COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
2013-SC-000267-DG

THEODORE ANTHONY MARAS — APPELLANT

v.

Appeal from the Court of Appeals
No. 2011-CA-002231-MR
Jefferson Circuit Court
Action No. 11-CR-000280

COMMONWEALTH OF KENTUCKY — APPELLEE

BRIEF FOR APPELLANT, THEODORE ANTHONY MARAS

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Certificate of Service

This is to certify that a copy of this brief was mailed, first class postage prepaid, to Hon. Mary Shaw, Judge, Jefferson Circuit Court, Division Five, Jefferson County Judicial Center, 700 West Jefferson Street, Louisville, KY 40202, Hon. Wm. Robert Long, Assistant Attorney General, Office of the Attorney General, Office of Criminal Appeals, 1024 Capital Center Drive, Frankfort, KY 40601, and Hon. Samuel P. Givens, Jr., Clerk, Court of Appeals of Kentucky, 360 Democrat Drive, Frankfort, KY 40601, and was sent electronically by agreement to Hon. Dorislee Gilbert, Assistant Commonwealth's Attorney, 514 West Liberty Street, Louisville, KY 40202, on April 14, 2014. I further certify that the record on appeal was not removed from the office of the Clerk of the Court.

BRUCE P. HACKETT

INTRODUCTION

This Court granted discretionary review of the decision of the Court of Appeals that rejected Mr. Maras's argument that he had been convicted of a crime that does not exist under the Penal Code. Mr. Maras was convicted of stalking in the first degree and violation of a protective order at jury trial. He was sentenced to five years imprisonment.

STATEMENT CONCERNING ORAL ARGUMENT

The issue presented in Argument I of the brief appears to be one of first impression in the Commonwealth. Kentucky's stalking statutes (KRS 508.130-508.155), unlike the statutes of many other states, only apply where the defendant intends to place the targeted victim in personal fear for his or her own safety and not in fear of harm to any third person. The appellant believes that oral argument may be helpful to the Court in resolving the issue. Appellant requests oral argument.

NOTE CONCERNING CITATIONS

Citations to the circuit court digital record will be in accordance with CR 98(4)(a): (VR, month /day/year, hour:minute:second). The Transcript of Record will be designated: (TR, page number) and references to the Appendix to this brief will be: (App., page number).

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STATEMENT OF THE CASE

Theodore Anthony "Tony" Maras was charged with stalking in the first degree in a continuing course of conduct between November 1, 2010, and December 5, 2010, and violation of a protective order during the same period of time. (TR 1-4). The alleged victim of the stalking charge was Christina Potter.[1] A charge of possession of a firearm by a convicted felon was severed for a separate trial from the stalking and protective order offenses. (TR 1; VR, 4/28/11, 10:27:30; VR, 9/20/11, 11:12:00, 11:22:30). On the day of trial, the Commonwealth admitted that Mr. Maras was not eligible to be punished as a persistent felony offender, and moved to dismiss that count of the indictment. (VR, 9/20/11, 11:24:17). The witnesses at trial were Ms. Potter, Mr. Maras, Ms. Potter's daughter, Olivia Blandford, and Louisville Metro Police Officers David Kemper, Michael Fowler and Jennifer Lee. (VR, 9/21/11, 10:57:08, 02:02:40, 02:04:50, 02:13:05).

Mr. Maras, whose wife had died from AIDS in 1996, began a relationship with Ms. Potter in 2007. Mr. Maras, who was diagnosed with HIV and AIDS in 1991, said that he had not dated anyone from the time his wife died until 2007. (VR, 9/21/11, 02:49:45, 02:54:20). Ms. Potter worked at the Speedway on National Turnpike, which was near Mr. Maras's house. (VR, 9/21/11, 10:59:15, 02:50:29). Mr. Maras, a frequent customer, gave Ms. Potter a ride on his motorcycle. With the passage of time, the two developed a friendship and ultimately a romantic relationship. (VR, 9/21/11, 10:59:50). In June or July of 2007, Ms. Potter moved in with Mr. Maras at his house. (VR, 9/21/11, 11:00:28).

In August 2007, Ms. Potter took out an emergency protective order (EPO) against Mr. Maras. But after speaking with Mr. Maras and some of his family members, Ms.

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[1] Christina Potter was also known as Christina Edwards. (VR, 9/22/11, 04:34:10, 04:57:46).

Potter did not follow up on the EPO. She failed to appear in court for the scheduled hearing and no domestic violence order (DVO) was issued. (VR, 9/21/11, 11:01:55, 11:03:30). In September 2008, Ms. Potter applied for another EPO. This time, she did appear in court, as did Mr. Maras. (VR, 9/21/11, 11:04:01). After a hearing, the Jefferson Family Court entered a DVO that ordered Mr. Maras to have no contact with Ms. Potter or her property and to refrain from possessing any firearm, both for a period of three years. (VR, 9/21/11, 11:04:34, 11:36:30, 11:55:08; COM EXH 1). After the DVO was issued, both Mr. Maras and Ms. Potter said that they continued to have contact. (VR, 9/21/11, 11:55:08). Mr. Maras said that Ms. Potter moved in with him again but Ms. Potter denied that ever happened. (VR, 9/22/11, 11:54:38, 03:12:53, 03:13:30).

The stalking and violation of a protective order offenses charged in the indictment were both alleged to have occurred in a continuing course of conduct between November 1, 2010, and December 5, 2010. (TR 2-3). The November 1st event that eventually became the beginning point for the "course of conduct"[2] that formed the basis for the charges was Mr. Maras's leaving a note on Ms. Potter's porch along with a tote containing several items of personal property. In addition to some of Ms. Potter's personal items, the tote contained a shotgun barrel. (VR, 9/21/11, 11:07:21, 11:08:30, 02:51:07). When Mr. Maras came to the door, Ms. Potter's daughter, Olivia Blandford, answered and told him to leave. When Mr. Maras went to his truck and remained there, Olivia called the police. (VR, 9/21/11, 11:13:45, 02:00:13). Mr. Maras left before Officer David Kemper arrived to take a report. (VR, 9/21/11, 02:0120).

[2] KRS 508.130(2)

On November 9, 2010, Ms. Potter decided to leave for work early. She had a feeling that Mr. Maras might be around, so she told her boyfriend to stay in the house. (VR, 9/21/11, 11:18:02). Ms. Potter's instincts were correct. When she left the house she saw Mr. Maras sitting in his truck waiving at her. (VR, 9/21/11, 11:20:31). He told her that he came to say goodbye. When she asked what he meant, he said she knew what he was talking about. (VR, 9/21/11, 11:20:10). Ms. Potter asked if he had the gun and he said he did. She told him to give it to her, which he did. Ms. Potter took the gun, a sawed off shotgun, into the house and told her boyfriend that she would call the police later. She left the house, told Mr. Maras to go home, to sober up and to leave her alone. Ms. Potter then went to work. (VR, 9/21/11, 11:20:30-11:21:20).

While Ms. Potter was working, Mr. Maras left notes on her car and he was waiting when she left work, telling her he wanted to talk to her. (VR, 9/21/11, 11:21:55-11:24:47). Ms. Potter went home and called the police. (VR, 9/21/11, 11:25:06, 11:25:47). Officer Michael Fowler took possession of the firearm, which was a double barrel shotgun that had been cut down and the barrel had been sawed off. (VR, 9/21/11, 11:26:27, 02:05:08, 02:06:45). It was loaded with two shotgun shells. (VR, 9/21/11, 02:06:45). Ms. Potter thought Mr. Maras needed help, so after speaking with Mr. Maras's brother and Officer Fowler, she took out a mental inquest warrant (MIW) so that Mr. Maras's mental stability could be checked out. (VR, 9/21/11, 11:09:45). Officer Fowler told Ms. Potter about the procedure to take out a mental inquest warrant. (VR, 9/21/11, 02:11:47-02:13:00).

An arrest warrant was issued for Mr. Maras. (VR, 9/21/11, 02:10:16). Mr. Maras was arrested on November 11, 2010, on the warrant for stalking and violation of the

protective order. (VR, 9/21/11, 02:13:23). After his arrest, Mr. Maras sent Ms. Potter a letter that was postmarked December 2, 2010. That letter was introduced as COM EXH 5. (VR, 9/21/11, 11:39:02, 11:40:30, 03:20:46).

Mr. Maras testified that he did leave the tote on Ms. Potter's porch on November 1, 2010, but he did know why he put the gun barrel in it. The tote contained personal items belonging to Ms. Potter. (VR, 9/21/11, 02:51:07). He said he had cut down the shotgun the day before because he could not shoot himself with the long barrel attached. (VR, 9/21/11, 02:51:07, 02:52:09-02:53:00, 03:00:03). He had test-fired the gun after cutting it down and the recoil caused the gun to hit him in the chest. (VR, 9/21/11, 03:00:31). Mr. Maras admitted leaving notes for Ms. Potter and having contact with her. (VR, 9/21/11, 02:53:34, 02:56:07). He said that she had moved back in with him after the September 2008 EPO, and she had said she was again moving back in with him in 2010 but then she changed her mind. (VR, 9/21/11, 02:53:34). Mr. Maras said he was depressed because of his wife's death and his medical condition, and he was suicidal because Ms. Potter had left him. (VR, 9/21/11, 02:54:20). He had contact with her despite the DVO because he wanted to speak to her and he wanted her to be happy because he loved her. (VR, 9/21/11, 03:11:01, 03:12:00).

According to the post-trial defense motion for new trial or judgment notwithstanding the verdict (JNOV), while the jurors were deliberating, they sent a note to the judge asking for clarification of the meaning of the jury instructions. (TR 81-82). After consulting with defense counsel and the prosecutor, the court sent a note back to the

jurors advising them that the court could provide no clarification.[3] (TR 83).

The jury returned guilty verdicts about four hours after it had begun deliberations. (VR, 9/22/11, 11:42:18, 03:42:08). Mr. Maras was convicted of stalking in the first degree and violation of a protective order.[4] Once the jury returned verdicts of guilty on stalking and violation of a protective order, the court instructed the jury on the penalty range for the misdemeanor offense of violation of a protective order (confinement for a maximum of twelve months and/or a fine of a maximum of $500.00). (VR, 9/22/12, 04:11:05). The jury then deliberated and returned a verdict imposing nine months confinement. (VR, 9/22/12, 04:32:20). Next, the court conducted the Truth-in-Sentencing hearing on the stalking offense. (VR, 9/22/11, 04:43:33). The Commonwealth presented the testimony of three witnesses: a probation and parole officer (Heather Foster), a paralegal from the Commonwealth's Attorney office (Sadie Jackson), and Ms. Potter. (VR, 9/22/11, 04:45:57, 04:51:03, 05:00:40).

The jury imposed the maximum sentence of five years imprisonment on the stalking offense. (VR, 9/22/11, 05:28:06). At the conclusion of the Truth-in-Sentencing phase of the trial, the judge asked the jurors to return to the deliberation room, explaining that she would speak to them briefly before discharging them. (VR, 9/22/11, 05:28:36).

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[3] The discussion involving the court and counsel was apparently not recorded. The facts are set out in the defense motion for a new trial and the Commonwealth's response to that motion. (TR 80-85, 88-96). Because there is no dispute about the facts and because the issue presented here is a question of law, there is no need to present a narrative statement or bystanders bill to the Court. CR 75.13-75.15.

[4] The jury instructions are contained in the manila envelope marked "Juror Information Sealed" that was certified as part of the record on appeal. That envelope, to which the circuit court granted access to appellate counsel, contains juror information forms, juror strike sheets, jury instructions and trial exhibits. A copy of the jury instructions is attached in the Appendix to this brief. (App. C1-8).

As explained in the motion for new trial, the judge later advised counsel that she had spoken to the jurors about the jury instruction question that they had during deliberations. (TR 83). The jurors had concluded that the Commonwealth did not prove that Mr. Maras had placed Ms. Potter in fear for own safety, but had proved that she was in fear for the safety of her boyfriend. (TR 83). The jury convicted on that basis.

The first issue raised in this appeal concerns the stalking conviction. Kentucky is in the minority of states that did not adopt the "fear for the safety of others" component of stalking. In Kentucky, under KRS 508.140, a stalker must intend to place the stalked person in fear of sexual contact, serious physical injury or death, and it is not enough for the Commonwealth to prove that the stalker intends that the stalked person be fearful for the safety of a third person. As a result, Mr. Maras was convicted of a crime that does exist under our Penal Code.

The Commonwealth's theory of guilt on the stalking charge was that Mr. Maras's behavior made Ms. Potter fearful for her own safety, the safety of her loved ones and the safety of her boyfriend. In his opening statement, the prosecutor told the jury, "She was afraid of what he would do, not only to her, but also to her boyfriend." (VR, 9/21/11, 10:46:53). In closing arguments, the prosecutor said that Mr. Maras was a danger to himself, to Ms. Potter and to Ms. Potter's loved ones. (VR, 9/22/11, 11:26:19). Later, the prosecutor argued that if Ms. Potter was not at risk, what about her daughter and what about her boyfriend? "Why are they not at risk?" (VR, 9/22/11, 11:30:39). The prosecutor argued that when Ms. Potter saw Mr. Maras outside her home on the morning of November 9, 2010, she feared for her boyfriend, because while Mr. Maras might not shoot her, he might shoot the boyfriend. (VR, 9/22/11, 11:30:48). The prosecutor

continued by saying that Mr. Maras was not only a danger to himself, he was a danger to Ms. Potter, to the boyfriend, to Ms. Potter's daughter and to everyone else who might be around. (VR, 9/22/11, 11:31:27).

After the judge told defense counsel about the jurors' explanation of their verdict and defense counsel filed the motion for a new trial or judgment notwithstanding the verdict, the prosecutor made a convoluted argument that Mr. Maras could be convicted for placing Ms. Potter in fear for others, particularly her boyfriend, but despite the jury's instruction question and despite what the jurors had reported to the judge, the jury convicted Mr. Maras of placing Ms. Potter in fear for herself. (TR 92). In response to the defense motion, the prosecutor said that the jury instruction on stalking in the first degree mirrored the statute (KRS 508.140) and "the jury was instructed to find the defendant guilty only if they believed beyond a reasonable doubt that the defendant intentionally stalked Christina Potter AND explicitly or implicitly threatened Christina Potter with the intent to place Ms. Potter in reasonable fear of sexual contact or serious physical injury or death." [Emphasis in original] (TR 90-91). This argument was contrary to what the prosecutor had argued to the jury in closing argument – that is, the jury could convict if it found that Mr. Maras placed Ms. Potter in fear for the safety and well-being of her boyfriend. (VR, 9/22/11, 11:26:19; 11:30:39; 11:30:48; 11:31:27).

Post-trial, the prosecutor defended the instruction given, but also admitted that the jury had to interpret the language of the statute in order to convict. "The jury must base their decision on their interpretation of the specific language set out in the Instructions given to them." (TR 91). The jury instruction did require the jury to interpret the meaning of the words in the instruction, and the jury interpreted the instruction to allow a

conviction if the Commonwealth proved that Ms. Potter was in fear for someone other than herself. The jury told the judge that they did not believe that Ms. Potter was in fear for herself. (TR 83). The circuit court denied the motions for a new trial ("Motion for new trial denied.") and for judgment notwithstanding the verdict ("Motion for JNOV denied."). (TR 86, 87).

On appeal, the Court of Appeals simply disposed of the argument regarding the scope of the stalking statute by stating, "The jury in this case did not charge (or convict) Appellant with a crime that does not exist; it convicted him of stalking in the first degree. This fact is conclusively supported by the record." (App. A4). Mr. Maras now respectfully requests that this Court analyze and address the merits of the issue, which has not previously been discussed or adjudicated by a Kentucky appellate court.

The second issue raised in this appeal concerns the reliance, in part, by Mr. Maras on the post-verdict statements made by jurors to the judge to establish that he had been convicted of stalking under a "fear for others" theory. The Court of Appeals ruled that "it has a long been held that a verdict may not be impeached by a juror's post-trial statements. Kentucky Rules of Criminal Procedure (RCr) 10.04; *Bowling v. Commonwealth*, 168 S.W.3d 2 (Ky. 2004)." (App. A4). As explained below, RCr 10.04 does not actually say that a "juror's post-trial statements" cannot be considered in circumstances like those in Mr. Maras's case. Furthermore, this Court has recognized that RCr 10.04 may be unconstitutional. *See Bowling v. Commonwealth*, 168 S.W.3d 2, 7-8 (Ky. 2004).

ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT DENIED THE DEFENSE MOTION FOR A JUDGMENT NOTWITHSTANDING THE VERDICT (JNOV) AFTER IT WAS DISCOVERED THAT THE JURY CONVICTED THE APPELLANT OF STALKING UNDER A THEORY THAT IS NOT AN OFFENSE UNDER THE PENAL CODE.

A. Preservation

This issue was preserved for review in appellant's motion for new trial/JNOV. (TR 80-85). The Commonwealth filed a written response opposing the motion. (TR 88-96). The trial court denied the motion in orders entered on October 27, 2011. (TR 86-87). As explained in the Statement of the Case, above, when the jury, during deliberations, sent a question to the court requesting clarification about the elements of stalking, the court discussed the matter with counsel but apparently that discussion was not on the record. (The jury began deliberations at 11:42 a.m. and the court did not go back on the record until the jury returned with the verdicts at 3:41 p.m. (VR, 9/22/11, 11:42:18, 03:41:03)). Defense counsel learned from the judge on the day after trial (September 23, 2011) that the jurors had concluded that the Commonwealth failed to prove beyond a reasonable doubt that Mr. Maras intended to place Ms. Potter in fear that she would be subjected to sexual contact, serious physical injury or death. (TR 83). Rather, the jurors convicted Mr. Maras on the theory that the Commonwealth had proven that Ms. Potter was in fear for her boyfriend. (TR 83). Defense counsel filed the motion for new trial/JNOV on September 29, 2011. (TR 80). Because the verdicts finding Mr. Maras guilty had been returned on September 22, 2011, the motion for new trial/JNOV was timely filed. RCr 10.06, RCr 10.24 and CR 6.01.

For a conviction to pass constitutional muster, it must "rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." *United States v. Gaudin*, 515 U.S. 506 (1995). *See also Vachon v. New Hampshire*, 414 U.S. 478 (1974), wherein the Supreme Court reversed a conviction when the Court found that the proof was lacking on an essential element of the offense. Here, the proof failed on the critical element that Mr. Maras had to intend to place Ms. Potter in reasonable fear that she personally would be subjected to sexual contact, serious physical injury or death.

As noted below, when the jury interrupted deliberations to ask the court for clarification of the meaning of the instructions, neither defense counsel nor the Commonwealth objected to the response given to the jury: "The Court cannot clarify." (TR 91). According to the Commonwealth, the jury instruction question to the Court "was whether or not the phrase 'in reasonable fear' applied only to Christina Potter's fear for herself, or to her fear for others." (TR 91). Should this Court consider that the issue raised here was not properly preserved for appellate review, Mr. Maras requests palpable error review under RCr 10.26. In *Vachon v. New Hampshire*, *supra*, the Supreme Court reversed on a sufficiency of the evidence issue that had not been raised in any lower court. The Supreme Court's "independent examination of the trial record disclose[d] that evidence is completely lacking" on one of the elements of the charged offense. 414 U.S. at 479. "In these circumstances, the conviction must be reversed." *Id.* at 480. Where the jury convicts, as it did in Mr. Maras's case, based upon a finding that the Commonwealth failed to prove an essential element of the offense but proved a fact that is not an element

of the charged offense, manifest injustice has resulted and palpable error review is warranted.

B. Court of Appeals decision

The Court of Appeals first misconstrued the issue on appeal as being a claim that the petit jury had "inadvertently charged" Mr. Maras with a crime that did not exist in Kentucky. (App. A4). Then, the Court of Appeals, with no analysis of the applicable statutes and without addressing the evidence at trial, simply concluded that:

> The jury in this case did not charge (or convict) Appellant with a crime that does not exist; it convicted him of stalking in the first degree. This fact is conclusively supported by the record.

(App. A4). The Court of Appeals either deliberately or inadvertently chose to avoid the issue before the court, or it misconstrued or misunderstood the issue.

C. Argument

The Commonwealth has the burden of proving all the elements of a criminal offense beyond a reasonable doubt. KRS 500.070. A criminal defendant is entitled to "a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466 (2000), quoting *United States v. Gaudin*, 515 U.S. 506, 510 (1995), and citing *Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993), and *In Re Winship*, 397 U.S. 358, 364 (1970). This is because "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged". *In Re Winship*, 397 U.S. 358, 364 (1970). See also *Jackson v. Virginia*, 443 U.S. 307, 317-319 (1979).

As set out in the motion for new trial/JNOV, the issue about whether the law as set out in the jury instructions allowed the jury to convict Mr. Maras in the absence of a finding that Mr. Maras intended to place Ms. Potter in reasonable fear that Ms. Potter (and not another person) would be subjected to sexual contact, serious physical injury or death came up as follows:

> (a) The proof in this trial ended on Thursday morning at approximately 11:40 a.m., and the jury retired to deliberate.
>
> (b) During deliberations, the jurors indicated that they had a question. Counsel for the Defendant, the Assistant Commonwealth's Attorney, Honorable John Balliet, and Honorable Judge Mary Shaw returned to the courtroom to review and discuss the question. The jurors were seeking a "point of clarification" on the language of Instruction No. 1: Stalking in the First Degree. In essence, the question was whether the phrase "in reasonable fear" applied only to Christina Potter's fear for herself, or to her fear for others.
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> * * * *
>
> (g) After discussing the jurors' question as to the interpretation of the statute, the court sent back the answer that "the Court cannot clarify."
>
> (h) After three hours and 50 minutes, the jury returned with the guilty verdict.
>
> (i) After the jury returned the recommendation for sentence, Judge Shaw asked that the jury return to the deliberation room so that she could speak with them.
>
> (j) The morning after the end of trial, on September 23, 2001, counsel for the defendant was in Judge Shaw's courtroom. Judge Shaw related to defense counsel what she had learned from the jury during the post-trial colloquy. First, the jurors did not believe that Christina Potter was in fear for herself. Second, the length of the deliberations, nearly four hours, was due to the jurors attempting to interpret the statute. Their confusion as to the interpretation was reflected in the sole question to the court as mentioned above. After lengthy discussion, the jurors erroneously determined that they were required to find Mr. Maras guilty if they found beyond a reasonable doubt that Christina Potter was in fear for others, i.e. her boyfriend.

(TR 81-83). In its response to the motion for new trial/JNOV, the Commonwealth related additional facts as follows:

> The jurors [sic] question to the Court was whether or not the phrase "in reasonable fear" applied only to Christina Potter's fear for herself, or to her fear for others. In response to the jurors' question, the Court correctly, and with no objection from the defense or the Commonwealth, told the jurors that "the Court cannot clarify."

(TR 91). Although the Commonwealth referred to the facts about the judge's post-trial discussion with the jurors as "comments purportedly made by discharged jurors off the record after completion of their service" and "defense counsel's second-hand account of statements jurors purportedly made to the Court after completion of their duty in this case," the Commonwealth offered no different version of the facts. More importantly, the comments by the jurors were made directly to the judge, the decision maker for the defense motion. Obviously, Judge Shaw knew what the jurors had said to her after the conclusion of trial and she advised defense counsel about the post-trial discussion.

The Commonwealth's main argument in opposition to the defense motion was that KRS 508.140 allows for a stalking conviction if the defendant intended to place the named victim in fear of sexual contact, serious physical injury or death **to herself** or intended to place the victim in fear of sexual contact, serious physical injury or death **to others**. (TR 92-92). But this argument was directly contrary to the argument made by the same prosecutor to the jurors, urging them to convict Mr. Maras because the evidence proved that Mr. Maras placed Ms. Potter in fear for the safety and well-being of her boyfriend and others. (VR, 9/22/11, 11:26:19; 11:30:39; 11:30:48; 11:31:27).

The Commonwealth's theory of guilt on the stalking charge was that Mr. Maras's behavior made Ms. Potter fearful for her own safety, the safety of her loved ones and the

safety of her boyfriend. In his opening statement, the prosecutor told the jury, "She was afraid of what he would do, not only to her, but also to her boyfriend." (VR, 9/21/11, 10:46:53). In closing arguments, the prosecutor said that Mr. Maras was a danger to himself, to Ms. Potter and to Ms. Potter's loved ones. (VR, 9/22/11, 11:26:19). Later, the prosecutor argued that if Ms. Potter was not at risk, what about her daughter and what about her boyfriend? "Why are they not at risk?" (VR, 9/22/11, 11:30:39). The prosecutor argued that when Ms. Potter saw Mr. Maras outside her home on the morning of November 9, 2010, she feared for her boyfriend, because while Mr. Maras might not shoot her, he might shoot the boyfriend. (VR, 9/22/11, 11:30:48). The prosecutor continued by saying that Mr. Maras was not only a danger to himself, he was a danger to Ms. Potter, to the boyfriend, to Ms. Potter's daughter and to everyone else who might be around. (VR, 9/22/11, 11:31:27).

Taken as a whole, it is evident from the language of the jury instructions that for Mr. Maras to be guilty of stalking in the first degree, he must have engaged in an intentional course of conduct directed at Christina Potter which seriously alarmed, annoyed, intimidated or harassed her. And, he must have explicitly or implicitly threatened Christina with the intent to place her in reasonable fear of sexual contact or serious physical injury or death to herself.

The stalking in the first degree statute, KRS 508.140(1), states:

> 1) A person is guilty of stalking in the first degree,
>
> (a) When he intentionally:
>
> 1. Stalks another person; and
>
> 2. Makes an explicit or implicit threat with the intent to place that person in reasonable fear of:

a. Sexual contact as defined in KRS 510.010;
b. Serious physical injury; or
c. Death; and

(b) 1. A protective order has been issued by the court to protect the same victim or victims and the defendant has been served with the summons or order or has been given actual notice; or

2. A criminal complaint is currently pending with a court, law enforcement agency, or prosecutor by the same victim or victims and the defendant has been served with a summons or warrant or has been given actual notice; or

3. The defendant has been convicted of or pled guilty within the previous five (5) years to a felony or to a Class A misdemeanor against the same victim or victims; or

4. The act or acts were committed while the defendant had a deadly weapon on or about his person.

As reflected in the discovery, the bill of particulars and the testimony at trial, the language in KRS 508.140 that applies to Mr. Maras's case is:

(1) A person is guilty of stalking in the first degree,
(a) When he intentionally;
1. **Stalks another person**; and
2. Makes an explicit or implicit threat with the intent **to place that person in reasonable fear** of:
a. Sexual contact as defined in KRS 510.010;
b. Serious physical injury; or
c. Death.

[Emphasis added]. The "another person" or victim in Mr. Maras's case was Ms. Potter. Mr. Maras was charged with making implicit or explicit threats "to place [Ms. Potter] in reasonable fear of" sexual contact, serious physical injury or death. KRS 508.130 further defines "stalk" as:

(1) (a) To "stalk" means to engage in an intentional course of conduct:

1. Directed at a specific person or persons;
2. Which seriously alarms, annoys, intimidates, or harasses the person or persons; and
3. Which serves no legitimate purpose.

(b) The course of conduct shall be that which would cause a reasonable person to suffer substantial mental distress.

In Mr. Maras's case, the jury instructions tracked the language of both KRS 508.140 (stalking in the first degree) and KRS 508.130(1) (defining "stalk"). Those jury instructions required the jury to find beyond a reasonable doubt that Mr. Maras:

(1) Intentionally stalked Christina Potter

AND

(2) Explicitly or implicitly threatened Christina Potter with the intent to place Ms. Potter in reasonable fear of sexual contact or serious physical injury or death;

AND

B. That when he did so, he knew that a protective order had been issued against him by the Jefferson County Family Court to protect Christina Potter from such conduct or he had a deadly weapon on or about his person.

INSTRUCTION NO. 1: STALKING IN THE FIRST DEGREE. (App. C2). The jury instructions also included the definition of "stalk" from KRS 508.130:

"**Stalk**" means to engage in an intentional course of conduct;

(1) Directed at a specific person or persons
(2) Which seriously alarms, annoys, intimidates, or harasses the person or persons
AND
3. Which serves no legitimate purpose.

This course of conduct must be such as would cause a reasonable person to suffer substantial mental distress.

INSTRUCTION NO. 6: DEFINITIONS. (App. C6).

Based upon the jury instructions and the explicit arguments made by the prosecutor, the jury convicted Mr. Maras because even though the jury concluded that the Commonwealth had not proved beyond a reasonable doubt that Mr. Maras intended to place Ms. Potter, the victim, in fear for her own safety, the Commonwealth had proved that Mr. Maras intended to place Ms. Potter in fear for the safety of her boyfriend. But Kentucky has never adopted the "fear for others" type of stalking offense. Had Mr. Maras' case been brought before the courts of more than 80 percent of the states, districts and territories in this country, there would be no doubt – from the very beginning – that fearing for the safety of others is an element of the offense of stalking.

Stalking laws have evolved quickly since 1993, when the National Institute of Justice, the research and development agency of the U.S. Department of Justice, published a research report aimed at developing a model stalking code to help guide state legislatures. *Project To Develop a Model Anti-Stalking Code for the States*, National Institute for Justice (October 1993). The report surveyed the stalking laws of the United States and proposed a model code that specifically described stalking as a "course of conduct directed at a specific person that would cause a reasonable person to fear bodily injury to himself or herself or a member of his or her immediate family" and "has knowledge or should have knowledge that the specific person will be placed in reasonable fear of bodily injury to himself or herself or a member of his or her immediate family or will be placed in reasonable fear of the death of himself or herself or a member

of his or her immediate family." *Id.* at 43. The fear for "immediate family" members was suggested as an element of stalking. Many states subsequently changed their stalking laws to include this element. Kentucky did not.

In 2007, the model stalking code was revisited and the scope of potential victims was expanded. The National Center for Victims of Crime went beyond including fear for immediate family members as an element of stalking; the institute added fear for the safety of third persons to the list. *The Model Stalking Code Revisited: Responding to the New Realities of Stalking*, National Center for Victims of Crime, p. 31 (January 2007). The model stalking code stated that "(a)ny person who purposefully engages in a course of conduct directed at a specific person and knows or should know that the course of conduct would cause a reasonable person to: (a) fear for his or her safety *or the safety of a third person*; or (b) suffer other emotional distress is guilty of stalking." *Id.* Again, a number of states changed their stalking laws on the heels of the 2007 model code and added the element of fear for the safety of third persons. And again, Kentucky did not.

The concept of "fear for third party" stalking pre-dates both model stalking codes. Ohio included this element as a part of its stalking code in 1974. Ohio's "menacing by stalking" code includes a provision stating that if the offender is the subject of a protection order, the offender can be convicted "regardless of whether the person to be protected under the order is the victim of the offense or another person." Ohio Rev. Code § 2903.21. Ohio's "aggravated menacing" statute (which encompasses stalking) states that "(n)o person shall knowingly cause another to believe that the offender will cause physical harm to the person or property of the other person, the other person's unborn, or a member of the other person's immediate family." *Id.* The 1973 Ohio Legislative

Service Commission notes accompanying the aggravated menacing statute state that "...the threatened harm need not be directed at the victim as such, but may be directed at a member of the victim's immediate family. Under former law, the person to whom the threat was addressed had also to be the object of the threatened harm." *Id.* In the years that have followed, all but 11 state legislatures have added similar "fear for third party" (including family members) language to their stalking codes.[5] More recently, effective October 1, 2012, the Connecticut legislature changed its second-degree stalking law to include "a course of conduct directed at a specific person that would cause a reasonable person to fear for such person's physical safety *or the physical safety of a third person...*" Conn. Gen. Stat. § 53a-181d. (Emphasis added).

Kentucky is in the minority of states with regard to the "fear for third persons" or even "family members" element of the offense of stalking.[6] As the law stands today, and more importantly, at the time of Mr. Maras' trial, fearing for the safety of a third party is not an element of stalking. If the Kentucky Legislature had seen fit to add this element to the offense, it would have done so by now. The Kentucky General Assembly opted to not include in the stalking statute the language that would encompass "fear for others".

Under KRS 508.140 and the jury instructions that incorporated the language of KRS 508.140, Mr. Maras could only be found guilty of stalking in the first degree if the

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[5] The "fear for third parties" type of stalking offense is criminalized in Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Iowa, Kansas, Louisiana, Maine, Maryland, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Oregon, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, Washington, Wisconsin and Wyoming. Territories and districts include Washington, D.C., Guam, Northern Mariana Islands, Puerto Rico and the Virgin Islands. (*See* Appendix to this Brief, p. D1).

[6] This minority of states also includes Hawaii, Indiana, Massachusetts, Michigan, Montana, Ohio, Pennsylvania, Rhode Island, South Dakota and West Virginia. (Appendix, p. D1).

Commonwealth proved beyond a reasonable doubt that he "[e]xplicitly or implicitly threatened Christina Potter with the intent to place Ms. Potter in reasonable fear of sexual contact or serious physical injury or death." (App. B2). The reference in KRS 508.130(1) and Instruction No. 6 (defining "stalk") to "person or persons" is merely a reflection that a defendant may stalk one person or may stalk multiple persons. Mr. Maras was charged with stalking only one person, Christina Potter. He could only be convicted of stalking Ms. Potter if the Commonwealth proved beyond a reasonable doubt that Mr. Maras's intent was to place Ms. Potter (and not some third person) "in reasonable fear of sexual contact or serious physical injury or death." (App. B2).

The language used in the jury instructions, which had been proposed by both the Commonwealth and the defense,[7] was an accurate reflection of the language contained in KRS 508.130 and 508.140. That language did not allow a conviction upon proof that Mr. Maras intended to place anyone other than Ms. Potter "in reasonable fear of sexual contact or serious physical injury or death." Ms. Potter testified that when she took the gun she did not know what Mr. Maras would do, and she thought he might hurt himself or her but she was scared he might do something. (VR, 9/21/11, 11:33:00). Later, Ms. Potter acknowledged that she told Detective Horn on November 10th that the gun incident made her scared that Mr. Maras was going to hurt himself, not her. (VR, 9/21/11, 11:45:00). On redirect examination, Ms. Potter said that, on some level, she was not afraid of Mr. Maras but she was afraid of what he would do to her or others. (VR, 9/21/11, 01:53:26). But she then said that the gun concerned her because she was "afraid

[7] The written jury instructions proposed by both the Commonwealth and the defense are contained in the manila envelope marked "Juror Information Sealed" that also contains the instructions actually given to the jury.

he might do something" without specifying what she feared. (VR, 9/21/11, 01:53:50). Her objective was to keep peace and she did not want to get hurt or have her children get hurt. She did not know what Mr. Maras would do. (VR, 9/21/11, 01:55:58).

The jurors' confusion about the meaning of the instructions was caused, not by the jury instructions, but by the Commonwealth's closing argument in which the prosecutor repeatedly said that Mr. Maras could be found guilty if Ms. Potter was in fear for the safety of others. He argued that Mr. Maras was a danger to himself, to Ms. Potter, to Olivia, to Ms. Potter's boyfriend, to her loved ones and to "anyone else who might be around." (VR, 9/22/11, 11:26:14, 11:31:27).

In the Court of Appeals, the Commonwealth did not take issue with the position that in order to convict of stalking in the first degree under KRS 508.140, the Commonwealth is required to prove that the defendant intended to place the named victim in fear of sexual contact, serious physical injury or death to herself. The Commonwealth did not argue that the offense may be committed by a defendant who intended to place the victim in fear of sexual contact, serious physical injury or death to someone other than the named victim.

By convicting Mr. Maras of stalking in the first degree, based on the theory that Christina Potter was not afraid for herself, but on behalf of her boyfriend or other third persons, the jury in this case convicted Mr. Maras of a crime that does not exist in the Commonwealth of Kentucky. Since the jury found that one of the essential elements of the offense – that Mr. Maras intended to place Christina Potter in fear for herself – had not been proven beyond a reasonable doubt, Mr. Maras was entitled to entry of a directed verdict of acquittal. For a constitutionally sound conviction, it must "rest upon a jury

determination that the defendant is guilty of every element of the crime for which he is charged, beyond a reasonable doubt." *United States v. Gaudin*, 515 U.S. 506 (1995).

The trial court's failure to grant a judgment notwithstanding the verdict deprived the appellant of due process of law under both the Kentucky [Sections 1, 2, 3, 7 and 11] and United States [Amendment 14] Constitutions. *Jackson v. Virginia*, *supra*; *In re Winship*, *supra*; *Commonwealth v. Jones*, 880 S.W.2d 544 (Ky. 1994). "To prevail [on palpable error review], one must show that the error resulted in 'manifest injustice.' While the language used is clear enough, we further explain that the required showing is probability of a different result or error so fundamental as to threaten a defendant's entitlement to due process of law." *Martin v. Commonwealth*, 207 S.W.3d 1, 3 (Ky. 2006). Had the jurors properly applied the law, they would have acquitted Mr. Maras because they concluded that the Commonwealth failed to prove that Mr. Maras intended to place Ms. Potter in fear of her own safety. Under *Jackson v. Virginia*, *In re Winship*, *Apprendi v. New Jersey* and *Vachon v. New Hampshire*, Mr. Maras's entitlement to due process of law was denied. Because he was convicted of a crime that does not exist in Kentucky, Mr. Maras is now entitled to reversal of his conviction and remand for entry of an order of dismissal. *Croomer v. Commonwealth*, 694 S.W.2d 471, 472 (Ky.App. 1985); *Burks v. United States*, 437 U.S. 1 (1978).

II. RCr 10.04 does not prohibit a court from considering information from a juror when the court is determining whether a defendant has been properly convicted of a criminal offense as defined in the Penal Code.

A. Preservation

To establish that he had been convicted of stalking under a "fear for others" theory, Mr. Maras relied, in part, upon the information conveyed by the jurors to the

judge after trial. Citing RCr 10.04, the Commonwealth argued in circuit court that the statements made by the jurors to Judge Shaw could not be used to impeach the jury verdict. (TR 92-95). The circuit court, without comment, denied the motions for a new trial ("Motion for new trial denied.") and for judgment notwithstanding the verdict ("Motion for JNOV denied."). (TR 86, 87).

On appeal, as part of Argument I (reversal and remand for dismissal of the stalking charge), Mr. Maras argued why RCr 10.04 did not prevent the circuit court or the Court of Appeals from taking into consideration the statements made by the jurors to Judge Shaw. (Brief for Appellant, pp. 18-20). The Commonwealth's brief addressing the "fear for others" stalking conviction issue (Argument I) consisted of six pages. (Brief for Commonwealth, pp. 3-8). Of the six pages in the Commonwealth's brief that addressed Argument I, five pages were devoted to the argument that RCr 10.04, just like Federal Rule of Evidence (FRE) 606(b), prohibits the court from considering the jurors' statements made to Judge Shaw. Mr. Maras responded in the Court of Appeals in a reply brief in which he countered the Commonwealth's arguments on this issue. (Reply Brief for Appellant, pp. 1-4).

B. Court of Appeals decision

The Court of Appeals ruled that "it has a long been held that a verdict may not be impeached by a juror's post-trial statements. Kentucky Rules of Criminal Procedure (RCr) 10.04; *Bowling v. Commonwealth*, 168 S.W.3d 2 (Ky. 2004)." (App. A4). But RCr 10.04 does not say that a "juror's post-trial statements" cannot be considered in circumstances like those in Mr. Maras's case. Furthermore, this Court has recognized that

RCr 10.04 may be unconstitutional. *See Bowling v. Commonwealth*, 168 S.W.3d 2 (Ky. 2004).

C. Argument

The notion that RCr 10.04 prevented the court from considering what the jurors told Judge Shaw is refuted by the plain language of that rule. This Court's rule-making authority under Section 116 of the Kentucky Constitution is without question, and it is assumed that the language of the civil and criminal procedural rules was chosen with the utmost precision. Questions of interpretation, of course, are inevitable, but not without guidance. "(A)s with statutes, we interpret the civil rules in accordance with their plain language." *Lanham v. Commonwealth*, 171 S.W.3d 14, 21 fn. 9 (Ky. 2005).

Where no specific definition is provided for terms contained within a statute, the words of a statute shall be construed according to their common and approved usage. *Johnson v. Branch Banking and Trust Co.*, 313 S.W.3d 557 (Ky. 2010). In interpreting a statute, a court must construe all words and phrases according to common and approved uses of language. *Withers v. University of Kentucky*, 939 S.W.2d 340 (Ky. 1997). When engaging in statutory interpretation, it is imperative that the court give the words of the statute their literal meaning and effectuate the intent of the legislature. *Samons v. Kentucky Farm Bureau Mut. Ins. Co.*, 399 S.W.3d 425 (Ky. 2013).

RCr 10.04 states in its entirety:

> A juror cannot be examined to establish a ground for a new trial, except to establish that the verdict was made by lot.

In Mr. Maras's case, Judge Shaw did not "examine" the jurors after the trial in order "to establish a ground for a new trial." The word "examined" in RCr 10.04 is the verb form of the word "examination," defined in *Black's Law Dictionary* as "[t]he questioning of a

witness *under oath*." *Black's Law Dictionary* 601 (8th ed. 2004) (italics added). It is an unmistakably clear and concise definition. To be "examined" under modern legal usage of the word requires that an oath be taken. *Id.* Both historically and in numerous recent cases, this Court has turned to *Black's Law Dictionary* to ascertain the plain meaning of terms contained in the rules and statutes of this Commonwealth.[8] A similar plain-language analysis and interpretation of RCr 10.04 should be undertaken by this Court.

Looking even further back in time reveals more about the plain legal meaning of the word "examination" and places its meaning in historical context. The third edition of *Black's Law Dictionary* – published in 1933, the most-recent edition that would have been available to the drafters of RCr 10.04 – not only defines the word "examination," but provides a commentary on how the word is understood in the context of trial practice:

> The examination of a witness consists of the series of questions put to him *by a party* to the action, or his counsel, for the purpose of bringing before the court and jury in legal form the knowledge which the witness has of the facts and matters in dispute, or of probing and sifting his evidence previously given.

Black's Law Dictionary 708 (3rd ed. 1933) (italics added).

More specifically, the same third edition of *Black's* features a commentary on "examination" in the specific context of criminal practice:

> An investigation by a magistrate of a person who has been charged with a crime and arrested, or of the facts and circumstances which are alleged to have attended the crime and to fasten suspicion upon the party so charged, in order to ascertain

[8] See, for example, *Commonwealth v. Wright*, 415 S.W.3d 606 (Ky. 2013) (defining "duly" entered court order); *Beshear v. Haydon Bridge Co. Inc.*, 416 S.W.3d 280, 292 (Ky. 2013) (defining "reparative injunction"); *Pete v. Anderson*, 413 S.W.3d 291, 299 (Ky. 2013) (defining "prosecute"); *Allen v. Commonwealth*, 410 S.W.3d 125, 138 (Ky. 2013) (defining "standby counsel"); *Webb v. Meyer*, 406 S.W.3d 444, 447 (Ky. 2013) (defining "layoff"); *Commonwealth v. Jones*, 406 S.W.3d 857, 860 (Ky. 2013) (defining "void"); *Bartley v. Commonwealth*, 400 S.W.3d 714, 721 fn. 6 (Ky. 2013) (defining "battery"); *Poindexter v. Commonwealth*, 389 S.W.3d 112, 117 (Ky. 2013) (defining "willful").

> whether there is sufficient ground to hold him to bail for his trial by the proper court.

Black's Law Dictionary 708 (3rd ed. 1933).

To "examine" under a modern legal plain-language approach is to question a witness *under oath*. In Mr. Maras' case, the jurors who provided the testimony upon which this appeal is based were never placed under oath. They were never asked to submit affidavits. There was no series of questions put to them by either party to the action. There was no effort whatsoever by a party to bring before the court any knowledge or information from the jurors that the court did not already have. There was no probing or sifting for evidence. There was no harassment or outside influence.

Furthermore, the information obtained by the trial court was never elicited "to establish a ground for a new trial." RCr 10.04. It would be impossible for Mr. Maras to have violated this provision of the rule, since *no* juror information was *ever* sought by Mr. Maras or his counsel, and also because his counsel did not even learn about the jurors' statements until *the day after the trial ended*. It was the trial judge who prompted the jury to share information on its deliberative process. This information was volunteered to Mr. Maras's counsel after the trial was complete. Since Judge Shaw, in speaking to the jury, did not do so with the intent "to establish a ground for a new trial," RCr 10.04 does not apply.

If any jurors were "examined" at all, it was not done under the plain-language definition of the word, and it was not done by Mr. Maras in an effort to impeach the verdict or obtain a new trial. But the information *was* given to him and it speaks for itself. Mr. Maras was convicted of a crime that doesn't exist in Kentucky.

What happened in Mr. Maras's case was not an impeachment of the verdict by the jurors. Rather, the jurors' statements were an explanation of the verdict, statements made in support of the verdict. As such, they could properly be considered by the court. "It has long been the rule in this jurisdiction that testimony of a juror may be received in support of the verdict but not to impeach it for misconduct on the part of some of the jurors, hence the evidence contained in the stipulation [about jurors' post-verdict statements] was competent. [Citations omitted]" *Tate v. Shaver*, 287 Ky. 29, 152 S.W.2d 259, 262 (1941).

In both the circuit court and on appeal, the Commonwealth relied heavily upon FRE 606(b) and federal cases interpreting that rule, in particular *United States v. Gonzales*, 227 F.3d 520, 524 (6th Cir. 2000). (TR 93-94; Brief for Commonwealth, pp. 4-7). Federal Rule of Evidence 606(b) contains very specific restrictions on juror testimony:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

Federal Rule of Evidence 606(b).

Kentucky declined to adopt the detailed juror testimony prohibitions found in the federal rule, choosing to make the testimonial limitation very narrow. KRE 606 reads in its entirety:

> A member of the jury may not testify as a witness before that jury in the trial of the case in which the juror is sitting. No objection need be made in order to preserve the point.

Unlike FRE 606(b), the only prohibition against juror testimony in KRE 606 is an absolute bar of a juror testifying at trial before the very jury on which the testifying juror is serving.

In *Bowling v. Commonwealth*, 168 S.W.3d 2 (Ky. 2004), this Court recognized the potential unconstitutionality problem with RCr 10.04. The Court in *Bowling* analyzed the problem, in part, by citing Fed. R. Ev. 606(b), which (as noted above) specifically prohibits post-trial juror testimony about juror deliberations. But KRE 606 only prohibits juror testimony at trial. For all other purposes and in all other situations outside of the trial, a juror ("every person") is competent as a witness under KRE 601, which means that RCr 10.04 is in conflict with the evidence rules. *Commonwealth v. Wood*, 230 S.W.3d 331 (Ky. App. 2007), was a case in which the circuit court admitted the testimony of a juror, and the Court of Appeals upheld that decision. Furthermore, in *Wood*, the Court of Appeals pointed out that this Court had twice noted that "the Sixth Circuit Court of Appeals declared unconstitutional an Ohio rule which is similar to our RCr 10.04. [Citations omitted]." *Wood*, 230 S.W.3d at 332.

Recently, this Court was presented with a case in which a purported juror's unsworn, unverified, and uncorroborated letter alleged irregularities in the jury's deliberation process. *Commonwealth v. Abnee,* 375 S.W.3d 49 (Ky. 2012). This Court

held that the letter was insufficient proof to warrant an evidentiary hearing or a new trial. *Id.* This Court described RCr 10.04 as "Kentucky's current expression of the old and well-considered common law rule that prohibited the impeachment of a jury verdict by the testimony of one of the jurors" that is 'firmly rooted in the early years of Kentucky jurisprudence.'" *Id.* at 52. (*See Johnson v. Davenport,* 26 Ky. 390, 393 (1830)).

Thus, the legislative intent of RCr 10.04 is rooted in the common law. As this Court wrote in *Abnee*:

> The rule serves several important purposes. It aids in protecting the sanctity and finality of judgments based upon jury verdicts. It promotes open and frank discussion among the jurors during deliberations. By barring the use of a juror's testimony to attack a verdict, the rule protects individuals who have served on juries from potentially corruptive influences that, in the hope of altering a verdict, might otherwise be brought to bear against a former juror.

Abnee, 375 S.W.3d at 53.

Thus, the purpose and intent of the rule is to spare jurors the harassment of having to provide post-trial testimony about their deliberations, and to protect the discussions that take place in the deliberation room from potentially corruptive influences. "However, [RCr 10.04] is not absolute, and it has not been interpreted as the clear-cut exclusionary rule that its text appears to suggest." *Taylor v. Commonwealth*, 175 S.W.3d 68, 74 (Ky. 2005). "Indeed, we could not read it in such a way because the rule must give way to various constitutional requirements, including due process of law." *Id.*

Mr. Maras' case fits squarely within this constitutional exception to the rule. Mr. Maras was denied due process of law when he was convicted of a crime that does not exist in Kentucky. "Common law offenses are abolished and no act or omission shall constitute a criminal offense unless designated a crime or violation under this code or

another statute of this state." KRS 500.020(1). There is no designated crime or violation under the Penal Code or the entire Kentucky Revised Statutes that describes the crime of stalking as including the situation where the offender intends that the victim be fearful for the safety of others. But according to the jurors who provided information to the trial judge, that was the criminal act for which they convicted Mr. Maras.

What distinguishes Mr. Maras's case from other cases interpreting RCr 10.04, and the *Abnee* case (where the defense attorney *initiated* contact with the juror), is that Mr. Maras and his counsel did nothing to offend the purpose and intent of RCr 10.04. With the intent of the rule being to provide a mechanism to keep defense attorneys and prosecutors from badgering jurors post-trial to impeach a verdict, then that aspect of the rule was strictly adhered to in this case. Mr. Maras, his counsel, and the prosecutors never met with or questioned any jurors after Mr. Maras' trial.

The Court of Appeals was wrong to simply declare that RCr 10.04 prohibits a court from considering "a juror's post-trial statements" for all purposes. To interpret the rule to bar all juror statements from consideration by the court would render the rule unconstitutional. The reality is that Mr. Maras stands convicted based upon acts that simply do not constitute a crime in Kentucky. That conviction is in violation of Mr. Maras's rights to due process of law and must, therefore, be reversed.

CONCLUSION

For the foregoing reasons, the appellant, Theodore Anthony Maras, respectfully submits that the judgment of conviction entered by the Jefferson Circuit Court on stalking in the first degree must be reversed and the case remanded for dismissal of the Count One of the indictment.

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Appendix