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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-000173-MR

DANIEL JOSEPH COX — APPELLANT

v.

APPEAL FROM BELL CIRCUIT COURT
HONORABLE JAMES L. BOWLING, JR., JUDGE
ACTION NO. 00-CR-00069

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
REVERSING AND REMANDING
** ** ** ** **

BEFORE: EMBERTON, CHIEF JUDGE; JOHNSON AND SCHRODER, JUDGES.

JOHNSON, JUDGE: Daniel Joseph Cox has appealed from a final judgment of the Bell Circuit Court convicting him of manslaughter in the second degree[1] and sentencing him to prison for ten years. Having concluded that the trial court improperly excluded important testimony offered by the defense, we reverse and remand.

[1]Kentucky Revised Statutes 507.040.

Cox's manslaughter conviction stems from the shooting death of Terry Lee "Emmett" Brown, which occurred on April 21, 2000. Six days earlier, on April 15, 2000, Cox and Brown encountered one another at the home of Gloria Diane Lynch.[2] Lynch had been dating a friend of Cox's, Maynard Marcum, and Cox had given Marcum a ride to her house. Shortly after Cox arrived at the Lynch home, Brown pulled up behind him and began yelling obscenities in Cox's direction. Apparently, Brown was under the impression that Cox had been engaging in sexual relations with his recently divorced wife, Laura Brown.[3] The confrontation escalated, and at one point Brown told Cox, "I'm going to kill you, Mother Fucker!"

At some point during the altercation, Cox and Brown agreed to continue their discussion at a nearby sawmill, outside the presence of Brown's children. When Cox returned to Lynch's house, he reported that the misunderstanding had been resolved and that he and Brown had shaken hands.

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[2]Cox and Brown had known each other previously. At one time they had lived in the same neighborhood and had done things together such as hunting. They had not had direct contact with each other for several years.

[3]Laura Brown is the daughter of Gloria Diane Lynch. Since her divorce, Laura Brown and her two children had been residing at her mother's house. Emmett Brown was at Lynch's house on April 15 to return the two children after his visitation with them. Brown had observed Cox's car at Lynch's house on previous occasions, giving rise to his belief that Cox was having a sexual relationship with his ex-wife, Laura. Lynch testified at trial that Cox had visited her house two or three times previously, but always for the sole purpose of dropping off Maynard Marcum. According to Lynch, Marcum had obtained a ride from Cox in order to prevent his wife from discovering his affair with Lynch.

Just six days later, however, Cox was awakened at approximately 7:00 a.m. by a telephone call from Marcum. The details of that telephone conversation are not clear from the record because the trial court erroneously sustained a hearsay objection, but apparently Marcum called Cox to warn him about Brown. Cox left his house to drive to a nearby store to buy cigarettes, but he returned shortly thereafter because he realized he did not have any money with him. When Cox entered his home, Wendy Barnett[4] was talking on the telephone to his mother, Belva Davis. It was approximately 7:30 a.m. and Cox's wife and their three-year old daughter and Barnett's seven-year old daughter were also at home. Davis informed her son that Emmett Brown had just been to her home, asking for directions to his residence. Davis explained that Brown had asked for directions under the guise that he wanted her son to repair his car. After Davis provided the directions to Brown, he ran away shouting, "I'm going to kill that Mother Fucker!"

Brown arrived at Cox's residence while Cox was still on the telephone with his mother. Cox observed Brown leap out of his car, armed with a shotgun. Upon seeing this, Cox grabbed his nine millimeter handgun and went outside to confront Brown. When Cox came out of his house, Brown pointed the shotgun at Cox and said, "Mother Fucker, I am going to kill you!" Cox then pulled his handgun from his pants and pointed it at Brown. Cox's former

[4]Barnett and her seven-year old daughter lived with Cox and his former wife and their daughter.

wife Michelle came out on the porch, and Brown said, "Get your wife out here, I am going to blow her fucking brains out."[5] Cox told Michelle to go back inside the house, and she did.

According to Cox's testimony, he began walking toward Brown in an attempt to diffuse the situation. Cox said Brown continued to say that he was going to kill him and his wife. As he approached Brown, Cox testified that he heard Brown's gun "click"--as though it had misfired. Cox was close enough to Brown to shove his shotgun toward the ground. Brown then walked back to his car, and threw his shotgun in the backseat. Cox claims at that time he put his handgun on the top of his mini-van. Brown then got into his car and started to back out of Cox's driveway. The driver's window in Brown's car was down, and he continued to scream obscenities at Cox and to threaten to kill him. Brown then stopped his car, and exclaimed, "No, Mother Fucker, I am going to kill you now!" Testimony at trial differed over whether Brown then reached for his gun, but, in any event, in approximately four seconds Cox fired fourteen shots into the driver's side and rear of Brown's car. Three of the shots hit Brown and he died instantly.

On May 1, 2000, the Bell County grand jury indicted Cox for murder. At a jury trial held November 14 through 16, 2000, Cox was convicted of manslaughter in the second degree and the

[5]Cox and Michelle had been married and divorced. They were living together on April 21, 2000, and had re-married by the time of the trial.

jury recommended a sentence of ten years' imprisonment.[6] On December 20, 2000, the trial court entered a final judgment confirming the jury's verdict and sentencing Cox in accordance with the jury's recommendation. This appeal followed.[7]

The first issue on appeal concerns the trial court's refusal to allow the defense to present evidence concerning various statements that had been made in regard to threats by Brown toward Cox. Cox attempted to have three separate witnesses testify to the threats made by Brown during their first confrontation on April 15, 2000. From the avowal testimony that was submitted, we learn that Gloria Diane Lynch, Bonnie Shackleford, and Laura Brown were all planning to testify that Emmett Brown had threatened to kill Cox six days before Cox shot Brown. The Commonwealth objected to the introduction of this testimony on the basis that it was hearsay. The defense countered that the testimony was admissible non-hearsay because it would show the state of mind of the recipient--i.e. that Cox had a justifiable fear of Brown. While essentially agreeing with the defense, the trial court nonetheless excluded the testimony on the grounds that the evidence was irrelevant since Cox's fear had dissipated following the subsequent meeting with Brown and their handshake. That is, the trial court reasoned that because

[6]Manslaughter in the second degree is a Class C felony, which provides for a term of imprisonment of 5 to 10 years.

[7]This Court entered an order on March 12, 2001, granting Cox's motion for a belated appeal.

Cox and Brown had temporarily come to a peaceful settlement of their differences, the threats made by Brown to Cox on the 15th of April were no longer relevant. Cox claims that the trial court's exclusion of this crucial evidence severely hampered his defense, and that he is entitled to a reversal of his conviction and a new trial. We agree.

Kentucky Rules of Evidence (KRE) 401 states that evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Relevancy is established by any showing of probativeness, however slight.[8] Since the ultimate fact sought to be proved by Cox at trial was that he had a justifiable fear of Brown, we believe any evidence that Brown had threatened to kill Cox just six days prior to the shooting would be clearly relevant. We agree with the trial court that in certain situations such evidence may be rendered irrelevant by an intervening peaceful settlement between the parties. However, the threats made by Brown on April 15, 2000, were in such close proximity to the date of the fatal shooting that they remained highly relevant in proving Cox's state of mind. Furthermore, the threats made by Brown are highly relevant in proving Brown's state of mind during the shooting of April 21, 2000. Cox's entire defense involved his claim of justifiable use of deadly

[8]Springer v. Commonwealth, Ky., 998 S.W.2d 439, 449 (1999).

force to protect himself and others from Brown. Certainly, deadly threats made by Brown only six days before the fatal shooting are relevant evidence in proving Brown's state of mind at the time of the final altercation. Therefore, we hold that the trial court erred in ruling such evidence inadmissible.

Our analysis of this issue cannot end with a determination that it is relevant evidence. At trial the Commonwealth objected to the testimony on hearsay grounds, and, in its brief on appeal, the Commonwealth now asserts that such testimony from three different witnesses to the same event would amount to the needless presentation of cumulative evidence. Hence, we believe it is necessary to discuss those issues as well; and we resolve both issues in favor of Cox.

Throughout the trial, the defense was bombarded with hearsay objections to testimony concerning the threats of April 15 and April 21 and the events surrounding the April 21 shooting. While the trial court later stated that the basis for denying evidence of the April 15 threats was lack of relevancy, we note that several of the hearsay objections were sustained nonetheless. We believe those rulings were erroneous and that they significantly hampered the presentation of the case for the defense. The following exchanges are illustrative:

> (From the direct examination of defense witness Gloria Diane Lynch)
>
> Defense Counsel: Okay, and did anybody else come to your residence that evening?

Lynch:	Well, Terry ("Emmett" Brown) come up and got the kids and took them down to McDonald's and bought them a Happy Meal. And then Maynard, Danny drove Maynard up to my house. And like I said, it was after visitation. And Terry and the kids wasn't gone very long, and he came up behind them.
Defense Counsel:	"He," being Terry Brown?
Lynch:	Uh-huh (nodding yes). And he just started cussing and raving. Maynard got out. Danny wasn't going to get out. And he started cussing and raving, you know, all you are doing is---.
Prosecutor:	Object, to the hearsay, Your Honor.
The Court:	Sustained.
Defense Counsel:	At this point, Danny Cox and Maynard were both still in somebody's vehicle?
Lynch:	Maynard was out. Danny was still sitting in his.
Defense Counsel:	In his vehicle?
Lynch:	Uh-huh (nodding yes).
Defense Counsel:	And you've testified, that Mr. Brown came back. How was he acting that evening?
Lynch:	I would say high as usual.

Defense Counsel:	Were there words exchanged? You don't have to tell me what they are, but did anybody exchange words?
Lynch:	I would rather not, but yeah, he was threatening Danny Joe.
Prosecutor:	Judge, Your Honor, excuse me, object to the hearsay.
The Court:	Sustained. Ma'am, you heard the question didn't you?

. . .

(From the direct examination of defense witness Bonnie Shackleford)[9]

Shackleford:	Maynard and Danny had just pulled up. When they pulled up, Emmett had came [sic] up the hill with Britney and Steven in the vehicle.
Defense Counsel:	Now Britney and Steven would be his children, correct, Emmett's children?
Shackleford:	Yes, sir.
Defense Counsel:	All right, and was their mother present at that time?
Shackleford:	Laura was standing right out on the porch with me and Diane.
Defense Counsel:	And so she was present there as well?

[9]Bonnie Shackleford was a neighbor of Lynch and was visiting Lynch at the time of the confrontation on April 15.

Shackleford: Yes.

Defense Counsel: Now what happened, when Mr. Brown showed up?

Shackleford: Mr.--Emmett was very angry, he was cussing.

Defense Counsel: Who was the cussing directed at?

Shackleford: At first, he was cussing at Laura.

Defense Counsel: Laura, his wife or ex-wife?

Shackleford: I guess, it's his ex-wife.

Defense Counsel: Then, to whom?

Shackleford: Then he went to cussing the kids. The kids was wanting out of the vehicle and Emmett wouldn't let them out.

Defense Counsel: Okay, the kids being his children?

Shackleford: Yeah.

Defense Counsel: Okay, so he wouldn't let them out of the vehicle. Is this while the cussing is going on?

Shackleford: Yes.

Defense Counsel: So he begins to cuss Laura and then who?

Shackleford: He left. Emmett spunned [sic] out. He went off the hill real fast, then he came back.

Defense Counsel: Okay, were the kids--did the kids remain at the house, or did they go

away with him when he left?

Shackleford: At that time, he wouldn't let them out of the car.

Defense Counsel: So he took them and brought them back?

Shackleford: Yeah.

Defense Counsel: Any idea how long a period of time that he was gone?

Shackleford: It wasn't long.

Defense Counsel: So he comes back for-for-for, how was he acting when he comes back the second time, or comes back to the residence?

Shackleford: He was worser [sic] than he was the first time. He was very upset.

Defense Counsel: Was [sic] Maynard and Danny Joe still there?

Shackleford: Yeah.

Defense Counsel: Who was his anger directed at when he returned to the house?

Shackleford: Danny.

Defense Counsel: And that the--was Mr. Brown in or out of his car?

Shackleford: As far as I can remember, at that time he was in it. The kids jumped out and that is when my daughter[10] got involved,

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[10]Shackleford's daughter had been visiting Lynch with her (continued...)

because his kids was upset with all the cussing going on. You know, emotional, I guess. She got the kids in the house. Then Emmett got out of his car.

Defense Counsel: Did he approach anybody, or what did he do?

Shackleford: He just stood at the car cussing. And he was hollering that he was going to whip Danny, and he said, damn it. And after he said that, I will kill you.

Defense Counsel: Now who was present at this time, was it the same people as before, or had anybody left?

Shackleford: No, me and my daughter, when the kids was [sic] crying and going on, we went out there and we got the kids in the house. I helped her then. But I was at the door, I could still watch.

Defense Counsel: Did anything physical happen between Mr. Brown and Mr. Cox at that time?

Shackleford: No.

Defense Counsel: Did--how was Mr. Cox acting at the time this was going on?

Shackleford: Danny told Emmett--.

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[10](...continued)
mother at the time of the incident. The daughter apparently ushered the children indoors sometime during the confrontation between Brown and Cox.

Prosecutor: Object, to hearsay.

Defense Counsel: I don't know what--I don't want to know what he told. Just how was he acting, what did he do?

Shackleford: Nothing.

Defense Counsel: Without saying what he said, if he said anything, did he say anything to Mr. Brown?

Shackleford: Yes, he did.

Defense Counsel: Was Danny acting agrily, or was he---.

Shackleford: No.

Defense Counsel: How long, if you know, if you can recall, was this incident taking place this second time?

Shackleford: It wasn't long, because they both left.

Defense Counsel: Did they leave in the same car, in separate cars, on foot, by themselves?

Shackleford: They was [sic] in separate vehicles.

Defense Counsel: Separate vehicles. They were by themselves?

Shackleford: Yeah.

Defense Counsel: Okay, did either of them return?

Shackleford: Danny did.

Defense Counsel: How was he acting when he returned?

Shackleford: He was all right.

Defense Counsel: The same as he was earlier, or different in any fashion?

Shackleford: No, he wasn't no different.

Defense Counsel: Your Honor, could we approach the bench on something, please.

The Court: Yes, sir.

Bench Conference

Out of the hearing of the jury:

Defense Counsel: Your Honor, at that time, we have already discussed the matters of the avowal, as to what this witness will say. We want for the record to know, that this is the point in time, when we would want to be illiciting that testimony by avowal.

The Court: I thought you just illicited it.

Prosecutor: He has asked everything that is in that statement, except one sentence. And I want the record to reflect that the Commonwealth certainly made no objection, after the Court's direction.

Defense Counsel: Your Honor, we need to illicit what was said to be very clear in all of my questioning to say, tell me what was said. But there are very specific details that I need to put in by avowal. And I just want the

record to reflect, at this time, that we would go on and do it later when the jury is out. I just wanted to make sure that that was done contemporaneous [sic].

The Court: If we proceed by avowal, I assume the Commonwealth is going to object to that.

Prosecutor: He has already illicited it. I have followed his line, and he has already illicited the direct.

Defense Counsel: I mean---.

Prosecutor: What is there to put in an avowal?

The Court: Well, to be honest with you, I have sit here and listened to the questions and thinking, surely, he is not going there.

Defense Counsel: Well, your Honor, I wouldn't go there.

Prosecutor: But you didn't, they certainly did. The Commonwealth is not going to get to.

The Court: Well, maybe the Commonwealth can change its strategy, because these things are going to come out.

Prosecutor: The Commonwealth wants the record to reflect, that the Court gave very specific instructions that were disregarded by counsel. And the Commonwealth is not going to be put into the

position in this trial of hearing, even after the Court has ruled it out of the presence of the jury, as obstructions to this trial [sic]. The Court made very specific directions, that were completely disregarded by counsel.

Defense Counsel: Your Honor, I would like to address the fact, that my questions were very clear to say, just don't tell me what was said, and I just asked about his actions. I never asked the witness specifically what was said. I would have asked very specific questions, but the Court said I couldn't. I expected her to answer my questions. I would have asked her, what did Emmett Brown say to---.

The Court: Well, there is no need to proceed by any avowal, because---.

Prosecutor: It is in there.

The Court: ---it is already in there, so let's go.

End of Conference.

. . .

(From the direct examination of defense witness Laura Brown)

Defense Counsel: Now drawing your attention to April 15, 2000, at your mother's house, did you see Danny Joe that evening?

Brown:	Yes, he brought Maynard Marcum up to my mom's.
Defense Counsel:	Do you know for what purpose?
Brown:	They were dating.
Defense Counsel:	"They" being?
Brown:	Maynard and my mom.
Defense Counsel:	And did the--do you know where Danny Joe had been coming from that evening?
Brown:	Yeah, he was coming from--his stepdad had passed away, and they was [sic] coming from the funeral home.
Defense Counsel:	While he was there bringing Mr. Marcum, did Terry Lee Brown show up?
Brown:	Yes.
Defense Counsel:	How was he acting when he showed up?
Brown:	The first time, or the second time?
Defense Counsel:	Well, let's separate them. And when I say acting, I just want to know what his actions were not anything that he said. I want to know for on [sic] his first time that he showed up, how was he acting?
Brown:	The first time, he acted like he wanted to get back together, but that was before he seen Danny Joe up there.

Defense Counsel:	And when--did he see Danny Joe before he left?
Prosecutor:	Object to when the deceased saw Danny Joe.
The Court:	Sustained.
Defense Counsel:	Was Danny Joe there, when Terry Lee Brown showed up the first time?
Brown:	No.
Defense Counsel:	And did the--do you know, do you know why Terry Lee Brown showed up?
Prosecutor:	Object to the witness speculating why the deceased showed up.
The Court:	If she knows, I will allow her to answer.
Defense Counsel:	Do you know why he showed up?
Brown:	He came [sic] to see the kids.
Defense Counsel:	And did he, in fact, take the children with him?
Brown:	He took them to McDonald's.
Defense Counsel:	And was anybody else in his vehicle, other than he and the children when he left?
Brown:	No.
Defense Counsel:	And was [sic] Mr. Cox and Mr. Marcum there when he left?
Brown:	No.

Defense Counsel: At some point in time, I assume he brings the children back?

Brown: Right.

Defense Counsel: Now when he comes back, was [sic] Mr. Marcum and Danny Joe there?

Brown: They had just pulled in.

Defense Counsel: And what was the attitude, or demeanor, of Terry Lee Brown, when he returned to the residence and saw Mr. Cox?

Brown: He was verbally abusive.

Defense Counsel: To-to who [sic]?

Brown: Me, at first, and then he started hollering things at Danny Joe.

Defense Counsel: Now where was Danny Joe, when he was being hollered at?

Brown: In the car.

Defense Counsel: Where was Mr. Marcum?

Brown: Walking up the sidewalk.

Defense Counsel: Up the sidewalk away from the car, towards the car?

Brown: Away from the car, toward the porch.

Defense Counsel: And once again to make sure we get it straight, now we have the second appearance. Who was present, besides Mr. Marcum, Mr. Cox and yourself, Mr. Brown and the children, through this second time?

Brown: Bonnie Shackleford and her daughter.

Defense Counsel: Where was your mother?

Brown: Everybody was sitting on the porch.

Defense Counsel: Sitting on the porch. Without saying anything that was said, how did Mr. Cox respond to Mr. Brown?

Brown: Well, he acted like he ignored him for a while. And then, you know, he just-he finally just got up out of the car.

Defense Counsel: And when he got out of the car ("he" being Danny Joe that got out of the car) did any physical altercation occur between the two of them at that time?

Brown: No.

Defense Counsel: Without, at this time, indicating what was said, were words exchanged between them?

Brown: Yes.

Defense Counsel: Once again, without saying what was said, how would you describe the things that--that Terry Brown was saying to Mr. Cox, quiet, calm, peaceful, angry, funny, laughing, how would you characterize that?

The Court: Counsel, approach.

Defense Counsel: Yes, sir.

Bench Conference
Out of the hearing of the jury:

The Court: For the sake of brevity, is she going to say threatening?

Defense Counsel: I was going to do that next.

The Court: You are fishing, you are fishing for a way around the Court's admonitions---.

Defense Counsel: I would indicate to the Court---.

The Court: ---during this trial.

Defense Counsel: I would indicate for the record that I am not fishing for a way around it. It is our intent to put this in by avowal. I have been walking on eggs, to avoid asking direct questions. And at this time---.

The Court: This is your witness. I know what you are doing. You are wanting her to say, he threatened him.

Defense Counsel: At this time, I would ask for the record to reflect that we wish to put this in by avowal, and the previous testimony in by avowal.

The Court: I will allow that.

Defense Counsel: Okay.

End of Bench Conference

. . .

KRE 801 defines "hearsay" as "a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." The statement by Brown that he was going to kill Cox was being offered to prove Cox's and Brown's state of mind. As Professor Lawson states in his influential treatise: "A legitimate non-hearsay use of an out-of-court statement always involves relevancy in the mere utterance of the words comprising the statement (i.e., a logical connection between the utterance of the words and some material element of the case)" [emphasis original].[11] The use of an out-of-court statement to prove the state of mind of a person shown to have heard or read the statement in question is a classic example of this variety of non-hearsay evidence. Further, as our Supreme Court has stated, "'[i]t is well settled that a defendant can introduce evidence of particular violent acts of an alleged victim, evidence of threats by the victim, and evidence of hearsay statements about such acts or threats, all of which tends to show the defendant had a justifiable fear of the victim at the time of their encounter. . . .'"[12] Accordingly, we hold that the trial court erred in its rulings which prohibited various witnesses from testifying concerning statements made on April 15 and April 21 related to

[11]Lawson, The Kentucky Evidence Law Handbook, § 8.05 (3d ed., 1993).

[12]Wilson v. Commonwealth, Ky.App., 880 S.W.2d 877, 878 (1994)(quoting Lawson, supra); See also Commonwealth v. Davis, Ky., 14 S.W.3d 9, 14 (1999).

threats made by Brown regarding Cox. The avowal testimony revealed that all three witnesses had crucial information to offer concerning Cox's state of mind, as well as Brown's state of mind. Such relevant, non-hearsay evidence must be admitted for the purpose of allowing Cox to attempt to justify his use of deadly force against Brown for the protection of himself and others.

On appeal, the Commonwealth presents a new argument in its brief. The Commonwealth claims that even if evidence of the threats made on April 15 is ruled admissible, that testimony from all three witnesses amounts to the needless presentation of cumulative evidence--rendering it irrelevant under KRE 403. Since the Commonwealth never presented the cumulative evidence objection to the trial court, this issue has not been preserved for our review.

RCr[13] 9.22 requires parties to make known to the trial court the action which he or she desires the court to take or his or her objection to the action of the court, and on request of the court, his or her grounds therefor.[14] Numerous bench conferences and in camera hearings were held during Cox's trial to resolve the admissibility of the April 15 threats. At no time did the Commonwealth object to such testimony on the grounds that it was cumulative. Since the defense had no opportunity to

[13]Kentucky Rules of Criminal Procedure.

[14]See also Murphy v. Commonwealth, Ky., 50 S.W.3d 173, 182 (2001).

respond to this objection and since the trial court had no opportunity to rule on this issue, we will not address it in any detail on appeal. Suffice it to say that we do not believe the evidence would have been cumulative.

Since the issue concerning the jury instructions will likely recur at a new trial, we now turn to Cox's second argument on appeal. Cox argues that the instructions forced the jury to apply a reasonable-person standard to his defense of self-protection. The Commonwealth counters that Cox failed to preserve this issue at trial and that even if the issue had been preserved that the trial court gave proper jury instructions. We agree with the Commonwealth.

At trial, Cox raised several objections to the trial court's proposed instructions. However, none of those objections relate to the theory advanced on appeal. While Cox's counsel argued for separate instructions on reckless homicide and second-degree manslaughter, and for separate definitions for the terms "reckless" and "wanton", notably absent from the record are any objections to the reasonable-person standard employed by the trial court in its instructions concerning imperfect self-protection. RCr 9.54(2) provides:

> 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 to which the party objects and the ground or grounds for objection.

Further, "'. . . failure to comply with RCr 9.54(2) has been consistently held to prohibit review of an alleged error in instructions because of the failure to properly preserve the claimed error.'"[15] Cox claims that his proposed jury instructions preserved this issue. However, the proposed jury instructions are not in the record and the record does not otherwise contain any such objection to the instructions. Accordingly, we find that the jury instruction issue was not properly preserved for our review.

Regardless of the lack of preservation, we note that the trial court's jury instructions were nonetheless proper. In Commonwealth v. Hager,[16] our Supreme Court certified the law on this very issue. In its analysis of Kentucky's self-protection statute, KRS 503.120(1), the Court stated:

> The statute first recognizes that all KRS 503 justifications, including self-protection, are premised upon a defendant's actual subjective belief in the need for the conduct constituting the justification and not on the objective reasonableness of that belief. Secondly, the statute recognizes that a defendant may be mistaken in his belief and that the mistaken belief, itself, may be so unreasonably held as to constitute wantoness or recklessness with respect to the circumstance then being encountered. If so, the statute provides that the justification, e.g., self-protection, is unavailable as a defense to an offense having the mens rea element of wantonness, e.g., second-degree

[15]Commonwealth v. Collins, Ky., 821 S.W.2d 488, 492 (1991) (quoting Commonwealth v. Thurman, Ky., 691 S.W.2d 213 (1985)).

[16]Ky., 41 S.W.3d 828, 842 (2001).

> manslaughter, or recklessness, e.g., reckless homicide, "as the case may be."
>
> Thus, while a wantonly held belief in the need to act in self-protection is a defense to an offense having the mens rea element of intent, it supplies the element of wantonness necessary to convict of second-degree manslaughter; and while a recklessly held belief in the need to act in self-protection is a defense to an offense requiring either intent or wantonness, it supplies the element of recklessness necessary to convict of reckless homicide [emphasis added] [citations omitted].

Thus, while our Supreme Court recognized the subjective nature of the self-protection defense, as urged by Cox in this appeal, it went on to clarify that an unreasonable belief in the need for self-protection is only a defense to murder and not a defense to crimes requiring a lower level of mens rea, such as reckless homicide and manslaughter in the second degree. Therefore, Cox's argument that the subjective-intent standard should be equally applied to manslaughter in the second degree and reckless homicide is misguided.

In the case sub judice, the trial court submitted the following instructions to the jury:

> INSTRUCTION NO. 1
> MURDER
>
> You will find the Defendant, Daniel Joseph Cox, guilty of Murder under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:
>
> A. That in Bell County, Kentucky, on or about the 21st day of April, 2000 and before the finding of indictment herein, he killed Terry

Lee Brown by shooting him with a pistol;

AND

B. That in so doing, he caused the death of Terry Lee Brown intentionally;

AND

C. That in so doing, he was not privileged to act in self-protection.

If you find the Defendant guilty under this instruction, you will not deliberate as to his punishment but will return immediately to the Courtroom.

INSTRUCTION NO. 2

SELF-PROTECTION

Even though the Defendant might otherwise be guilty of Murder under Instruction No. 1 if at the time the Defendant killed Terry Lee Brown, he believed that Terry Lee Brown was then and there about to use physical force upon him, he was privileged to use such physical force against Terry Lee Brown as he believed to be necessary in order to protect himself against it, but including the right to use deadly physical force in so doing only if he believed it to be necessary in order to protect himself from death or serious physical injury at the hand of Terry Lee Brown.

Provided, however, if you believe from the evidence beyond a reasonable doubt that the Defendant was mistaken in his belief that it was necessary to use physical force against Terry Lee Brown in self-protection, or in his belief in the degree of force necessary to protect himself,

AND

A. That when he killed Terry Lee Brown he failed to perceive a substantial

and unjustifiable risk that he was mistaken in that belief, and that his failure to perceive that risk constituted a gross deviation from the standard of care that a reasonable person would have observed in the same situation, then you shall not find the Defendant guilty of Murder under Instruction No. 1, but shall instead find him guilty of Reckless Homicide under this Instruction.

OR

B. That when he killed Terry Lee Brown, he was aware of and consciously disregarded a substantial and unjustifiable risk that he was mistaken in that belief, and that his disregard of that risk constituted a gross deviation from the standard of care that a reasonable person would have observed in the same situation, then you shall not find the Defendant guilty of Murder under Instruction No. 1, but shall instead find him guilty of Second Degree Manslaughter under this Instruction.

If you find the Defendant guilty under this Instruction, you will not deliberate as to his punishment but will return immediately to the Courtroom.

We believe that these instructions are entirely consistent with the Supreme Court's holdings in Elliot v. Commonwealth,[17] and Hager, and thus proper.

For the foregoing reasons, the judgment of the Bell Circuit Court is reversed and this case is remanded for proceedings consistent with this Opinion.

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[17]Ky., 976 S.W.2d 416 (1998).

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