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NOT TO BE PUBLISHED

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2003-CA-002613-MR

MARK BREWER

APPELLANT

v. APPEAL FROM POWELL CIRCUIT COURT  
HONORABLE WILLIAM LARRY MILLER, JUDGE  
ACTION NO. 02-CR-00156

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: TACKETT AND MINTON, JUDGES; HUDDLESTON, SENIOR JUDGE.<sup>1</sup>

TACKETT, JUDGE: Mark Brewer appeals from the judgment of the Powell Circuit Court finding him guilty of trafficking in a controlled substance. Brewer argues on appeal that the prosecutor's commentary upon matters not in evidence and his use

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<sup>1</sup> Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

of a personal anecdote in closing arguments made the trial fundamentally unfair. We disagree, and affirm.

Mark Brewer was charged with selling eight Lorcet tablets to police informant John Andrews. The transaction was recorded by a concealed device, but Brewer never confirmed his identity on tape when the informant tried to get him to acknowledge his name. Brewer was not arrested at the time of the transaction, but instead was arrested during a roundup of a number of suspects identified through police informants. Andrews described the man who sold the Lorcets to him as being of medium build and height, having reddish brown hair and a full beard, and being on crutches. When Brewer was arrested weeks later he had a full beard and was still on crutches. At the trial he wore a knee brace outside of his clothing. The defense theory was misidentification, with Brewer arguing that the informant's description does not match his physical characteristics.

During closing arguments, the Commonwealth's Attorney attempted to explain the apparent inconsistencies in the informant's description and Brewer's appearance by arguing that since the transaction took place at around seven in the evening, it was dark outside. Brewer's objection to this argument was sustained, and Brewer did not ask for an admonition or other curative measure. Later in closing, the Commonwealth's

Attorney, over objection, related a personal anecdote in arguing that the discrepancy in height could be explained as simple perception. The anecdote was as follows:

I don't know if any of you remember, in Wolfe County, up there around Pine Ridge, I believe it was - I lived there one time for a short while, when I was building a house in Jackson, and me and my wife went out... and I went up there, and there was this little fellow in a tree stand who was about that high, and looked like he was about ten years old, and he had a gun that long - literally - I mean that very seriously. It went all the way down his leg. And he started talking to me, and he was telling me why he was carrying that gun, was because he had gotten robbed. And he said the fellow that robbed him was about seven foot tall - about my height, he told me. Now I'm not close to seven foot tall. I am about 6'4".

Brewer was convicted of the charged offense and sentenced to five years' imprisonment. This appeal followed.

On appeal, Brewer argues that the prosecutor improperly commented on facts not in evidence, specifically the lighting conditions, in his closing argument, and improperly injected himself into the case by the use of the anecdote, effectively vouching for the witness's credibility. We disagree, and affirm.

The commentary on the lighting conditions does not require reversal. The defense objection to the prosecutor's argument was sustained, and the defense asked for no curative admonition from the court. Brewer argues on appeal that the

prosecutor continued to argue that the lighting conditions were bad even after the objection was sustained. Even if the prosecutor's further commentary was improper, there was no request for curative measures, and the conduct does not rise to the level which would render the result of the trial unreliable. We fail to see how the prosecutor's comment on the lighting conditions, explaining away the informant's description of the defendant's hair color, could have prejudiced the appellant. There were numerous other reasons that the jury could have believed that the informant's description was accurate, most notably that the defendant had a beard and was on crutches both at the time of the transaction and when he was arrested, and that the informant identified Mark Brewer in court as the person who sold him the drugs.

Likewise, we fail to see how the prosecutor's anecdote amounts to vouching for the credibility of a witness. The anecdote is nothing more than a general commentary about how people perceive things, and how perception is sometimes colored by other things - in the case of the boy in the anecdote, presumably by the boy's small stature relative to the prosecutor. It is in no way an attempt to offer personal knowledge of the facts of the case, nor is it an attempt to vouch for the credibility of a witness. No prejudice resulted to the appellant from this anecdote.

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

ALL CONCUR.

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