**Commonwealth of Kentucky**
**Supreme Court**
**2007-SC-000081-MR**

Phillip Leroy Wines Appellant

V. Appeal from the Jefferson Circuit Court
Action Nos. 05-CR-1921 and 06-CR-1838

Commonwealth of Kentucky Appellee

**Brief for Appellant, Phillip Leroy Wines**

Submitted By:

Elizabeth B. McMahon
Assistant Public Defender
Office of the Louisville Metro
Public Defender
Advocacy Plaza
717-719 West Jefferson Street
Louisville, Kentucky 40202
(502) 574-3800
Counsel for Appellant

**Certificate of Service**

I hereby certify that a copy of this brief was mailed with first-class postage prepaid to: Hon. Mary M. Shaw, Judge, Jefferson Circuit Court, Division Five, Jefferson County Judicial Center, 700 West Jefferson Street, Louisville, KY 40202; Hon. Mac Shannon, Assistant Commonwealth's Attorney, 514 West Liberty Street, Louisville, KY 40202; and Hon. Gregory D. Stumbo, Attorney General, Office of Criminal Appeals, Office of the Attorney General, 1024 Capital Center Drive, Frankfort, KY 40601-8204, on August 20, 2007. I further certify that the record on appeal has been returned to the Office of the Jefferson Circuit Court Clerk.

ELIZABETH B. McMAHON

## INTRODUCTION

Following a jury trial in Division Five of the Jefferson Circuit Court, the appellant, Phillip Leroy Wines, was convicted of murder, assault in the second degree, tampering with physical evidence, and being a persistent felony offender in the second degree. This is a direct appeal from the final judgment imposing sentences totaling forty-five years to serve.

## STATEMENT CONCERNING ORAL ARGUMENT

The appellant believes that oral argument may be helpful to this Court. Argument II addresses the 2006 amendments to self-protection laws under KRS Chapter 503 and their application to this case. Argument II also asks this Court to reconsider the case of Hilbert v. Commonwealth, 162 S.W.3d 921(Ky. 2005), in light of the codification of the "no duty to retreat" principle and requests that this Court specify the procedures to be used in determining the issue of immunity under KRS 503.085.

## NOTICE TO CITATIONS

Citations to the record of the Jefferson Circuit Court Clerk are made (TR, indictment number, volume number, page number). References to the Appendix to this brief are made (App., page number). References to the videotape of the proceedings are made in conformance with CR 98, as follows:

| | |
|---|---|
| MISC. VR: | Pretrial proceedings conducted on various dates and final sentencing conducted on December 20, 2006; |
| VR No. 1: | 30-5-06-VCR-074-1, trial proceedings conducted on October 30, 2006; |

| | |
|---|---|
| VR No. 2: | 30-5-06-VCR-074-2, trial proceedings conducted on October 31, 2006; |
| VR No. 3: | 30-5-06-VCR-074-3, trial proceedings conducted on November 1, 2006; |
| VR No. 4: | 30-5-06-VCR-074-4, trial proceedings conducted on November 2, 2006; |
| VR No. 5: | 30-5-06-VCR-074-5, trial proceedings conducted on November 3, 2006; |
| VR No. 6: | 30-5-06-VCR-074-6, trial proceedings conducted on November 6, 2006; and |
| VR No. 7: | 30-5-06-VCR-074-7, trial proceedings conducted on November 7, 2006. |

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## STATEMENT OF THE CASE

During the afternoon of April 14, 2005, the appellant, Phillip Wines, received a phone call from his longtime friend Micah Brashear, asking to come over with Brian Langan. (VR No. 6; 11/6/06; 12:48:58-12:50:22). Although Phillip worked second shift at Ford Motor Company, he was staying home from work that day because he was sick. (VR No. 6; 11/6/06; 12:47:55-12:48:58). He told Micah that he was ill and that he did not want Brian at his house.[1] (VR No. 3; 11/1/06; 16:26:30-16:27:40, VR No. 6; 11/6/06; 12:48:58-12:52:46). Phillip and Micah spoke on the phone several more times that afternoon and continued to have heated discussions about why Phillip did not want Micah and Brian to come to his house. (VR No. 3; 11/1/06; 16:29:15-16:30:38, VR No. 6; 11/6/06; 12:51:14-12:52:50).

That same day, Micah and Brian visited Micah's sister, Kathy, who lived in the same neighborhood as Phillip. After having a couple of beers, Micah and Brian went across the street to visit their friend Vaughn, and they drank some more beer. (VR No. 3; 11/1/06; 16:24:15-16:24:55, 16:27:40-16:28:26, 17:07:10-17:10:03). Upon leaving Vaughn's house, Micah and Brian walked over to Phillip's house and stood out in the street.[2] Phillip saw that Brian and Micah both had something in their hands, so he grabbed a pair of nunchaku karate sticks for protection before heading down his drive-

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[1] At trial, Micah Brashear testified that Phillip said he did not want Brian to come over because Brian was a "narc." (VR No. 3; 11/1/06; 16:27:14-16:27:40). Phillip, however, testified that he did not want Brian to come to his house because Brian was a convicted felon and he did not like Brian. (VR No. 6; 11/6/06; 12:51:14-12:52:26).

[2] At trial, Micah Brashear testified that Phillip was standing on his front porch and calling for Micah to come down to his house. (VR No. 3; 11/1/06; 16:30:58, 16:40:52, 17:17:49). In contrast, Phillip testified that he was in bed when he heard Micah outside yelling, "Come on out here, fat boy!" and "I'm going to whoop your ___!" (VR No. 6; 11/6/06; 12:52:50-12:54:26).

way. (VR No. 6; 11/6/06; 12:55:57-12:57:35). A verbal altercation ensued between Micah and Phillip, which eventually turned into a physical altercation. Micah kept one of his hands in his pocket, and Phillip knew he carried a pocketknife. As Micah came at Phillip a second time, Phillip believed he was in danger and struck Micah in the head with the nunchakus.[3] (VR No. 6; 11/6/06; 12:57:01-13:00:18).

Phillip waited for the police to arrive and gave a taped statement at the police station. (VR No. 6; 11/6/06; 13:00:18-13:02:53). Phillip explained to Detective Chris Horn that he knew Micah carried a knife and that Micah kept reaching in his pocket. He repeatedly told Micah to leave, and he only hit Micah once with the nunchakus after Micah stepped onto his property. (VR No. 4; 11/2/06; 14:36:50, 14:40:35-14:56:15). Phillip was placed under arrest and charged with assault. (Id. at 14:56:37). In the meantime, Micah was treated at University Hospital for a head laceration and a bruised shoulder. He was intoxicated but did not need stitches and did not stay overnight. He did, however, experience some short-term memory loss and dizziness. (TR 05CR1921, Vol. I, 98; VR No. 3; 11/1/06; 16:33:13-16:36:12, 16:36:51-16:39:25, 17:20:53-17:23:16).

Phillip posted bond and was released from jail on April 26, 2005. (VR No. 6; 11/6/06; 13:02:53-13:03:26). That day, James Hamilton stopped by Phillip's house to return some items to James, including Phillip's keys. (Id. at 13:11:13-13:12:30). Phillip had asked James to take care of his cat and to handle some financial matters for him while he was in jail. (Id. at 13:03:26-13:10:47). James lived in the neighborhood with his

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[3] Phillip testified that Micah came onto his property and that Micah "came at" him twice before he used the nunchakus. (VR No. 6; 11/6/06; 12:59:19-13:00:18). Micah claimed that he did not enter Phillip's property but that Phillip kept trying to persuade him to come onto his property. (VR No. 3; 11/1/06; 16:32:15-16:33:13).

girlfriend, Angela Nelson. Although Phillip had met Angela sometime in December 2004 when he moved into the neighborhood, he had not met James until March 2005. (VR No. 6; 11/6/06; 12:41:47-12:44:25).

Angela and James had been living together for a couple of years and had a volatile relationship. (VR No. 3; 11/1/06; 11:01:33-11:03:10, 11:08:57-11:13:58). Although they got along well at first, things started going downhill after James was diagnosed with having AIDS. Angela was tested and learned that she was HIV positive. This was especially upsetting to Angela because her mother had died from AIDS. In addition, James had lied to her about being tested for HIV before they became sexually active. (Id. at 11:10:35-11:13:12). James and Angela began arguing more and had physical altercations. They also began to do more drugs. James was a drug dealer and sold all types of drugs, including cocaine, marijuana, pills, and acid. (Id. at 11:12:09-11:15:05, 14:27:22-14:31:31:24). Angela did not work and relied on James to support her. (Id. at 14:27:22-14:27:55).

In March and April 2005, James and Angela both began coming over to Phillip's house. (VR No. 6; 11/6/06; 12:45:06-12:45:30). Angela would sometimes come by herself and began confiding in Phillip about her violent relationship with James. Phillip had also seen James push Angela down in the street. (Id. at 12:45:30-12:47:55). Angela was comfortable with Phillip, and he would listen to her. (VR No. 3; 11/1/06; 14:46:58-14:49:18). On Derby Day in May 2005, Angela told Phillip that she was going on a date. Angela returned to Phillip's house later that evening and told him that the date had not gone well. (VR No. 3; 11/1/06; 14:49:18-14:51:40, VR No. 6; 11/6/06; 13:15:00-13:18:43). Angela stayed the night with Phillip, and they began a sexual relationship the

next morning. (VR No. 3; 11/1/06; 14:51:40-14:54:14, VR No. 6; 11/6/06; 13:17:4313:20:44). Thereafter, Angela continued to stay at Phillip's house, and they continued their sexual relationship. However, Angela was also still seeing James. (VR No. 3; 11/1/06; 14:54:14-14:56:07, VR No. 6; 11/6/06; 13:21:15-13:23:25).

On May 20, 2005, James broke into Phillip's house. He found Angela in Phillip's bed, pulled the covers off of her, and saw that she was naked. He was angry, screaming, and called Angela names. (VR No. 3; 11/1/06; 14:56:07-14:59:18, VR No. 6; 11/6/06; 14:12:55). Phillip came to Angela's assistance, pulled James off of her, and took him outside.[4] (VR No. 3; 11/1/06; 14:59:18-14:59:44, VR No. 6; 11/6/06; 14:12:55-14:13:56). Subsequently, on May 30, 2005, Angela was asleep on the couch when James came into Phillip's house again and started choking her. Phillip woke up when he heard Angela screaming, pulled James off of her, and called the police. (VR No. 3; 11/1/03; 14:59:44-15:01:44, VR No. 6; 11/6/06; 14:15:35-14:17:37). James left before the police arrived. The police took photos of Angela's neck and advised her to take out an emergency protective order (EPO). (VR No. 3; 11/1/03; 15:01:44-15:03:33, VR No. 6; 11/6/06; 14:17:37-14:19:50). Angela went to the courthouse that day and filed an EPO against James. (VR No. 3; 11/1/06; 15:03:33-15:04:50, VR No. 6; 11/6/06; 14:18:40-14:19:50). However, Angela continued to see James, even though she was still staying with Phillip and having a sexual relationship with him. The EPO was dismissed when Angela failed to appear in court. (VR No. 3; 11/1/06; 15:05:17-15:06:27, 15:07:47-15:09:28). On June

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[4] Phillip testified that James was choking Angela when he pulled him off of her. Angela acknowledged that James was on top of her but denied that James was choking her on that occasion. (VR No. 3; 11/1/06; 14:56:07-14:59:44, VR No. 6; 11/6/06; 14:12:55-14:13:56).

7, 2005, James showed up at Phillip's house again and knocked a screen and a fan out of the bedroom window. Phillip called the police, but James had taken off and Angela went with him. (VR No. 6; 11/6/06; 14:20:45-14:25:13). Angela began staying with Phillip again the next night. (VR No. 6; 11/6/06; 14:24:10-14:25:13).

On June 12, 2005, James pulled up outside Phillip's house in his car around 2:00 a.m. He was honking his horn, yelling for Angela to come outside, and making threats. Phillip called the police, but once again, James left before they arrived. (VR No. 3; 11/1/06; 15:13:50-15:50:50, VR No. 6; 11/6/06; 14:25:13-14:29:42). Phillip talked to the police, but Angela stood behind the door and would not speak to them. (VR No. 5; 11/3/06; 11:21:59-11:24:17, VR No. 6; 11/6/06; 14:27:14-12:29:42).

Around 4:00 a.m., James returned to Phillip's house. However, Phillip and Angela had different versions of what transpired. According to Phillip, James was outside screaming and yelling for Angela to talk to him, but Angela went to the front door and told him to leave. Phillip tried to call the police, but Angela stopped him. (VR No. 6; 11/6/06; 14:30:55-14:32:00). By that time, James was on the front porch. James opened the door, stepped in, and started hitting Phillip. (Id. at 14:32:00-14:35:20). James struck Phillip in the face and head and knocked Phillip down to his knees. James then leaned over Phillip, pressed his chest on Phillip's head, and started beating Phillip in the back. (Id. at 14:34:35-14:36:00). At that point, Phillip grabbed a knife and stabbed James several times to get James off of him. James pulled Phillip out onto the porch, where Phillip stabbed him a couple of more times. James then took off running, and Phillip called 911. (Id. at 14:36:14-14:39:48). Phillip knew that James was HIV positive, so he washed off the knife and placed it on a towel on top of the television. He also washed off himself and

got dressed. (Id. at 14:39:05-14:41:52). He then went out on his porch and waited for the police to arrive. Phillip told Officer McNamara that he stabbed James to defend himself after James entered his house and that the knife was on top of the television. (VR No. 5; 11/3/06; 11:29:47-11:31:45; VR No. 6; 11/6/06; 14:42:03-14:42:55). Phillip was placed under arrest. (VR No. 5; 11/3/06; 11:35:35, VR No. 6; 11/6/06; 14:42:55). James died that morning at University Hospital. (VR No. 5; 11/3/06; 13:58:35-13:59:05).

Angela Nelson, however, claimed that Phillip had been threatening to kill James for weeks but that she had not taken him seriously. (VR No. 3; 11/1/06; 14:20:50-14:22:04). She stated that after the 2:00 a.m. incident on June 12, Phillip told her she had to choose between James and him and that Phillip got mad and threatened to kill James when she refused to leave James. (Id. at 14:21:44-14:22:16). According to Angela, she was trying to leave Phillip's house around 4:00 a.m. when James just happened to drive by and saw that Phillip would not let her leave. (Id. at 11:03:53-11:04:14). She maintained that James came onto the porch but that he did not enter the house. James and Phillip were yelling at each other through the screen door, and Angela supposedly told James to run because Phillip had a knife. (Id. at 11:04:14-11:04:40). James ran towards a neighbor's house, and Phillip went to James's car and took the keys out of the ignition. Angela stated that James and Phillip started fighting behind the car and that Phillip pulled out a knife and started stabbing James. When Phillip ran back into his house, James tried to leave in his car but the keys were gone. Angela claimed that she went to get the keys from Phillip but that he was calling 911 and denied having the keys. (Id. at 11:04:40-11:06:44). When Angela went back outside, James was lying in another yard, and Angela

started screaming for help. She attempted to stop the bleeding with her shirt and sought help from James's friend Mike who lived nearby. (Id. at 11:06:44-11:08:40).

Although the Jefferson County Grand Jury that convened in May 2005 had already returned no true bill regarding the alleged assault of Micah Brashear, the Commonwealth decided to try its luck with a new grand jury, presenting the assault allegation along with evidence concerning the death of James Hamilton to the grand jury in June. On June 21, 2005, the Jefferson County Grand Jury returned Indictment No. 05CR1921, charging Phillip Wines with murder and tampering with physical evidence regarding the incident with James Hamilton and assault in the second degree involving the incident with Micah Brashear. (TR 05CR1921, Vol. I, 1-2). The case was assigned to Division Five of the Jefferson Circuit Court. (TR 05CR1921, Vol. I, 1). Another grand jury later returned Indictment No. 06CR1838, charging Phillip Wines with being a persistent felony offender in the second degree. (TR 06CR1838, 1-2).

A jury trial was conducted in this case from October 30 through November 7, 2006. The jury returned verdicts finding Phillip Wines guilty of intentional murder, assault in the second degree, and tampering with physical evidence. (TR Exhibits Envelope; App. E21, E29; VR No. 7; 11/7/07; 14:46:21-14:48:43). A penalty phase was conducted the same day. (VR No. 7; 11/7/07; 16:12:58-17:15:09). The jury found Phillip guilty of being a persistent felon in the second degree (PFO 2) and recommended the following sentences: murder – 30 years; assault in the second degree – 5 years, enhanced to 10 years by PFO 2; tampering with physical evidence – 1 year, enhanced to 5 years by PFO 2. The jury further recommended that all sentences run consecutively, for a total sentence of 45 years. (TR 05CR1921, Vol. IV, 723-729; VR No. 7; 11/7/07; 17:49:01-17:51:48).

On December 20, 2006, the trial court conducted final sentencing and imposed consecutive sentences totaling 45 years to serve, as recommended by the jury. (MISC. VR; 12/20/06; 10:11:39-10:26:05). The Judgment of Conviction and Sentence was entered on December 22, 2006. (TR 05CR1921, Vol. IV, 768-770; App. A1-A3). Phillip Wines filed a timely notice of appeal. (TR 05CR1921, Vol. IV, 773; TR 06CR1838, 128). Additional facts will be set out as necessary in the arguments below.

## ARGUMENT

### I. The trial court committed reversible error by denying the appellant's motion to sever the counts of the indictment for separate trials.

#### A. Preservation and Background

On August 3, 2005, Phillip Wines, through counsel, filed a written motion to sever the assault count of Indictment No. 05CR1921, involving Micah Brashear, from the murder and tampering with physical evidence counts of the indictment, involving the death of James Hamilton, for separate trials. (TR 05CR1921, Vol. II, 257-260). A hearing was conducted concerning this motion on November 14, 2005. (MISC. VR; 11/14/05; 9:15:46-9:32:15). The trial court entered a written order on December 14, 2005, denying the appellant's motion to sever the counts of the indictment but did not state the basis for its decision. (TR 05CR1921, Vol. II, 396; App. B1). On June 15, 2006, the appellant filed a renewed motion for severance of the counts of the indictment. (TR 05CR1921, Vol. IV, 608-611). The trial court[5] heard arguments concerning this motion on June 26, 2006.

[5] Judge Stephen P. Ryan presided over the initial severance hearing but retired prior to the trial of this case. Hon. W. Douglas Kemper was appointed to fill the vacancy in Division Five of the Jefferson Circuit Court and conducted the second severance hearing, as well as presided over the trial.

(MISC. VR; 6/26/06; 14:46:00-15:05:07). On July 27, 2006, the trial court denied the motion to reconsider, finding that evidence of one crime would be admissible at the trial of the other and that Phillip Wines had not shown he would be unduly prejudiced. (TR 05CR1921, Vol. IV, 612; App. B2; MISC. VR; 7/27/07; 13:57:25-13:59:40). The appellant subsequently renewed his motion to sever the counts at trial. (VR No. 2; 10/31/06; 10:25:11-10:26:02, VR No. 6; 11/6/06; 16:15:10-16:18:40). Therefore, this issue was properly preserved for review.

**B. Legal Analysis**

According to RCr 6.18, two or more offenses may be charged in the same indictment "if the offenses are of the same or similar character or are based on the same acts or transactions connected together or constituting parts of a common scheme or plan." However, "[t]he bare fact that two or more counts are joined in a single indictment under RCr 6.18 or could be consolidated for trial under RCr 9.12 does not require or even permit a joint trial of counts under all circumstances." Russell v. Commonwealth, 482 S.W.2d 584, 587 (Ky. 1972), overruled on other grounds by Pendleton v. Commonwealth, 685 S.W.2d 549 (Ky. 1985). RCr 9.16 mandates separate trials "[i]f it appears that a defendant or the Commonwealth is or may be prejudiced by a joinder of offenses."

To constitute reversible error on the issue of improper joinder, there must be "a showing of prejudice and clear abuse of discretion." Rearick v. Commonwealth, 858 S.W.2d 185, 187 (Ky. 1993). "A significant factor in identifying such prejudice is the extent to which evidence of one offense would be admissible in the trial of the other offense." Rearick, 858 S.W.2d at 187, citing Spencer v. Commonwealth, 554 S.W.2d 355, 357 (Ky. 1977). However, "[t]o be admissible...the evidence must be relevant to the is-

sues in some manner other than proof of a general criminal disposition in the accused to commit the particular crime." Spencer, 554 S.W.2d at 357-358.

In the present case, the trial court incorrectly determined that "evidence of the Assault charge would be admissible in the trial of the murder charge and vice versa." (TR 05CR1921, Vol. IV, 612; App. B2). The offenses involved different purported victims and occurred approximately two months apart. Although Phillip Wines claimed that he acted in self-defense on both occasions, the offenses were not of similar character. Phillip used nunchaku karate sticks to defend himself against Micah Brashear while he used a knife to defend himself and Angela Nelson against James Hamilton. The circumstances surrounding these incidents were also drastically different. Phillip and Micah had been friends for over thirty years but had become embroiled in a dispute that day because Phillip did not want Micah and Brian Langan coming over to his house. (VR No. 3; 11/1/06; 16:23:18-16:30:38, VR No. 6; 11/6/06; 12:48:58-13:00:18). In contrast, Phillip had only known James Hamilton for a few months. (VR No. 3; 11/1/06; 14:32:48-14:33:01, VR No. 6; 11/6/06; 12:43:0612:44:45). James became angry after Angela began a sexual relationship with Phillip, and he entered Phillip's house without permission twice in the month of May 2005. (VR No. 6; 11/6/06; 13:23:25-13:24:16, 14:10:12-14:13:56, 14:15:35-14:19:50). James had also shown up outside his house earlier in the morning on June 12. (VR No. 4; 11/2/06; 11:07:49-11:10:20, VR No. 6; 11/6/06; 14:26:32-14:29:42).

In fact, the only similarity of the offenses was the location (i.e., the property Phillip Wines rented at 2926 Cannons Lane), although there was a dispute as to whether the fight with James Hamilton began inside Phillip's house. In all other respects, the offenses were very different. Unlike the offenses involved in the case of Spencer v. Common-

wealth, 554 S.W.2d 355, 358 (Ky. 1977), the offenses in the case at hand did not "involve[] the same unique circumstances and modus operandi."

In addition, the offenses were not connected and involved few overlapping witnesses. In its response to the appellant's severance motion, the Commonwealth stated that "[t]he victim of the murder offense in this indictment, James Hamilton, was a key witness to the assault offense against Micah Brashear" and that it was "the theory of the Commonwealth that Defendant committed the assault in April, 2005, and murdered Mr. Hamilton, a key witness in the assault of Mr. Brashear." (TR 05CR1921, Vol. II, 392). While the uniform incident report does list James Hamilton as a witness to the altercation between Phillip and Micah, neither the report nor any other document provided in discovery alleges what James Hamilton supposedly observed. In addition, the Commonwealth's purported theory, that Phillip killed James because he was a "key witness in the assault of Mr. Brashear" is undermined by the fact that the grand jury had already returned no true bill concerning the assault charge on May 25, 2005, approximately two weeks before James Hamilton's death. (MISC. VR; 11/14/05; 9:26:06-9:27:29). It is also important to note that the Commonwealth did not pursue this theory at trial.

Contrary to the Commonwealth's assertion, the cases were not linked or intertwined due to the fact that Phillip wrote a letter to James while he was in jail, asking for assistance in taking care of his pet and finances. (TR 05CR1921, Vol. I, 94-95; MISC. VR; 11/14/05; 9:19:29-9:21:00). If found relevant and ruled admissible, the letter could have been introduced at the trial of the assault charge without reference to the murder charge and introduced at the trial of the murder charge without reference to the assault charge. Unlike the circumstances presented in Schambon v. Commonwealth, 821 S.W.2d

804, 808-809 (Ky. 1991), the evidence of one offense was not necessary to establish an element of the other offense in the case at hand.

The Commonwealth also asserted in its response that "both the trial for the murder charge and the assault charge will involve the statements and testimony of three (3) witnesses: Defendant's acquaintance, Doc Adams; a neighbor, Kristin White; and Angela Nelson." (TR 05CR1921, Vol. II, 392). However, Doc Adams[6] was not present at either incident, and Angela Nelson was not present during the altercation with Micah Brashear. (TR 05CR1921, Vol. II, 230-234, 242-243; VR No. 3; 11/1/06; 11:22:58-11:24:17, 11:26:01-11:26:20). Neighbors James White and Kristen White were the only persons called to testify who observed or heard some of the events on both April 14th and June 12th. (VR No. 4; 11/2/06; 11:10:20-11:11:40, 11:13:26-11:15:48, 11:23:13-11:24:42, 12:05:19-12:13:59).

In short, the evidence against Phillip Wines as to the murder charge would not have been admissible in a separate trial of the assault charge and evidence as to the assault charge would not have been admissible in a separate trial of the murder charge. The acts were not of similar character, and the offenses were not connected. The evidence did not constitute common scheme or plan evidence, and identity was not an issue. KRE 404(b)(1). Further, there was no evidence of one charge that was intertwined with or necessary to prove the other charge against Phillip Wines. KRE 404(b)(2).

The trial court also overlooked the prejudice that resulted from combining these separate and distinct offenses at one trial. There was "a substantial likelihood that the inadmissible 'other crimes' evidence tainted the jury's belief as to each of the crimes

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[6] Doc Adams did not testify at trial.

charged and that each additional unrelated charge took on weight by virtue of being joined with the others whereby the whole exceeded the sum of its parts." Rearick, 858 S.W.2d at 188. In fact, this spillover effect seemed to occur at the June grand jury, where Phillip was indicted for assault along with murder and tampering with physical evidence, even though the May grand jury had returned no true bill with respect to the assault charge. Similarly, once the trial jury found Phillip Wines guilty as to one incident, the likelihood that the jury would find guilt as to the other incident was greatly enhanced due to the collective proof and the prejudice of being charged with multiple violent offenses. "A person who is charged with the commission of crimes may not always have a perfect trial, but he is entitled to a fair trial." Cargill v. Commonwealth, 528 S.W.2d 735, 737 (Ky. 1975). Because the trial court clearly abused its discretion by denying the motion to sever the charges for trial and because the joint trial prejudiced Phillip Wines' rights to a fair trial and due process of law, as guaranteed by the 6th and 14th Amendments to the United States Constitution and Sections 2 and 11 of the Kentucky Constitution, Phillip's convictions must be reversed and the offenses remanded for separate trials.

## II. The trial court failed to properly apply the law under KRS Chapter 503, as amended by the General Assembly in 2006, resulting in erroneous self-protection instructions and an inadequate immunity hearing.

### A. Preservation and Background

This issue was properly preserved for review as follows. On June 15, 2006, defense counsel filed a motion to rely on amendments made by the legislature to KRS Chapter 503, which were to become effective on July 12, 2006. (TR 05CR1921, Vol. IV, 621-623). At that time, trial was scheduled to begin on June 26, 2006. When the trial was continued beyond the effective date of the amendments, the trial court remanded the mo-

tion as "moot – because of continuance until after 7-12-06." (TR 05CR1921, Vol. IV, 624; MISC. VR; 6/26/06; 14:16:50-14:18:00).

On October 19, 2006, defense counsel filed a motion to dismiss Phillip Wines's charges based on a newly enacted section of KRS Chapter 503 [KRS 503.085] that creates immunity from prosecution for those acting in self-defense. In the alternative, Phillip Wines sought an evidentiary hearing on the question of immunity. (TR 05CR1921, Vol. IV, 673-676). Defense counsel also reiterated that Phillip Wines should be able to rely on the version of KRS Chapter 503 which became effective on July 12, 2006, and pointed out that the new version contained a codification of the pre-existing no duty to retreat law and expanded the circumstances under which deadly force may be used. (Id.).

On October 30, 2006, the trial court heard arguments concerning the application of amended KRS Chapter 503. (VR No. 1; 10/30/06; 14:33:40-15:45:39). Indicating that it had already ruled on this issue in another case, the trial court held that the amendments to KRS Chapter 503 did not apply retroactively. However, the trial court agreed to consider the motion to dismiss on the merits because the immunity provision of KRS 503.085 could be interpreted as prohibiting continued prosecution of a case. (Id. at 15:07:45-15:17:15). The court asked for suggestions on what procedure to use to determine the issue of immunity as the statute failed to provide any guidance. (Id. at 15:04:25-15:07:28). As in her motion, defense counsel requested that the court conduct a pretrial evidentiary hearing, wherein the court could hear testimony from witnesses as well as review the discovery. (Id. at 15:05:52-15:07:28, 15:17:15-15:19:49). Defense counsel asserted that the Commonwealth should have the burden of proof to establish that Phillip

Wines was not entitled to immunity, but counsel did not know what that burden should be. (Id. at 15:19:49-15:24:25). The Commonwealth argued that there was no practical way to determine immunity except as a directed verdict motion and that the defendant should bear the burden. (Id. at 15:24:25-15:33:25). Looking to the case of People v. Guenther, 740 P.2d 971 (Colo. 1987), the trial court determined that the burden should be placed on the defendant to establish his entitlement to immunity by a preponderance of the evidence because it was in the nature of an affirmative defense. (Id. at 15:35:40-15:43:00). However, relying on King v. Venters, 595 S.W.2d 714 (Ky. 1980), the court ruled that Phillip Wines was not entitled to an evidentiary hearing but instead could only make arguments in support of immunity. (Id. at 15:43:32-15:45:39). The court then heard arguments from both sides concerning the evidence. (Id. at 15:45:39-16:04:25).

The next day, the trial court denied the motion to dismiss the charges, finding that there was conflicting evidence as to whether Phillip was justified in using deadly physical force against James Hamilton and physical force against Micah Brashear. The court believed that immunity would only apply to a situation where there was undisputed evidence of the need to use self-defense. (VR No. 2; 10/31/06; 10:06:30-10:17:00).

During motions for directed verdict at trial, defense counsel renewed the motion to dismiss Phillip's charges based on the immunity provision. (VR No. 5; 11/3/06; 15:58:55-16:08:33, VR No. 6; 11/6/06; 16:13:50-16:15:10). Defense counsel also tendered two sets of proposed jury instructions (i.e., one set for the assault charge and one set for the murder and tampering charges), which included self-protection instructions that incorporated amendments to KRS Chapter 503. (TR Exhibits Envelope; App. C and App. D; VR No. 6; 11/6/06; 16:17:59-16:24:38). The trial court's instructions to the jury

did not include any of the amendments to KRS Chapter 503. (TR Exhibits Envelope; App. E).

**B. Legal Analysis**

In April 2006, the Kentucky General Assembly made extensive changes to KRS Chapter 503 with regard to the law of self-protection. 2006 Kentucky Acts, Chapter 192, §§ 1-6, eff. 7-12-2006. These changes became effective on July 12, 2006, and included amendments to existing self-defense statutes as well as the creation of new statutes. For example, with the enactment of KRS 503.055, the legislature created new presumptions with regard to self-protection. According to KRS 503.055(1), "[a] person is presumed to have held a reasonable fear of imminent peril of death or great bodily harm to himself or herself or another when using defensive force that is intended or likely to cause death or great bodily harm to another" under the following circumstances:

> (a) The person against whom the defensive force was used was in the process of unlawfully and forcibly entering or had unlawfully and forcibly entered a dwelling, residence, or occupied vehicle, or if that person had removed or was attempting to remove another against that person's will from the dwelling, residence, or occupied vehicle; and
> (b) The person who uses defensive force knew or had reason to believe that an unlawful and forcible entry or unlawful and forcible act was occurring or had occurred.

However, this presumption is not applicable in the situations enumerated in KRS 503.055(2). The statute further provides that "[a] person who unlawfully and by force enters or attempts to enter a person's dwelling, residence, or occupied vehicle is presumed to be doing so with the intent to commit an unlawful act involving force or violence." KRS 503.055(4).

In addition, KRS 503.055(3) expressly codifies the "no duty to retreat" principle, which has long been recognized as part of Kentucky law:

> 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.

The "no duty to retreat" principle was also added to both KRS 503.050(4) ("A person does not have a duty to retreat prior to the use of deadly physical force.") and KRS 503.070(3) ("A person does not have a duty to retreat if the person is in a place where he or she has a right to be."). Moreover, the right of a person to use deadly force was extended in KRS 503.055(2) to include "when the defendant believes that such force is necessary to protect himself against...[a] felony involving the use of force, or under those circumstances permitted pursuant to KRS 503.055." The right to use deadly force was also extended in this manner with regard to protection of others. KRS 503.070(2)(a).

Phillip Wines's defense to both the assault charge and the murder charge was that he acted in self-defense. As a result, he sought to have the jury instructed in accordance with these amendments to KRS Chapter 503. (TR Exhibits Envelop; App. C3-C4, D3-D4). However, the trial court erred in failing to instruct the jury with regard to the changes in the law of self-protection, as well as the already existing legal principle of no duty to retreat, and failed to follow appropriate procedures in determining whether Phillip Wines should be immune from prosecution under KRS 503.085.

**1. Retroactivity of amendments to KRS Chapter 503**

KRS 446.110 provides as follows:

> No new law shall be construed to repeal a former law as to any offense committed against a former law, nor as to any act done, or penalty, forfeiture or punishment incurred, or any right accrued or claim arising under the former law, or in any way whatever to affect any such offense or act so committed or done, or any penalty, forfeiture or punishment so incurred,

> or any right accrued or claim arising before the new law takes effect, except that the proceedings thereafter had shall conform, so far as practicable, to the laws in force at the time of such proceedings. If any penalty, forfeiture or punishment is mitigated by any provision of the new law, such provision may, by the consent of the party affected, be applied to any judgment pronounced after the new law takes effect.

"This statute creates an exception to the general rule that '[n]o statute shall be construed to be retroactive, unless expressly so declared.'" Bolen v. Commonwealth, 31 S.W.3d 907, 909 (Ky. 2000), quoting KRS 446.080(3). However, "KRS 446.110 only applies if the new penalty is definitely mitigating." Bolen, 31 S.W.3d at 909, citing Commonwealth v. Phon, 17 S.W.3d 106, 108 (Ky. 2000), and Coleman v. Commonwealth, 160 Ky. 87, 169 S.W. 595, 597 (1914).

The amendments to KRS Chapter 503 are definitely mitigating as they increase the scope of when a defendant is justified in acting in self-defense and in protection of others. It is a complete defense that exonerates a defendant when the belief to use self-defense is properly held, or it can reduce the offense, and therefore the penalty, when the belief to use self-defense is reckless or wanton. The amendments create presumptions, expand the circumstances when deadly force may be used, and emphasize the "no duty to retreat" principle.

"[I]t is the duty of the trial judge to prepare and give instructions on the whole law of the case, and this rule requires instructions applicable to every state of the case deducible or supported to any extent by the testimony.... A defendant has a right to have every issue of fact raised by the evidence and material to his defense submitted to the jury on proper instructions." Taylor v. Commonwealth, 995 S.W.2d 355, 360 (Ky. 1999). See also Holland v. Commonwealth, 114 S.W.3d 792, 802 (Ky. 2003). "A trial court is re-

quired to instruct on every theory of the case reasonably deducible from the evidence"[7] and "[a] defendant is entitled to an instruction on any lawful defense which she has."[8] The self-defense instruction was erroneous because it did not inform the jury of the whole law of the case. The failure to instruct the jury in accordance with the 2006 amendments prevented the jury from properly applying the whole law of self-defense to the evidence and deprived Phillip of "a meaningful opportunity to present a complete defense."[9] The absence of the instruction "so infected the entire trial that the resulting conviction violates due process.'"[10] Phillip Wines's convictions must be reversed for a new trial at which the jury is properly instructed regarding the law of self-defense.

**2. Codification of pre-existing "no duty to retreat" principle**

Even if the amendments to KRS Chapter 503 did not apply retroactively, Phillip Wines was still entitled to have the jury instructed regarding the "no duty to retreat" principle. Self-defense is not merely a statutory right under KRS Chapter 503 but is an "inherent and inalienable right[]" guaranteed by § 1 of the Kentucky Constitution.[11] The right to self-defense "means that a Kentuckian never runs. He does not have to."[12] "It is traditional Kentucky law that a man does not have to act the coward and run, or 'retreat to the

[7] Manning v. Commonwealth, 23 S.W.3d 610, 614 (Ky. 2000).
[8] Springer v. Commonwealth, 998 S.W.2d 439, 452 (Ky. 1999) (other citation omitted).
[9] California v. Trombetta, 467 U.S. 479, 485, 104 S.Ct. 2528, 81 L.Ed.2d 413, 419 (1984).
[10] Middleton v. McNeil, 541 U.S. 433, 124 S.Ct. 1830, 1832, 158 L.Ed.2d 701, 707 (2004), citing Estelle v. McGuire, 502 U.S. 62, 72, 112 S.Ct. 475, 482, 116 L.Ed.2d 385, 399 (1991).
[11] "All men ... have certain inherent and inalienable rights ... First: The right of enjoying and defending their lives ... Seventh: The right to bear arms in defense of themselves ...". See Bill of Rights, Kentucky Constitution, §1.
[12] Gibson v. Commonwealth, 24 Ky.L.Rptr. 91, 237 Ky. 33, 34 S.W.2d 936 (1931); Marcum v. Commonwealth, 9 Ky.L.Rptr. 253, 4 S.W. 786 (1887).

wall,' as under the common law rule"[13] and it is error to give an instruction implying that a defendant in a self-defense case has a duty to retreat.[14] The "no duty to retreat" principle survived the passage of the Penal Code and remains a viable component of the law of self-defense: "A proposal by the drafters of the Kentucky Penal Code to change this rule was rejected by the General Assembly and the right of a defender to stand his ground against aggression was left intact." Lawson and Fortune, Kentucky Criminal Law, § 4-2(d)(2), p. 146 (1998) (footnotes omitted).

Despite this long-standing tenet of Kentucky law, this Court has determined that Kentucky "follow[s] the principle 'that when the trial court adequately instructs on self-defense, it need not also give a no duty to retreat instruction.'" Hilbert v. Commonwealth, 162 S.W.3d 921, 926 (Ky. 2005), quoting State v. Ottman, 144 Ariz. 560, 562, 698 P.2d 1279, 1281 (1985). However, one year after the opinion in Hilbert was rendered, the General Assembly codified the "no duty to retreat" principle in several statutes within KRS Chapter 503, expressly stating as follows:

> 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.

KRS 503.055(3). See also KRS 503.050(4) ("A person does not have a duty to retreat prior to the use of deadly physical force.") and KRS 503.070(3) ("A person does not have a duty to retreat if the person is in a place where he or she has a right to be."). The appel-

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[13] Sikes v. Commonwealth, 304 Ky. 429, 435, 200 S.W.2d 956, 960 (1947) overruled on other grounds in White v. Commonwealth, 360 S.W.2d 198, 200 (Ky. 1962).
[14] Caudill v. Commonwealth, 234 Ky. 142, 27 S.W.2d 705, 706-707 (1930) citing Howard v. Commonwealth, 24 Ky.L.Rptr. 91, 67 S.W. 1003, 1004 (1902).

lant submits that Hilbert should be reconsidered in light of these statutory provisions, as they express the legislature's intent that the "right [of a person] to stand his or her ground and meet force with force" is not an abstract idea but is instead an integral element of the law of self-defense. Therefore, the appellant submits that a trial court cannot adequately instruct on self-defense without including a "no duty to retreat" instruction.

As this Court has often stated,

> [I]t is the duty of the trial judge to prepare and give instructions on the whole law of the case, and this rule requires instructions applicable to every state of the case deducible or supported to any extent by the testimony. ... A defendant has a right to have every issue of fact raised by the evidence and material to his defense submitted to the jury on proper instructions.

Taylor v. Commonwealth, 995 S.W.2d 355, 360 (Ky. 1999). See also Holland v. Commonwealth, 114 S.W.3d 792, 802 (Ky. 2003). "A trial court is required to instruct on every theory of the case reasonably deducible from the evidence"[15] and "[a] defendant is entitled to an instruction on any lawful defense which she has."[16] The self-defense instruction was erroneous because it did not inform the jury of the whole law of the case, i.e., that Phillip had no duty to retreat and had the right "to stand his ground."[17]

The defendant has a right to present self-defense not only under KRS Chapter 503 but also under §11 and §1 (Paragraphs 1 and 7) of our Constitution. Self-defense is "'so rooted in the traditions and conscience of our people'" that it is a "fundamental" right and depriving a defendant of it "in a criminal trial is constitutional error." Taylor v. Withrow, 288 F.3d 846, 851 (6th Cir. 2002). The right to self-defense is protected by the 6th and 14th Amendments which guarantee the right to "a meaningful opportunity to present a

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[15] Manning v. Commonwealth, 23 S.W.3d 610, 614 (Ky. 2000).
[16] Springer v. Commonwealth, 998 S.W.2d 439, 452 (Ky. 1999) (other citation omitted).

complete defense"[18] and while the traditional manner of presenting a defense is through the introduction of evidence, a defense can be presented through jury instructions. "[I]n certain circumstances refusing to instruct a jury properly on self-defense can so taint the resulting verdict as to be an error of constitutional dimension." Taylor v. Withrow, 288 F.3d at 852. Regardless of whether the amendments to KRS Chapter 503 are retroactive, the lack of an instruction on "no duty to retreat," which was a pre-existing right, prevented Phillip Wines from exercising his constitutional right to present a complete defense. "[E]rroneous instructions...are presumed to be prejudicial" and a party "claiming harmless error bears the burden of showing that no prejudice resulted from the instruction."[19] The error here is not harmless because jurors are presumed to follow their instructions.[20] Since the jury did not apply the "no duty to retreat" principle, the possibility that some or all of the jurors believed that Phillip was obligated to flee or otherwise avoid the confrontation before defending himself cannot be eliminated. Thus, there is "'reasonable likelihood that the jury...applied the...instruction in a way' that violates the Constitution."[21]

The lack of a "no duty to retreat" instruction prevented the jury from properly applying the whole law of self-defense to the evidence and deprived Phillip of "a meaning-

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[17] Sikes v. Commonwealth, supra, 304 Ky. at 435, 200 S.W.2d at 960.
[18] California v. Trombetta, supra, 467 U.S. at 485, 81 L.Ed.2d at 419.
[19] Commonwealth v. Hager, 35 S.W.3d 377, 379 (Ky.App. 2000); McKinney v. Heisel, 947 S.W.2d 32, 35 (Ky. 1997).
[20] United States v. Olano, 507 U.S. 725, 740, 113 S.Ct. 1770, 1781, 123 L.Ed.2d 508, 523-524 (1993), citing Richardson v. Marsh, 481 U.S. 200, 206, 107 S.Ct. 1702, 1707, 95 L.Ed.2d 176, 185 (1987). Weeks v. Angelone, 528 U.S. 225, 234,120 S.Ct. 727, 733, 145 L.Ed.2d 727, 738 (2000).
[21] Estelle v. McGuire, supra, 502 U.S. at 72, 112 S.Ct. at 482, 116 L.Ed.2d at 399, citing Boyde v. California, 494 U.S. 370, 380, 110 S.Ct. 1190, 1198, 108 L.Ed.2d 316, 329 (1990). See also Middleton v. McNeil, supra, 124 S.Ct. at 1832, 158 L.Ed.2d at 707.

ful opportunity to present a complete defense."[22] The absence of the instruction "so infected the entire trial that the resulting conviction violates due process.'"[23] The conviction must be reversed for a new trial at which the jury is instructed that Phillip Wines had no duty to retreat.

**3. Procedure for determining immunity from criminal prosecution**

Another new statute enacted by the legislature in KRS Chapter 503 creates immunity from criminal prosecution for those persons using justifiable force:

> A person who uses force as permitted in KRS 503.050, 503.055, 503.070, and 503.080 is justified in using such force and is immune from criminal prosecution and civil action for the use of such force, unless the person against whom the force was used is a peace officer, as defined in KRS 446.010, who was acting in the performance of his or her official duties and the officer identified himself or herself in accordance with any applicable law, or the person using force knew or reasonably should have known that the person was a peace officer. As used in this subsection, the term "criminal prosecution" includes arresting, detaining in custody, and charging or prosecuting the defendant.

KRS 503.085(1). However, this statute does not specifically designate what procedure should be used in determining the issue of immunity. Relying on the case of People v. Guenther, 740 P.2d 971 (Colo. 1987), the trial court determined that the burden should be placed on the defendant to establish his entitlement to immunity by a preponderance of the evidence because it was in the nature of an affirmative defense. (VR No. 1; 10/30/06; 15:35:40-15:43:00). However, the court ruled that Phillip Wines was not entitled to an evidentiary hearing but instead could only make arguments in support of immunity. (Id.

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[22] California v. Trombetta, supra, 467 U.S. at 485, 81 L.Ed.2d at 419.

[23] Middleton v. McNeil, supra, 124 S.Ct. at 1832, 158 L.Ed.2d at 707, citing Estelle v. McGuire, supra, 502 U.S. at 72, 112 S.Ct. at 482, 116 L.Ed.2d at 399.

at 15:412:45-15:45:39). Phillip Wines asserts that the trial court failed to conduct a proper evidentiary hearing and violated his right to due process.

In People v. Guenther, 740 P.2d 971, 974 (Colo. 1987), the Colorado Supreme Court designated the procedures to be followed in determining whether a person is entitled to immunity from criminal prosecution under Colorado's immunity statute, which provides in pertinent part as follows: "Any occupant of a dwelling using physical force, in accordance with the provisions of subsection (2) of this section shall be immune from criminal prosecution for the use of such force." The court found that the statute "confers authority on a court to conduct a pretrial hearing on whether the statutory conditions for immunity from prosecution have been established and, if so established, to dismiss the criminal charges." Guenther, 740 P.2d at 975. The court further determined that the burden of proof should be placed on the defendant, concluding "it reasonable to require the accused to prove his entitlement to an order of dismissal on the basis of statutory immunity." Id. at 980. However, the court "decline[d] to require that the defendant prove his entitlement to immunity beyond a reasonable doubt" and instead concluded that preponderance of evidence was the appropriate standard of proof. Id. at 980.

In this case, the trial court correctly determined that KRS 503.085(1) permits the issue of immunity to be addressed at the pretrial stage. The plain meaning of "is immune from prosecution" can only be construed as intending to bar criminal proceedings against a person who uses force under the circumstances set forth in the statute. See Guenther, 740 P.2d at 975 ("In accordance with the plain meaning of these terms, the phrase 'shall be immune from criminal prosecution' can only be construed to mean that the statute was intended to bar criminal proceedings against a person for the use of force under the cir-

cumstances set forth in [the statute]."); see also Boggs v. State, 581 S.E.2d 722, 723 (Ga.App. 2003) ("[A]s the statute provides that such person "shall be immune from criminal prosecution," the decision as to whether a person is immune under OCGA § 16-3-24.2 must be determined by the trial court before the trial of that person commences."). Yet the trial court erroneously believed that an evidentiary hearing was not required. However, the trial court's reliance on King v. Venters, 595 S.W.2d 714 (Ky. 1980), was misplaced. In King, the Court reiterated its position "that a preliminary hearing, examining trial, or any other 'probable cause' inquiry, is not prerequisite to the consideration of a charge by the grand jury or to the validity of an indictment returned pursuant to a 'direct submission.'" Id. at 715. In contrast, a criminal defendant is entitled to pretrial evidentiary hearings on suppression issues[24] and a determination of whether he or she is competent to stand trial.[25] Like immunity, these are threshold issues that must be decided by the trial court before a defendant can be made to stand trial. Further, although the Colorado Supreme Court did not fully explain what it meant by a "pretrial hearing" in Guenther, the lower courts in Colorado have considered witness testimony in ruling on motions to dismiss under the immunity statute. See People v. McNeese, 892 P.2d 304, 306-307 (Colo. 1995) (considered testimony from several witnesses), and People v. Malczewski, 744 P.2d 62, 64 (Colo. 1987) (reviewed evidence presented at preliminary hearing, including testimony of police officer who was alleged victim).

The trial court also erred in placing the burden on the defendant to establish he was entitled to immunity. At trial, "[o]nce a defendant produces evidence that he acted in

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[24] RCr 9.78
[25] Gabbard v. Commonwealth, 887 S.W.2d 547, 551 (Ky. 1994).

self-protection, the burden of proof as to that issue shifts to the Commonwealth...." Estep v. Commonwealth, 64 S.W.3d 805, 811 (Ky. 2002). The Commonwealth then "has the burden to disprove it beyond a reasonable doubt, and its absence becomes an element of the offense." Commonwealth v. Hager, 41 S.W.3d 828, 833, n.1 (Ky. 2001). Similarly, as to immunity, the defendant should only have to produce some evidence that he acted in self-protection before the burden shifts to the Commonwealth to disprove that he is entitled to immunity.

Phillip Wines was entitled to an evidentiary hearing where he could call witnesses and present other forms of evidence in support of his claim of immunity, particularly as he was made to bear the burden of establishing his entitlement to immunity. He should not have been limited to making arguments only. The trial court's refusal to permit an evidentiary hearing denied Phillip Wines his right to due process, as guaranteed by the 14th Amendment to the United States Constitution and Sections 2 and 11 of the Kentucky Constitution, and prevented a fair determination of whether he should have been immune from prosecution. Therefore, his convictions should be reversed.

**III. The trial court committed reversible error by failing to give a presumption of innocence instruction that admonished the jury to find guilt as to the lesser offense of manslaughter in the first degree if it had a reasonable doubt as to whether Phillip Wines was acting under extreme emotional disturbance, where the evidence reasonably supported the conclusion that extreme emotional disturbance was a mitigating factor.**

**A. Preservation and Background**

This issue was properly preserved for review by the appellant's tendering of a presumption of innocence instruction that included the following language:

> B. If you believe from the evidence beyond a reasonable doubt that Phillip Wines would be guilty of Murder under Instruction IIA, ex-

> cept that you have a reasonable doubt as to whether at the time he killed James Lee Hamilton, he was or was not acting under the influence of extreme emotional disturbance, you shall not find Phillip Wines guilty of Murder under Instruction IIA, but shall find him guilty of manslaughter in the First Degree under Instruction IIB.

(TR Exhibits Envelope; App. C12). See RCr 9.54(2). The appellant requested that all of his tendered instructions be submitted to the jury and objected to any instructions being given that varied from his own. (TR Exhibits Envelope; App. C1; VR No. 6; 11/6/06; 16:17:59-16:23:59). Although the jury was instructed as to manslaughter in the first degree and was given a definition of extreme emotional disturbance, the generic presumption of innocence instruction did not contain the above language and failed to instruct the jury on reasonable doubt with respect to the issue of extreme emotional disturbance. (TR Exhibits Envelope; App. E20).

**B. Legal Analysis**

KRS 507.020(1)(a) provides that a person shall not be convicted of murder for an intentional homicide that is committed while acting under the influence of extreme emotional disturbance (EED) for which there is a reasonable explanation or excuse. If the jury finds the existence of EED, then the offense of murder is reduced to manslaughter in the first degree. KRS 507.030(1)(b). "A failure to act under the influence of extreme emotional disturbance is an element of the offense of murder, and if the evidence affords any basis upon which the jury could entertain a reasonable doubt as to whether appellant acted under the influence of extreme emotional disturbance, the absence of that element must be enumerated as a part of the instruction on murder, and an instruction on first-degree manslaughter, differing from the murder instruction only by the omission of that

element, must be given." Edmonds v. Commonwealth, 586 S.W.2d 24, 27 (Ky. 1919), overruled on other grounds by Wellman v. Commonwealth, 694 S.W.2d 696 (Ky. 1985).

"In addition, the jury should be instructed to the effect that if it finds the appellant guilty but has a reasonable doubt as to whether he was acting under the influence of extreme emotional disturbance, it will not find him guilty of murder but shall find him guilty of first-degree manslaughter." Edmonds, supra, 586 S.W.2d at 27. Although not mentioned in RCr 9.56, this language is to be inserted in the presumption of innocence instruction and presented along with a separate instruction regarding the definition of EED in cases where the evidence could reasonably support the conclusion that extreme emotional disturbance was a mitigating factor. Cooper and Cetrulo, Kentucky Instructions to Juries, Criminal §§ 2.03 and 3.21, cmt. (5th ed. 2006); Holbrook v. Commonwealth, 813 S.W.2d 811, 815 (Ky. 1991), overruled on other grounds by Elliott v. Commonwealth, 976 S.W.2d 416 (Ky. 1998). This Court has held that "such an instruction is required if requested and if warranted by the evidence." Sherroan v. Commonwealth, 142 S.W.3d 7, 23 (Ky. 2004), citing Commonwealth v. Hager, 41 S.W.3d 828, 831-32 (Ky. 2001), Holbrook, 813 S.W.2d at 815, Edmonds, 586 S.W.2d at 27, and 1 William S. Cooper, Kentucky Instructions to Juries § 2.03, cmt. (4th ed. 1999). See also Cooper and Cetrulo, Kentucky Instructions to Juries, Criminal § 2.03, cmt. (5th ed. 2006).

In this case, defense counsel tendered a presumption of evidence instruction that contained language instructing the jury on reasonable doubt with respect to the issue of emotional disturbance, and the evidence warranted such an instruction. (TR Exhibits Envelope; App. C12). Although Phillip Wines's primary defense was that he acted in self-defense when he stabbed James Hamilton, there was evidence presented at trial that

could reasonably support the conclusion that Phillip was acting under EED, including the fact that James Hamilton had broken into Phillip's house on several occasions, that James had already tried to start an altercation just a couple of hours before this incident, and that James returned yet again to take Angela. In McClellan v. Commonwealth, 715 S.W.2d 464, 468-469 (Ky. 1986), this Court defined extreme emotional disturbance (EED) as:

> a temporary state of mind so enraged, inflamed, or disturbed as to overcome one's judgment, and to cause one to act uncontrollably from the impelling force of the extreme emotional disturbance rather than from evil or malicious purposes. It is not a mental disease in itself, and an enraged, inflamed, or disturbed emotional state does not constitute an extreme emotional disturbance unless there is a reasonable explanation or excuse therefore, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under circumstances as the defendant believed them to be.

This Court further recognized that the onset of EED "may be more gradual than the 'flash point' normally associated with sudden heat of passion...." McClellan, 715 S.W.2d at 468. Subsequently, in Springer v. Commonwealth, 998 S.W.2d 439, 452 (Ky. 1999), the Court clarified that "[t]he fact that the triggering event may have festered for a time in [the defendant's] mind before the explosive event occurred does not preclude a finding that [the defendant acted]...while under the influence of extreme emotional disturbance." Moreover, "[e]xtreme emotional distress requires the jury 'to place themselves in the actor's position as he believed it to be at the time of the act.'" Holbrook v. Commonwealth, 813 S.W.2d 811, 815 (Ky. 1991), overruled on other grounds by Elliott v. Commonwealth, 976 S.W.2d 416 (Ky. 1998).

The trial court obviously believed that an instruction on EED was supported by the evidence, making it an element of the intentional murder instruction, giving an instruction as to first-degree manslaughter, and providing a definition of EED. (TR Exhibits

Envelope; App. E2, E4, E19). However, the trial court failed to give an instruction explaining how to apply the definition of EED in order get to the lesser offense of first-degree manslaughter. Under these circumstances, there should have been an instruction so that the jury could understand how to apply EED to differentiate the two intentional homicide crimes: intentional murder and manslaughter in the first degree.

Unlike the defendant in Sherroan, Phillip Wines properly preserved this issue for review by specifically tendering a presumption of innocence instruction that included the admonition regarding reasonable doubt as to extreme emotional disturbance. Sherroan, 142 S.W.3d at 23. "In a criminal case, it is the duty of the trial judge to prepare and give instructions on the whole law of the case, and this rule requires instructions applicable to every state of the case deducible or supported to any extent by the testimony." Taylor v. Commonwealth, 995 S.W.2d 355, 360 (Ky. 1999), citing RCr 9.54(1) and Kelly v. Commonwealth, 267 S.W.2d 536, 539 (Ky. 1954). In addition, a defendant is entitled to an instruction on any lawful defense that he may have. Springer v. Commonwealth, 998 S.W.2d 439, 452 (Ky. 1999), citing Sanborn v. Commonwealth, 754 S.W.2d 534, 550 (Ky. 1988), cert. denied, 516 U.S. 854, 116 S.Ct. 154, 133 L.Ed.2d 98 (1995). "Although a lesser included offense is not a defense within the technical meaning of those terms as used in the penal code, it is in fact and principle, a defense against the higher charge." Id. (citations omitted). The failure of the trial court to properly instruct the jury as to the mitigating effects of EED deprived Phillip Wines of his defense to the higher charge of murder. Therefore, he is entitled to a new trial.

## IV. The trial court committed reversible error by permitting the Commonwealth to introduce Angela Nelson's taped statement.

### A. Preservation and Background

This issue was properly preserved for review by the appellant's timely objections to the admission of Angela Nelson's taped statement. (VR No. 3; 11/1/06; 10:50:15-10:58:25, MISC. VR; 11/3/06; 10:12:43-10:23:57, VR No. 5; 11/3/06; 10:28:09-10:55:00, 12:10:32-12:11:50).

Before calling Angela Nelson to testify, the Commonwealth informed the trial court that it intended to play a portion of the taped statement Angela Nelson made to police at the scene on the morning of June 12, 2005. The prosecutor contended that the portion of the statement was admissible under KRE 803(2) as an excited utterance. (VR No. 3; 11/1/06; 10:50:15-10:53:15). Defense counsel objected, arguing that the statement did not qualify as an excited utterance, especially since the statement had been given over two hours after the incident, and that it constituted an inadmissible prior consistent statement. (Id. at 10:53:15-10:55:28). The trial court ruled that it would be admissible as long as the proper foundation was laid. (Id. at 10:56:36-10:58:25).

During the cross-examination of Angela Nelson, defense counsel asked the following question: "And in fact you shouldn't, you should be in jail, shouldn't you, right now?" (VR No. 3; 11/1/06; 15:31:57). The trial court immediately told counsel to approach. (Id. at 15:31:01). At the bench, defense counsel explained that there had been an outstanding bench warrant for Angela Nelson since September 2005 due to her failure to appear in district court on a charge of possession of a controlled substance. Counsel argued that it was admissible to show bias because Angela Nelson had a reason to curry

favor, but the court contended that the warrant did not show bias and was not relevant. (Id. at 15:32:10-15:38:15).

After the trial court recessed the jury, Angela Nelson approached the bench. She admitted that she knew she had missed her court date but claimed she did not have money to pay an attorney and tearfully stated that she did not want to go to jail. The trial court advised Ms. Nelson not to worry about that now and suggested that someone escort her out of the courtroom. (VR No. 3; 11/1/06; 15:39:32-15:42:50). The court and the parties then resumed their discussion concerning the admissibility of the bench warrant. (Id. at 15:42:50-15:49:28, 15:59:45-16:11:25). Defense counsel stated that she was not alleging recent fabrication by Angela Nelson, as Ms. Nelson was charged with possession of a controlled substance in the first degree on April 19, 2005, before she made any statements to police concerning the June 12th incident. (Id. at 15:59:45-16:05:08). The Commonwealth asserted that defense counsel had already put the bench warrant issue before the jury and opened the door for the Commonwealth to admit Angela Nelson's prior taped statements to rebut a claim of recent fabrication. (Id. at 11/1/06; 16:05:08-16:07:50). The trial court ultimately ruled that the fact Angela Nelson had a pending felony charge was relevant to bias. (Id. at 16:09:00-16:09:45). The court further ruled that although defense counsel had not done so yet, she risked opening the door to the admission of Angela Nelson's prior statements if additional questions were asked about the bench warrant because the bench warrant had not been issued until September 7, 2005. (Id. at 16:09:45-16:10:13). After defense counsel asked for clarification on how to proceed so as not to trigger the admission of Angela Nelson's prior statements, the court agreed that counsel could ask Angela Nelson whether she had a pending charge, the type

of charge, and the penalty range because those issues were relevant to bias. (Id. at 16:10:13-16:11:25).

When cross-examination resumed, Ms. Nelson admitted she was facing a felony charge but claimed she did not know what the charge was or how many years it carried. (VR No. 3; 11/1/06; 16:13:25-16:14:02). When the Commonwealth declined to proceed with any re-direct examination, the judge verified that neither party intended to recall Angela Nelson as a witness. (Id. at 16:14:35-16:15:38). The judge then revealed that he had arranged to have the bench warrant against Angela Nelson set aside and that her case had been placed back on the docket for the next week. He explained that he had the ability to set aside the bench warrant "simply by virtue of my role" as a judge and that he had done so out of "my compassion as a human being." (Id. at 16:15:38-16:17:44).

Two days later, the Commonwealth reiterated its intention to play a portion of Angela Nelson's taped statement. Specifically, the Commonwealth sought to introduce the initial portion of Ms. Nelson's statement, which corresponded to the first three pages of the transcript.[26] The prosecutor not only argued that it was admissible as an excited utterance, but also asserted that it was admissible under KRE 803(1) as a present sense impression and under KRE 801A(a)(2) to rebut an express or implied charge of recent fabrication or improper influence or motive. (MISC. VR; 11/3/06; 10:12:43-10:20:46, VR No. 5; 11/3/06; 10:28:09-10:33:33). Relying on the case of Noel v. Commonwealth, 76 S.W.3d 923 (Ky. 2002), the prosecutor argued that even if the statement postdated the improper motive or influence, it still had some rebutting force beyond the fact that it was

[26] The Commonwealth sought to introduce the initial portion of the taped statement Angela Nelson made to detectives on June 12, 2005, which corresponds to the first three pages of the prepared transcript. (TR 05CR1921, Vol. I, 76-78; App. F1-F3).

a prior consistent statement because it established that there was no time for Angela to be manipulated and no evidence that she was trying to curry favor. (MISC. VR; 11/3/06; 10:15:13-10:20:01). Defense counsel objected to the admission of the prior consistent statement on grounds that it did not fall within any of those hearsay exceptions. Counsel pointed out that Angela Nelson's prior taped statement did not meet the factors identified in Jarvis v. Commonwealth, 960 S.W.2d 466 (Ky. 1998), for admissibility as an excited utterance. (VR No. 5; 11/3/06; 10:34:13-10:41:11). Defense counsel also argued that the prior statement was not admissible under KRE 801A(a)(2) because she had not alleged recent fabrication, as the June statement was made after Angela had acquired the April felony charge. Counsel also reminded the trial court that she had stayed away from further questioning about the bench warrant to avoid having the prior statement admitted and that the court had assisted Angela with having the bench warrant set aside. (VR No. 5; 11/3/06; 10:41:11-10:45:03).

The trial court ruled that, assuming a proper foundation was laid, the Commonwealth could introduce the portion of Angela Nelson's taped statement as an excited utterance because it was a spontaneous statement uttered under the stress of excitement and not after reflection or deliberation. (VR No. 5; 11/3/06; 10:45:03-10:47:15). The trial court further ruled that the prior consistent statement was also admissible under KRE 801A(a)(2) because the cross-examination about the pending felony indicated she had a current motive to mold her testimony in a certain way. (Id. at 10:48:54-10:52:12). Defense counsel continued to object to the admission of any portion of Angela Nelson's taped statement. However, if the statement was going to be admitted, counsel requested that the jury be informed that the trial court had taken steps to have Angela Nelson's out-

standing bench warrant set aside to demonstrate that she was in fact given preferential treatment after her testimony. (Id. at 10:52:12-10:54:43). Defense counsel also requested the trial court recuse itself from further presiding over the case. (Id. at 10:54:43-10:54:54). The court denied both of these motions. (Id. at 10:54:54).

Later that morning, the Commonwealth called Detective Michael Sherrard to the stand. Detective Sherrard testified that he was a detective in the homicide unit of the Louisville Metro Police Department in 2005 and that he was called to the scene of a stabbing on Cannons Lane on June 12, 2005. (VR No. 5; 11/3/06; 11:52:20-11:57:35). Detective Sherrard stated that he talked with Angela Nelson at the scene and that she was very upset, crying, and borderline hysterical. (Id. at 12:09:19-12:10:10). He interviewed Ms. Nelson in the back of his police car because it was raining, and she was aware that she was being recorded. (Id. at 12:11:51-12:13:00). Over defense counsel's objection, the tape was admitted into evidence, and the initial portion of Ms. Nelson's statement was played for the jury. (Id. at 12:10:32-12:11:51, 12:13:00-12:19:19).[27]

After the tape was played, the prosecutor asked if there was additional information on the tape, and Detective Sherrard responded, "Yes." (VR No. 5; 11/3/06; 12:19:20-12:19:30). Defense counsel objected and requested a mistrial, contending that the trial court had only ruled a portion of the tape to be admissible and that the jury would believe there was more to the interview. (Id. at 12:19:30-12:20:45). The trial court refused to grant a mistrial, and defense counsel then requested an admonition. (Id. at 12:20:45-

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[27] A transcript of the admitted portion of Angela Nelson's taped statement is located in the Appendix to this brief. (App. F1-F3).

12:23:07). The trial court then admonished the jury that the rest of the statement just contained biographical information. (Id. at 12:23:07-12:23:55).

**B. Legal Analysis**

**1. The statement was not admissible as an excited utterance under KRE 803(2).**

Hearsay is inadmissible except as provided by the Kentucky Rules of Evidence or rules of this Court. See KRE 802. The party seeking admission of hearsay evidence has the burden of proving that it falls within an exception to the hearsay rule. See Noel v. Commonwealth, 76 S.W.3d 923, 926 (Ky. 2002), citing Slaven v. Commonwealth, 962 S.W.2d 845, 854 (Ky. 1997), and Jarvis v. Commonwealth, 960 S.W.2d 466, 470 (Ky. 1998). According to KRE 803(2), hearsay that qualifies as an "excited utterance" is not excluded by the hearsay rules even though the declarant is available as a witness. KRE 803(2) defines an "excited utterance" as "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." As this Court has noted, "[t]he premise for the exception is that statements made under the stress of the excitement caused by a startling occurrence are more likely the product of that excitement and, thus, more trustworthy than statements made after the declarant has had an opportunity to reflect on events and fabricate." Noel v. Commonwealth, 76 S.W.3d 923, 926 (Ky. 2002). Therefore, "[f]or an out-of-court statement to qualify for admission under KRE 803(2), 'it must appear that the declarant's condition at the time was such that the statement was spontaneous, excited, or impulsive rather than the product of reflection and deliberation.'" Noel, 76 S.W.3d at 926, quoting United States v. Iron Shell, 633 F.2d 77, 86 (8th Cir. 1980), cert. denied, 450 U.S. 1001, 101 S.Ct. 1709, 68 L.Ed.2d 203 (1981).

Whether a particular statement qualifies as an excited utterance depends on the particular facts and circumstances of each case. R.C. v. Commonwealth, 101 S.W.3d 897, 902 (Ky.App. 2002). See also R. Lawson, The Kentucky Evidence Law Handbook § 8.60[4] (4th ed. 2003). This Court has cited the following factors as the "most significant criteria" for determining whether an out-of-court statement is admissible as an excited utterance under KRE 803(2):

> (i) lapse of time between the main act and the declaration, (ii) the opportunity or likelihood of fabrication, (iii) the inducement to fabrication, (iv) the actual excitement of the declarant, (v) the place of the declaration, (vi) the presence there of visible results of the act or occurrence to which the utterance relates, (vii) whether the utterance was made in response to a question, and (viii) whether the declaration was against interest or self-serving.

Jarvis v. Commonwealth, 960 S.W.2d 466, 470 (Ky. 1998), quoting Souder v. Commonwealth, 719 S.W.2d 730, 733 (Ky. 1986). These criteria "do not pose a true-false test for admissibility, but rather only act as a guideline for consideration of admissibility." Jarvis, 960 S.W.2d at 470, citing Smith v. Commonwealth, 788 S.W.2d 266, 268 (Ky. 1990), cert. denied 498 U.S. 852, 111 S.Ct. 146, 112 L.Ed.2d 112 (1990). A trial court's decision to admit or exclude the evidence is entitled to deference. R.C. v. Commonwealth, 101 S.W.3d at 902, citing Souder, 719 S.W.2d at 733. However, the trial court's resolution of the issue will be overturned when clearly erroneous, i.e., where the ruling is not supported by substantial evidence. R.C., 101 S.W.3d at 902, citing Young v. Commonwealth, 50 S.W.3d 148, 167 (Ky. 2001). For example, this Court has found trial court rulings to be clearly erroneous where the statement was too remote and unreliable to qualify under the excited utterance exception to the hearsay rule [see Mounce v. Commonwealth, 795 S.W.2d 375, 380 (Ky. 1990), and Souder, 719 S.W.2d at 734], where there was no

evidence that the declarant was still under the stress of the startling event when the statement was made [see Jarvis, 960 S.W.2d at 470], and where temporal proximity and the presence of visible results of the occurrence (i.e., wounds) were the only factors weighing in favor of admission of prior statements as excited utterances [Thomas v. Commonwealth, 170 S.W.3d 343, 350-351 (Ky. 2005)].

Applying the above Jarvis factors to this case, the trial court clearly erred in admitting the initial portion of Angela Nelson's taped statement as an excited utterance. First, based on 911 records, there was more than a two-hour lapse of time between the stabbing and when Angela Nelson made her statement at 6:27 a.m., giving her ample opportunity to fabricate her version of events. (TR 05CR1921, Vol. I, 42-43, 76). In addition, Ms. Nelson had several motives to fabricate a story to assist the police in building a case against Phillip Wines. She not only had reason to curry favor with the police due to a pending felony charge for possession of cocaine but also had incentive to portray Phillip as a jealous, controlling man who plotted James Hamilton's death in order to shift any blame away from herself for creating the volatile situation. Angela had been playing James and Phillip against each other since early May 2005. By Angela's own admission, she began having sex with Phillip to "get back at" James, who had cheated on her. (VR No. 3; 11/1/06; 11:43:35-11:44:17, 14:53:23-14:54:14). She continued the sexual relationship with Phillip and stayed at his house through June 12, 2005, yet continued to see James as well. (Id. at 14:54:14-14:56:07, 15:05:17-15:06:27). She even told James about her sexual relationship with Phillip even though Phillip had asked her not to say anything. (Id. at 11:44:48-11:45:47). Whether Angela was just hoping to make James jealous or perhaps seeking payback for treating her badly, physically abusing her, and giving her

HIV, Angela Nelson was clearly using Phillip and trying to create conflict between Phillip and James. In order to claim that she had nothing to do with James's death, she had to shift all blame to Phillip, making it appear that he had intended to kill James, while portraying herself as a helpless victim who was being bullied and manipulated by Phillip. Angela had everything to gain and nothing to lose by fabricating this version of events and painting herself in the best possible light. Therefore, Angela Nelson's statement was also self-serving.

The location and lack of spontaneity of the statement further undermine the trial court's ruling, as Angela Nelson made this statement while being interviewed by two detectives in the back of a police car. (VR No. 5; 11/3/06; 12:11:51-12:13:00). "'[S]pontaneity, as opposed to mere proximity in time, is a most important consideration.'" Thomas v. Commonwealth, 170 S.W.3d 343, 350 (Ky. 2005), quoting Roland v. Beckham, 408 S.W.2d 628, 632 (Ky. 1966). In fact, the only factor that appears to weigh in favor of an excited utterance is that Angela was upset, or at least became upset, when she made her statement. Based on these circumstances, the trial court's decision to admit a portion of Angela Nelson's taped statement as an excited utterance was not supported by substantial evidence and, therefore, was clearly erroneous. R.C., supra, 101 S.W.3d at 902, citing Young, supra, 50 S.W.3d at 167.

**2. The statement was not admissible under KRE 801A(a)(2).**

It is has long been recognized that prior consistent statements are admissible only under very limited circumstances:

> As a general rule, a witness cannot be corroborated by proof that on previous occasions he has made the same statements as those made in his testimony. Where, however, a witness has been assailed on the ground that his story is a recent fabrication, or that he has some motive for testifying

> falsely, proof that he gave a similar account of the matter when the motive did not exist, before the effect of such an account could be foreseen, or when motive or interest would have induced a different statement, is admissible.

Eubank v. Commonwealth, 210 Ky. 150, 275 S.W. 630, 633 (1925). According to Professor Robert Lawson, "[t]he first of these rules – that prior consistent statements are not admissible for rehabilitation – assumes that there is no restoration of credibility in proof that a witness has said the same thing on other occasions (even after prior inconsistent statements have been used for impeachment)." R. Lawson, The Kentucky Evidence Law Handbook, Section 4.15[7], p. 294 (4th ed. 2003). Therefore, as this Court has stated, "[m]erely challenging the truthfulness of a witness's testimony does not open the door to a parade of witnesses who repeat the witness's story as told to them." Bussey v. Commonwealth, 797 S.W.2d 483, 485 (Ky. 1990). Rather, under the Kentucky Rules of Evidence, prior statements "[c]onsistent with the declarant's testimony" may only be "offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive...." KRE 801A(a)(2).

In Tome v. United States, 513 U.S. 150, 160, 167, 115 S.Ct. 696, 130 L.Ed.2d 574, 584, 588 (1995), the United States Supreme Court held that FRE 801(d)(1)(B) "embodies the common law premotive requirement" and "permits the introduction of a declarant's consistent out-of-court statements to rebut a charge of recent fabrication or improper influence or motive only when those statements were made before the charged recent fabrication or improper influence or motive." Similarly, this Court in Smith v. Commonwealth, 920 S.W.2d 514, 516-517 (Ky. 1995), held that a prior consistent statement offered under KRE 801A(a)(2) to rebut a claim of improper influence or motive is admissi-

ble if the statement was made before that influence or motive came into existence. The general rationale behind this rule has been stated as follows:

> To a degree, all prior consistent statements tend to corroborate the testimony of a witness. KRE 801A(a)(2) preserves the concept that the problems of admitting this testimony outweigh its cumulative probative effect except in certain circumstances. One such instance is where the claim is made that collateral events or motives have caused the testimony to be untrustworthy. A consistency in the statements of the witness at times when the improper influence or motive claimed could not have been a factor in establishing the trustworthiness of the statements provides sufficient corroboration to justify an exception to the hearsay rule. Prior consistent statements at other times do not.

Fields v. Commonwealth, 905 S.W.2d 510, 512 (Ky.App. 1995). See also R. Lawson, The Kentucky Evidence Law Handbook, Section 4.15[7], pp. 294-296 (4th ed. 2003).

In this case, the trial court clearly erred in concluding that Angela Nelson's prior consistent statement was admissible under KRE 801A(a)(2). First, defense counsel was only able to generally impeach Angela Nelson's credibility with the fact that she had a pending felony charge. Angela claimed she did not know what the actual charge was or how many years it carried. (VR No. 3; 11/1/06; 16:13:25-16:14:02). As noted by Professor Lawson, many courts have recognized "that attacks on credibility can sometimes be too general to justify rebuttal by use of prior consistent statements." R. Lawson, The Kentucky Evidence Law Handbook, Section 4.15[7], pp. 295-296 (4th ed. 2003), citing Christmas v. Sanders, 759 F.2d 1284, 1288-1289 (7th Cir. 1985) ("To require a trial judge to admit all records purporting to be 'prior consistent statements' when a party minimally impeaches a witness and when there is no clear charge of recent fabrication would undermine the very purpose of excluding prior consistent statements."), Thomas v. United States, 41 F.3d 1109 (7th Cir. 1994) (cross examination suggesting that the witness did not tell the whole truth did not constitute a charge of recent fabrication), Breneman v.

Kennecott Corp., 799 F.2d 470, 473 (9th Cir. 1986) ("Mere contradictory testimony cannot give rise to an implied charge of fabrication."), and United States v. Brennan, 798 F.2d 581 (2nd Cir. 1986) (a general attack on credibility is inadequate to justify admission of prior consistent statements). This Court has also "sounded a similar warning against excessive reliance on the 'recent fabrication or improper influence or motive' exception to the sound prohibition against use of prior consistent statements: 'Merely challenging the truthfulness of a witness's testimony does not open the door to a parade of witnesses who repeat the witness's story as told to them.'" R. Lawson, The Kentucky Evidence Law Handbook, Section 4.15[7], p. 296 (4th ed. 2003), quoting Bussey v. Commonwealth, 797 S.W.2d 483, 485 (Ky. 1990). Therefore, the minimal impeachment involved in this case should not have opened the door to the admission of the initial portion of her prior consistent taped statement. Moreover, defense counsel deliberately avoided the bench warrant issue and specifically asked the trial court for guidance on how to proceed so as not to trigger the admission of Angela Nelson's prior statements. At that time, the court agreed that counsel could ask Angela Nelson whether she had a pending charge, the type of charge, and the penalty range because those issues were relevant to bias. (VR No. 3; 11/1/06; 16:10:13-16:11:25). Yet the trial court later permitted the Commonwealth to introduce the prior consistent statement, contending that this very line of questioning had triggered KRE 801A(a)(2).

Further, even if this impeachment could be inferred as a charge "of recent fabrication or improper influence or motive," the prior consistent statements introduced by the Commonwealth were not made before that influence or motive came into existence, contravening the principle enunciated by this Court in Smith v. Commonwealth, 920 S.W.2d

514, 516-517 (Ky. 1995). See also Tome v. United States, 513 U.S. 150, 115 S.Ct. 696, 130 L.Ed.2d 574 (1995). Rather, Angela Nelson was charged with possession of cocaine on April 19, 2005, well before she made the statement to detectives on June 12, 2005. (VR No. 3; 11/1/06; 15:59:45-16:05:08, VR No. 5; 11/3/06; 10:42:00-10:45:03). Therefore, the motive to curry favor with the police and prosecution to gain favorable treatment on her felony charge existed at the time she gave her taped statement. As with its federal counterpart, KRE 801A(a)(2) likewise only "speaks of a party rebutting an alleged motive, not bolstering the veracity of the story told." Tome, supra, 513 U.S. at 157-158, 130 L.Ed.2d at 582.

Nor did Angela Nelson's post-motive statement have "'some rebutting force beyond the mere fact that the witness ha[d] repeated on a prior occasion a statement consistent with [her] trial testimony.'" Noel v. Commonwealth, 76 S.W.3d 923, 929 (Ky. 2002), quoting United States v. Ellis, 121 F.3d 908 (4th Cir. 1997), cert. denied, 522 U.S. 1068, 118 S.Ct. 738, 139 L.Ed.2d 674 (1998). In Noel, this Court determined that the post-motive prior consistent statement was admissible where "the circumstances under which the report [of abuse] was made tended to rebut the inference that C.M.'s accusation was the product of improper influence by her father." Noel, 76 S.W.3d at 929. In contrast, the circumstances under which Angela Nelson gave the taped statement to police did nothing to rebut the inference that she wanted to cooperate with police to curry favor with regard to her pending charge. Therefore, the trial court clearly erred in admitting Angela Nelson's taped statement under KRE 801A(a)(2).

### 3. Conclusion

Because Angela Nelson's prior taped statement did not fall within any hearsay exception and because it unfairly bolstered her trial testimony, its admission prejudiced Phillip Wines's rights to a fair trial and due process of law, as guaranteed by the 6th and 14th Amendments to the United States Constitution and Sections 2 and 11 of the Kentucky Constitution. Therefore, this Court must reverse Phillip's convictions and remand his case for a new trial.

## V. The trial court committed reversible error by permitting the Commonwealth to introduce expert testimony concerning blood spatter and cast-off.

### A. Preservation and Background

This issue was properly preserved for review by the appellant's timely objection to the testimony of Dr. Amy Burrows-Beckham concerning blood spatter and cast-off blood. (VR No. 5; 11/3/06; 14:43:18-14:51:40). The Commonwealth called Dr. Burrows-Beckham, an Assistant Medical Examiner, as a witness at trial. (VR No. 5; 11/3/06; 13:55:52-15:42:55). During the course of direct examination, the prosecutor asked Dr. Burrows-Beckham to define "cast off." She described it as occurring when someone is beating or stabbing someone with a weapon and blood from the weapon is cast off and deposited on other surfaces. (Id. at 14:38:47-14:39:26). The prosecutor then asked the doctor whether she would expect cast off to have occurred given the number of wounds found on James Hamilton. (Id. at 14:39:26). Defense counsel objected, arguing that Dr. Burrows-Beckham was not qualified to testify regarding cast-off blood, that the Commonwealth had failed to provide the doctor's opinion on this subject matter in discovery, and that she could only testify to the cause of death and any observations she made dur-

ing the autopsy. (Id. at 14:39:26-14:42:26). The trial court stated that the Commonwealth needed to lay additional foundation before it would deal with specific objections. (Id. at 14:42:26).

The prosecutor then asked Dr. Burrows-Beckham about her training and education with regard to cast-off blood evidence. Dr. Burrows-Beckham testified that she had attended a week-long course in blood spatter interpretation and that she had been qualified to testify regarding blood spatter. (VR No. 5; 11/3/06; 14:42:47-14:43:18). She further explained that blood spatter is the pattern of blood that can arise from different circumstances, including cast off or expiration. (Id. at 14:43:18-14:43:48). The prosecutor next began to pose the following question: "And you said that, if there's only one stab wound, would there be, would you expect to find…." (Id. at 14:43:48). Defense counsel again objected, pointing out that even if Dr. Burrows-Beckham had training, the Commonwealth had failed to provide any notice that it would be presenting expert testimony concerning blood spatter and her autopsy report did not contain this information. (Id. at 14:43:55-14:45:05). The Commonwealth maintained that cast-off blood evidence was within the purview of Dr. Burrows-Beckham's knowledge. (Id. at 14:45:05). Defense counsel reiterated that she had not been given any notice concerning this expert testimony and that the introduction of this evidence violated Phillip Wines's right to due process because the Commonwealth was attempting to insinuate that the stabbing could not have happened inside Phillip's home. (VR No. 5; 11/3/06; 14:46:13-14:47:20). The trial court overruled defense counsel's objection, claiming it was unaware of anything that would prevent this line of questioning. (Id. at 14:51:25).

Thereafter, Dr. Burrows-Beckham testified that although blood cast-off does not typically result from the first bloodletting blow, if a victim is continually stabbed, blood could accumulate on the knife and create cast off. (VR No. 5; 11/3/06; 14:41:45-14:52:33). Dr. Burrows-Beckham further testified that the body must be near an object for the blood cast-off to land and be seen and that in an open environment, the cast-off may be obscured by pavement or grass. (VR No. 5; 11/3/06; 14:52:33-14:53:00).

**B. Legal Analysis**

**1. The foundation was inadequate to establish expertise on cast-off blood evidence.**

The admissibility of expert testimony under KRE 702 is left to the trial court's discretion and must be based on the facts and circumstances of the case. Goodyear Tire and Rubber Co. v. Thompson, 11 S.W.3d 575, 583 (Ky. 2000). See also Fields v. Commonwealth, 12 S.W.3d 275, 283 (Ky. 2000), and Fugate v. Commonwealth, 993 S.W.2d 931, 935 (Ky. 1999). In this case, the Commonwealth failed to meet its burden of establishing that Dr. Burrows-Beckham was qualified as an expert on the topic of cast-off blood evidence. The foundation that was laid to qualify her as an expert in this matter was inadequate because it consisted only of generalized statements concerning the training she received and her assertion that she had been qualified as an expert in this area. There was no testimony concerning the quality or depth of her limited training.

In Mills v. Commonwealth, 996 S.W.2d 473, 487-488 (Ky. 1999), the Court ruled that a police detective was qualified to give expert testimony on blood spatter evidence and found any error in the admission of the officer's testimony to be harmless. However, the officer only made one reference to blood spatter evidence in a crime scene videotape. Id. at 487-488. In contrast, Dr. Burrows-Beckham not only testified as to how cast-off

blood evidence could occur but also how the environment affected it. (VR No. 5; 11/3/06; 14:38:47-14:39:25, 14:51:45-14:53:00). Yet, the foundation that was laid to establish Dr. Burrows-Beckham's expertise was sparse, with her expertise described in only the most general terms. The nature, intensity, and depth of her training were unspecified and there was no discussion of what it ordinarily takes for someone in the scientific, medical, or law enforcement field to be recognized as an expert in blood spatter interpretation. For her to simply describe her training as attendance in a week long course is to tell the court nothing about what was discussed or what knowledge was imparted to the attendees. Such a foundation is inadequate to qualify Dr. Burrows-Beckham as a purported blood spatter expert. Therefore, the trial court abused its discretion in permitting Dr. Burrows-Beckham to testify on this subject. Farmland Mutual Insurance Co. v. Johnson, 36 S.W.3d 368, 378-379 (Ky. 2001).

**2. The Commonwealth failed to provide notice that Dr. Burrows-Beckham would provide expert testimony concerning cast-off blood evidence.**

Even if Dr. Burrows-Beckham was qualified to testify as to cast-off blood evidence, Phillip Wines was entitled under RCr 7.24 to be confronted with the fact that this expert testimony would be presented against him before the trial started so that he had a reasonable opportunity to defend against it. RCr 7.24(1)(b) provides as follows:

> Upon written request by the defense, the attorney for the Commonwealth shall disclose the substance, including time, date, and place, of any oral incriminating statement known by the attorney for the Commonwealth to have been made by a defendant to any witness, and to permit the defendant to inspect and copy or photograph any relevant...(b) results or reports of physical or mental examinations, and of scientific tests or experiments made in connection with the particular case, or copies thereof, that are known by the attorney for the Commonwealth to be in the possession, custody or control of the Commonwealth.

Although the Commonwealth provided Dr. Burrows-Beckham's autopsy report in discovery (TR 05CR1921, Vol. II, 335-343), the report did not include any opinion as to the probability of cast-off blood being produced or the likelihood of its visibility.

This Court has found reversible error where the Commonwealth has violated the rules of discovery by failing to disclose relevant information. In James v. Commonwealth, 482 S.W.2d 92, 93 (Ky. 1972), this Court held that the Commonwealth's failure to provide a bill of particulars constituted reversible error where the abbreviated indictment merely alleged that the appellant sold cocaine to a particular individual on or about a stated date:

> On or about the date could have covered a period of several days. Appellant should not have been required to have available alibi witnesses for all those days. Nor should he have had to guess whom the Commonwealth might use as corroborating witnesses, if any, nor where the alleged transactions took place.

James, 482 S.W.2d at 93. The Court emphasized that "[a] cat and mouse game whereby the Commonwealth is permitted to withhold important information requested by the accused cannot be countenanced." James, 482 S.W.2d at 94. In Barnett v. Commonwealth, 763 S.W.2d 119, 121-122 (Ky. 1989), this Court found reversible error where the trial court allowed "the Commonwealth's serologist to give expert opinion not included in the copy of his report furnished to defense counsel, testimony to explain the significance of the physical evidence regarding traces of blood." The Court further explained as follows:

> All things considered, we conclude that the serologist's conclusion was admissible as opinion evidence, but the appellant was entitled under RCr 7.24 to be confronted with the fact that this opinion would be presented against him before the trial started so that he had a reasonable opportunity to defend against the premise. RCr 7.24(1)(b) requires that on motion the Commonwealth must produce "results or reports of physical or mental examinations, and of scientific tests or experiments made in connection with the particular case." The appellant moved for this discovery and was pro-

vided a report which did not include this significant piece of information, the expert's opinion as to what the physical findings indicated. James v. Commonwealth, supra, suggests that this was error, and given the equivocal background circumstances, here it was reversible error.

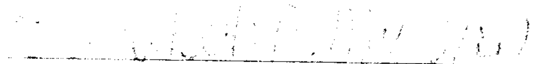
Barnett, 763 S.W.2d at 123.

Phillip Wines was entitled to know, prior to trial, that an expert opinion concerning cast-off blood would be presented against him so that he had a reasonable opportunity to defend against it. The Commonwealth's theory was that the physical altercation between Phillip Wines and James Hamilton occurred outside, rather than inside Phillip's home, and that Phillip was not acting in self-defense. The testimony of Dr. Burrows-Beckham that the body must be near an object for the cast-off blood to land and be seen and that the cast-off may be obscured by pavement or grass in an open environment constituted an expert opinion as to what the physical findings indicated. (VR No. 5; 11/3/06; 14:52:33-14:53:00). Thus, Dr. Burrows-Beckham's testimony about cast-off blood was prejudicial.

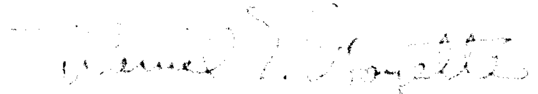
The purpose of subsection RCr 7.24(1)(b) is to provide a criminal defendant with pretrial disclosure of the substance of expert testimony at trial. The failure of the Commonwealth to provide notice that it would be presenting expert opinion concerning cast-off blood not only subverted the purpose of RCr 7.24(1)(b) but also violated Phillip Wines's rights to a fair trial, to present a defense, to confront and cross-examine the witnesses against him, and to due process of law, as guaranteed by the 6th and 14th Amendments to the United States Constitution and Sections 2 and 11 of the Kentucky Constitution. Therefore, Phillip Wines's convictions must be reversed and his case remanded for a new trial.

## CONCLUSION

For the foregoing reasons, the appellant, Phillip Leroy Wines, by counsel, respectfully submits that his convictions must be reversed and his case remanded for a new trial.



ELIZABETH B. McMAHON
Assistant Public Defender
Office of the Louisville Metro
Public Defender
Advocacy Plaza
717-719 West Jefferson Street
Louisville, Kentucky 40202
(502) 574-3800
Counsel for Appellant



DANIEL T. GOYETTE
Louisville Metro Public Defender
Of Counsel