a facilitation conviction would require proof that Appellant, acting with knowledge that *another person* is committing or intending to commit the crime, engaged in conduct which knowingly provided the *other person* with the means or opportunity to do so. KRS 506.080(1). "Facilitation reflects the mental state of one who is 'wholly indifferent' to the actual completion of the crime." *Perdue v. Commonwealth*, 916 S.W.2d 148, 160 (Ky. 1995). Appellant could not be guilty of both first-degree trafficking and of criminal facilitation;

therefore, the crimes are mutually exclusive and an instruction on criminal facilitation can be appropriate under *Hudson*.

"Prior to the giving of an instruction, however, there must be evidence to support it." *Monroe v. Commonwealth*, 244 S.W.3d 69, 75 (Ky. 2008) (citing *Thompkins v. Commonwealth*, 54 S.W.3d 147 (Ky. 2001)). For Appellant to be guilty of criminal facilitation, the jury would be required to find that Appellant had knowledge of the crime, and engaged in conduct that knowingly provided Samantha Strange with the means or opportunity to commit the crime, but that he remained wholly indifferent to whether the crime was committed. KRS 506.080(1); *Perdue*, 916 S.W.2d at 160. The evidence established that Appellant arranged the sale when Betty Campbell called him, that he helped Samantha count the pills, and that he took the money from Betty Campbell. Under these circumstances, no reasonable juror could conclude that Appellant was involved and had knowledge, but was wholly indifferent to the commission of the crime. *See Monroe*, 244 S.W.3d at 75. Therefore, there was no error in not instructing the jury on criminal facilitation, and thus no palpable error.

III. EVIDENCE OF OTHER BAD ACTS

Appellant argues that error occurred when the jury heard Betty Campbell's statement that Appellant been charged with drug-related offenses in Georgia and her speculation that Appellant was conducting another drug transaction. While Appellant characterizes the admission of this evidence as prosecutorial misconduct, the record makes it clear that this is an evidentiary

error only, and we will address it as such. *See Stopher v. Commonwealth*, 57 S.W.3d 787, 806 (Ky. 2001) ("[D]espite the trend to classify many unpreserved issues as prosecutorial misconduct, such actually only occurs when a conviction is obtained by the knowing use of false evidence.") (citing *Davis v. Commonwealth*, 967 S.W.2d 574, 579 (Ky. 1998)).

Prior to trial, defense counsel moved to redact portions of the November 10, 2008 audio/video recording that dealt with Appellant's prior unrelated drug charges in Georgia. As previously mentioned, the prosecutor agreed to redact the portion of Betty Campbell's conversation with Phyllis Hale, Appellant's mother, in which the two discussed Appellant's Georgia drug charges. The prosecutor and defense counsel also agreed to review the tape to determine if any other portions needed to be redacted. The record does not reveal whether the parties did in fact review the tape. However, no further portions of the tape were redacted, and Appellant did not object to the two statements that he now alleges to be error. Therefore, we conclude that these objections are unpreserved, and review only for palpable error pursuant to RCr 10.26.

The two statements to which Appellant objects occurred on the audio/video recording of the November 10, 2008 transaction after Betty Campbell returned to her vehicle, and was speaking to Detectives Fearin and McGraw. Campbell stated:

> You all know Earl Ray said he didn't get caught for nothing. But Phyllis said that Georgia's charging him and Samantha both for them four joints $865 per joint. Said if he was a Florida – Florida or Georgia resident, he'd have lost – he'd have got that, plus, he'd

> lost his license and two years' probation.

A few moments later, Campbell also said:

> Oh. And he called while I was in there, and said he was sorry, he'd been held up on some traffic, and he was on his way. I said, okay. Evidently, somebody had a bigger buy than we did. Or we wouldn't had to wait a few minutes, would we?

These statements reflected bad acts—or possible bad acts—by Appellant. Their only probative value would have been to show that Appellant acted in conformity with his prior bad acts. Therefore, these statements were inadmissible pursuant to KRE 404(b), and it was error for the jury to hear them. However, Appellant did not object to the playing of these statements, and these isolated remarks do not rise to the level of palpable error.

> Under RCr 10.26, an unpreserved error may be reviewed on appeal if the error is "palpable" and "affects the substantial rights of a party." . . . . Generally, a palpable error "affects the substantial rights of a party" only if "it is more likely than ordinary error to have affected the judgment." We note that an unpreserved error that is both palpable and prejudicial, still does not justify relief unless the reviewing court further determines that it has resulted in a manifest injustice; in other words, unless the error so seriously affected the fairness, integrity, or public reputation of the proceeding as to be "shocking or jurisprudentially intolerable."

Miller v. Commonwealth, 283 S.W.3d 690, 695 (Ky. 2009) (internal citations omitted).

Betty Campbell's comments were fleeting, and they occurred after she had completed the transaction with Appellant. Because the statements were

not part of the transaction that was the subject of the charge, the jury may have paid little attention to the comments. Additionally, the discussion of Appellant's Georgia charges referred to relatively minor charges of marijuana possession, for which Appellant was apparently fined. The second comment was a reference to another possible sale of illegal drugs, but the comment was pure speculation by Campbell.

Furthermore, the evidence against Appellant was strong, making it highly unlikely that the other bad acts evidence influenced the verdict. The facts of both drug transactions were essentially undisputed by Appellant. He offered no defense to the November 10, 2008 charge, and did not dispute the essential facts. It is therefore unlikely that these passing comments by Betty Campbell had any effect on the verdict at all, much less an effect so profound as to warrant relief under RCr 10.26. No palpable error occurred with respect to the evidence of Appellant's other bad acts.

IV. ALLEGED PROSECUTORIAL MISCONDUCT

In addition to the evidentiary issue discussed above, Appellant makes four additional claims of prosecutorial misconduct, one of which occurred during the guilt phase of the trial, while the others occurred during the penalty phase. Appellant concedes that three claims of prosecutorial misconduct are unpreserved, and therefore requests that this Court review for palpable error pursuant to RCr 10.26. We also conclude that the fourth claim is unpreserved, and thus review only for palpable error.

A. Vouching for the Commonwealth's Witness (Guilt Phase)

In the guilt phase of a trial, "[w]here there was no objection, we will reverse [for prosecutorial misconduct] only where the misconduct was flagrant and was such as to render the trial fundamentally unfair." *Duncan v. Commonwealth*, 322 S.W.3d 81, 87 (Ky. 2010) (citing *Barnes v. Commonwealth*, 91 S.W.3d 564 (Ky. 2002); *Partin v. Commonwealth*, 918 S.W.2d 219 (Ky. 1996)). In determining whether a prosecutor's misconduct was "flagrant," we consider "(1) whether the remarks tended to mislead the jury or to prejudice the accused; (2) whether they were isolated or extensive; (3) whether they were deliberately or accidentally placed before the jury; and (4) the strength of the evidence against the accused." *Hannah v. Commonwealth*, 306 S.W.3d 509, 518 (Ky. 2010) (quoting *United States v. Carroll*, 26 F.3d 1380, 1385 (6th Cir. 1994)).

Appellant argues that the prosecutor improperly vouched for Betty Campbell's credibility during her testimony. Campbell testified that she was convicted of burglary in Morgan County, and that she had served time in prison as a result. Campbell also admitted that she was under investigation in Powell County (the county where Appellant's trial occurred), because her vehicle had been involved in another burglary. Detective Fearin testified that Campbell's cooperation with police in Powell County had been mentioned to the Commonwealth Attorney in Morgan County.

During direct examination, the prosecutor asked Campbell about the extent of any benefit she had received from working as a confidential informant:

> Q: Ma'am, did you get any benefit from working with the police in these investigations?
>
> A: No, sir, I didn't.
>
> Q: Well, by *benefit*, I mean, did you get anything at all?
>
> A: I got paid – I got paid $150 per buy. But as far as if you're asking did I get a deal on a – on a sentence or anything like that, no, I didn't.
>
> Q: I know you didn't, because I've never dealt with you.

Appellant argues that this final statement by the prosecutor was improper, and that it amounted to misconduct. We agree that the comment was improper. "The personal opinion of the prosecutor as to the character of a witness is not relevant and is not proper comment." *Moore v. Commonwealth*, 634 S.W.2d 426, 438 (Ky. 1982) (citing *Barnett v. Commonwealth*, 403 S.W.2d 40 (Ky. 1966)). *See also United States v. Francis*, 170 F.3d 546, 550 (6th Cir. 1999) (holding that improper vouching by the prosecutor includes implying a special knowledge of the witness's credibility).

However, the prosecutor's brief remark, although improper, did not amount to palpable error. There was no dispute about the fact that Betty Campbell had never faced charges in Powell County. While the prosecutor did

improperly vouch for Campbell's credibility, the jury also heard that Campbell had been convicted of burglary in Morgan County, thus lessening any prejudice resulting from Campbell's lack of a record in Powell County. The prosecutor's comment, while deliberate, was also fleeting and isolated, coming briefly at the end of a line of questioning. Finally, as discussed previously, the evidence against Appellant was strong and largely undisputed. The alleged misconduct in this case was not flagrant. Appellant received a fundamentally fair trial.

B. Penalty Phase

Appellant alleges three instances of prosecutorial misconduct during the penalty phase of his trial. Where, as here, the alleged error is unpreserved, we review only for palpable error pursuant to RCr 10.26, i.e., whether Appellant has suffered "manifest injustice."

> An appellate court's review of alleged [penalty phase prosecutorial misconduct] to determine whether it resulted in "manifest injustice" necessarily must begin with an examination of both the amount of punishment fixed by the verdict and the weight of evidence supporting that punishment. Other relevant factors, however, include whether the Commonwealth's statements are supported by facts in the record and whether the allegedly improper statements appeared to rebut arguments raised by defense counsel.

Young v. Commonwealth, 25 S.W.3d 66, 74 (Ky. 2000) (footnotes omitted).

1. Cross-Examination of Appellant

Appellant testified during the penalty phase of the trial. He explained his history of drug abuse, and said that he sold pills to support his habit. He

added, "I didn't go over here and rob this old woman . . . for her disability check, or I didn't go out here and steal all this stuff off this guy that he's worked 30 years for." He added that, while he was in jail awaiting trial, he had seen people "caught selling hundreds of pills" receive drug court in lieu of jail time.

During cross-examination, the prosecutor asked Appellant if he could name a single person who had sold hundreds of pills and received drug court. This line of questioning continued for some time, and included the following:

> Q: Name one person that sold 15 [pills] and got drug court.
>
> A: Your Honor, I'm done.
>
> Court: Sir, this is cross-examination. Now you –
>
> A: I don't have anything else to say.
>
> Court: You made the statements.
>
> Q: That's right, you made the statement and accused me. Now, you go ahead and back it up, big boy.
>
> A: I'm just telling you what comes through the jail.
>
> Q: No sir, you're not. You can't tell us anything that came through the jail even close to that, **because there's not a word of that the truth.** Now, you tell us one person that sold as many as 15 pills and got drug court in this county.
>
> . . . .
>
> Q: Well, looks to me, with all of these people getting these great benefits you're not

getting, you could name at least one name.

A: Nah, I –

Q: And you can't.

A: I don't name names.

Q: No, you don't name names. **You just sell dope to children.**

A: I'm not here selling dope to children or here for molesting children. I promise you.

(emphasis added). Appellant raises two assignments of error related to this cross-examination.

First, Appellant argues that the prosecutor's statement, "there's not a word of that the truth" was improper. We agree. When he made this comment, the prosecutor was no longer conducting legitimate cross-examination. He was, in effect, testifying. *See Moore*, 634 S.W.2d at 438 (prosecutor's personal opinion is not relevant and not proper); *see also Chipman v. Commonwealth*, 313 S.W.3d 95, 101 (Ky. 2010) (citing *Miller v. Commonwealth*, 283 S.W.3d 690, 695 (Ky. 2009)) (arguments of counsel are not evidence). While the prosecutor's comment was intended to rebut Appellant's statement, it was also not supported by evidence in the record.

The prosecutor was, of course, free to argue during closing argument that Appellant had lied because he could not identify a single example to back up his claim. *See Soto v. Commonwealth*, 139 S.W.3d 827, 873 (Ky. 2004)

(quoting *Slaughter v. Commonwealth*, 744 S.W.2d 407, 412 (Ky. 1987)) ("A prosecutor may comment on tactics, may comment on evidence, and may comment as to the falsity of a defense position."). But to effectively testify during cross-examination was improper.

Second, Appellant argues that the prosecutor's comment, "You just sell dope to children" was improper and amounted to injecting a false issue, because there was no evidence that Appellant had sold drugs to children. We agree that the comment was improper. There was no evidentiary basis for the prosecutor's comment. "A prosecutor may not deliberately inject into the case an issue prejudicial to the rights of the defendant without some reasonable basis for raising the issue." *Hicks v. Commonwealth*, 805 S.W.2d 144, 151 (Ky. App. 1990) (citing *Rowe v. Commonwealth*, 269 S.W.2d 247 (Ky. 1954); *Taylor v. Commonwealth*, 269 Ky. 656, 108 S.W.2d 645 (1937)). Nor did the comment rebut arguments raised by defense counsel. However, the prosecutor's remark came as part of cross-examination, and Appellant had the opportunity to rebut the improper charge. The prosecutor did not follow up on this line of questioning, and moved on.

Although both of these comments by the prosecutor were improper, we cannot say that they individually or collectively resulted in manifest injustice. This is particularly true in light of the strong evidence supporting Appellant's sentence. The jury recommended, and the trial court imposed, the maximum possible sentence of 20 years' imprisonment. However, Appellant had a

lengthy prior criminal record, which included multiple convictions related to burglary and trespass in addition to prior drug-related convictions. In addition, during the penalty phase of the trial, Appellant admitted to years of drug use, and to selling drugs to support his habit. He stated he had not had a job for 17 years, which suggested that he had sold drugs for a very long period of time. These factors strongly support the jury's recommendation that Appellant receive the maximum sentence. While the prosecutor's remarks were highly improper, they did not result in manifest injustice.

2. Improper Questioning

During the penalty phase, the defense called Chris Crowe, Appellant's nephew. Crowe testified about growing up with Appellant, and Appellant's problems with using drugs. Crowe stated that he was "in the dark" about the charges against Appellant, but that it was Crowe's opinion that Appellant was not a drug dealer. On cross-examination, Crowe stated that he had not lived in the area for over two years.

> Q: . . . . So the time that your uncle's over here peddling this dope out, you weren't even here, so you don't know if he's a drug dealer or not, do you?
>
> A: I – my opinion, I wouldn't say he's a drug dealer, no. I'd say he was a drug user. Like you said, I wasn't up here. I don't know what he was doing.
>
> Q: **Well, these people over here [the jury] think he's a drug dealer. You telling them they're wrong?**
>
> A: No sir, I am not.

. . . .

Q: You weren't even in the area, so you don't know how big a drug dealer he is, do you?

A: No, sir.

(emphasis added).

Appellant argues that it was improper to ask Crowe to characterize the jury as being wrong in its verdict. First, we disagree with Appellant that this argument was preserved by an objection at trial. Defense counsel actually objected to a subsequent question by the prosecutor, and not to the question that Appellant now claims to be prosecutorial misconduct. We therefore review for palpable error only.

We agree that the question was improper. This Court has held that "[a] witness should not be required to characterize the testimony of another witness . . . as lying. Such a characterization places the witness in such an unflattering light as to potentially undermine his entire testimony." *Moss v. Commonwealth*, 949 S.W.2d 579, 583 (Ky. 1997). This danger is all the more serious when the witness is asked to characterize the jury in an unflattering light.

However, we do not believe that this error rises to the level of manifest injustice. *See Young*, 25 S.W.3d at 74. The prosecutor's comment, while improper, was an attempt to rebut Crowe's statement that Appellant was not a drug dealer. And the prosecutor rebutted this statement by using the fact of

Appellant's conviction. Crowe was not attempting to be dishonest with the jury; rather, he was relating the facts as he understood them. When the prosecutor asked him if he was saying the jury was wrong about Appellant being a drug dealer, Crowe responded that he was not. He agreed that he did not know whether Appellant was a drug dealer. Crowe qualified his statement, and essentially admitted that he had not heard everything the jury had heard. Therefore, we find it highly unlikely that this comment by the prosecutor placed Crowe in such an unflattering light as to undermine his other testimony. The error did not amount to manifest injustice requiring reversal.

For the foregoing reasons, the judgment of the Powell Circuit Court is affirmed.

All sitting. All concur.

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