

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2009-CA-001493-MR

CLARENCE ARTHUR HILL

APPELLANT

v. APPEAL FROM DAVIESS CIRCUIT COURT  
HONORABLE JOSEPH W. CASTLEN, III, JUDGE  
ACTION NO. 08-CR-00395

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: CAPERTON AND DIXON, JUDGES; LAMBERT,<sup>1</sup> SENIOR JUDGE.

CAPERTON, JUDGE: Clarence Arthur Hill appeals from his conviction for robbery in the first degree and corresponding sentence of ten years in the penitentiary. After a thorough review of the parties' arguments, the record, and the applicable law, we affirm Hill's conviction and sentence.

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<sup>1</sup> Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

On the evening of June 26, 2008, Owensboro police officers arrived at the apartment of Walter White after receiving a phone call from White's neighbor, Larry Bickett, reporting a home invasion at White's residence. When White answered the door he informed the officers that he was being robbed by three people inside his apartment. The officers entered the apartment and found Hill feigning sleep and lying in vomit on White's bed and discovered Robert Stamper and Valada Layson hiding in the bathtub with the curtain drawn. Upon recovering \$101.00 from Stamper's pocket, seeing cuts and marks on White's arms, wrists, and ankles, and discovering a pool cue in White's bedroom along with two knives and cut cables and cords, the officers arrested Hill, Stamper, and Layson. All three were indicted for kidnapping and first-degree robbery.<sup>2</sup>

At trial Hill did not testify. Stamper's testimony of the evening in question was drastically different than White's. Stamper testified that White had given Stamper money to buy narcotics and asked Stamper to procure him a sexual tryst with a female. Stamper then left and returned to White's apartment with Layson. Stamper, a self-proclaimed "crackhead", testified that he stole White's cash since he needed more "dope". According to Stamper, Layson's boyfriend, Hill, arrived at the apartment and instigated a fight. Stamper testified that when Hill entered the apartment he "started raging out". At this time, according to Stamper, White found his money missing, confronted Stamper, and yelled profanities at Layson saying "you got my money". As White accosted Stamper, he

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<sup>2</sup> The kidnapping charge was later dismissed. Layson's trial was severed from the other two defendants because of her visit to KCPC.

also grabbed Layson at which time he was attacked by Hill. Stamper testified that he did not threaten White, did not tie him up, that no one hit White with a pool stick, pulled a knife on White, or pulled cable wire from the wall. Stamper's account of the evening at trial was substantially different from what he told the police the night of his arrest. According to Det. McClellan, Stamper admitted to holding a knife to White's throat and tying him up. Stamper admitted that Layson was there to distract White so they could rob him.

White testified that Stamper visited his apartment around 4:00 or 5:00 in the evening and requested that White cash a check for Stamper. The two had been acquaintances for a few weeks at this time. White noticed that the check was not drawn on Stamper's account and gave Stamper \$20.00 in the hopes he would leave. Stamper left. Stamper returned later that night with Layson. Inside the apartment, Stamper and Layson shot pool and then began to act suspiciously. Stamper began closing the blinds on the windows and White immediately reopened them. Stamper then said he was getting sick and left for the bathroom. After Stamper returned, he and Layson began behaving suspiciously again and whispering. Stamper then went to the front door and admitted Hill to the apartment. White did not know Hill and asked everyone to leave. White went to his bedroom and Layson followed trying to persuade him to go to a bar. Stamper then entered the bedroom and hit White with a pool stick. White tackled Stamper and a struggle ensued. Hill joined the fray and the pair wrestled White to the floor.

Stamper pulled a knife and held it to White's throat. Stamper then took White's wallet and told Hill to get some cord to tie up White.

Hill then tied White's hands and feet behind his back and pushed him down on the bed. Thereafter, White vomited on the bed. Stamper directed Layson to find White's cell phones and take them. Stamper then decided he wanted to take White's truck which contained all of White's construction tools and told White he would kill him if he did not turn over the keys.

The commotion in the apartment garnered the attention of White's neighbor, Bickett. Bickett testified that he and White share a common wall and he could hear yelling coming from the apartment. White and Bickett also illegally shared cable. When Hill began pulling the cable out of White's wall to get cord to bind White, Hill actually pulled Bickett's television off its stand. Bickett called 911 to report the incident.

The jury found both Stamper and Hill guilty of first-degree robbery and Hill was subsequently sentenced to 10 years in a penitentiary. It is from this verdict and sentence that Hill now appeals.

On appeal, Hill presents two alleged errors. First, that the trial court erred to Hill's substantial prejudice in failing to instruct the jury on the justification defense of protection of another when the facts demonstrated that he was protecting his girlfriend, Layson, from White. Second, Hill was denied state and federal due process of law by the Commonwealth's misconduct in the cross-

examination of co-defendant Robert Stamper which adversely affected Hill's case, especially when Hill did not testify. We address these arguments respectively. .

First, Hill argues that the trial court erred to Hill's substantial prejudice in failing to instruct the jury on the justification defense of protection of another when the facts demonstrated that he was protecting his girlfriend, Layson, from White.

We review a trial court's decision not to give an instruction under the abuse of discretion standard. *Harris v. Commonwealth*, 313 S.W.3d 40, 50 (Ky. 2010). The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.

*Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999)

As noted by the *Harris* Court,

[A] trial court is required to instruct the jury on affirmative defenses and lesser-included offenses if the evidence would permit a juror reasonably to conclude that the defense exists or that the defendant was not guilty of the charged offense but was guilty of the lesser one....It is equally well established that such an instruction is to be rejected if the evidence does not warrant it.

*Id.* at 50 (internal citations omitted).

At issue in the case *sub judice* is KRS 503.070 which states in relevant part:

- 1) The use of physical force by a defendant upon another person is justifiable when:
  - (a) The defendant believes that such force is necessary to protect a third person against the use or imminent use of unlawful physical force by the other person; and

(b) Under the circumstances as the defendant believes them to be, the person whom he seeks to protect would himself have been justified under KRS 503.050<sup>3</sup> and 503.060<sup>4</sup> in using such protection.

In applying KRS 503.070, “the focus of the penal code is on the defendant's actual subjective belief in the need for self-protection and not on the objective reasonableness of that belief.” *Hilbert v. Commonwealth*, 162 S.W.3d 921, 924 (Ky. 2005).<sup>5</sup> Kentucky courts have long held that a defendant need not testify in order to receive an instruction on self-defense. *Id.* However, the

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<sup>3</sup>KRS 503.050 states:

(1) The use of physical force by a defendant upon another person is justifiable when the defendant believes that such force is necessary to protect himself against the use or imminent use of unlawful physical force by the other person.

(2) The use of deadly physical force by a defendant upon another person is justifiable under subsection (1) only when the defendant believes that such force is necessary to protect himself against death, serious physical injury, kidnapping, sexual intercourse compelled by force or threat, felony involving the use of force, or under those circumstances permitted pursuant to KRS 503.055.

(3) Any evidence presented by the defendant to establish the existence of a prior act or acts of domestic violence and abuse as defined in KRS 403.720 by the person against whom the defendant is charged with employing physical force shall be admissible under this section.

(4) A person does not have a duty to retreat prior to the use of deadly physical force.

<sup>4</sup> KRS 503.060 states:

Notwithstanding the provisions of KRS 503.050, the use of physical force by a defendant upon another person is not justifiable when:

(1) The defendant is resisting an arrest by a peace officer, recognized to be acting under color of official authority and using no more force than reasonably necessary to effect the arrest, although the arrest is unlawful; or

(2) The defendant, with the intention of causing death or serious physical injury to the other person, provokes the use of physical force by such other person; or

(3) The defendant was the initial aggressor, except that his use of physical force upon the other person under this circumstance is justifiable when:

(a) His initial physical force was non-deadly and the force returned by the other is such that he believes himself to be in imminent danger of death or serious physical injury; or

(b) He withdraws from the encounter and effectively communicates to the other person his intent to do so and the latter nevertheless continues or threatens the use of unlawful physical force.

<sup>5</sup> We note that the case *sub judice* presents a different situation than *Hilbert*. In *Hilbert*, the defendant did not testify at trial, but his statement to the police was admitted. Given that statement, the Court determined that the statement to the police was sufficient to raise the issue of self-defense, as “such evidence need only raise the issue, for an instruction on self-defense is necessary once sufficient evidence has been introduced at trial which could justify a reasonable doubt concerning the defendant's guilt.” *Hilbert* at 925.

entitlement to an affirmative instruction is dependent upon the introduction of some evidence justifying a reasonable inference of the existence of a defense.

*Brown v. Commonwealth*, 555 S.W.2d 252, 257 (Ky. 1977); *Jewell v.*

*Commonwealth*, 549 S.W.2d 807, 812 (Ky. 1977), overruled on other grounds by,

*Payne v. Commonwealth*, 623 S.W.2d 867 (Ky. 1981). In general, where

circumstantial or indirect evidence fails to raise the issue of self-protection, the fact

that a defendant must testify or forgo this defense does not implicate the Fifth

Amendment. The defendant's "choice between complete silence and presenting a

defense has never been thought an invasion of the privilege against compelled self-

incrimination." *Hilbert* at 925 (internal citations omitted). Certainly the actions of

White and the subjective belief of Hill are open to interpretation but our review of

the decision of the trial court is for abuse of discretion. In light of the evidence

presented at trial through Stamper, White, multiple police officers, and Bickett, we

find that the trial court did not abuse its discretion in denying Hill the requested

instruction.

. We now turn to Hill's second argument, namely, that he was denied

state and federal due process of law by the Commonwealth's misconduct in the

cross-examination of co-defendant Robert Stamper. Hill argues that this

misconduct adversely affected his case and that this is especially so as Hill did not

testify. This argument was not properly preserved for appeal. Accordingly, we

shall review this claimed error under RCr 10.26, which states:

A palpable error which affects the substantial rights of a party may be considered by the court on motion for a

new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.

Thus, under RCr 10.26 we may grant relief for an unpreserved error only when the error is (1) palpable; (2) affects the substantial rights of a party; and (3) has caused a manifest injustice. *Commonwealth v. Jones*, 283 S.W.3d 665, 668 (Ky. 2009). “Manifest injustice” requires showing a probability of a different result or error so fundamental as to threaten a defendant's entitlement to due process of law, i.e., the error so seriously affected the fairness, integrity, or public reputation of the proceeding as to be ‘shocking or jurisprudentially intolerable.’. *Martin v. Commonwealth*, 207 S.W.3d 1, 3 (Ky. 2006).

Further refining the parameters of RCr 10.26, the Kentucky Supreme Court in *Brewer v. Commonwealth*, 206 S.W.3d 343 (Ky. 2006), undertook an analysis of what constitutes a palpable error:

For an error to be palpable, it must be easily perceptible, plain, obvious and readily noticeable. A palpable error must involve prejudice more egregious than that occurring in reversible error. A palpable error must be so grave in nature that if it were uncorrected, it would seriously affect the fairness of the proceedings. Thus, what a palpable error analysis “boils down to” is whether the reviewing court believes there is a “substantial possibility” that the result in the case would have been different without the error. If not, the error cannot be palpable.

*Id.* at 349.

At issue is whether the Commonwealth's line of questioning, which called upon Stamper to remark on the veracity of the other testifying witnesses, constitutes palpable error. The Kentucky Supreme Court addressed a similar situation in *Ernst v. Commonwealth*, 160 S.W.3d 744, 764 (Ky. 2005), wherein the Court held:

On several occasions, the Commonwealth's Attorney brought to Appellant's attention the trial testimony of various Commonwealth's witnesses and asked him whether he would characterize those statements as lies. We have held that this method of cross-examination is improper. *Moss v. Commonwealth*, 949 S.W.2d 579, 583 (Ky. 1997) ("A witness should not be required to characterize the testimony of another witness, particularly a well-respected police officer, as lying. Such a characterization places the witness in such an unflattering light as to potentially undermine his entire testimony."). However, after a review of the record as a whole, we are not persuaded that the result would have been different had these questions been withheld. *Compare Caudill*, 120 S.W.3d at 662; *Tamme*, 973 S.W.2d at 28; *Moss*, 949 S.W.2d at 583. While the questions were improper, they did not result in manifest injustice, thus did not amount to palpable error.

We agree with White that the questions to the witness were improper, they did not result in manifest injustice; thus it did not amount to palpable error. In the case *sub judice*, after our review of the record as a whole, there was substantial evidence from which a jury could find guilt and we do not believe that absent the improper questions the result would have been different. *See Ernst* at 764. Finding no reversible error, we affirm Hill's conviction and sentence.

ALL CONCUR.

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