

RENDERED: MAY 15, 2009; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2007-CA-001646-MR

TERRY KIDWELL

APPELLANT

v. APPEAL FROM BOONE CIRCUIT COURT
HONORABLE JAMES R. SCHRAND, II, JUDGE
ACTION NO. 07-CR-00200

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, CHIEF JUDGE; WINE, JUDGE; BUCKINGHAM, SENIOR JUDGE.

WINE, JUDGE: Appellant, Terry Kidwell (“Kidwell”), appeals as a matter of right from his conviction for receiving stolen property valued at \$300.00 or more and being a persistent felony offender in the second degree. Kidwell failed to preserve the appealed issue and does not request palpable error review under Kentucky Rules of Criminal Procedure (“RCr”) 10.26. Hence, we affirm.

On February 11, 2007, Deputy Dan Delaney (“Deputy Delaney”) of the Boone County Sheriff’s Department was making his routine patrol of a local shopping complex. On this particular night, Deputy Delaney noticed Kidwell drive into the parking lot of the complex. He further noticed that Kidwell had only one operating headlight. He observed Kidwell and two passengers enter a Kroger store and exit sometime thereafter and reenter the subject vehicle. Deputy Delaney decided to follow Kidwell and make a traffic stop for the non-operational headlamp. He called another officer, Mitch Katzbauer (“Deputy Katzbauer”) to alert him that he was about to make a stop. Deputy Delaney activated his lights and pulled Kidwell’s car over. He requested Kidwell’s license and insurance card and asked the two passengers for identification. One of the passengers in the back seat provided a false name.

Deputy Katzbauer arrived on the scene shortly thereafter as Deputy Delaney was attempting to verify the information provided by Kidwell and the two passengers. Deputy Katzbauer approached the vehicle to speak to its occupants. When the woman in the front passenger seat rolled down her window to speak with him, he immediately noticed the smell of marijuana emanating from the vehicle. He asked Kidwell if he could search the car and Kidwell agreed. In the course of the search, Deputy Katzbauer found twenty-six new flash memory cards and flash drives between the front seats of the vehicle. Deputies Delaney and Katzbauer testified that Kidwell said his father had given the cards to him. They further

testified that Kidwell claimed his father did not have a home telephone and the deputies could not call him to verify the story.

At this point, Deputy Delaney called the Kroger store and confirmed that they sold the exact brand and type of memory cards as were found in Kidwell's car. The two deputies, with Kidwell voluntarily following them, walked into the Kroger Store with the memory cards. As they walked through the front doors of the store with the cards, the security alarms went off. A cashier from the store scanned the memory cards at the cash register and confirmed that the cards were sold at the store. A Kroger employee confirmed that the pre-tax value of the cards was slightly over \$300.00 dollars. The store manager walked with Deputy Katzbauer to the aisle where the memory cards were sold and the two men found the area in a state of disarray. Using a scanner, the manager determined that the number of cards missing from inventory matched the number of cards found in Kidwell's vehicle.

Kidwell was arrested and indicted by a Boone County grand jury for receiving stolen property valued at \$300.00 dollars or more and being a persistent felony offender in the second degree. Following a jury trial, Kidwell was convicted of both charges and sentenced to seven years' imprisonment.

At trial, Kidwell's primary defense was that he purchased the memory cards in question and that the cards were not from Kroger. He testified that he purchased the cards for \$8.99 a piece on sale and received a \$4.00 rebate on each one. Kidwell testified that he had over 140 cards at his house, saying that he

wanted so many cards because he used them to store pictures. However, Kidwell admitted that he did not own a computer or have access to a computer at his house. Kidwell stated that he did previously have computer access at Northern Kentucky University when he was a student there during the previous year.

The prosecutor understandably sought to question the credibility of Kidwell's story on cross-examination. The prosecutor asked Kidwell if he had receipts for the memory cards or if he had documentation of any of the rebates he received. Kidwell testified that he did not. The prosecutor also asked if Kidwell had a transcript showing he went to Northern Kentucky University. Defense counsel objected to this question on the basis that he had already testified that he attended the university until December of the previous year. The trial judge overruled the objection, indicating that if Kidwell didn't have a transcript, he could answer accordingly.

On appeal, Kidwell argues that it was improper for the prosecutor to ask him to provide evidence of his innocence, as it is the Commonwealth's burden to prove that he is guilty. Specifically, Kidwell argues that the prosecutor should not have asked him if he had receipts showing the purchase of the memory cards, documentation for the rebates, or a transcript showing that he attended Northern Kentucky University. He argues that the line of questioning inappropriately gave the jury the impression that he had the burden of bringing forth evidence to show his innocence. Kidwell does not claim that the jury was improperly instructed on burden of proof, but argues that burden of production was effectually shifted to

him when the prosecutor questioned him about whether he was able to produce documentation or receipts. Kidwell argues that a “distinct impression” was created in the jurors’ minds that the defendant could be called on to produce evidence.

As an initial matter, we agree with the Commonwealth that this issue is not preserved for review. Defense counsel objected to the Commonwealth’s question concerning the transcript, but did not object to previous questions concerning the receipts or documentation. Further, defense counsel did not object on the basis of the specific grounds raised in this appeal: *that the prosecutor’s questions inappropriately gave the impression that a criminal defendant bears the burden of coming forward with evidence in his defense*. As our Courts have stated many times before, an appellant may not “feed one can of worms to the trial judge and another to the appellate court.” *Kennedy v. Commonwealth*, 544 S.W.2d 219, 222 (Ky. 1976). As Kidwell has not requested palpable error review, we do not address this issue. *See Dant v. Commonwealth*, 258 S.W.3d 12, 21 (Ky. 2008) (holding that an appellate court will not review for palpable error unless requested and briefed by appellant, absent extreme circumstances).

Accordingly, the judgment of the Boone Circuit Court is affirmed.

ALL CONCUR.

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