

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

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APPELLANT

KENNETH H. JONES

v.

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

COMMONWEALTH OF KENTUCKY

APPELLEE

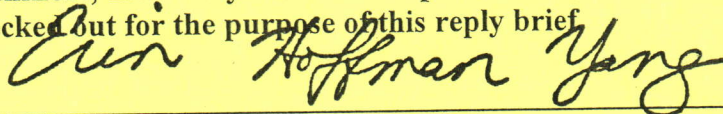
REPLY BRIEF FOR APPELLANT, KENNETH H. JONES

Submitted by:

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The undersigned does certify that copies of this Reply 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 September 14, 2010. The record on appeal was not checked out for the purpose of this reply brief.



ERIN HOFFMAN YANG

PURPOSE OF REPLY BRIEF

The purpose of this reply brief is to address only those matters presented in Appellee's brief that Appellant believes deserve further comment or citation of additional authorities beyond that presented in the previously filed Brief for Appellant. The failure to address a particular issue should not be taken as a reflection that Appellant believes the issue has no merit or less merit than issues that have been addressed in this reply brief.

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

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

The Commonwealth defends the insertion of the “castle doctrine” into the instructions, arguing the statute is meant to apply to all citizens and is not limited to defendants in criminal or civil litigation. To the contrary, statutes granting immunity from civil and criminal penalties are, by nature, intended to protect defendants. Recently, in *Rodgers v. Commonwealth*, 285 S.W.3d 740, 753 (Ky.2009), the Kentucky Supreme Court addressed the new amendments to KRS Chapter 503:

At least in cases such as this one, that do not involve a peace officer, [KRS 503.085] does not constitute substantive law; ***it has nothing to do with who is entitled to use self-defense or under what circumstances self-defense is justified. It is, rather, purely procedural, and by prohibiting prosecution of one who has justifiably defended himself, his property or others, it in effect creates a new exception to the general rule that trial courts may not dismiss indictments prior to trial.*** By declaring that one who is justified in using force ‘is immune from criminal prosecution,’ and by defining ‘criminal prosecution’ to include ‘arresting, detaining in custody, and charging or prosecuting the defendant,’ the General Assembly has made unmistakably clear its intent to create a true immunity, not simply a defense to criminal charges.
[emphasis added].

Regardless, it is uncertain that Perry Warren would have been entitled to use deadly force in this case. KRS 503.055 allows a person to use 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." There was no testimony showing that Kenneth Jones went to the Warren residence intending to use deadly force or commit a felony.

To the contrary, Jones testified that he simply wanted to talk about chemicals he believed were being pumped into his house. VR 3, 2/20/09 at 2:29:00. He testified that he did not draw a weapon until Warren threatened him with a gun. The Commonwealth's theory at trial was that Jones ambushed Warren and thus, Warren was entitled to defend himself under KRS 503.055. In fact, there was no direct evidence supporting the theory; thus the use of the statute in instructions was based on conjecture.

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

Mr. Jones believes this issue was preserved by defense counsel's vigorous and repeated objections to the insertion of KRS 503.055 into the instructions. However, should this court disagree, Mr. Jones asks for palpable error review under RCr 10.26, since the insertion of the statute confused jurors and caused manifest injustice. The Commonwealth

cannot deny substantial prejudice regarding an instruction when the trial court, addressed defense counsel on the record and stated his belief that the instruction “cuts your legs right out from under you.” VR 4, 1/26/09 at 9:17:00.

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 this case, the Commonwealth urged jurors to pay special attention to the use of defensive force 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. As noted in argument A, *supra*, this amounted to a confusing comment on the evidence; because Kenneth Jones is the only living witness to the altercation, Warren’s right to use defensive force was based on the Commonwealth’s theory and not direct evidence.

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

Contrary to the Commonwealth’s assertions, this evidence was relevant to Mr. Jones’ defense. While the Commonwealth is correct that

an insanity defense must be based on Jones' mental state at the time of the shooting, Jones' belief that he continued to be poisoned after the shooting demonstrates that Jones acted as a result of paranoia and not an ongoing grudge between neighbors. It was relevant under KRE 401 to rebut the Commonwealth's expert who refuted defense counsel's theory that Jones was delusional and characterized his problems as "narrow," suggesting they may be limited to his interactions with the Warren family.

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

Contrary to the Commonwealth's arguments otherwise, Scott Davidson's testimony was crucial to its case and should have been excluded. Kenneth Jones testified that he approached Perry Warren to talk when Warren drew a gun on him. He was forced to act in self-defense. Disregarding Kenneth Jones' prior military history, the prosecution openly disparaged the idea that an elderly man could best Perry Warren in a gunfight.

This case is easily distinguished from *Justice v. Commonwealth*, 987 S.W.2d 306, 315 (Ky. 1999), cited by the Commonwealth. First of all, in *Justice*, there was no motion to separate witness until after the defendant's wife, a key defense witness, testified, thus "the motion came too late to prevent the prejudice alleged on appeal." Further, the only prejudice alleged by *Justice* was that the witness's testimony

contradicted his wife. By contrast, in this case, it is a fair inference that Davidson tailored his testimony to the Commonwealth's theory of the case--that Warren, the younger and stronger adversary, would have prevailed in a gunfight. See *Id.*

V. Cumulative Error Requires Reversal

Kenneth Jones believes that each of the errors alleged *supra*, individually warrant reversal. Nonetheless, should this Court disagree, 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).

Respectfully Submitted,

A handwritten signature in cursive script that reads "Erin Hoffman Yang". The signature is written in black ink and is positioned above a horizontal line.

Erin Hoffman Yang