COMMONWEALTH OF KENTUCKY
KENTUCKY SUPREME COURT
FILE NO. 2009-SC-000221

KENNETH H. JONES — APPELLANT

v.

APPEAL FROM CARLISLE CIRCUIT COURT
HON. TIMOTHY A. LANGFORD, JUDGE
INDICTMENT NO. 08-CR-00009

COMMONWEALTH OF KENTUCKY — APPELLEE

BRIEF FOR APPELLANT, KENNETH H. JONES

Submitted by:

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The undersigned does certify that copies of this Brief were mailed, first class postage prepaid, to the Hon. Timothy A. Langford, Judge, Courthouse, 114 E. Wellington Street, P.O. Box 167, Hickman, Kentucky 42050; the Hon. Michael B. Stacy, Commonwealth's Attorney, 133 N. 4th Street, P.O. Box 788, Wickliffe, Kentucky 42087; the Hon. Mark P. Bryant, Bryant Law Center, PSC, P.O. Box 1876, Paducah, Kentucky 42002; and served by messenger mail to Hon. Jack Conway, Attorney General, Office of Criminal Appeals, 1024 Capital Center Drive, Frankfort, Kentucky 40601 on March 24th, 2010. The record on appeal has been returned to the Kentucky Supreme Court.

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Introduction

Kenneth Jones was convicted of murder in the Carlisle Circuit Court following a trial riddled with error. After excluding evidence crucial to Jones' defense and failing to enforce KRE 615, the trial court gave misleading instructions that lowered the Commonwealth's burden of proof. Jones received a 25-year sentence and appeals a matter of right.

Statement Regarding Oral Argument

Kenneth Jones requests oral argument since this case deals with an issue of first impression, namely the giving of a "no duty to retreat" instruction on behalf of a victim rather than the defendant.

Statement Regarding Cites to the Record

The record on appeal consists of five videotapes labeled one through five, eleven unmarked supplemental tapes of hearings and final sentencing, and two volumes of trial records. The trial tapes do not appear to be marked in chronological order. The trial records shall be cited as TR, Vol. No., Page No. The trial tapes shall be cited as VR 1-5, date stamp, time stamp. Citations ot the unmarked supplemental tapes shall be VR Supplemental, date stamp, time stamp.

Statement of Points and Authorities

Statement of the Case

Appellant, Kenneth Jones, was a father of three and a decorated veteran with over forty years in the Navy. VR 3, 2/20/09 at 1:15:40; 1:17:00; 1:17:50. However, instead of enjoying a peaceful retirement, Kenneth lived in constant fear: fear for his health, fear for his personal safety. Beginning sometime around 2006, Kenneth believed that his trailer was being tampered with and that toxic chemicals were being pumped into his residence. He believed his neighbor, Perry Warren, was at the center of this constant harassment.

Kenneth tried everything he could to protect himself. He added extra caulk throughout his trailer to keep the chemicals out. VR 2, 2/19/09 at 10:35:40. He put padlocks on his shelves and refrigerator. VR 2, 2/19/09 at 10:33:40. He noted the days he smelled chemicals in the trailer on a calendar. Kenneth also wrote notes by his vents and other places of when they had been sprayed with chemicals and whom he believed was responsible. Id. at 10:11:10; 10:39:12. He collected swab samples of the suspected chemicals in plastic bottles for testing. VR 2, 2/19/09 at 10:55:30.

Kenneth turned his home into a fortress. He ran 100 miles of electrified cattle fence around his trailer. He placed seven razor blades, facing upward, on the roof of his trailer to keep intruders intent on poisoning from climbing onto the trailer. VR 2, 2/19/09 at 10:28:40.

Likewise, he secured the underpinning of the trailer to keep people out and wrapped barbed wire around his A/C unit and antenna. VR 5, 2/20/09 at 10:02:10. Kenneth bought five cameras connected to motion detectors in order to photograph anyone on his property. VR 2, 2/19/09 at 10:27:00. He chained and padlocked his front door. Id. at 10:30:50. The back door of his trailer bore a sign warning "danger, unplug electrocution." Id. at 10:32:50. At night Kenneth could be seen patrolling the area from his rooftop and sometimes he shot into the night. VR 4, 1/26/09 at 3:45:50; 4:02:50. Neighbors saw Kenneth around his property in a bullet proof vest. Id. at 3:46:50.

However, his efforts were not limited to self-help. Kenneth Jones repeatedly called the Kentucky State Police and Carlisle County Sherrif's Department seeking protection from his tormentors. He called the Kentucky State Police so many times he was deemed a "1055," someone who make repeated unsubstantiated calls. VR 5, 2/19/09 at 4:43:40. According to the KSP communication supervisor, "1055" is, in layman's terms, the dispatch code for "crazy." Id. at 4:45:50. He also called Carlisle County 911 a number of times alleging chemicals were being pumped into the trailer. Id. at 10:13:20.

Kenneth Jones was so determined to prevent himself from being repeatedly poisoned that he called the Environmental Protection Agency and hired a private investigator. He paid a private investigator $250 to search his trailer for bugs he believed were planted by his neighbors. VR

5, 2/20/09 at 10:00:30; 10:08:10. The investigator found no bugging devices, no signs of break-ins and no chemicals. Id. at 10:14:15-10:05:40. He testified that Kenneth was cordial when he reported his findings but remained "extremely paranoid" and there was "no question" he believed people were spraying chemicals in his home. Id. at 10:06:59.

On March 3, 2008, there was a power outage in Carlisle County. VR 3, 2/20/09 at 2:22:40. Kenneth went to sit in his truck so he could use the heater. Id. at 2:23:15. He saw Perry Warren driving home and followed him so they could talk about the chemicals and some trash Kenneth believed Warren left on his property. Id. at 2:25:30; 2:24:10. Kenneth testified that after years of looking for help with being constantly poisoned with chemicals gasses, he had decided to deal with the matter himself by discussing his issues with Perry Warren Id. at 2:29:00. Kenneth stopped on the drive a few feet from the concrete pad at Warren's residence. Id. at 2:33:40. He testified that while he had a concealed carry license, he was trained never to use his weapon if he did not have to do so. Id. at 2:29:30; 2:34:15. Kenneth put his hands where Warren could see and told him they needed to talk. Id. at 2:34:20.

Warren became irate and demanded Kenneth leave. Kenneth, hands still in the air said he only wanted a minute to talk. Id. Warren drew his weapon and Kenneth considered running back to the truck, but Warren followed with the gun. Id. at 2:36:10. Kenneth said he was leaving but implored Warren to talk about the poisoning and stop the

madness because it had gone on too long. Id. at 2:36:30. Warren pointed the gun at Kenneth and he heard a crack. Id. at 2:38:00. He saw Warren's gun and made a decision, firing back. Id. at 2:40:10. Kenneth testified he believed Warren would have killed him and regretted taking a man's life. Id.

After shooting Warren, Kenneth immediately went to the home of Billy Trevathan and his son Josh, asking them to call 911. VR 4, 1/26/09 at 2:59:30. Both Josh and Billy's recollection of the encounter changed considerably between the shooting and the trial. Josh testified that Kenneth reported he "shot the S.O.B., he won't be putting chemicals in my house anymore." Id. at 2:57:20. Likewise, Billy Trevathan said that Kenneth approached him and stated he "shot the S.O.B." Id. at 3:30:40. However, on cross-examination, Josh admitted that his statement to the police that night was that Kenneth simply stated " I shot Perry." Id. at 3:08:54. Kenneth told Billy that he had tried to shoot Warren in the legs. Id. at 3:57:10.

Kenneth Jones returned to the scene with the Trevathans and surrended peacefully when the police arrived. Kenneth told Detective Jerry Jones he had not come over to the Warren home to harm him, but Warren pulled a rifle on him. VR 2, 2/18/09 at 9:49:30. Jailer Will Ben Martin, like Josh Trevathan, also testified that he had an enhanced memory of March 3, 2008. VR 5, 2/19/09 at 3:46:50. Martin said he noticed blood on Kenneth's hands when he was booked and asked if he

needed help. According to Martin, Kenneth replied, "No sir, I do not. I took care of a job I have been meaning to do for a long time." Id. However, Martin, a shift supervisor and former Carlisle County Sheriff, admitted this was the sort of incident generally requiring a report and he did not make a report on it. Id. 3:55:20. Apparently, none of the other people present reported the statement either. He also could not recall when he reported it to the Commonwealth. Id. at 3:48:50; 3:59:30. He could not explain why no incident report was filed memorializing the statement. Id. at 4:00:55.

During the trial, there were varying opinions on Kenneth Jones' mental state. Billy Trevathan testified that Jones was obsessed with the idea of being poisoned. VR 4, 1/26/09. Richard Johnson, a psychologist from KCPC, testified that Kenneth had no mental disease and he found nothing out of the ordinary. VR 5, 2/19/09 at 1:56:30. He did not see Kenneth as fitting the profile for a delusional disorder. Id. at 1:57:30. On cross-examination, Johnson acknowledged that the pictures of Kenneth's fortified trailer showed Kenneth felt threatened but did not indicate a delusion. Id. at 2:26:30. He noted that while Kenneth was at KCPC, he had not shown signs of paranoia. Nonetheless, he admitted that he had never seen a person go to such lengths to protect himself. Id. at 2:28:20. He conceded there was useful information he did not have at the time of the evaluation, but insisted that Kenneth was not delusional and may just have a very "narrow" problem. Id. at 2:45:30.

Kenneth's lifelong friend Mr. Moyers also took the stand for the defense. However, Moyers seemed to have surprised defense counsel with his testimony. Contrary to every other witness, he noted that he had smelled chemicals in the trailer during a visit. VR 5, 2/20/09 at 10:37:00. He said Kenneth was his best friend and he did not believe he was delusional. Id. at 10:39:10.

By contrast, psychologist Michael Nicholas reached a different conclusion. Nicholas testified that he used a more recent and sophisticated version of the IQ test administered by KCPC. VR 5, 2/20/09 at 11:14:00. The newer addition was much more sensitive to the beginnings of any onset of brain conditions. Id. Nicholas also used more than one test to confirm his findings. Id. at 11:17:30. Kenneth Jones met the criteria for a cognitive disorder, not otherwise specified, likely suffered from a delusional disorder of the persecutorial type. Id. at 11:31:20. Nicholas noted Jones tended to get "stuck" in thinking patterns such as his pervasive belief about chemicals in his home, but could speak normally about other aspects of life like fishing. Id. at 11:35:00; 11:34:40; 11:33:30. Nicholas believed Kenneth Jones' cognitive disorder could be the result of a progressive brain disease, though he could not say if it would be Alzheimer's or vascular dementia without further testing. VR 3, 2/20/09 at 11:46:10. Nicholas said in a situation of stress or a situation that kicked in the delusional process,

Kenneth would not be able to "pull himself back from his actions" or impulsive behavior. Id.

Unlike Dr. Johnson, Nicholas was in a unique position, having examined Jones on an occasion prior to the shooting. VR 5, 2/20/09 at 11:37:50. On January 20, 2007, Jones had gone to the emergency room at Western Baptist Hospital reporting he had been affected by chemicals. Id. at 11:38:20. He was referred to Nicholas by the ER physician since there was no evidence he was being poisoned. Id. at 11:39:20. Nicholas was unable to hold Kenneth for further treatment without a threat of imminent harm. VR 5, 2/20/09 at 11:38:40. However, Nicholas noted--over a year before the shooting--a "need to rule out delusional disorder." TR, Vol. 1, pg. 79.

Perry Warren's mental state at the time of the shooting would also become an issue at trial. While the Commonwealth tried to portray Warren as a "salt of the earth" family man, in reality, Warren had had a methamphetamine problem for some time. His wife, Chera, had first noticed it when he was adding onto a house four years before the shooting. VR 4, 1/26/09. Billy Trevathan was also aware of the meth problem. He said the subject came up when Perry Warren had a mouth sore, and he implored him to quit ingesting meth. Id. at 3:51:00. Timothy Spillard, a toxicologist in charge of the Kentucky Poison Control Center, testified that Warren had a significant amount of meth in his system at the time of death. VR 5, 2/20/09 at 9:46:25. The amount of

meth found in Warren's system is known to cause increased alertness or jitters, agitation and aggressive behavior. Id. at 9:47:10.

Perry Warren's .22 shotgun was found by his body after the shooting. VR 4, 1/26/09 at 3:31:15. Detective Jones conceded that Warren's body was exposed to freezing rain and sleet that could have removed gunshot residue from his hands. VR 5, 2/19/09 at 1:43:50. Nonetheless, the technician from KSP who tested Warren's hands found gunshot residue on the back of Warren's left hand. Id. at 3:28:10. The Commonwealth suggested that the gunshot residue may have resulted from a gunshot wound to Warren's hand; however, the technician explained that because gunshot residue transfers so easily, one cannot predict which part of the hand, or which hand, the residue would be found on. Id. at 3:26:50. He noted that not all guns emit the residue, and exposure to rain could have removed gunshot residue. Id. at 3:20:30.

Despite the evidence, at trial, the Commonwealth wanted to exclude Jones' claim of self-defense. VR 4, 1/26/09 at 9:08:00. Apparently, the Commonwealth believed that KRS 503.055, otherwise known as the "castle doctrine" statute, prevents a self-defense claim anytime a victim uses a weapon on or near his own property. Id. at 9:08:30. The trial court allowed Kenneth to proceed on a self-defense theory, but took the unprecendented step of giving a jury instruction on based on KRS 503.055 in favor of the victim, Perry Warren, discussed in

the argument section *infra*. The trial court noted that the tendered instruction would "cut [the defense's] legs right out from under you." VR 4, 1/26/09 at 9:17:00.

The Commonwealth also elicited testimony that Warren kept spent shells in his truck. VR 3, 2/20/09 at 3:42:40. On cross examination, the Commonwealth accused Kenneth of shooting Perry Warren and then removing the spent shells and .22 from his truck in order to bolster his self defense claim. Id. at 3:44:20. Over objection, the Commonwealth emphasized the castle doctrine instruction to the jury.

Kenneth Jones was found guilty, but mentally ill of murder. He appeals as a matter of right.

ARGUMENT

I. Improper Jury Instructions Shifted the Burden of Proof and Denied Kenneth Jones a Fair Trial

Standard of Review.

This is a mixed question of fact and law. Insofar as the propriety of giving an instruction rests on an examination of the "totality of the evidence introduced," the standard for review is for abuse of discretion. *Muse v. Commonwealth*, 551 S.W.2d 564 (Ky. 1977). However, a question regarding the appropriateness of a jury instruction is also a legal question that must be reviewed *de novo*: the reviewing court must

ensure the jury was instructed in a way that gave an opportunity to determine the merits of any lawful defense. *Curtis v. Commonwealth*, 184 S.W.1105, 1107 (Ky. 1916).

Facts and Preservation

At the start of trial, the prosecution made a motion in limine to exclude self-defense as a defense based on KRS 503.055, otherwise referred to as the "castle doctrine." VR 4, 9:08:30.[1] The trial court agreed the Commonwealth was entitled to the use the language of the statute as an instruction. Id. at 9:14:50. Defense counsel objected, noting that the main issue in the case would be who was the initial aggressor. Id. at 9:11:55. Counsel explained that there was evidence supporting Jones' claim of self defense: Perry Warren had a gun which was apparently fired and Jones would testify that Perry Warren was the initial aggressor. Id.

The trial court went on to opine that defense counsel was entitled to try and "sell" self-defense to the jury, but the Commonwealth was entitled to a "no duty to retreat" instruction on behalf of Mr. Warren. Id.

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[1] KRS 503.055, the statute at issue, states: "[a] person who is not engaged in an unlawful activity and who is attacked in any other place where he or she has a right to be has no duty to retreat and has the right to stand his or her ground and meet force with force, including deadly force, if he or she reasonably believes it is necessary to do so to prevent death or great bodily harm to himself or herself or another or to prevent the commission of a felony involving the use of force.

at 9:16:30. The trial court told defense counsel he believed the instruction "cuts your legs right out from under you." Id. Id. at 9:17:00.

The trial court acknowledged such an instruction was not in "the green book," and set out to draft its own version. Id. at 9:17:00. Defense counsel again protested, asking if there was any proof Perry Warren was aware of the castle doctrine. The trial court stated "I am gonna take judicial notice that everyone in the state with a gun knew about that statute" as it had been the "talk of every restaurant." Id.

Defense counsel renewed his objection to the instructions at the close of evidence, noting that the statute was intended to be used as a defense and not on behalf of the Commonwealth. VR 1, 2/20/09 at 4:49:50. The tendered instruction read:

> 'Use of Defensive Force'- A person who is not engaged in any unlawful activity in any place where he or she has a right to be has no duty to retreat and has the right to stand his or her ground and meet force with force, including deadly force, if he or she reasonably believes it is necessary to do so to prevent death or great bodily harm to himself or another or to prevent the commission of a felony involving the use of force.

The Commonwealth highlighted the instruction during closing argument, asking jurors to read the instruction. VR 1, 2/21/09 at 10:21:20. He stated that the victim had the right to stand his ground and use deadly force. Id. at 10:34:10. Defense counsel made a motion for a judgment notwithstanding the verdict based on the erroneous use of the statute. VR Supplemental, 3/10/09 at 1:41:00.

A. The Self Protection Instruction Given on Behalf of the Victim was Improper and Unprecedented

It is axiomatic that the prosecution must prove all the elements of an offense beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970). It follows that the prosecution must also "disprove beyond a reasonable doubt any defenses that negate an element of the charged offense." *United States v. Dodd*, 225 F.3d 340, 344 (3d Cir.2000) (citing *Patterson v. New York*, 432 U.S. 197, 210 (1977)); see *United States v. Diaz*, 285 F.3d 92, 97 n. 5 (1st Cir.2002); *United States v. Solorzano-Rivera*, 368 F.3d 1073, 1079 (9th Cir.2004); *State v. Hage*, 595 N.W.2d 200, 205 (Minn.1999). Any instruction that effectively pre-empts an affirmative defense violates a defendant's right to due process. *Lybarger v. People*, 807 P.2d 570, 582 (Colo. 1991).

In *Lybarger, supra*, the defendant asserted an affirmative defense to the charge of child abuse resulting in death under the "treatment by spiritual means" provision of the statute. The jury was given instructions that if they found "that the affirmative defense is not available to the Defendant, you should find the Defendant guilty of Child Abuse Resulting in Death." *Id.* at 581. The instructions further stated that the affirmative defense of "treatment by spiritual means" was:

> [N]ot available to the Defendant if the People proved beyond a reasonable doubt that under the circumstances the Defendant ... consciously disregarded a substantial and unjustifiable risk of death to [his daughter] if she did not receive

> available medical care or grossly deviated from a standard of reasonable care in failing to perceive the child's condition and the need for immediate medical attention available to the child.

Id. at 582.

The Court held that the effect of this instruction was to virtually preempt the affirmative defense by telling the jury that as long as the prosecution proved beyond a reasonable doubt that the defendant acted in such a manner so as to satisfy all the elements of the crime charged, then the affirmative defense was simply not an issue for the jury's consideration *Id.* Because a defendant's constitutional right to due process is violated by an improper lessening of the prosecution's burden of proof, such error cannot be deemed harmless. *Id.*, *People v. Garcia,* 113 P.3d 775, 784 (Colo. 2005).

Likewise, in *Gilchrist v. State*, the defendant's conviction was reversed after an instruction was given negating his claim of self defense. 938 So.2d 654, 657 (Fla. App.2006). In *Gilchrist,* the challenged instruction read as follows:

> The use of force not likely to cause death or great bodily harm is not justifiable if you find: one, that Freddie Gilchrist was attempting to commit, committing, or escaping after the commission of aggravated battery upon a pregnant woman....

Id.

This particular instruction was misleading and confusing such that the effect was to exclude the defendant's only defense to the charge

of aggravated battery. *Id.* The instruction is applicable "only in circumstances where the person claiming self-defense is engaged in another, independent forcible felony at the time" and is normally given in situations where the accused is charged with at least two criminal acts, the act for which the accused is claiming self-defense and a separate forcible felony. *Id.*

However, even though Gilchrist was charged with committing two aggravated batteries on two different women, they were both acts for which he claimed self-defense. *Id.* He was not engaged in a separate forcible felonious act at the time of the alleged aggravated batteries. *Id.* The instruction thereby negated his defense for both aggravated batteries by telling the jury that the very act Gilchrist sought to justify precluded a finding of justification. *Id.* To give such a jury instruction is to commit fundamental error. *Id.*

In *People v. Janes*, the defendant sought an affirmative defense to a shooting at his residence under Colorado's corollary of KRS 503.055, referred to as the "make my day" statute. 982 P.2d 300, 302 (Colo. 1999). Janes relied on the statute as an affirmative defense to the shooting of an intruder. *Id.* However, over objection, the trial court tendered a jury instruction that qualified that defense stating:

> To find the defendant not guilty based upon the lawful use of deadly physical force against an intruder, you must find that the victim made a knowingly unlawful entry into the defendant's apartment. An entry that is uninvited is not

> necessarily unlawful. This defense is not available if the victim entered the apartment in the good faith belief he was making a lawful entry.

Id.

Janes argued the instruction denied him the "make my day" defense in the absence of proof that the victim did not enter his residence "in the good faith belief he was making a lawful entry." *Id.* The language in the instruction eliminated the government's burden to disprove Janes' affirmative defense by suggesting to jurors that the "make-my-day" statute did not apply unless the defendant proved that the intruder's entry was knowingly unlawful. *Id.*

The Colorado Court held that the jury could have concluded that the burden was on the defendant to prove the the victim did not enter his residence with the good faith belief that he acted lawfully. *Id.* "Clearly it is not the defendant's burden at trial to prove that the victim did not enter in good faith." *Id.* Because the instructions misled the jury as to the burden of proof, reversible error occurred. *Id.* at 304.

Likewise, the instructions in this case, highlighted by the prosecution, negated Kenneth Jones' defense and lowered the Commonwealth's burden of proof. The trial court acknowledged that the instruction excluded Jones' defense by suggesting that Perry Warren could use any force necessary while on his property. Proper initial aggressor instructions had already been given in the case, the self-

protection instruction served no purpose but to cloud the issues and negate Kenneth Jones' defense.

B. The Instructions Violated Kentucky's "Bare Bones" Principle of Jury Instructions

"Kentucky follows the 'bare bones' principle with respect to jury instructions." *Hodge v. Commonwealth*, 17 S.W.3d 824, 850 (Ky.2000). Instructions should not overemphasize particular aspects of the evidence because evidentiary matters should be left to the lawyers to flesh out during closing arguments. *Id.* Further, this Court has repeatedly cautioned against instructions which amplify an aspect of the evidence or amount to a comment on the evidence. *McGuire v. Commonwealth*, 885 S.W.2d 931 (Ky. 1994); *McKinney v. Heisel*, 947 S.W.2d 32, 34 (Ky. 1997).

The problem with evidentiary instructions is that they over-emphasize an aspect of the evidence. *McGuire*, 885 S.W.2d at 936. In criminal and civil cases, this Court cautions against instructions intruding into evidentiary matters and subnits that better practice suggests such should be omitted from the instructions. *Id.*, citing *Ford Motor Co. v. Fulkerson*, 812 S.W.2d 119, 123 (Ky. 1991). As seen in section A, *supra*, other states have indeed grappled with burden-shifting issues when complex instructions highlight particular evidentiary issues.

The self-protection instruction definition given by the Commonwealth violated this Court's clear mandate. It overemphasized

one piece of evidence--the location of the shooting. It highlighted the improper subquestion of what effect Perry Warren being shot on his property may have on the verdict. It also overemphasized this piece of evidence because it was cumulative in nature--the Commonwealth had already been granted proper initial aggressor instructions. The error was compounded by the Commonwealth's closing argument, which highlighted that Perry Warren had no duty to retreat.

Conclusion

The erroneous jury instructions lessened the Commonwealth's burden of proof and negated his defense in violation of the 6th and 14th Amendment under the United States Constitution and Section Eleven of the Kentucky Constitution. Reversal is the warranted.

II. The Trial Court Denied Kenneth Jones' Right to Present a Defense When It Barred Relevant Evidence That Jones Believed He Was Being Poisoned in the County Jail

Standard of Review

A trial court's decision on whether to admit evidence is reviewed under the abuse of discretion standard. *Clark v. Commonwealth*, 223 S.W.3d 90, 95 (Ky. 2007)

Preservation.

During direct examination, the defense wanted to question Kenneth Jones concerning whether he was having any problems in the county jail. VR 3, 2/20/09 at 3:02:00. The Commonwealth objected on

the basis that such was not relevant to the events of March 3, 2008. Id. Defense counsel approached and explained Jones believed he was being poisoned with arsenic in the jail. Id. at 3:02:30. Defense counsel argued that it added credence to Dr. Nicholas' diagnosis that Jones suffered from delusions. Id. at 3:03:00. The trial court ruled the connection was "tenous at best" and overruled the objection.

During, final sentencing defense counsel again argued the exclusion of the evidence denied Jones a fair trial. VR Supplemental, 3/19/09 at 1:4i:00. Counsel noted that it was relevant evidence for the jury in weighing Jones' insanity defense.

KRE 401.

Evidence is relevant when it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." KRE 401. Relevancy is established by *any* showing of probativeness, however slight. *Springer v. Commonwealth*, 998 S.W.2d 439, 449 (Ky. 1999).

In the instant case, evidence that Kenneth Jones believed the county jail was poisoning him was relevant to his insanity defense. The Commonwealth argued that Jones was feigning insanity after the KCPC-appointed psychologist testified that Jones showed no signs of mental illness and his friend Moyers took the stand and claimed that he, too, smelled chemicals in the trailer. Further, this evidence contradicted

KCPC psychologist Johnson's testimony that Jones never displayed any delusional behavior after the shooting. His belief that he continued to be poisoned in the county jail after the death of Mr. Warren supported Dr. Nicholas' testimony that he suffered from a delusional disorder and subsequently could not conform his actions to the law.

Evidence is admissible when it is "relevant to a full understanding of the circumstances" surrounding the crime charged. *Greene v. Commonwealth*, 244 S.W.3d 128, 137 (Ky. App. 2008). In this case, the jury was denied a full picture of the circumstances surrounding Jones' delusions when the trial barred testimony of his continuing delusions. As this Court acknowledged in *Springer, supra*:

> An item of evidence, being but a single link in the chain of proof, need not prove conclusively the proposition for which it is offered. It need not even make that proposition appear more probable than not.... It is enough if the item could reasonably show that a fact is slightly more probable than it would appear without that evidence. Even after the probative force of the evidence is spent, the proposition for which it is offered still can seem quite improbable.

998 S.W.2d at 449, citing *Turner v. Commonwealth*, 914 S.W.2d 343, 346 (Ky. 1996), quoting, *R. Lawson, The Kentucky Evidence Law Handbook § 2.05, p. 53 (3d ed. Michie 1993)* and *Cleary, McCormick on Evidence 542-43 (3d ed.1984).*:

In this case, the excuded evidence would make a finding of insanity more probable than it would be without it. Further, it demonstrates Jones had more than a beef with Perry Warren, but

suffered from ongoing delusions that his health was being threatened. Thus, the evidence was relevant to a full understanding of the circumstances and its exclusion was error.

The Exclusion of Relevant Evidence Violated Jones' Right to Present a Defense

"The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." *Chambers v. Mississippi*, 410 U.S. 284, 294, (1973). The Due Process Clause affords a criminal defendant the fundamental right to a fair opportunity to present a defense. *Crane v. Kentucky*, 476 U.S. 683, 690-91 (1986).

The Supreme Court of the United States has repeatedly asserted that the right to present a defense at trial is a fundamental right guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution. *Scheffer*, 523 U.S. at 308; *Michigan v. Lucas*, 500 U.S. 145, 149 (1991); *Taylor v. Illinois*, 484 U.S. 400, 408 (1988); *Rock v. Arkansas*, 483 U.S. 44, 55 (1987); *Crane v. Kentucky*, 476 U.S. 683, 690-91 (1986).

The exclusion of criminal defense evidence undermines the central truth-seeking aim of the criminal justice system because it deliberately distorts the record at the risk of misleading the jury into convicting an innocent person. *See United States v. Nixon*, 418 U.S. 683, 709 (1974). The paramount value our criminal justice system places on acquitting

the innocent demands close scrutiny of any decision which prevents the jury from hearing evidence favorable to the defendant. *See In re Winship*, 397 U.S. 358 (1970). Likewise, the "right to present a defense" is firmly ingrained in Kentucky jurisprudence. *See Rogers v. Commonwealth*, 86 S.W.3d 29, 39-40 (Ky. 2002); *Mills v. Commonwealth*, 996 S.W.2d 473, 489 (Ky. 1999).

Exclusion of testimony relevant to an affirmative defense abridges the right to a fair trial. For example, in *Weaver v. Commonwealth*, the defendant argued he was denied a fair trial when the trial court would not allow expert testimony regarding his intoxication defense. 298 S.W.3d 851, 854-55 (Ky. 2009). Weaver argued that the trial court's exclusion of the expert's testimony from the guilt phase deprived him of his constitutional right to present a defense. *Id.* at 857. This Court held that the trial court did not completely deprive Weaver of the opportunity to present an intoxication defense because Weaver was allowed to present other evidence concerning his intoxication in the guilt phase; and the trial court instructed the jury on voluntary intoxication as a defense. *Id.* Therefore, this Court determined that while the any error was not of Constitutional magnitude, it was nonetheless error. *Id.*

This Court could not conclude the error was harmless, since determining the testimony would have little or no effect on the outcome was "would be sheer speculation." *Id.* Citing KRE 401, the Court noted the testimony was relevant to Weaver's defense. *Id.* Weaver's conviction

was reversed due to the trial court's failure to allow the testimony. *Id.* at 855.

This case is similar to *Weaver, supra.* Jones' testimony that he was being continuously poisoned was relevant to his insanity defense. Like Weaver, Jones was allowed to put on other evidence regarding his insanity and was given an insanity defense instruction. Nonetheless, excluding testimony that he believed he was being poisoned in the county jail denied him a full defense. It would be sheer speculation to say the exclusion of Jones' testimony would have little or no impact on the outcome, especially in light of the conflicting testimony on Jones' mental state. The evidence was relevant and should have been admitted.

Conclusion

The trial court's exclusion of an evidence which aided the jury in determining whether Kenneth Jones was legally insane violated the Fifth, Eighth and Fourteenth Amendments to the United States Constitution and §§2, 7, 11 and 17 of the Kentucky Constitution. This Court must reverse for a new trial.

III. The Trial Court's Violation of KRE 615 Caused Kenneth Jones Undue Prejudice

Standard of Review

A trial judge's decision to exclude the testimony of a witness who has been in the courtroom during prior testimony is reviewed for abuse of discretion. *Smith v. Miller*, 127 S.W.3d 644, 647 (Ky. 2004).

Preservation

This issue is preserved for appeal. Defense counsel made a timely objection when Scott Davidson was called as a rebuttal witness, noting that he had been in the courtroom throughout the trial. VR 3, 2/20/09 at 3:48:30. The trial court overruled the objection on the basis that Davidson was a rebuttal witness. Id.

Facts.

Davidson had been called early in the Commonwealth's case. VR 4, 2:06:40. He testified that he and Perry Warren were first cousins and lifelong friends. Id. They had also worked together for a time. Id. He testified about spending the evening with Warren the night of the shooting. Id.

During Mr. Jones' testimony, the Commonwealth repeatedly sought to challenge Jones' version of events. The Commonwealth argued that Jones must have ambushed Warren. Despite Jones' extensive military history, and by the Commonwealth's own evidence, current fascination with guns--the Commonwealth suggested an older man would have been bested by a thirty year old in a gunfight. VR 3, 2/20/09 at 3:44:00. The Commonwealth stated "you want people to believe you could stumble, shot a hole in the truck, shoot a healthy 30 year old man and him not put a bullet in you?" Id. at 3:45:00.

Thereafter, Davidson took the stand as a rebuttal witness. He testified the he and Warren had hunted together "all the time" in

addition to doing a lot of target practice. Id. at 3:49:20. Davidons said that while he considered himself a very good shot, "Perry was the one person I never could beat with a rifle or a pistol." Id. He said Warren could shoot the .22 found on his body from the hip or shoulder extremely fast. Id. at 3:49:00. When the Commonealth asked whether Warren could "put a bullet in someone if he needed to," Davidson replied if there was "any one person" who could, it would be Warren. Id. at 3:50:00.

Law.

The purpose of the separation of witnesses rule codified in KRE 615 is "to insure the integrity of the trial by denying a witness the opportunity to alter his testimony." *Alexander v. Commonwealth*, 220 S.W.3d 704, 710 (Ky. App. 2007). However, the defendant must show he was prejudiced by the violation to receive relief on appeal. For instance, in *Alexander, supra,* the defendant argued that he was prejudiced when a rebuttal witness was called after hearing during the testimony of other witnesses. *Id.*. The court disagreed, noting that while the testimony contradicted Alexander's, the subject matter was merely tangential to charges and was unlikely to be influenced by other testimony. *Id.*

By contrast, in this case, Davidson's testimony was directly relevant to the case as the issue to be decided was who had been the initial aggressor. Kenneth Jones was the only witness to the shooting. Davidson's testimony was elicited to bolster the Commonwealth's theory

that Perry Warren was ambushed since given the opportunity to draw his gun, he would have surely "put a bullet" in Jones. Davidson had just heard the Commonwealth's cross-examination, suggesting that no competent young man could be bested by a senior citizen in a gun fight and likely felt compelled to defend the abilities of his late cousin and friend.

This case is similar to *Mills* v. *Commonwealth*, where the complaining witness was allowed to remain in the courtroom throughout the testimony of the investigative officers. 95 S.W.2d 838, 841 (Ky. 2003). His credibility was crucial to the Commonwealth' s case and his memory was refreshed by the testimony of the investigating officers. *Id.* Therefore, this Court reversed his conviction due to the violation of KRE 615. *Id.*

Whether the defendant is called during the case-in-chief or on rebuttal is not the deciding factor in analyzing whether calling a witness would violate KRE 615. Rather, the trial court must determine if the witness has heard testimony directly bearing on the outcome of the trial and would offer testimony even where the "witness herself is not conscious of this subtle influence." *Smith*, 127 S.W.3d at 646. "A mechanical exclusion or admission of the testimony of such a witness (reflecting failure to exercise any discretion at all) is offensive to this approach and likely to produce a reversal on appeal." *Id.*, Citing Lawson, Kentucky Evidence Law, note 4, § 11.30[4], p. 892.

Moreover, the trial court's admission of Davidson's testimony under the guise of rebuttal is not credible. The Commonwealth's theory of the case throughout trial was that there was no self-defense because Jones ambushed Warren. As such, the Commonwealth had every opportunity to question Davidson about Warren's shooting skills during the case-in-chief. Instead, he lay in wait and asked Davidson to testify after hearing the Commonwealth repeatedly suggested on cross-examination that any competent 30 year old man should have bested the elderly Jones.

Conclusion

KRE 615 is mandatory, and its violation denied Kenneth Jones a fair trial. The court and the prosecutor violated the Sixth and Fourteenth Amendments to the United States Constitution and Sections 2 and 11 of the Kentucky Constitution. Reversal is required because of this error.

IV. The Commonwealth's Repeated Violations of Moss v. Commonwealth Denied Kenneth Jones a Fair Trial

Preservation.

This issue is not preserved for appellate review. However, Kenneth Jones requests palpable error review under RCr 10.26 as the error caused him undure prejudice. Because the issue of whether or not

Kenneth Jones fired in self defense was paramount, witness credibility was of utmost importance. The Commonwealth's questions about other witnesses served to undermine his veracity and paint him in an unflattering light. The error cannot be harmless.

Facts.

During the Commonwealth's cross-examination of Kenneth Jones, he was asked about jailer Will Ben Martin's recent recollection of Jones saying he had had 'taken care of a job he needed to do." VR 3, 2/20/09 at 3:35:10. Jones denied making the statement. The Commonwealth proceeded to repeatedly ask Jones to comment on the veracity of witnesses:

Commonwealth: So Will Ben Martin came to this Court and lied?

Jones: I'm saying he did.

Commonwealth: And the Trevathans lied when they said you said 'I shot the son of a bitch.'

Jones: They are lying.

Commonwealth: And then Detective Jones changed his tape up here where your versions you told him that night aren't right, is that right?

Jones: No, I didn't say that

Commonwealth: Well, everyone else was lying, just figured Detective Jones was doing so, also.

Commonwealth: Were the Trevathans lying when they said you showed no remorse for shooting Perry Warren?

Jones: I said I was sorry for shooting.

Commonwealth:Well that's really nice of you, but did you show any remorse that night?

Jones: Yes, I did.

Commonwealth: To who?

Jones: Not to them.

Commonwealth: Why?

Jones: We don't get along, I don't like them.

Commonwealth: What's that got to do with it?

Id. at 3:35:10-3:36:10.

When a defendant takes the stand in a criminal trial, he is "subject to all the obligations and liabilities of any other witness." *Keen v. Commonwealth*, 307 Ky. 308, 210 S.W.2d 926, 929 (Ky. 1948) (Overruled on other grounds in *Colbert v. Commonwealth*, 306 S.W.2d 825 (Ky. 1957). However, this Court has recognized that there are limitations to questions the Commonwealth is permitted to ask criminal defendants under cross-examination. In *Howard v. Commonwealth*, 227 Ky. 142, 12 S.W.2d 324 (Ky. 1928), this Court reversed the defendant's conviction stating:

> In cross-examining the appellant, the Commonwealth's attorney in several instances asked her about certain testimony and then asked her about what other witnesses had said concerning the same thing, in this manner, for example, 'I am asking you if what Maud Denton swore is a lie'...[w]here the cross—examination proceeds beyond proper bounds...the court should interfere *with or without objection from counsel.*

Emphasis added.

In *Moss v. Commonwealth*, 949 S.W.2d 579, 583 (1997), this Court reaffirmed *Howard, supra*, as the established standard for cross-examination of this type:

> A witness should not be required to characterize the testimony of another witness, *particularly a well respected police officer, as lying.* Such a characterization places the witness in such an unflattering light as to potentially undermine his entire testimony. Counsel should be sufficiently articulate to show the jury where the testimony of witnesses differ without resort to blunt force.

Id., [emphasis added.]

As pointed out by the Connecticut Supreme Court, several reasons underlie the prohibition of such questioning:

> First, it is well established that 'determinations of credibility are for the jury and not for witnesses.' Consequently, questions that ask a defendant to comment on another witness' veracity invade the province of the jury. Moreover, '[a]s a general rule [such] questions have no probative value and are improper and argumentative because they do nothing to assist the jury in assessing witness credibility in its fact—finding mission and in determining the ultimate question of guilt or innocence.
>
> Second, questions of this sort also create the risk that the jury may conclude that, in order to acquit the defendant, it must find that the witness has lied. That risk is especially acute when the witness is a government agent in a criminal case. A witness' testimony, however, 'can be unconvincing or wholly or partially incorrect for a number of reasons without any deliberate misrepresentation being involved[,]'

> such as 'misrecollection, failure or recollection or other innocent reason.'
>
> Similarly, courts have long admonished prosecutors to avoid statements to the effect that if the defendant is innocent, the jury must conclude that witnesses have lied. The reason for this restriction is that '[t]his form of argument...involves a distortion of the government's burden of proof.' Moreover, like the problem inherent in asking a defendant to comment on the veracity of another witness, such arguments preclude the possibility that the witness' testimony conflicts with that of the defendant for a reason other than deceit.

State v. Singh, 793 A.2d 226, 236—38 (Conn. 2002). (Citation omitted).

The use of this tactic—asking the accused whether another witness is lying—is also incompatible with the duties of a prosecutor. Unfairly questioning an accused simply to make him look bad in front of the jury is not consistent with the prosecutor's primary obligation to seek justice, not simply a conviction. See *Berger v. United States* , 295 U.S. 78, 88 (1935); ABA Standards for Criminal Justice 3-1.2(b), (c) (3d Ed. 1993). Nor is such questioning consistent with the prosecutor's duty to ensure a fair trial, including a verdict that rests on the evidence and not on passion or prejudice. *State v. Casteneda-Perez*, 810 P.2d 74, 79 (Wash.Ct.App 1991).

This tactic improperly diverts the jury from its proper focus on whether the relevant evidence establishes the elements of the crimes charged. Such conduct is clearly inconsistent with the prosecutor's proper role and the accused's rights to a fair trial.

Conclusion

Kenneth Jones suffered undue prejudice because of prosecutorial misconduct. And, prosecutors are unlikely to try cases within the rules of fair play when convictions are affirmed despite their transgressions. The Illinois Supreme Court considered the ramifications of unchecked prosecutorial misconduct in *People v. Johnson*, 803 N.E.2d 405, 412 (Ill. 2003):

> Despite long-standing and widespread dissatisfaction, there does not seem to be any substantial change in the perception of the performance of prosecutors or courts. The volume of reported appellate cases of misconduct in argument remains high; there are frequent findings of improper argument, but only occasional reversals; and the volume of scholarly criticism is, if anything, increasing

Id., Citing P. Spiegelman, Prosecutorial Misconduct in Closing Argument: The Role of Intent in Appellate Review, 1 J. App. Prac. & Process 115, 115-18 (1999).

The problem of misconduct may be growing, but it is not new--in fact, Roscoe Pound commented on it over 70 years ago. See R. Pound, Criminal Justice in America 187 (1930); 1 J. App. Prac. & Process, at 115. Over 50 years ago, Judge Jerome Frank of the Second Circuit Court of Appeals considered the troubling issues of prosecutorial misconduct and the consequences of dismissing the conduct as harmless error:

> This court has several times used vigorous language in denouncing government counsel for such conduct as that of the United States Attorney here. But, each time, it has said that, nevertheless, it would not reverse. Such an attitude of helpless piety is, I think, undesirable. It means actual condonation of counsel's alleged offense, coupled with verbal disapprobation. If we continue to do nothing practical to prevent such conduct, we should cease to disapprove it. For otherwise it will be as if we declared in effect, 'Government attorneys, without fear of reversal, may say just about what they please in addressing juries, for our rules on the subject are pretend-rules. If prosecutors win verdicts as a result of "disapproved" remarks, we will not deprive them of their victories; we will merely go through the form of expressing displeasure. The deprecatory words we use in our opinions on such occasions are purely ceremonial.' Government counsel, employing such tactics, are the kind who, eager to win victories, will gladly pay the small price of a ritualistic verbal spanking.

Id. at 412-413, citing *United States v. Antonelli Fireworks Co.*, 155 F.2d 631, 661 (2d Cir. 1946).

Mr. Jones implores this Court to do more than go through the motions of expressing displeasure. This Court must reverse and remand, so that Kenneth Jones may receive a fair trial.

V. Cumulative Error Requires Reversal

It is long established authority in this Commonwealth that an accumulation of concurrent errors may authorize a reversal where no

one error taken alone would justify a reversal. *Funk v. Commonwealth*, 842 S.W.2d 476, 483 (Ky. 1993); *Peters v. Commonwealth*, 477 S.W.2d 154 (Ky. 1972); *Faulkner v. Commonwealth*, 423 S.W.2d 245 (Ky. 1965).

Kenneth Jones believes that each of the errors alleged supra individually warrant reversal. However, assuming *arguendo* that this Court declines to hold any individual, previously assigned error sufficient to require reversal, the cumulative effect of the preceding errors requires that his convictions be set aside. See *Sanborn v. Commonwealth*, 754 S.W.2d 534, 542-49 (1988), *overruled on other grounds by Hudson v. Comonwealth.*, 202 S.W.3d 17 (Ky. 2006).

Cumulative error denied Kenneth Jones his rights to due process and a fair trial under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and §§7 and 11 of the Kentucky Constitution. This Court should reverse his convictions and remand this cause for a new trial.

Respectfully Submitted,

Erin Hoffman Yang

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