

RENDERED: JULY 30, 2004; 2:00 p.m.  
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2003-CA-000587-MR

GLENN EDWARD LARGE

APPELLANT

v. APPEAL FROM HARDIN CIRCUIT COURT  
HONORABLE T. STEVEN BLAND, JUDGE  
ACTION NO. 02-CR-00106

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING  
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BEFORE: BARBER, KNOPF, AND TACKETT, JUDGES.

KNOPF, JUDGE: Glenn Edward Large appeals from a judgment of conviction by the Hardin Circuit Court imposing a jury verdict finding him guilty of trafficking in marijuana in or near a school<sup>1</sup> and being a persistent felony offender in the first degree.<sup>2</sup> On appeal, Large raises three allegations of error,

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<sup>1</sup> KRS 218A.1411. Trafficking in a controlled substance in or near a school is a class D felony.

<sup>2</sup> KRS 532.080(3).

none of which were properly preserved for review. Finding no error, palpable or otherwise, we affirm the conviction.

On June 12, 2001, officers from various Hardin County police departments arranged for a controlled drug buy using an informant, Nancy Elliott. Detective Randy Gibbs testified he provided Elliott with a quantity of marked bills and a tape recorder. He also stated that he searched Elliott prior to sending her out to make the purchase.

Elliott then arranged to meet Large for the transaction. Detective Gibbs observed a male enter the car with a t-shirt draped over his head. Elliott testified that Large entered the car and directed her to drive to the parking lot of a convenience store. Upon arriving at that location, Large sold Elliott the marijuana. Elliott also played the tape recording for the jury and identified Large as the person in the car. The Commonwealth presented evidence showing that the packages delivered to Elliott contained marijuana and that the parking lot where the transaction occurred was within 1,000 yards of a school. Large did not testify during the guilt phase of the trial.

The jury found Large guilty of trafficking in marijuana for the June 12 transaction, but acquitted him on another trafficking charge. During the penalty phase, the Commonwealth presented evidence to establish that Large had been previously

convicted of two felony offenses. Large then testified, admitting that he had sold the marijuana to Joyce but stating that he never intended to sell marijuana near a school. On cross-examination, Large admitted to the facts of the sale and that he had been convicted of two prior felonies. The jury found Large to be a persistent felony offender in the first degree and fixed his sentence at a total of fifteen years, which the trial court imposed.

Large raises three issues on appeal. He argues that: (1) the Commonwealth failed to provide both the current and the prior name of the informant before trial; (2) the prosecutor improperly commented on his failure to testify during the guilt phase of the trial; and (3) the prosecutor's cross-examination of him exceeded its reasonable scope. Large concedes that he did not make a contemporaneous objection on the latter two issues, but urges this Court to review them under the palpable error standard.<sup>3</sup>

As an initial matter, however, we find that Large did not properly preserve his objections on any of the grounds raised in this appeal. Between the date of the controlled drug buy and the trial, Nancy Elliott married. Prior to trial, the Commonwealth informed the defense that Nancy Joyce would be a

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<sup>3</sup> RCr 10.26.

witness, but did not inform Large that she used to be known as Nancy Elliott. On the morning of trial, Large's counsel objected to the Commonwealth's presenting Elliott as a witness because her former name had not been disclosed. Counsel requested a continuance, noting that he had been unable to discover any background on Nancy Joyce. The trial court suggested that defense counsel use the lunch recess to conduct a records check on Nancy Elliott and to advise the court upon return of any problem. But at the end of the lunch recess, Large's counsel did not refer to the matter again.

RCr 9.22 requires a party to make "known to the court the action which that party desires the court to take or any objection to the action of the court...." Failure to comply with this rule renders an error unpreserved.<sup>4</sup> In this case, Large's counsel did not request any additional relief or a continuance after returning from the lunch recess. Furthermore, there is no suggestion in the record that the Commonwealth intentionally provided the wrong name prior to trial, nor does it appear that the error prevented Large's counsel from adequately cross-examining Elliott. Thus, any error was harmless.

Similarly, we find no error on the other unpreserved issues. During closing arguments in the guilt phase, the

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<sup>4</sup> West v. Commonwealth, Ky., 780 S.W.2d 600, 602 (1989).

prosecutor stated that the evidence presented by the Commonwealth was uncontradicted. Large asserts that this statement amounted to an improper comment on his decision not to testify. Nevertheless, a prosecutor may properly comment on the defendant's failure to introduce witnesses on a defensive matter.<sup>5</sup> The prosecutor's comment in this case merely noted the absence of any contradictory evidence, and was not "manifestly intended to reflect on the accused's silence or of such a character that the jury would naturally and necessarily take it as such to constitute prejudice."<sup>6</sup>

Lastly, Large complains that the prosecutor improperly cross-examined him during the penalty phase regarding the elements of the trafficking offense and his previous felony convictions. However, Large testified on direct regarding the trafficking offense. Therefore, the Commonwealth's questions on the matter were within the reasonable scope of cross-examination.<sup>7</sup> Likewise, the prosecutor's brief question about Large's prior felony convictions was relevant to Large's

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<sup>5</sup> Weaver v. Commonwealth, Ky., 955 S.W.2d 722, 728 (1997); Slaughter v. Commonwealth, Ky., 744 S.W.2d 407, 413 (1987).

<sup>6</sup> Byrd v. Commonwealth, Ky., 825 S.W.2d 272, 275 (1992); *overruled on other grounds* Shadowen v. Commonwealth, Ky., 82 S.W.3d 896 (2002).

<sup>7</sup> See KRE 611(b).

credibility.<sup>8</sup> Furthermore, since the jury had already heard evidence about Large's prior convictions, any prejudice to Large from this brief question was minimal.

Accordingly, the judgment of conviction by the Hardin Circuit Court is affirmed.

ALL CONCUR.

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<sup>8</sup> KRE 609.