Commonwealth of Kentucky
Supreme Court
No. 2007-SC-000081-MR

PHILLIP LEROY WINES — **APPELLANT**

Appeal From Jefferson Circuit Court
Hon. Douglas Kemper, Judge
Indictment Nos. 05-CR-001921 and 06-CR-001838

COMMONWEALTH OF KENTUCKY — **APPELLEE**

Brief for Commonwealth

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CERTIFICATE OF SERVICE

I certify that the record on appeal has been returned to the Clerk of this Court, and that a copy of the Brief for the Commonwealth has been mailed February 18th, 2008, to Hon. Douglas Kemper, Judge, Jefferson Circuit Court, Judicial Center, 700 W. Jefferson St., Louisville, KY 40202; Hon. David Stengel, Commonwealth's Attorney, 514 W. Liberty St., Louisville, KY 40202-2887 (electronic mail); and Hon. Elizabeth B. McMahon, Office of the Louisville Metro Public Defender, 200 Advocacy Plaza, 717-719 W. Jefferson St., Louisville, KY 40202, Counsel for Appellant.

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INTRODUCTION

This a direct appeal. Following a jury trial, appellant was found guilty of murder, second degree assault, tampering with physical evidence, and with being a second degree persistent felon. He was sentenced to forty-five (45) years in prison.

The Transcript of Record consists of five (5) volumes, hereinafter referenced as "TR." The Transcript of Evidence is contained on eight (8) videotapes, hereinafter referenced in accordance with CR 98(4)(a).

STATEMENT CONCERNING ORAL ARGUMENT

The Commonwealth does not believe that oral argument is necessary in this case since the issues are sufficiently addressed in the briefs. However, if the Court determines that oral argument would be helpful to it in the disposition of this appeal, the Commonwealth will gladly appear before the Court to present its case.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE

On June 21, 2005, the Jefferson County Grand Jury handed down Indictment No. 05-CR-01921, charging appellant with murder in the stabbing death of James Lee Hamilton on June 12, 2005, tampering with physical evidence on that same date, and second degree assault with regard to injuries sustained by Micah Brashear on April 14, 2005 (TR I 1-2). On June 7, 2006, the Jefferson County Grand Jury handed down Indictment No. 06-CR-1838, charging appellant with being a second degree persistent felon (TR V 1-2). A jury trial as to the charges contained in both indictments commenced in Jefferson Circuit Court on October 30, 2006 (TR IV 759). After hearings on pre-trial motions on the first day of trial, and voir dire and opening statements on October 31, 2006, the Commonwealth's first witness, Angela Nelson, was called on November 1, 2006.

Angela Nelson testified that in 2005 she was living with James Hamilton, but that on June 12, 2005, she was staying at appellant's residence (VR No. 3; 11/01/06; 11:02:00-11:05:00). On that date, appellant became angry, saying he was going to kill Hamilton (Id.). Hamilton pulled up in his car at appellant's residence as Nelson was trying to leave (Id.). Hamilton came up on appellant's porch when he saw appellant preventing Nelson from leaving (Id.). Knowing appellant had a knife, Nelson told Hamilton to run (Id.). Hamilton ran, but then realized he'd left his keys in his car (Id.). Appellant got to the keys before Hamilton, however, and when Hamilton returned to his car, he and appellant got into a fight during which appellant stabbed Hamilton (Id.).

Nelson stated that Hamilton sold drugs (VR No. 3; 11/1/06; 11:10:00), and that Hamilton and appellant became "involved in drugs together" (Id. at 11:15:00). At

one point, Hamilton decided to keep his drugs at appellant's house, and Hamilton had a key to the premises (Id. at 11:17:00-11:19:00). Nelson admitted taking drugs with appellant at his house and having sex with appellant (Id. at 11:44:00-11:48:00). The night of the fatal stabbing, appellant told Nelson she had to chose between him and Hamilton (Id.). When Nelson told appellant she would not leave Hamilton, appellant became angry and said he was going to kill Hamilton (Id.). Nelson stated that at the time, she had been staying with appellant off and on for about a month and a half (Id. at 12:07:00), but Nelson stated that appellant and Hamilton argued more about "drugs and money" than about her (Id. at 15:12:00-15:13:00). Nelson stated that appellant would always call the police whenever he and Hamilton had arguments, and that appellant told her he did this "so that when he finally did kill James he would get off" (Id. at 15:18:00).

Micah Brashear testified that he and appellant "grew up together" (VR No. 3; 11/1/06; 16:23:00-16:27:00). Brashear stated that on April 14, 2005, he asked a man named Brian Langdon to give him a ride to the residence of his sister, Kathy Burton, who lived near appellant (Id.). Brashear also hoped to "buy a couple joints" from appellant (Id.). However, when Brashear telephoned him, appellant told Brashear not to come over because appellant believed "Brian was a narc" (Id.). Brashear went to his sister's house, and then to the home of a friend across the street, where he drank some beer (Id. at 16:28:00-16:32:00). However, that night, when Brashear was walking back to his sister's residence, he and appellant "had words" (Id.). Brashear stated that appellant tried to get him to come on to his property, and when Brashear wouldn't do this, appellant approached him where he (Brashear) was standing in the street, and hit him on the head

and the arm with something (Id. at 16:33:00-16:36:00). Brashear stated that he was taken to the hospital that night, and that he had to go back to the hospital a couple of more times because he had problems with short term memory, dizziness and falling down (Id.).

James Hamilton's mother, Deanne Hamilton, testified that she was aware of her son's "life style," that she knew he had HIV, and that his girlfriend Angela Nelson blamed him when she (Nelson) learned that she too was HIV positive (VR No. 4; 11/2/06; 10:56:00-10:59:00). Deanne Hamilton stated that her son and Angela Nelson were together for about three years, but that they "fought all the time" (Id.).

Kristen White testified that she and her husband James White lived at 2924 Cannons Lane in Louisville, and that appellant was their next door neighbor (VR No. 4; 11/2/06; 11:07:00-11:11:00). White stated that at about 2:00 A.M. on June 12, 2005, she heard a car out in the street, and when she looked out the window, she saw a man–whom she recognized as a friend of appellant's–sitting in a car and calling for "Angela" to come out and talk to him (Id.). White telephoned the police, but when the police arrived, the man had already left (Id.). About 4:00 A.M., White heard the man yelling for the woman again, then she heard a woman "screaming hysterically" (Id.). Looking out the window, she saw that the man had gotten out of his car, and that a woman was running around in circles screaming (Id.). White then called 911 (Id.). White had observed the man–whom she referred to as "James"–arguing and yelling with appellant in the month or so before this incident (Id. at 11:22:00-11:24:00). White also remembered another incident which occurred on April 14, 2005, when she saw appellant out in his driveway arguing with a different man (Id.). They were "daring each other to

fight," White said (Id.). On this latter occasion, appellant was at the end of his driveway, and the other person was out in the street (Id.).

James White remembered that on April 14, 2005, he saw appellant in an argument with a man who was out in the street (VR No. 4; 11/2/06; 12:05:00-12:09:00). White saw appellant walk to the end of the driveway, and when a scuffle ensued, appellant pulled a club or numchuks out of his back pocket and hit the other man on the head (Id.). James White remembered hearing a car horn honking at a bout 2:00 a.m. on June 12, 2005, and he remembered hearing voices (Id. at 12:11:00-12:13:00). He also remembered hearing a woman screaming about 4:00 a.m. that night (Id.).

Brian Langan testified that on April 14, 2005, he gave Micah Brashear a ride to the home of Brashear's sister, Kathy Burton (VR No. 4; 11/2/06; 12:24:00-12:27:00). Langan and Brashear then walked across the street to the home of a friend named Vaughn McCutcheon, where they drank beer most of the afternoon and evening (Id.). That night, when Langan and Brashear were walking back across the street, they heard appellant yelling at them from his front porch, taunting Brashear to come and fight him (Id.). Langan understood that Brashear had earlier wanted to "bum a joint" from appellant, but that appellant didn't want Brashear to come to his house because appellant thought he (Langan) was a narc (Id.). Brashear and appellant met at the end of appellant's driveway, arguing and shouting at each other, toe-to-toe at the property line (Id. at 12:28:00-12:31:00). Finally, appellant pulled out a weapon he'd been concealing and hit Brashear (Id.).

Janice Stieff testified that she works for the Ford Motor Company as a

human resources associate (VR No. 4; 11/2/06; 14:28:00-14:32:00). Steiff stated that in 2005 she received a letter from appellant, who was an hourly employee at the time (Id.). In the letter, appellant stated that he was in jail, that he had killed a person, but that he expected to be found not guilty because the person he killed had broken into his home (Id.). Appellant also said in the letter that he hoped to get out on bond June 23, 2005 (Id.). Steiff stated that the letter was post marked June 21, 2005 (Id.).

Detective Chris Horn with the Louisville Metro Police Department investigated the assault on Micah Brashear (VR No. 4; 11/2/06; 14:34:00). Horn took a statement from appellant in which appellant claimed that Brashear had made threatening phone calls to him (Id. at 14:40:00-14:43:00). Appellant told Horn that Brashear had called to him saying "Come on out, fat boy" (Id. at 14:44:00-14:45:00). Appellant stated that he went outside, and that Brashear was out in the street with Brian Langan (Id.). Appellant said he asked them to leave (Id.). Appellant claimed that when Brashear stepped on his property, he hit Brashear twice with numchuks (Id. at 14:49:00-14:51:00).

Mark Houghton testified that he knows appellant, that he arrived at appellant's residence on April 14, 2005, shortly after the assault on Micah Brashear (VR No. 4; 11/2/06; 15:22:00-15:23:00). Houghton stated that appellant, James Hamilton and another friend were talking when he arrived (Id.). Houghton stated that he knew that Hamilton dealt drugs, and that he was familiar with how Hamilton did business (Id. at 15:25:00). "Yes sir, I was part of it," Houghton stated, "I'd do some deliveries for him or some pick-ups for him" (Id.). Houghton testified that appellant was involved in Hamilton's drug business, that at one point Hamilton kept his "stash" of drugs at

appellant's residence, and that Hamilton had a key to appellant's house (Id. at 15:32:00-15:33:00).

Susan Murray, with Louisville Metro government, testified regarding a copy of a 911 call made from appellant's residence at 2:04 a.m. on June 12, 2005, wherein appellant complained about James Hamilton driving recklessly, and having twice broken into his house (VR No. 5; 11/3/06; 11:08:00-11:10:00). Murray also provided copies of three later 911 calls made that night, one from a neighbor saying a man and woman were in the street fighting, one from appellant, and one from a woman saying that a man out in the street had been stabbed (Id. at 11:11:00-11:15:00).

Officer Daniel McNamara with the Louisville Metro Police Department testified that he and two other officers responded to a call regarding appellant's residence on June 12, 2005, at about 2:00 a.m. (VR No. 5; 11/3/06; 11:21:00-11:25:00). Appellant and Angela Nelson were present at the residence, and McNamara–who was familiar with the parties involved–suggested that if Nelson were to leave, appellant would not have further problems with James Hamilton (Id.). McNamara stated that he got another call to go to the same location again about 4:00 a.m. that night, at which time he found Hamilton on the ground across the street from appellant's residence (Id. at 11:26:00-11:31:00). Hamilton had been stabbed in the chest, and Nelson was trying to stop the bleeding (Id.). When McNamara turned around, he saw appellant come out the front door of his house, sit on the steps of his front porch, and put his hands up, saying "Alright, I did it" (Id.). McNamara took appellant into custody (Id.) When McNamara inquired about the weapon, appellant directed him to a knife on top of his television (Id.). The knife had

been cleaned off (Id.).

Detective Mike Sherrard with the Louisville Metro Police Department's homicide unit was notified to go to appellant's residence on the night of the stabbing (VR No. 5; 11/3/06; 11:54:00-11:58:00). Sherrard observed blood on the door of the victim's car, and drops of blood leading to where victim's body had been (Id.). Sherrard described Angela Nelson as "very upset," crying and "borderline hysterical" (Id. at 12:9:00-12:10:00). Sherrard took a taped statement from Nelson at the scene (Id.), and a portion of that statement was played for the jury (Id. at 12:14:00-12:19:00).

Assistant medical examiner Dr. Amy Burrows-Beckham performed an autopsy on the body of the victim (VR No. 5; 11/3/06; 13:58:00). Burrows-Beckham testified that the victim sustained some eight (8) stab wounds to the chest, back and upper body (Id. at 14:05:00-14:07:00). Regarding the cause of death, Dr. Burrows-Beckham stated: "Mr Hamilton died as a result of multiple stab wounds to the body" (Id. at 14:59:00). Two of the stab wounds pierced the victim's heart (Id.).

Called as the first defense witness, Debbie Heim, a supervisor in Jefferson Family Court, testified as to an emergency protective order (EPO) obtained by James Lee Hamilton against Angela Nelson in November, 2003 (VR No. 5; 11/3/06; 16:22:00-16:26:00).

Shelly Friess testified that she was a real estate paralegal at a business located in a building next to appellant's residence (VR No. 5; 11/3/06; 16:32:00-16:37:00). Friess remembered that about a week before the murder, she saw a man who looked like James Hamilton out in the street waving and pointing at appellant's residence

(Id.). Friess stated that the man appeared to be "upset" (Id. at 16:38:00).

Heather Osborne testified that she also worked at the business next to appellant's residence on Cannons Lane, and she also remembered seeing a man who looked like James Hamilton out in the street a week or two before the murder (VR No. 5; 11/3/06; 16:41:00-44:00). Osborne stated that the man was "agitated," and "screaming and yelling" toward the building next door (Id.).

Testifying in his own defense, appellant admitted having a prior felony conviction, but he denied knowing prosecution witness Mark Houghton or ever buying drugs from Houghton (VR No. 6; 11/6/00; 12:35:00, 12:41:00). Appellant denied helping James Hamilton sell drugs (Id. at 12:44:00). Appellant admitted hitting Micah Brashear with numchuks on April 14, 2005, but appellant claimed that he was sick that day, that he asked Brashear to leave, that Brashear came on his property and pushed him, that Brashear had his hand in his pocket and he knew Brashear to carry a knife, and that with Brian Langdon being there with a cane in his hand, he (appellant) thought he was in danger (Id. at 12:55:00-13:00:00). Appellant denied that the letter he wrote to Hamilton while he (appellant) was in jail had anything to do with drugs, or that he ever gave Hamilton permission to sell or store drugs at his home (Id. at 13:08:00-13:10:00).

Appellant testified that Angela Nelson began to live with him on May 8, 2005, and that he and Nelson had a sexual relationship (VR No. 6; 11/6/06; 13:19:00-13:22:00). Appellant stated that James Hamilton broke into his house on May 20, 2005, and May 30, 2005, and on both occasions attempted to strangle Nelson (Id. at 14:10:00-14:12:00, 14:17:00-14:18:00). On June 7, 2005, Hamilton knocked out a screen in a

bedroom window at appellant's house while appellant and Nelson were in bed together (Id. at 14:20:00-14:23:00). On May 30, 2005, and June 7, 2005, appellant called the police, but Hamilton was gone by the time the police arrived (Id.). Appellant also called the police at 2:00 a.m. on June 12, 2005, when Hamilton was outside the house hollering for Nelson (Id. at 14:25:00-14:29:00). Appellant denied threatening to kill Hamilton or giving Nelson an "ultimatum" to chose between him and Hamilton (Id. at 14:30:00).

Appellant stated that when Hamilton returned about 4:00 a.m. on June 12, 2005, Hamilton came up on his front porch and was acting "quite irrate" (VR No. 6; 11/6/06; 14:31:00-14:34:00). Appellant claimed that when he pulled Nelson away from the front door, Hamilton came into the house, striking appellant in the head and face, knocking appellant to his knees and hitting appellant in the back (Id.). Appellant stated that he got the pocket knife he kept by the door, opened it, and stabbed Hamilton four or five times (Id. at 14:35:00-14:38:00). "I was trying to get him off of me," appellant said (Id.). Appellant stated that Hamilton then dragged him out on the porch, and that he stabbed Hamilton a couple of more times when he thought Hamilton was going to throw him off the porch (Id.). Appellant stated that he washed the blood off the knife because he knew Hamilton was HIV positive (Id. at 14:39:00). Appellant denied planning to kill Hamilton (Id. at 14:45:00). Appellant stated that he believed Hamilton was going to harm or kill him or Angela Nelson (Id.).

After hearing all the evidence, the jury found appellant guilty of murder, second degree assault, tampering with physical evidence, and with being a second degree persistent felon, fixing his punishment at forty-five (45) years in prison (TR IV 759-761).

On December 22, 2006, the Jefferson Circuit Court entered its final judgement sentencing appellant in accordance with the jury verdict (TR IV 768-770). The instant appeal followed (TR IV 773). Further facts shall be developed, as warranted, in the argument section of the Commonwealth's brief.

ARGUMENT

I.

THE CIRCUIT COURT CORRECTLY EXERCISED ITS DISCRETION IN DENYING DEFENSE MOTIONS TO SEVER THE ASSAULT CHARGE.

On August 3, 2005, appellant filed (TR II 257-261) a pre-trial motion under RCr 9.16 to sever the murder and tampering charges from the second degree assault charge (VR No. 1; 8/3/05; 9:16:00). On October 27, 2005, the Commonwealth filed its response in opposition to the motion to sever (TR II 390-395), and on November 14, 2005, the circuit court heard arguments on the motion (VR No. 1; 11/14/05; 9:15:00-9:32:00). On December 14, 2005, the Jefferson Circuit Court, Division Five, Judge Stephen Ryan, entered its order denying the motion to sever (TR II 396).

Thereafter, on June 15, 2006, appellant renewed his motion to sever (TR IV 608-611). The motion came before the Jefferson Circuit Court, Division Five, Judge Doug Kemper presiding, on June 26, 2006, at which time the court again heard arguments of counsel, and Judge Kemper advised the parties that he would review the videotape of the prior hearing before ruling (VR No. 1; 6/26/06; 14:46:00-15:04:00). On July 27, 2006, the circuit court entered its order again denying the motion to sever (TR IV 612).

Appellant renewed his motion to sever prior to jury selection (VR No. 3; 10/31/06; 10:25:00-10:26:00), and at the close of all the proof (VR No. 7; 11/6/06; 16:15:00-16:17:00). The motions were overruled (Id.).

Appellant here claims that the trial court's severance rulings were in error (Brief for Appellant Pp. 8-13). Appellant is incorrect. The circuit court properly exercised its discretion in declining to sever the assault and murder charges for trial.

The Kentucky Rules of Criminal Procedure provide that 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." RCr 6.18. Nonetheless, the rules also require a trial court to sever previously joined counts if either the defendant or the Commonwealth "will be prejudiced" by a joinder. RCr 9.16. However, since a defendant suffers prejudice simply from the fact of "being tried at all," mere prejudice alone is insufficient to warrant severance under RCr 9.16. Ware v. Commonwealth, 537 S.W.2d 174, 176 (Ky. 1976). Rather, in order to warrant severance, it must be proven that joinder would be so prejudicial as to be unfair or unnecessarily or unreasonably hurtful. Ratliff v. Commonwealth, 194 S.W.3d 258, 264 (Ky. 2006). Furthermore, the trial court enjoys broad discretion in regard to joinder and the decision will not be overturned absent a demonstration that this discretion was clearly abused. Violett v. Commonwealth, 907 S.W.2d 773, 775 (Ky. 1995). The record here discloses no abuse of discretion.

A significant factor in determining whether joinder of offenses for trial is unduly prejudicial is whether evidence of one of the offenses would be admissible in a

separate trial for the other offense. Spencer v. Commonwealth, 554 S.W.2d 355 (Ky. 1977). Additionally, joinder is proper where the two crimes are closely related in character, circumstance and time. Commonwealth v. Collins, 933 S.W.2d 811, 816 (Ky. 1996). These are the standards upon which the trial judge here relied in denying the motion to sever (TR IV 612, VR No. 7; 11/6/06; 16:17:00). Appellant contends that severance was warranted because "the only similarity of the offenses was the location" and because there were "few overlapping witnesses" (Brief for Appellant Pp. 10-11). However, appellant's characterization of the evidence in this regard is not accurate.

In the instant case, record evidence regarding the assault and murder which would have been admissible at separate trials, and which showed that the two offenses were closely related in character, circumstance and time, included the following:

— Both offenses took place at appellant's residence. Specifically, both offenses took place at night, out in front of appellant's residence, in the street near appellant's property line. This is where Angela Nelson testified appellant stabbed James Hamilton (VR No. 4; 11/1/06; 11:05:00, 11:37:00). This was also where Micah Brashear testified that he was assaulted by appellant (Id. at 16:33:00). Brian Langan testified that this was where the assault occurred (VR No. 5; 11/2/06; 12:30:00), and Kristen White, who was a witness to both incidents, testified that this was where appellant confronted Brashear (Id. at 11:23:00-11:24:00). Kristen White's husband James also testified that appellant went to the end of his driveway and hit Brashear who was standing in the street (Id. at 12:06:00).

— In both instances, there was evidence which showed that appellant

endeavored to arrange for his attacks to take place on his property in order that he could claim defense of himself and/or his property as a justification for the attack. Micah Brashear testified that he and appellant "had words" on the telephone the afternoon and evening of the stabbing, that appellant called him several times on Brian Langan's cell phone, that appellant called out and taunted him when he saw him in the street, and that appellant tried to get him to come onto his property (VR No. 4; 11/1/06; 16:29:00-16:32:00). Angela Nelson testified that it was appellant's plan in continually calling the police on James Hamilton whenever Hamilton was on or around his property "that when he finally did kill James he would get off" (VR No. 4; 11/1/06; 15:17:00-15:18:00).

— In both instances, appellant used a concealed deadly weapon to attack the victims, pulling numchuks he'd been concealing out of his back pocket in one instance (VR No. 5; 11/2/06; 12:30:00-12:31:00, 12:06:00) and a knife from his back pocket in the other (VR No. 4; 11/1/06; 11:05:00).

— In both instances the victims were unarmed. Micah Brashear testified that he did not have a weapon, and that he did not remember having anything in his hand (VR No. 4; 11/1/06; 16:45:00). Brian Langan testified that Brashear only had a beer can in his hand (VR No. 5; 11/2/06; 12:36:00). Even appellant himself in his testimony did not allege that James Hamilton had a weapon or that he stabbed Hamilton because he believed him to have a weapon (VR No. 7; 11/6/06; 14:36:00-14:38:00). There was no weapon among James Hamilton's personal effects collected at the hospital (TR I 67-68).

— In both instances the victims were friends of appellant. James Hamilton's mother testified that appellant and her son were "good friends" (VR No. 5;

11/2/06; 11:05:00). In a letter to Hamilton, appellant himself called Hamilton a "true friend" (TR I 94). Micah Brashear testified that he had known appellant for thirty years (VR No. 4; 11/1/06; 16:23:00).

— In both instances, when the police arrived, appellant surrendered and immediately claimed self defense (VR No. 7; 11/6/06; 13:00:00, VR No. 5; 11/2/06; 14:50:00, VR. No. 6; 11/3/06; 11:30:00, TR I 57).

— Kristen White was a neighbor of appellant and a witness to both incidents. She testified that in each case she heard yelling out in front of appellant's house. On April 14, 2005, she saw appellant and Brashear yelling at each other and "daring each other to fight" (VR No. 5; 11/2/06; 11:23:00). Regarding the events of June 12, 2005, Kristen White heard James Hamilton yelling out in the street (Id. at 11:08:00), and she stated that in the month before the stabbing she did not see Hamilton unless he and appellant were arguing and yelling (Id. at 11:22:00).

— James White heard disturbances outside his house in both instances. He saw appellant argue with and assault Micah Brasher (VR No. 5; 112/06; 12:05:00-12:07:00). He knew James Hamilton from seeing him at appellant's house, and he heard voices, a car horn and screams on the night Hamilton was stabbed (Id. at 12:11:00-12:13:00).

— James Hamilton, the murder victim, was a witness to the assault on Micah Brashear (TR I 122).

— Furthermore, a primary interconnecting thread that ran through the testimony of witnesses as to both offenses was the drug activity in which appellant and

both victims were involved.

— Micah Brashear testified that he wanted to go to appellant's residence on the day of the assault to "buy a couple joints" from appellant, but that appellant didn't want him to come over because he was with Brian Langan, and appellant believed Langan to be "a narc" (VR No. 4; 11/1/06; 16:26:00-16:27:00). This is what precipitated the argument between Brashear and appellant that day.

— When appellant was incarcerated on the Micah Brashear assault charge, appellant wrote a letter to his "true friend" James Hamilton telling him to "watch for that cocksucker I fucked up" (TR I 94-95), and asking Hamilton to take care of a number of things for him which included–according to the testimony of Angela Nelson–taking care of certain of appellant's drug customers (VR No. 4; 11/1/06; 12:20:00-12:21:00, 14:41:00).

— Angela Nelson testified that James Hamilton stored marijuana and cocaine at appellant's house, and that appellant gave Hamilton a key to his house and the combination to his lock box (VR No. 4; 11/1/06; 14:40:00-14:42:00).

— Nelson described appellant and James Hamilton as "business partners" (VR No. 4; 11/1/06; 14:46:00), and she testified that the arguments between appellant and Hamilton were more about "drugs and money" than about her (Id. at 15:12:00-15:13:00).

— This evidence that appellant's dispute with Brashear was related to Brashear wanting to buy marijuana when he was with someone whom appellant believed to be a "narc," and that appellant was in the drug business with Hamilton and argued with him over "drugs and money," was consistent with the testimony of appellant's neighbor,

Kristen White, who observed appellant and Hamilton arguing in the weeks prior to the stabbing (VR No. 5; 11/2/06; 11:18:00-11:20:00). White also observed people coming and going from appellant's residence late at night, "stumbling" out to their cars after only staying at appellant's residence for five minutes or so (Id.).

— Mark Houghton, who testified about the drug business in which appellant and James Hamilton were involved (VR No. 5; 11/20/06; 15:32:00-15:34:00), stated that when he arrived at appellant's residence shortly after the assault on Micah Brashear, appellant and Hamilton were there talking together (Id. at 15:22:00-15:23:00).

This record amply establishes that the murder and assault charges were correctly joined for trial because they were offenses of "the same or similar character." RCr 6.18. This record also shows that there was a considerable extent to which the evidence of one offense would have been admissible at a separate trial of the other. Spencer, supra; Debruler v. Commonwealth, 231 S.W.3d 752, 760 (Ky. 2007). Appellant claimed that in both instances he attacked the victims in self defense, and at separate trials–as here–this would have been the primary issue for the jury. Consequently, evidence that he attempted to lure Brashear onto his property so that he could claim self defense with regard to a dispute which was actually drug-related, would certainly have been relevant and admissible at a separate trial on the Hamilton killing where appellant also claimed self defense with regard to an attack that was planned and–at least in part–drug-motivated. The same evidence regarding his drug business and drug-related dispute with Hamilton would have been relevant and admissible at a separate trial on the Brashear assault to refute the self-defense claim, and to support the victim's assertion that

the precipitating dispute involved his desire to purchase some marijuana and appellant's fear that Brian Langan was a "narc."

This inter-relationship of the evidence is all the more significant in light of the fact that both offenses took place in the same location, that both victims were friends of appellant, that both victims were unarmed, and that both victims were attacked by appellant with a concealed deadly weapon which appellant pulled from his back pocket during an altercations which appellant endeavored to have occur on his property. Given these interconnected circumstances and victims, as well as the overlapping witness testimony, the time between the two offenses was not sufficiently great to warrant severance, particularly when it is considered that the attack on Hamilton on June 12, 2005, occurred just a little over a month after appellant was released from jail on the Brashear attack on April 26, 2005 (VR No. 7; 11/6/06; 13:03:00).

Lastly, the record as discussed above shows that–contrary to what appellant claims (Brief for Appellant Pp. 12-13)–evidence as to each offense certainly would not have been inadmissible at separate trials under the standards set forth in KRE 404(b), in that the complained-of evidence here from each offense was not merely evidence of character. Rather, evidence of the one drug-related attack with a concealed deadly weapon upon an unarmed friend under the guise of self-defense tended to prove motive, opportunity, intent, preparation and plan on appellant's part as to the other offense. KRE 404(b)(1). Moreover, given these very similar modus operandi factors, along with the commonality in location, witnesses and general temporal proximity, the evidence as to each offense can fairly be characterized as inextricably intertwined with

evidence of the other. KRE 404(b)(2). This is all the more apparent when it is considered that appellant's claimed "self-defense" stabbing of Hamilton followed little more than a month after appellant successfully used that same defense ploy in initially avoiding indictment for the Micah Brashear assault (VR No. 3; 11/1/06; 17:44:00).

In sum, the record discloses no abuse of the trial court's broad discretion in denying appellant's motion to sever the murder and assault charges. Violett, supra. The offenses were "of the same or similar character,." RCr 6.18, and appellant has failed to demonstrate undue, unfair or unreasonable prejudice such as would warrant severance. RCr 9.16; Ware, supra; Ratliff, supra. Evidence of the one offense would have been admissible in a separate trial for the other. Spencer, supra. Joinder was proper since the two crimes were closely related in character, circumstance and time. Collins, supra. The trial court correctly exercised its discretion. There was no error.

II.

THE CIRCUIT COURT RULED CORRECTLY IN DETERMINING THAT REVISIONS TO KRS CHAPTER 503 ARE NOT APPLICABLE TO APPELLANT'S CASE.

On June 15, 2006, appellant filed a motion claiming entitlement to changes in KRS Chapter 503 made effective July 12, 2006 (TR IV 621-623). On June 26, 2006, the court considered the matter but ruled that the issue was then moot as trial had been continued (VR No. 1; 6/26/06; 14:17:00, TR IV 624). Thereafter, on October 19, 2006, appellant filed a motion to dismiss under KRS Chapter 503 as amended, claiming entitlement to a pre-trial evidentiary hearing to determine his "immunity" in terms of

changes made to the chapter (TR VI 673-679).[1] The Commonwealth filed a response to the motion (TR IV 684-686), and on the first scheduled day of trial, the court heard arguments on the issue at a lengthy hearing (VR No. 2; 10/30/06; 14:31:00-16:04:00). The next day, the court denied the motion to dismiss (VR No. 3; 10/31/06; 10:06:00-10:16:00), concluding that whether KRS Chapter 503 as amended was retroactively applicable or not, dismissal would not be appropriate at that point in the trial given the "conflicting evidence" on the issue of self defense (Id. at 10:15:00-10:16:00).

At the close of the Commonwealth's case, defense counsel–as part of appellant's motion for a directed verdict–renewed the motion to dismiss under KRS Chapter 503 (VR No. 6; 11/3/06; 15:59:00-16:14:00). The judge denied the motion for a directed verdict, and overruled the motion to dismiss (Id.). The circuit judge's ruling was the same when defense counsel reiterated the motions at the close of all the proof (VR No. 7; 11/6/06; 16:14:00-16:16:00).

Appellant claims that these rulings by the trial court were in error (Brief for Appellant Pp. 13-26). Appellant maintains that the changes to KRS Chapter 503 made effective July 12, 2006, should be retroactively applicable to the acts he committed in 2005 (Brief for Appellant Pp. 17-19); that under the changes to KRS Chapter 503 as retroactively applied to his case, he should have gotten a jury instruction stating that he had "no duty to retreat" (Brief for Appellant Pp. 19-23); and that he was entitled to a pre-

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[1]As part of the motion, appellant raised the baseless claim that "off the record" and at the June 26, 2006, hearing the court and the Commonwealth conceded that KRS Chapter 503 as amended was applicable to his case. The record of the earlier hearing does not support this assertion, and appellant here does not reiterate the claim.

trial evidentiary hearing to establish his immunity from prosecution under newly-enacted KRS 503.085, at which hearing he would "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" (Brief for Appellant Pp. 23-26).

Appellant's arguments are without merit. The changes to KRS Chapter 503 are not retroactively applicable to appellant's case. Therefore, there was no error in the jury instructions regarding the absence of a duty to retreat, and no basis for a pre-trial evidentiary hearing on appellant's ill-founded claim of self-protection. The circuit court ruled correctly. There was no error.

A. Changes to KRS Chapter 503 adopted effective July 12, 2006, are not retroactively applicable to appellant's case.

The law with regard to the retroactive applicability of a newly enacted statute–such as KRS 503.085 which is addressed to the immunity appellant seeks–is contained in KRS 446.080 which states, as follows, with regard to the construction of statutes: "No statute shall be construed to be retroactive, unless expressly so declared." KRS 446.080(3). This would seem to settle the matter. KRS 503.085 does not expressly declare that it is to be given retroactive application. Consequently, KRS 446.080(3) forecloses the application of KRS 503.085 to the offense in appellant's case which occurred more than five (5) months prior to the effective date of KRS 503.085.

However, appellant argues that language in KRS 446.110 controls the retroactive applicability of KRS 503.085, not KRS 446.080(3). KRS 446.110 states, in pertinent part, as follows:

> . . . If any penalty, forfeiture or punishment is mitigated by any provision of the new law, such provision may, by consent of the party affected, be applied to any judgement pronounced after the new law takes effect.

KRS 446.110. According to appellant, KRS Chapter 503 should be viewed as change in the law under which "punishment is mitigated," in that it deals with a defense that "exonerates a defendant" or "can reduce the offense, and therefore the penalty" (Brief for Appellant P. 18). This is a self-servingly expansive interpretation f the language of KRS 446.110 which is contrary to both the plain language of the statute and case law applicable thereto.

This Court has previously addressed the interaction of KRS 446.080(3) and KRS 446.110 in Commonwealth v. Phon, 17 S.W.3d 106 (Ky. 2000). In that case, it was explained that "[w]hile KRS 446.080(3) deals with retroactive application of statutes in general, KRS 446.110 deals specifically with the procedure to be followed when a law is amended." Phon, supra, 17 S.W.3d at 108. The distinction made by the Court is not between a new or existing statute and an amended one, but–where two statutes appear to be in conflict–between a statute with a "general provision," in this case KRS 446.080(3), and one with a "specific provision," in this case KRS 446.110. Phon, supra; citing Porter v. Commonwealth, 841 S.W.2d 166 (Ky. 1992). "In the event two statutory provisions directly conflict, it has been long established the specific provision takes precedence over the general provision." Porter, supra, 841 S.W.2d at 168-169. In the Phon case it was recognized that KRS 446.110 controls over the general provision of KRS 446.080(3) in the specific situation "where there is no express declaration of retroactivity in a new

statute *containing mitigating penalties*." Phon, supra; emphasis added.

KRS Chapter 503 is not addressed to any "mitigating penalties." It is not addressed to penalties at all. Therefore, KRS 446.110 is not controlling as to it's retroactive applicability; KRS 446.080(3) is. The language of KRS 446.110 upon which appellant relies plainly pertains only to statutes which are addressed to sentencing, i.e., penalties, forfeitures and punishment. This plain understanding of the statute is evidenced in both the subject matter and language of the Phon opinion. The Phon case involved a certification of law as to the retroactive applicability of "newly authorized *sentences*" under HB 455 which "added life without parole to Kentucky's capital sentencing range." Phon, supra, 17 S.W.3d at 107; emphasis added. This is the type of legislation involving penalty and punishment to which the language at issue in KRS 446.110 clearly pertains.

As this Court observed, KRS 446.110 is addressed to statutes "containing mitigating penalties." Phon, supra, 17 S.W.3d at 108. "The exception of KRS 446.110 only applies if *the new penalty* is definitely mitigating." Bolen v. Commonwealth, 31 S.W.3d 907, 909 (Ky. 2000); emphasis added. KRS 503.085 is addressed to a justification for the use of force. It does not involve a "new penalty" of any kind. While appellant attempts to use the Bolen opinion to support his self-servingly expansive interpretation of KRS 446.110 (Brief for Appellant Pp. 18), he ignores–or endeavors to misconstrue–the fact that Bolen involved an amendment to KRS 532.080 which is addressed to persistent felony offender *sentencing*. "The amendment to KRS 532.080 in question eliminates an eligible person's *sentence* from being enhanced as a persistent

felony offender." Bolen, supra, 31 S.W.3d at 909; emphasis added. The changes to KRS Chapter 503 made effective July 12, 2006, encompass no such new sentencing provision.

In other words, the statutory change examined in Bolen, the statutory change to which KRS 446.110 was found to be applicable, delineated a new penalty or sentence enhancement provision held to be definitely mitigating. Bolen was addressed to the type of mitigation of penalty or punishment to which KRS 446.110 expressly pertains. This was the case in Phon which involved a change in capital sentencing. Phon, supra. This was also the case in Furnish v. Commonwealth, 95 S.W.3d 34 (Ky. 2002) which was addressed to a statutory amendment authorizing "a *sentence* of life without the benefit of probation or parole (LWOP) in capital cases." Furnish, supra, 95 S.W.3d at 50; emphasis added. There this Court reiterated that KRS 446.110 "permits a newly enacted *penalty* to be applied retroactively if it is mitigating." Furnish, supra; emphasis added.

Recently, in Cummings v. Commonwealth, this Court–in considering the retroactive applicability of the sentencing cap–noted: "The 70 year cap on consecutive sentences took effect July 15, 1998. Pursuant to KRS 446.110, the amendment including the 70 year cap may govern his *sentence* even on those offenses Appellant committed prior to the effective date of that statutory provision." Cummings v. Commonwealth, 226 S.W.3d 62, 67 (Ky. 2007); emphasis added. See also St. Clair v. Commonwealth, where KRS 446.110 was held applicable to a new "*sentencing* option [i.e., LWOP] in capital cases." St. Clair v. Commonwealth, 140 S.W.3d 510, 525-526 (Ky. 2004); emphasis added. In both Cummings and St. Clair, KRS 446.110 was found controlling because retroactive applicability of a statute addressed to sentencing, penalty or punishment was

at issue.

Hence, the limited applicability of KRS 446.110 is evidenced both by the language of the statute itself, and by the case law addressed to the statute. Appellant would have this Court adopt his tortured construction of the word "mitigate" in order to bring the changes to KRS Chapter 503, and KRS 503.085 in particular, within the purview of KRS 446.110. His argument in this regard is without merit. Even if KRS 503.085 were to be construed as a mitigating statute, it still would not be a *sentencing* statute, and it is sentencing to which KRS 446.110 pertains. As this Court has observed:

> This Court and its predecessor have consistently interpreted KRS 446.110 to require courts to *sentence* a defendant in accordance with the law which existed at the time of the commission of the offense unless the defendant specifically consents to the application of a new law which is "certainly" or "definitely" mitigating. . . .

Lawson v. Commonwealth, 53 S.W.3d 534, 550-551 (Ky. 2001); emphasis added. At issue in Lawson was retroactive applicability of "changes to the sentencing ranges in felony cases" Lawson, supra.

Simply put, for KRS 446.110 to be applicable, the new, revised or amended statute at issue must involve a mitigated sentence. Under appellant's construction of KRS Chapter 503, sentencing itself is eliminated, because he would be–under his theory–entitled to dismissal of the indictment; dismissal was what appellant asked the trial court for. Not only is KRS 503.085 not addressed to any new penalty or mitigation of sentence, but appellant himself argued that dismissal–not a mitigated sentence–was what he was entitled to under the changes to KRS Chapter 503. KRS

446.110 says nothing about any such remedy. Under its express language, and case law pertaining thereto, KRS 446.110 provides for retroactive application of a mitigated penalty at sentencing. Neither KRS Chapter 503, nor appellant's theory with regard thereto, comports with the "specific" applicability of KRS 446.110 as recognized in Phon, Bolen, Lawson and related cases.

B. Since KRS Chapter 503 as amended is not retroactively applicable to appellant's case, a "no duty to retreat" instruction was not required.

Since, KRS Chapter 503 as amended effective July 12. 2006, is not retroactively applicable to appellant's case, there was no requirement that the trial court instruct the jury in accordance with any language contained in the amended or newly adopted portions of the chapter. This includes any instruction regarding appellant having no duty to retreat. Indeed, even though newly enacted KRS 503.055, and amended sections of the chapter include "no duty to retreat" language, this does not–contrary to what appellant here asserts–require that jury instructions addressed to self-defense include such language. This Court's determination that there is "no error in the failure to give an instruction on retreat" where the jury is "otherwise fully instructed on self-defense," is still the proper perspective with regard to jury instructions. Hilbert v. Commonwealth, 162 S.W.3d 921, 926 (Ky. 2005). "[A]n instruction on self-defense should be in the usual form, leaving the question to be determined by the jury in the light of all the facts and circumstances of the case, rather than in the light of certain particular facts." Hilbert, supra; citing Bush v. Commonwealth, 335 S.W.2d 324, 326 (Ky. 1960). Consequently, there was no error in the jury instructions here on this point, under the 2006 amendments

to KRS Chapter 503 or otherwise.

C. The trial court correctly denied the motion to dismiss without holding a pre-trial evidentiary hearing.

Appellant's arguments are also flawed insofar as he asserts that KRS 503.085 requires dismissal of his indictment. KRS 503.085 contains no express language directing that dismissal of the indictment is required upon assertion of the immunity. Moreover, "the rule in Kentucky has long been that summary judgment does not exist in criminal cases." Barth v. Commonwealth, 80 S.W.3d 390, 404 (Ky. 2001); citing Commonwealth v. Hayden, 489 S.W.2d 513, 516 (Ky. 1972) and Commonwealth v. Hamilton, 905 S.W.2d 83, 84 (Ky.App. 1995). Appellant asserts that he is entitled to an evidentiary hearing to establish a factual basis for his claimed immunity under KRS 503.085, but there is no language in KRS 503.085 requiring any such pre-trial hearing.

On the contrary, the Kentucky Rules of Criminal Procedure state:

> A pretrial motion raising defenses or objections shall be determined before trial *unless the court orders that it be deferred for determination at the trial of the general issue*, but no such determination shall be deferred if a party's right to appeal is adversely affected. . . .

RCr 8.22; emphasis added. Here the court recognized that the claim of self defense was not undisputed, that there was "conflicting evidence" in this regard, and that determining the matter pre-trial would not be appropriate (VR No. 2; 10/31/06; 10:15:00). Needless to say, KRS Chapter 503 as amended contains no provision requiring the pre-trial evidentiary hearing appellant proposes. Moreover, it is unlikely that any pre-trial

evidentiary hearing would protect the right to appeal, by providing a complete record of the facts, as well as the full record of actual trial proceedings.

For example, KRS 620.050 provides for immunity from criminal liability where child abuse is reported as required under KRS 620.030. In Commonwealth v. Allen, this Court–in considering claims of immunity by two individuals under KRS 620.030–held in pertinent part as follows:

> These cases have been twice dismissed prior to trial. As such, the record on appeal is undeveloped and we know little other than the essential claims and preliminary defenses. In general, cases should not be dismissed at such a preliminary stage. We so stated in Commonwealth v. Hicks, Ky., 869 S.W.2d 35, 37 (1994), "[a] party who announces ready for trial is entitled to go forward and it is not within the province of the trial judge to evaluate the evidence in advance to determine whether a trial should be held . . . [t]he time for an evaluation is upon motion for a directed verdict." The trial court erroneously dismissed the indictments prior to a trial at which the evidence could be presented. *Hereafter, the proper time for the trial court to consider evidentiary sufficiency is after the evidence has been heard and upon a motion for directed verdict.*

Commonwealth v. Allen, 980 S.W.2d 278, 281 (Ky. 1998); emphasis added. This reasoning as to the determination of the immunity under KRS 620.050 is equally applicable to the determination of any immunity provided for under KRS 503.085. This is particularly true given the language of RCr 8.22, and given the fact that KRS 503.085 itself contains no provision for pre-trial hearings as to its applicability, or for dismissal of any indictment based thereon.

Hence, the changes to KRS Chapter 503 upon which appellant has

endeavored to rely are not retroactively applicable to his case. He committed the assault and murder more than a year before those statutory changes took effect. Likewise, there is no legitimate basis under KRS Chapter 503 as amended, or existing Kentucky law for the pre-trial evidentiary hearing appellant seeks. Appellant's argument (Brief for Appellant Pp. 23-25) based on case law from other states, i.e., People v. Guenther, 740 P.2d 971 (Co. 1987) and Boggs v. State, 581 S.E.2d 722 (Ga.App. 2003), does not establish his entitlement to a pretrial hearing because any such entitlement would have to be found, not in the language of statutes from Georgia or Colorado, but in the language of KRS 503.085 and Kentucky case law, statutory law and constitutional law.

In terms of the appropriate construction of KRS 503.085, the cardinal rule of statutory interpretation is to ascertain and give effect to the legislature's intent. Hale v. Combs, 30 S.W.3d 146, 151 (Ky. 2000); Magic Coal Co. v. Fox, 19 S.W.3d 88, 94 (Ky. 2000). However, in determining legislative intent, a court must refer to the language of the statute, and it is not free to add or subtract from the statute or interpret it at variance from the language in the statute. Hale, supra, 30 S.W.3d at 151. KRS 503.085 provides, in pertinent part, as follows:

> 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).

Clearly, nothing in the language of the KRS 503.085(1) directs that a pretrial hearing–of the kind to which appellant claims entitlement–must be held. Indeed, nowhere else in the other two subsections of the statute is there any mention of a hearing, or of an immunity of the kind mentioned in KRS 503.085(1). Nowhere else in KRS Chapter 503 is there any mention of an immunity of the kind referenced in KRS 503.085(1). When KRS 503. 085 was enacted in 2006, the legislature also enacted KRS 503. 055, and it amended KRS 503.010, KRS 503.050, KRS 503.070 and KRS 503.080. Nowhere else in the 2006 enactments and amendments to KRS Chapter 503 is there any mention of immunity from prosecution except in KRS 503.085(1).

This absence of any other mention of immunity in KRS Chapter 503 is significant in terms of the interpretation of KRS 503.085(1) because a statute should not be interpreted in a manner which would bring about absurd or unreasonable results, Estes v. Commonwealth, 952 S.W.2d 701, 703 (Ky. 1997), or in such a way as to render any part of it meaningless or ineffectual. Stevenson v. Anthem Cas. Ins. Group, 15 S.W.3d 720, 724 (Ky. 1999). To interpret KRS 503.085(1) as appellant requests would bring about an absurd and unreasonable result in terms of KRS 503.020 which states: "In any prosecution for an offense, justification, as defined in this chapter, is a defense." KRS Chapter 503 is itself denominated as a chapter dealing with "General Principles of Justification." To determine entitlement to the claimed justification at a pretrial

hearing–particularly in the absence of statutory language directing that such hearing be held–would bring about an absurd or unreasonable result in terms of the express language of KRS 503.020, which the legislature did not change, though it easily could have, in enacting KRS 503.085 and in amending several other statutes in KRS Chapter 503.

The Commentary to KRS 503.020 states: "By designating justification as a defense, this section serves to impose upon defendants the burden of raising the issues covered in this chapter. Once this responsibility is satisfied as to a particular issue (see KRS 500.070), the prosecution must bear the ultimate burden of persuading *the jury* that the defendant was not justified." Kentucky Crime Commission / LRC Commentary (1974); emphasis added. "In cases where a defendant is relying upon a defense of justification, a directed verdict should be granted when the evidence conclusively establishes justification." Holbrook v. Commonwealth, 925 S.W.2d 191, 192 (Ky.App. 1995); citing KRS 503.020 and KRS 500.070. To grant the pre-trial hearing appellant requests would be to render meaningless this established procedure with regard to the principles of justification contained in KRS Chapter 503.

Furthermore, each statutory chapter is self-contained and complete, reflecting its own distinct legislative purpose, Beatus v. Commonwealth, 965 S.W.2d 167, 169 (Ky.App. 1998), and the legislature is presumed to be aware of the existing law at the time of enactment of a later statute. Haven Point Enterprises, Inc. v. United Kentucky Bank, Inc., 690 S.W.2d 393, 395 (Ky. 1985); Fairbanks v. Large, 957 S.W.2d 307, 310 (Ky.App. 1997). Thus, the legislature can be presumed to have been aware of–and to have had no intention to change or contravene–the purpose of KRS Chapter

503 when it enacted KRS 503.085, otherwise it would have expressly so stated.

Additionally, it is also well-established that "where two statutes concern the same or similar subject matter, the specific shall prevail over the general." Withers v. University of Kentucky, 939 S.W.2d 340, 345 (Ky. 1997). "Generally, when a later-enacted and more specific statute conflicts with an earlier-enacted and more general statute, the subsequent and specific statute will control." Commonwealth v. Brasher, 842 S.W.2d 535, 536 (Ky.App. 1992). KRS 503.085, while later-enacted than KRS 503.020, is not more specific, insofar as it announces, in what it characterizes as an "immunity", nothing more than an existing defense, justification and privilege recognized under established provisions of KRS Chapter 503. For example, the official commentary to KRS 503.050 states: "A person free of fault has always been privileged to defend himself against injury threatened by another." Kentucky Crime Commission / LRC Commentary (1974).

As previously noted, KRS 503.020 specifically and expressly states that any justification provided for under KRS Chapter 503 is a defense. KRS 503.020 was not changed in any way when KRS 503.010, KRS 503.050, KRS 503.070 and KRS 503.080 were amended in 2006. Taken with the presumption created by KRS 503.055 at the same time KRS 503.085 was enacted, KRS 503.085 can not reasonably be construed as abrogating KRS 503.020 or as creating–or envisioning–any pretrial hearing procedure with regard to the justifications addressed by KRS Chapter 503. That this is the case can perhaps be most clearly seen from the language of KRS 503.085(2). While KRS 503.085(1) states that the recognized immunity encompasses "arresting" and "detaining

in custody," KRS 503.085(2) states that "[a] law enforcement agency may use standard procedures for investigating the use of force as described in subsection (1) of this section, but the agency may not arrest the person for using force unless it determines that there is probable cause that the force that was used was unlawful."

Appellant claims that KRS 503.085(1) entitles him to a pretrial hearing to determine if he is immune from arrest, detention, etc., but KRS 503.085(2) expressly states that law enforcement agencies may use "standard procedures for investigating the use of force," and may arrest where "there is probable cause that the force that was used was unlawful." In other words, after reciting the extent of the provided immunity in subsection (1), KRS 503.085 in subsection (2) reaffirms the "standard procedures" for investigation and arrest based on "probable cause" which comport entirely with the provisions of RCr 3.02 which state–and have stated both before and after the enactment of KRS 503.085–in pertinent part, as follows:

> Any person making an arrest without a warrant shall take the arrested person without unnecessary delay before a judge and shall file with the court a post-arrest complaint specifying the offense for which the arrest was made and the essential facts constituting probable cause on which the complaint is based. Such complaint need not be verified but shall be signed by the person making the arrest. If the judge before whom the arrested person is taken is in a county other than the county in which the offense was committed, the judge shall proceed as directed in paragraph (1) of this Rule 3.02 as on an arrest under warrant in a county other than that in which the warrant was issued.

RCr 3.02(2). See also KRS 431.005 authorizing arrest by a police officer without a warrant based upon probable cause.

It is recognized that "all statutes should be interpreted to give them meaning, with each section construed to be in accord with the statute as a whole." Aubrey v. Office of the Attorney General, 994 S.W.2d 516, 520 (Ky.App. 1998);citing Transportation Cabinet v. Tarter, 802 S.W.2d 944, 946 (Ky.App. 1990). To construe KRS 503.085(1) as granting the immunity appellant claims it grants, and as requiring–in order to determine the immunity–a pretrial hearing the statute does not even mention, would be to adopt a construction which is not "in accord with the statute as a whole" when the express language of KRS 503.085(2) is taken into account. Stated otherwise, appellant's construction of KRS 503.085(1) ought not be adopted because a statute should not be interpreted in such a way as to render any part of it meaningless or ineffectual, Stevenson v. Anthem Cas. Ins. Group, supra, and appellant's arbitrary assertion that the immunity claimed under KRS 503.085(1) must be determined at a pretrial hearing renders both KRS 503.085(1) and KRS 503.085(2) meaningless and ineffectual.

In sum, appellant's claims of error under KRS Chapter 503 as amended fail because they are based on: one, an interpretation of KRS 503.085 which is contrary to the stated purpose of KRS Chapter 503 as it relates to the assertion of the justifications provided for in the chapter; two, an interpretation of KRS 503.085 which conflicts with the language of KRS 503.020 and case law related thereto; three, an interpretation of KRS 503.085 which is at odds with, and unsupported by, the language of KRS 503.085 itself; four, an interpretation of KRS 503.085 which is contrary to the long-established principle under Kentucky jurisprudence that summary judgment does not exist in criminal

cases; five, an interpretation of KRS 503.085 which is contrary to the Kentucky Rules of Criminal Procedure, i.e., RCr 8.22, dealing with procedures for addressing motions which raise defenses; and six, an interpretation of KRS 503.085 which is contrary to existing case law precedent which rejects pretrial hearings as a method for determining immunity from criminal liability. Thus, the circuit court here correctly denied the motion to dismiss. The 2006 amendments to KRS Chapter 503 are not retroactively applicable to appellant's case. There was no error under KRS Chapter 503 in terms of jury instructions, pre-trial hearings, or otherwise.

III.

APPELLANT'S CONVICTION SHOULD BE AFFIRMED WITH REGARD TO HIS UNPRESERVED COMPLAINT ABOUT THE JURY INSTRUCTION ON THE PRESUMPTION OF INNOCENCE.

Appellant contends that reversible error occurred at trial regarding the jury instruction on the presumption of innocence (Brief for Appellant Pp. 26-30). Appellant asserts–citing Sherroan v. Commonwealth, 142 S.W.3d 7 (Ky. 2004) and related authority–that error occurred because the jury instruction on the presumption of innocence given by the trial court here (see Instruction No. 12 of the trial court's jury instructions as included with the trial exhibits) was not like the specimen instruction in 1 William S. Cooper, Kentucky Instructions to Juries § 2.03, cmt. (4th ed.1999) as cited in Sherroan, supra, 142 S.W.3d at 23 (Brief for Appellant P. 28). Appellant claims that the issue is preserved by his tendered instruction on the presumption of innocence (see

Defendant's Proposed Jury Instructions, P. 12, included with the trial court exhibits) and by appellant's request that all his tendered instructions be given, and his objection to any instructions but his own being given (Brief for Appellant P. 27).

Appellant's assertions in this regard are without merit. The issue is not properly preserved and the trial court correctly declined to use appellant's tendered presumption of innocence instruction. No reversible error occurred.

The Sherroan case reaffirms that the specimen instruction on presumption of innocence as set forth in Kentucky Instructions to Juries § 2.03, "is required if requested and if warranted by the evidence." Sherroan, supra. However, appellant requested no such instruction, and the presumption of innocence instruction at P. 12 of appellant's tendered instructions–while it contains some of the language of the specimen in § 2.03 of Cooper's treatise–is not the same as the approved specimen instruction. Moreover, appellant at trial requested no instruction on presumption of innocence as set forth in § 2.03 of Cooper's treatise.

In fact, the record shows that at trial, during discussions about jury instructions, appellant made no argument as to the presumption of innocence instruction of the kind that he asserts here. In terms of preservation, as appellant here has stated, defense counsel at trial merely objected to any instructions being given because–according to defense counsel–the proof showed that appellant was not guilty (VR No. 6; 11/6/06; 16:18:30-16:19:00). Defense counsel then said: "Notwithstanding that argument, if the court is going to instruct, I would ask the court for the record that the court instruct as I have tendered these instructions" (Id.).

The record shows, however, that the presumption of innocence instruction which appellant tendered was not like that presented in Kentucky Instructions to Juries § 2.03 and discussed in Sherroan. The portion of the tendered instruction which appellant quotes in his brief (Brief for Appellant Pp. 26-27) does approximate the language of paragraph B of Cooper's specimen instruction, and the instruction tendered by appellant also contains a first paragraph approximating paragraph A. of Cooper's specimen instruction. However, what appellant here fails to mention is that his tendered instruction also contains a third paragraph C *not included* in the specimen instruction for presumption of innocence at § 2.03 of Cooper's treatise. Appellant's paragraph C of his tendered instruction was not mentioned or approved in Sherroan, and–not surprisingly–appellant does not mention it here.

Nevertheless, appellant claims that the issue he raises here was preserved by the tendering of this flawed instruction, and that the trial court committed reversible error by not giving the flawed instruction as tendered. Appellant's argument in this regard is wholly without merit. Had appellant tendered an instruction like that in Kentucky Instructions to Juries § 2.03, then perhaps his blanket insistence that the court instruct only in accordance with his tendered instructions might have sufficed to preserve the issue he now assigns for review. But the tendered instruction was not correct as tendered, and no argument that the nonconforming instruction was admissible under Sherroan, Kentucky Instructions to Juries § 2.03, Commonwealth v. Hager, 41 S.W.3d 828 (Ky. 2001), or any other of the authority appellant cites here, was ever presented to the trial court. Hence, the error asserted is not preserved for appellate review.

"No party may assign as error the giving or the failure to give an instruction unless the party's position has been fairly and adequately presented to the trial judge by an offered instruction or by motion, or unless the party makes objection before the court instructs the jury, stating *specifically* the matter which the party objects and the ground or grounds of the objection." RCr 9.54(2), emphasis added. Appellant here did not comply with this well-established rule. Appellant did not, per the holding in Sherroan, supra, "request" an instruction on presumption of innocence in conformance with Kentucky Instructions to Juries § 2.03. On the contrary, appellant merely tendered a nonconforming instruction, and made a blanket request that the jury be instructed according to all his tendered instructions. When the court did not use his tendered presumption of innocence instruction, he did not–as required by RCr 9.54(2)–object, "stating specifically" the complaint which he now articulates.

Consequently, the issue is unpreserved, and there was no palpable error under RCr 10.26. As stated in the Sherroan case: "Since the murder instructions directed the jurors not to convict Appellant of murder unless they believed beyond a reasonable doubt that he was not acting under EED, the failure to include the additional admonition in the presumption of innocence/reasonable doubt instruction did not adversely affect Appellant's substantial rights. RCr 10.26." Sherroan, supra. Indeed, given this reasoning, and the fact that–at least nominally–this jurisdiction is one which ascribes to the "bare bones" theory of jury instructions, Hodge v. Commonwealth, 17 S.W.3d 824, 850 (Ky. 2000), it would seem that a presumption of innocence instruction as set forth in § 2.03 of Cooper's treatise in conformance with the holdings in cases such as Sherroan,

Hagar, Holbrook v. Commonwealth, 813 S.W.2d 811 (Ky. 1991), and Edmonds v. Commonwealth, 586 S.W.2d 24 (Ky. 1979), would be entirely unnecessary for adequate instruction to the jury where intentional murder is charged and extreme emotional disturbance is claimed. Be that as it may, appellant failed to tender or request the instruction he now claims he should have received, and under rule and case law this is insufficient to establish reversible error on appellate review. Appellant's conviction should be affirmed.

IV.

THE CIRCUIT COURT CORRECTLY EXERCISED ITS DISCRETION IN PERMITTING THE ENTRY INTO EVIDENCE OF A PORTION OF ANGELA NELSON'S TAPED STATEMENT TO POLICE.

At trial, prior to the beginning of the Commonwealth's case-in-chief, the prosecutor advised the court that he intended to introduce a portion of Angela Nelson's taped statement to police (TR I 76-78) on the night James Hamilton was killed (VR No. 3; 11/01/06; 10:50:00-10:58:00). The judge listened to arguments of counsel, and concluded that it appeared as though–subject to proper foundation–the identified portion of Nelson's statement would be admissible under the hearsay exception provided for in KRE 803 concerning excited utterances (Id.).

Thereafter, during cross examination of Angela Nelson, who was the Commonwealth's first witness, defense counsel–after cross-examining Nelson for over an hour (VR No. 3; 11/1/06; 14:23:00-15:30:00)–suddenly asked Nelson: "And in fact you shouldn't, you should be in jail shouldn't you, right now?" (Id. 15:31:00). Before Nelson

could answer, the judge asked counsel to approach, and at the bench defense counsel stated that Nelson had an outstanding bench warrant from September of 2005 based on a cocaine possession charge for which she could receive a one-to-five-year sentence (Id. at 15:32:00-15:37:00). Defense counsel argued that the question was permissible to show bias on Nelson's part, in that she would have a motive regarding her testimony to "curry favor" with the Commonwealth (Id.). The judge then declared a recess, during which he heard arguments on the matter (Id. at 15:38:00-15:49:00). Defense counsel argued that it was permissible to impeach Nelson on this point because Nelson knew she was facing one to five years on the cocaine possession charge: "That implies and that's arguable to a jury that she will change her testimony or try and curry favor with the Commonwealth knowing she's looking at one to five years" (Id. at 15:44:00). However, defense counsel did not believe that presenting this evidence and argument to the jury entitled the Commonwealth to introduce evidence of prior statements by Nelson consistent with her trial testimony (Id. at 15:47:00).

Ultimately, following another recess and further arguments of counsel (VR No. 3; 11/1/06; 15:59:00-16:11:00), the judge ruled that defense counsel could ask Nelson if she was facing a felony charge of cocaine possession carrying a one-to-five-year sentence, but could not ask her about the bench warrant (Id. at 16:11:00). When Nelson was then asked about this, she testified that, yes, she was facing a felony charge, but she did not know if the charge was for cocaine possession, and she did not know if the charge carried a penalty of one to five years (Id. at 16:13:00-16:14:00). After counsel agreed that Nelson could be finally excused, the judge advised both sides that he had taken it upon

himself to have the bench warrant set aside, and to have Nelson's case re-docketed (Id. at 16:15:00-16:17:00). Nothing further was discussed that day about Nelson's testimony or about any prior statements by her to police.

The next morning, however, defense counsel complained about the judge having gotten Nelson's drug case re-docketed, and wanted the judge to state his reasons for having done this for the record (VR No. 4; 11/2/06; 10:43:00-10:45:00). The judge stated that he would say nothing beyond what he had told counsel the day before, i.e., that it appeared to him that Nelson was "on the verge of a nervous breakdown" and that out of compassion for her he had gotten her case re-docketed (Id.). Defense counsel then requested that if the Commonwealth called Nelson as a rebuttal witness, the jury be informed that Nelson had gotten this "preferential treatment" following her testimony (Id. at 10:45:00-10:51:00). The judge declined to make such a prospective ruling (Id.). This was on the fourth day of trial, and nothing further transpired that day regarding the issue of Nelson's statement to police.

On the morning of the fifth day of trial, the prosecutor again moved to admit the previously identified portion of Angela Nelson's statement to Detective Sherrard, arguing that it was admissible under KRE 801A to refute the implication of improper motive or influence brought out my defense counsel during her cross examination of Nelson, and under KRE 803 as an excited utterance (VR No. 5; 11/3/06; 10:32:00-10:33:00). Defense counsel objected, arguing–at some length–that her cross examination of Nelson had not implied any bias or motive on Nelson's part in terms of possible recent fabrication of her testimony, and that Nelson's statements to Sherrard,

made more than two hours after the fatal stabbing, did not constitute an excited utterance under KRE 803 (Id. at 10:34:00-10:44:00).

After listening to the arguments of counsel and considering cited authority, the judge ruled that the identified portion of Nelson's statement to Detective Sherrard (i.e., TR I 76-78, i.e. Pp. 59-61 of the Commonwealth's discovery) was admissible under KRE 803 as an excited utterance (VR No. 5; 11/3/06; 10:45:00-10:48:00). The judge further stated that since the evidence was admissible under KRE 803 as an excited utterance, it wasn't necessary to establish admissibility under KRE 801A (Id. at 10:49:00-10:52:00). Nevertheless, for the record, the judge found that the evidence would be admissible under KRE 801A, as well, because "the cross examination of Ms. Nelson was that you are currently facing one-to-five years in prison, indicating that she does have some motive currently to mold her testimony in a certain way because she has a felony charge pending" (Id.).

Defense counsel then argued that since she had insinuated and implied some kind of improper influence on Nelson because of the pending charge, the judge should advise the jury of the special treatment Nelson received following her testimony, i.e., the action of the judge with regard to having Nelson's bench warrant set aside (VR No. 5; 11/3/06; 10:52:00-10:54:00). The judge declined to do this, stating that he might be persuaded by defense counsel's argument in this regard had the Commonwealth done anything to influence Nelson's testimony, and if there was any indication that Nelson was aware of any such influence when she testified (Id.). The judge also overruled defense counsel's motion that the judge recuse himself (Id.).

Thereafter, during the testimony of Detective Sherrard, the Commonwealth played the audio tape of the portion of his interview with Angela Nelson that the Commonwealth had previously identified, and that the court had ruled admissible (VR No. 5; 11/3/06; 12:14:00-12:19:00). When the tape was stopped, the prosecutor asked Sherrard if there was additional information on the tape, and when Sherrard answered affirmatively, defense counsel objected and–at the bench–moved for a mistrial, claiming that the jurors would infer that it was defense counsel's fault they could not hear more, and that the jury would also conclude the defense was hiding something (Id. at 12:19:00-12:23:00). The judge denied the motion for a mistrial, but upon the request of defense counsel, the judge admonished the jury that there was nothing else on the tape but biographical information (Id.).

Now, on appeal, appellant argues that the portion of Angela Nelson's statement to Detective Sherrard which was played for the jury was not admissible under KRE 803(2) as an excited utterance (Brief for Appellant Pp. 36-39). Appellant also claims that the statement was not admissible under KRE 801A (Brief for Appellant Pp. 39-44). Appellant is incorrect. The trial judge properly exercised his discretion in admitting the limited portion of Nelson's statement to Sherrard. There was no error.

This Court has recently reiterated that there are eight factors to be considered in determining whether a statement was an excited utterance:

> . . . (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.

Thomas v. Commonwealth, 170 S.W.3d 343, 351 (Ky. 2005); citing Souder v. Commonwealth, 719 S.W.2d 730, 733 (Ky. 1986). Primarily appellant has complained, at trial and since, that the lapse of time between Angela Nelson's statement to Sherrard and the stabbing death of James Hamilton, i.e., about two and a half hours, was too great for Nelson's statement to be admitted as an excited utterance (Brief for Appellant P. 38).[2] However, "[t]emporal proximity to the 'startling event' is only one factor to consider in determining whether a statement was 'made while the declarant was *under the stress of* excitement caused by the event . . . .'" Thomas, supra; citing KRE 803(2), emphasis by the court.

"For 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." Thomas, supra; quoting Noel v. Commonwealth, 76 S.W.3d 923, 926 (Ky. 2002), emphasis by the court. "[S]pontaneity, as opposed to mere proximity in time, is a most important consideration." Thomas, supra; quoting Roland v. Beckham, 408 S.W.2d 628, 632 (Ky. 1966). Here the record shows that in terms of the first consideration as to admissibility under KRE 803(2), i.e., "lapse of time between the main act and the

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[2]The first officer to arrive at the scene of the stabbing, Officer Daniel McNamara testified that he received the call about 4:00 a.m. (VR No. 5; 11/3/06; 11:26:00), and Detective Sherrard's statement with Angela Nelson took place about 6:27 a.m. (Id. at 12:14:00).

declaration," Angela Nelson's "condition at the time" of her statements to Sherrard was such that her statements were spontaneous and excited, even impulsive, and not "the product of reflection and deliberation." Thomas, supra.

Officer McNamara testified that when he arrived sometime after 4:00 a.m., the victim was still alive, and that Angela Nelson–who was on the ground holding her shirt on the victim's chest wounds, trying to stop the bleeding–was crying and screaming (VR No. 5; 11/3/06; 11:27:0011:44:00). Likewise, one of the neighbors, Kristen White, testified that Nelson was "running around in circles screaming hysterically" (VR No. 4; 11/2/06; 11:11:00). This was the state Detective Sherrard found Nelson in when he arrived at the scene some two hours later. Sherrard testified that Nelson was "very upset, crying, almost borderline hysterical," her eyes red from crying (VR No. 5; 11/3/06; 12:09:00). In fact Nelson admitted that immediately following the events of that night, she was hospitalized because of how upset she was after being present at the stabbing death of James Hamilton (VR No. 3; 11/1/06; 15:30:00), and prior to trial the defense sought copies of these mental health records (TR IV 604-607).

Consequently, there was ample record evidence of how extremely upset, hysterical and distraught Angela Nelson was before, at the time of, and immediately following her statements to Detective Sherrard. There was ample evidence of her condition at the time of the statement which showed that her statement "was spontaneous, excited, or impulsive rather than the product of reflection and deliberation." Noel, supra; Thomas, supra. There was ample evidence which showed–the passage of over two hours between the killing and her statement notwithstanding–that Nelson's a statement was

"made while the declarant was under the stress of excitement caused by the event . . . ." KRE 803(2). Indeed, the record shows that even following her statement to Sherrard, Nelson was still so upset that she required hospitalization and psychiatric care.

As for the other recognized KRE 803(2) criteria, this record also shows that given Nelson's mental state at the time of the statement there was little or no realistic opportunity for fabrication, and even less likelihood thereof. Thomas, supra. Moreover, while "the actual excitement of the declarant" is well-demonstrated by the record, there is no record evidence of any "inducement" made to Nelson to fabricate her statement. Id. Similarly, while "the place of the declaration" was–due to the fact that it was raining–inside Sherrard's vehicle, Sherrard was parked at the scene of the stabbing which was outside on the street (VR No. 5; 11/3/06; 12:12:00). Hence, the statement would have been made in "the presence . . . of visible results of the act or occurrence to which the utterance relate[d]," insofar as–though the body had been removed–crime scene investigation, the making of the crime scene video, etc., had been ongoing.

Furthermore, in terms of "whether the utterance was made in response to a question," the record shows that it was, but except for questions related to biographical data, Sherrard only asked Nelson "what happened," and after that–other than being encouraged to continue at one point–Nelson recounted the entire incident without interruption (TR I 76-78). Lastly, in terms of "whether the declaration was against interest or self-serving," appellant here contends that Nelson was trying to shift the blame to him, but appellant admitted from the beginning that he was the one who stabbed Hamilton, and Nelson never denied that she was seeing both men. Appellant never

claimed Nelson was a party to the killing. Nelson had no "motive to accuse" appellant of being the killer, so as to avoid bing charged herself. Thomas, supra. Consequently, the record discloses nothing self-serving in Nelson's statement sufficient to render the statement inadmissible under KRE 803(2).

Here, the record shows that under a fair evaluation of all the recognized criteria discussed above, the Commonwealth more than met it's burden of proving that Nelson's out-of-court statement was an excited utterance. Jarvis v. Commonwealth, 960 S.W.2d 466, 470 (Ky.1998). The trial judge here correctly determined from the record that the Commonwealth had met its burden of proof. Under KRE 104(a) the trial court's finding that the prior statement of Angela Nelson was an excited utterance was supported by substantial evidence and was, therefore, not clearly erroneous. Thomas, supra. Furthermore, as the trial judge observed, since the statement was admissible as an excited utterance under KRE 803(2) it was not necessary for admissibility of the statement to establish that it was admissible under KRE 801A(a)(2) as a statement "offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive." Nevertheless–as the judge also recognized–it is clear from the record that the statement was admissible under KRE 801A as well as KRE 803.

The record as discussed above shows that defense counsel attacked Nelson on the stand, saying "you should be in jail shouldn't you, right now" (VR No. 3; 11/1/06; 15:31:00-15:32:00). In defending her question at the bench, defense counsel immediately asserted that Nelson had an outstanding bench warrant that was issued in September, 2005 (Id.). The implication was clear; Nelson's testimony was suspect due to the fact that

she ought to be in jail, i.e., on the September, 2005 bench warrant. This implication was later confirmed for the jury when defense counsel was permitted to elicit that Nelson was facing a felony charge (Id. at 16:13:00-16:14:00). In order to be admissible under KRE 801A(a)(2), prior consistent statements of witnesses must be made *before* a motive to fabricate exists. Slaven v. Commonwealth, 962 S.W.2d 845, 858 (Ky. 1997); Smith v. Commonwealth, 920 S.W.2d 514, 517 (Ky.1995). The prior statement at issue here was made in June, 2005; the implied motive to fabricate, i.e., to avoid going to jail, arose–as defense counsel told the judge–in September, 2005.

Hence, the June, 2005, statement of Angela Nelson, which was a prior statement consistent with her trial testimony, was admissible under KRE 801A(a)(2) to rebut defense counsel's implied charge that her trial testimony was recently fabricated by Nelson to avoid the consequences of the September, 2005, bench warrant which was the consequence of a pending drug charge. This determination as to admissibility by the trial judge was, as was his ruling under KRE 803(2), supported by substantial evidence and, therefore constituted no abuse of discretion. The limited portion of Angela Nelson statement to Detective Sherrard was correctly ruled admissible. There was no error.

V.

THE CIRCUIT COURT CORRECTLY OVERRULED APPELLANT'S OBJECTION TO BLOOD SPATTER TESTIMONY BY THE MEDICAL EXAMINER.

The medical examiner testified–and her autopsy report provided in discovery showed (TR II 336)–that the victim sustained eight (8) stab wounds (VR No. 5;

11/3/06; 14:05:00-14:07:00). On direct examination, the medical examiner stated that "cast off" is blood cast off from an object used to stab or beat someone (Id. at 14:38:00-14:39:00). When the prosecutor asked if given the number of stab wounds found on the victim "would you expect to find cast off," defense counsel objected, stating that the medical examiner was not an expert in blood spatter evidence, and that her report provided in discovery included no statements about cast off (Id. 14:39:00-14:42:00). The judge allowed the prosecutor to establish the medical examiner's expertise as to blood spatter evidence (Id. at 14:43:00), but when the prosecutor then asked–given the number of stab wounds sustained by the victim in this case–she would expect to find blood spatter, defense counsel objected again, complaining that appellant had not been provided notice of the medical examiner's testimony in this regard because the medical examiner's report did not mention blood spatter evidence (Id. at 14:44:00-14:50:00).

After some discussion at the bench, the judge overruled appellant's objection, and the medical examiner testified that upon repeated stabbing, blood would be expected to accumulate on the knife and cast off of blood from the knife might be observed on the surrounding environment (VR No. 5; 11/3/06; 14:51:00-14:52:00). Appellant here claims that the medical examiner's expert qualifications were not sufficiently established, and–citing RCr 7.24(1)(b) and Barnett v. Commonwealth, 763 S.W.2d 119 (Ky. 1988)–that even if the medical examiner was sufficiently qualified, her testimony was inadmissible because her report did not discuss blood spatter evidence (Brief for Appellant Pp. 44-49). Appellant is incorrect. The complained-of evidence was properly ruled admissible.

"A qualified expert may express an opinion about a matter requiring scientific, technical, or specialized knowledge if that opinion 'will assist the trier of fact to understand the evidence or to determine a fact in issue.'" Baraka v. Commonwealth, 194 S.W.3d 313, 318 (Ky. 2006); citing KRE 702. Here, Dr Burrows-Beckham testified as to her training in blood spatter evidence (VR No. 5; 11/3/06; 14:43:00). This Court has previously held that where–as here–a medical examiner has been properly qualified as an expert, she may testify as to blood spatter evidence. Wheeler v. Commonwealth, 121 S.W.3d 173, 183 (Ky. 2003). Hence, there was no abuse of the trial court's discretion in this regard. Fugate v. Commonwealth, 993 S.W.2d 931, 935 (Ky. 1999).

Furthermore, in terms of notice under RCr 7.24(1)(b), appellant's reliance here upon Barnett v. Commonwealth is–under the facts of the instant case–entirely misplaced. As this Court has recently pointed out, "Barnett stands for the principle that an expert may not testify to an additional, undisclosed principle or premise not readily deducible from the conclusions contained in that expert's report." Jones v. Commonwealth, 237 S.W.3d 153, 158 (Ky. 2007). In Barnett, the defendant was accused of stabbing his wife to death out on a secondary road. Barnett, supra, 763 S.W.2d at 120. At trial, the Commonwealth called a serologist who testified that faint traces of blood had been found on the defendant's hands and arms, and the serologist opined that this must have been due to the defendant washing his hands in a puddle near the body. Id. at 121-123. However, the serologist's report said nothing about any puddle, and RCr 7.24 error was found because the serologist's testimony was based on "an undisclosed premise," i.e., the puddle of water. Id.

Here there was no such undisclosed premise. The medical examiner's report stated that the victim suffered at least eight (8) stab wounds or "sharp force injuries" which pierced both the left and right ventricles of the heart (TR II 336-337). Evidence of blood loss, or the presence of blood on the weapon that caused the sharp force injuries, can hardly be regarded as evidence proceeding from any "undisclosed premise." Appellant, given the medical examiner's report, had every "reason to develop," and was in no way prevented from developing, proof regarding blood from a knife such as that which appellant *admitted* using. Jones, supra. Consequently there was no error in the admission of the medical examiner's blood spatter and cast off testimony.

CONCLUSION

For all the foregoing reasons, appellant's conviction under Jefferson County Indictment Nos. 05-CR-001921 and 06-CR-001838 should be affirmed.

Respectfully submitted,

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