RENDERED: December 3, 2004; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-002455-MR

DANIEL JOHNSON — APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE GREGORY M. BARTLETT, JUDGE
ACTION NO. 02-CR-00055

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: JOHNSON, TACKETT, AND SCHRODER, JUDGES.

JOHNSON, JUDGE: Daniel Johnson has appealed from the final judgment of the Kenton Circuit Court entered on October 17, 2002, which pursuant to a jury verdict, convicted him of manslaughter in the second degree,[1] and assault in the fourth degree.[2] Having concluded that (1) Johnson's objection to the jury instructions was not properly preserved; (2) his proffered evidence was not preserved by an avowal; (3) the trial court did

[1] Kentucky Revised Statutes (KRS) 507.040.

[2] KRS 508.030.

not err by denying Johnson's motion for a mistrial following witnesses' characterization of him as a "biker"; (4) the trial court did not err by denying Johnson's motion for a directed verdict of acquittal; and (5) the trial court's allowing cross-examination of Johnson regarding the Hell's Angels bumper sticker on his motorcycle during the sentencing phase of the trial was harmless error, we affirm.

The Commonwealth presented evidence that on November 1, 2001, Johnson and his son, Brandon, went to the First and Last Chance Bar in Kenton County, Kentucky, near the Grant County line.[3] At around 9:00 p.m. that evening, Johnson and Shawn Sandlin, a female bar patron, were having a brief conversation about Johnson's tattoos when a confrontation occurred, resulting in Johnson and Sandlin being physically separated by other bar patrons. During the confrontation, Johnson and Sandlin bumped into Greg Smith who was playing pool behind them. As Smith turned to ask Johnson and Sandlin not to interfere with his pool game, Johnson struck Smith twice in the face, knocking Smith to the floor. At this point, Anita Kinman, who was a co-owner of the bar and a bartender, went to the

[3] A brief review of the layout of the First and Last Chance bar is necessary to understand the facts of this case. The front door of the building opens to a pool table area where two pool tables are located to the right side of the doorway. To the left side of the doorway is a partition separating the pool table area from the dance floor which encases a karaoke stage and several tables and chairs. As you proceed into the building along the walkway between the pool tables and the partition, the bar is located in the back on the right side.

karaoke stage to get her husband, co-owner Rick Kinman, to come and stop the fight.[4] Rick Kinman placed Johnson in a "sleeper hold"[5] in an attempt to remove Johnson from the building. Kinman told Johnson that he would release him if Johnson would agree to leave the building. Johnson agreed and Kinman released his hold on Johnson. At that time, someone from behind yelled a derogatory comment at Johnson and Johnson turned around and punched the person.[6] A group of people then surrounded Johnson and forced him outside the building. Brandon, Johnson's son, attempted to start another fight and was subdued by Kinman and also taken outside.

Mike Lovelace was standing inside the building next to the bar with Jason Hicks. As Kinman re-entered the building and began walking towards Lovelace and Hicks, Johnson came back inside the doorway and began firing random shots from a .25 caliber semiautomatic pistol. Johnson first fired a bullet that hit the floor and then another one into the ceiling. Then Johnson fired at least two more shots, one of these two shots hit Lovelace in the chest. Lovelace died from his wounds two days later.

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[4] Anita Kinman also called 911 to summon the police to the bar.

[5] A "sleeper hold" is a fighting maneuver where a person's neck is placed in the grip of another person's arm and pressure is placed on the person's carotid artery rather than the throat.

[6] The identity of the person Johnson struck is unknown.

After firing the shots, Johnson was knocked down and pinned to the floor. Hicks pried the gun out of Johnson's hand and laid it on the bar. Johnson was led outside, but returned to the doorway wielding a knife. As Hicks walked towards Johnson in an attempt to prevent Johnson from coming back inside the building, Johnson cut Hicks across the right side of his chest with the knife. Johnson then walked to the bar, waived the knife, and demanded that Kinman serve him a drink. Kinman, who by then had retrieved his own handgun, told Johnson that the police had been called and that Johnson would wait in the bar until the police arrived.

On January 25, 2002, Johnson was indicted by a Kenton County grand jury for one count of murder[7] for the death of Lovelace, one count of assault in the second degree[8] for the stabbing of Hicks, and a second count of assault in the second degree for the stabbing of Doug Hartman.[9] An eight-day jury trial was held in the Kenton Circuit Court, beginning on August 27, 2002, and ending on September 10, 2002. Johnson was convicted of the lesser-included offenses of manslaughter in the second degree and assault in the fourth degree. Johnson was sentenced by a final judgment entered on October 17, 2002, to

[7] KRS 507.020.

[8] KRS 508.020.

[9] Because Johnson was acquitted by the jury on this charge, the facts leading to the stabbing of Hartman are not relevant to this Opinion.

ten years in prison for the conviction of manslaughter in the second degree and one year in jail for the misdemeanor conviction of assault in the fourth degree. Pursuant to statute, the sentences were run concurrently for a total prison sentence of ten years. This appeal followed.

JURY INSTRUCTIONS

The jury was instructed as to murder,[10] manslaughter in the second degree,[11] and reckless homicide,[12] including whether Johnson acted in self-protection[13] or in the protection of

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[10] KRS 507.020(1)(b) provides in part as follows:

> (1) A person is guilty of murder when:
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> . . .
>
> (b) [U]nder circumstances manifesting extreme indifference to human life, he wantonly engages in conduct which creates a grave risk of death to another person and thereby causes the death of another person.

[11] KRS 507.040(1) provides in part as follows:

> (1) A person is guilty of manslaughter in the second degree when he wantonly causes the death of another person. . . .

[12] KRS 507.050(1) provides:

> (1) A person is guilty of reckless homicide when, with recklessness[,] he causes the death of another person.

[13] KRS 503.050(1)-(2) provides:

> (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)

another person.[14] Whether Johnson was reasonable in his belief that he needed to act in self-protection or in the protection of another is viewed under a subjective test.[15] If Johnson were determined by the jury to have been reasonable[16] in his belief

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only when the defendant believes that such force is necessary to protect himself against death, serious physical injury, kidnapping, or sexual intercourse compelled by force or threat.

[14] KRS 503.070 provides:

(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 and 503.060 in using such protection.

(2) The use of deadly 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 imminent death, serious physical injury, kidnapping or sexual intercourse compelled by force or threat; and

(b) Under the circumstances as they actually exist, the person whom he seeks to protect would himself have been justified under KRS 503.050 and KRS 503.060 in using such protection.

[15] Elliott v. Commonwealth, Ky., 976 S.W.2d 416, 419 (1998).

[16] KRS 503.120(1) provides:

(1) When the defendant believes that the use of force upon or toward the person of another is necessary for any of the purposes for which such belief would establish a justification under KRS 503.050 to 503.110 but the defendant is wanton or reckless in believing the use of any force, or the degree of force used, to be necessary or in acquiring or failing to acquire any knowledge or belief which is material to the justifiability of his use of force, the justification afforded by those sections is unavailable in a prosecution for an offense for which

that deadly force was necessary for self-protection or the protection of another, then it would have acquitted him of killing Lovelace,[17] unless it found Lovelace to be an innocent bystander.[18] If Johnson were found to be unreasonable in his belief that deadly force was necessary for self-protection or the protection of another, then the jury would find him guilty of manslaughter in the second degree if he acted wantonly,[19]

> wantonness or recklessness, as the case may be, suffices to establish culpability.

See also Elliott, 976 S.W.2d at 420.

[17] Commonwealth v. Hager, Ky., 41 S.W.3d 828, 841 (2001) provides:

> [A] mistaken belief in the need to act in self-protection does not affect the privilege to act in self-protection unless the mistaken belief is so unreasonably held as to rise to the level of wantonness or recklessness with respect to the circumstances then being encountered by the defendant.

[18] KRS 503.120(2) provides in part as follows:

> (2) When the defendant is justified under KRS 503.050 to 503.110 in using force upon or toward the person of another, but he wantonly or recklessly injures or creates a risk of injury to innocent persons, the justification afforded by those sections is unavailable in a prosecution for an offense involving wantonness or recklessness toward innocent persons.

See also Phillips v. Commonwealth, Ky., 17 S.W.3d 870, 875-76 (2000).

[19] KRS 501.020(3) provides:

> "Wantonly" -- A person acts wantonly with respect to a result or to a circumstance described by a statute defining an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation. . . .

i.e., he was aware of the risk of death, but consciously disregarded it. Further, the jury would find him guilty of reckless homicide if he acted recklessly,[20] i.e., he was unaware of the risk but reasonably should have been.

Johnson argues on appeal that the trial court erred by failing to instruct the jury to acquit him if it found that his decision to use deadly force for self-protection or for the protection of another was mistaken, but reasonable. He argues that the instructions were erroneous because they failed to specifically set forth an option for the jury to acquit him.

However, our review of the record reveals that Johnson failed to adequately preserve this issue for appellate review. "[The] [f]ailure to comply with RCr[21] 9.54(2)[22] has consistently

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[20] KRS 501.020(4) provides:

> "Recklessly" -- A person acts recklessly with respect to a result or to a circumstance described by a statute defining an offense when he fails to perceive a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation.

[21] Kentucky Rules of Criminal Procedure.

[22] 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

been interpreted to prevent review of claimed error in the instructions because of the failure to preserve alleged error for review."[23]

Johnson stated in his brief, pursuant to CR[24] 76.12(4)(c)(v), that his objection to the jury instructions had been preserved at trial and he referred this Court to the record where he claims it was preserved. However, in reviewing the referenced portion of the record, we find that Johnson's objection was to the use of the word "mistaken" in the jury instructions instead of "wanton" and "reckless" in describing Johnson's belief in the need for self-protection or the protection of another. While Johnson argued at trial that the word "mistaken" would confuse the issue, he did not argue the need for an instruction requiring acquittal if his belief was mistaken but reasonable. Regardless of this lack of preservation, we conclude that the instructions met the requirements of Hagar.

COLLATERAL FACTS

Johnson also argues that the trial court erred when it denied the introduction of evidence regarding lawsuits that had

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

[23] Commonwealth v. Thurman, Ky., 691 S.W.2d 213, 216 (1985).

[24] Kentucky Rules of Civil Procedure.

been filed against the bar and Kinman and evidence of Sandlin's violent nature. At trial, Kinman testified that there had been fights at the bar in the past, but that he had no "marks" on his liquor license. In response to this testimony, Johnson attempted to impeach Kinman by questioning him about three pending lawsuits against him and his bar alleging injuries inflicted by bar patrons. The trial court prohibited this line of questioning as impeachment on a collateral fact and as lacking relevancy. Johnson then moved to admit into evidence certified copies of the lawsuits, which was denied by the trial court on the same grounds. Johnson argued that the evidence of the lawsuits was relevant because it would show the bar's violent environment and allow the jury to properly determine the reasonableness of his belief in the need for self-protection and the protection of another.

A collateral fact is one that could not have been introduced into evidence for a purpose independently of the self-contradiction.[25] Further, "[i]t is generally recognized that a witness may not be impeached with respect to a matter which is irrelevant and collateral to the issues in the action."[26] However, "[r]elevancy is established by any showing

[25] Commonwealth v. Jackson, Ky., 281 S.W.2d 891, 893-94 (1955) overruled on other grounds by Jett v. Commonwealth, Ky., 436 S.W.2d 788, 792 (1969).

[26] Simmons v. Small, Ky.App., 986 S.W.2d 452, 455 (1998) (quoting Jackson, supra).

of probativeness, however slight."[27] "The purpose of this rule is 'to minimize confusion for the triers of fact by avoiding an unwarranted and endless proliferation of side issues.'"[28]

Johnson argues that under Kentucky case law a defendant's right to present a defense prevails over the collateral facts doctrine. He claims that impeachment of a witness may be allowed when it is raised by the defendant in "an effort to help his own case," and that it can be accomplished on cross-examination of the witness being contradicted. The Commonwealth argues that the trial court was correct in not allowing the admission of this evidence because these civil suits were pending and proved nothing and that Kinman was not on trial. It further argued that mere allegations of unsettled civil claims against the bar did not tend to make any fact in issue more or less probable and were therefore irrelevant, especially since there was no evidence offered that Johnson was aware of previous violence at the bar, or that he had entered the bar fearing for his safety.

Johnson also attempted to question Kinman regarding Sandlin's reputation for violence. The trial court prohibited

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[27] Springer v. Commonwealth, Ky., 998 S.W.2d 439, 449 (1999). See also Kentucky Rules of Evidence (KRE) 401 and 402.

[28] Simmons, 986 S.W.2d at 455 (quoting Lawson, The Kentucky Evidence Law Handbook, § 4.10 (3d ed., 1993)).

this line of questioning based on KRE 608, which limits character impeachment to that of truthfulness. Johnson argues that while the trial court technically applied KRE 608 correctly, it violated his constitutional right to present a complete defense. Johnson argues that since he raised the defense of self-protection during trial, that the jury was required to determine whether he mistakenly used self-protection. He claims that without the admission of the evidence of Sandlin's violent reputation, he could not properly develop his defense. He contends that this evidence would have explained to the jury the reasonableness of his belief in the need for self-protection and that it would further help prove that Sandlin was the initial aggressor. Johnson asserts that under KRE 404(a)(2) he should have been allowed to introduce a pertinent character trait of a victim. Even though Sandlin was not a victim in this case, Johnson argues that he should not lose the privilege of using KRE 404(a)(2) just because the initial aggressor and the victim were two different people.

Once again, these issues were not properly preserved for appellate review, since Johnson did not offer the evidence into the record by an avowal. KRE 103 outlines the procedures for preserving issues regarding rulings made at trial as to the

admissibility of evidence for appellate review.[29] More specifically, RCr 9.52[30] describes the procedures for preserving evidentiary issues for appellate review in a criminal trial when the trial court sustains an objection to certain testimony.

The Supreme Court of Kentucky has consistently read KRE 103 and RCr 9.52 as requiring an offer of avowal testimony in order to preserve a ruling made at trial as to the

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[29] KRE 103 provides, in relevant part, as follows:

> (a) Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected; and
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> . . .
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> (2) Offer of proof. In case the ruling is one excluding evidence, upon request of the examining attorney, the witness may make a specific offer of his answer to the question.
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> (b) Record of offer and ruling. The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.

[30] RCr 9.52 provides:

> In an action tried by a jury, if an objection to a question propounded to a witness is sustained by the court, upon request of the examining attorney the witness may make a specific offer of his or her answer to the question. The court shall require the offer to be made out of the hearing of the jury. The court may add such other or further statement as clearly shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. In actions tried without a jury the same procedure may be followed, except that the court upon request shall take and report the evidence in full, unless it clearly appears that the evidence is not admissible on any ground or that the witness is privileged.

admissibility of evidence for appellate review.[31] In Cain v. Commonwealth,[32] the Supreme Court explained that "without an avowal to show what a witness would have said an appellate court has no basis for determining whether an error in excluding his proffered testimony was prejudicial."[33]

The record does not include Johnson's proffering by an avowal any evidence regarding the lawsuits against Kinman and the bar or Sandlin's violent reputation. Thus, this Court has not been provided a meaningful basis for reviewing the decision of the trial court concerning the admissibility of the evidence.[34] As the Supreme Court stated in Partin, supra, "[c]ounsel's version of the evidence is not enough. A reviewing court must have the words of the witness."[35] "A reviewing court requires more than the general substance of excluded evidence in order to determine whether a defendant has suffered prejudice."[36]

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[31] See Hart v. Commonwealth, Ky., 116 S.W.3d 481, 485-86 (2003); Garrett v. Commonwealth, Ky., 48 S.W.3d 6, 15 (2001); Commonwealth v. Ferrell, Ky., 17 S.W.3d 520, 523-24 (2000); and Partin v. Commonwealth, Ky., 918 S.W.2d 219, 223 (1996).

[32] Ky., 554 S.W.2d 369 (1977).

[33] Id. at 375.

[34] See Hart, 116 S.W.3d at 483 (quoting the 1992 commentary to KRE 103).

[35] 918 S.W.2d at 223. See also Garrett, 48 S.W.3d at 15 (stating that "[w]hile KRE 103(a)(2) and RCr 9.52 are both couched in terms of preserving oral testimony as opposed to real evidence, a fair reading of those rules requires avowal testimony to authenticate the document or object, then a tender of the document or object to the court as an avowal exhibit" [emphasis added]).

[36] Hart, 116 S.W.3d at 483.

"Without an avowal, or a crystal ball, reviewing courts can never know with any certainty what a given witness's response to a question would have been if the trial court had allowed them to answer."[37]

BIKER REFERENCES

Johnson further claims that the trial court erred by denying his motion for a mistrial after the Commonwealth's witnesses, Kevin Stambaugh and Casandra Wilson, impermissibly suggested to the jury during the guilt phase of the trial that Johnson looked like a "biker." When asked by the Commonwealth to describe Johnson's clothing on the night of the incident in question, Stambaugh stated that Johnson looked "kinda like a biker." Johnson objected and argued that references to Johnson being a biker had been discussed at a pretrial hearing, to which the Commonwealth responded that this hearing had regarded another witness. Johnson then moved for a mistrial, which the trial court denied. However, the trial court did admonish the jury. The trial court then asked defense counsel if he was requesting any further admonition, and he replied that the one given was sufficient.

Later, when Casandra Wilson was asked by the Commonwealth to describe the person she saw being escorted out of the bar, she stated, "I hate to make generalizations, but

[37] Ferrell, 17 S.W.3d at 525, n.10.

kind of biker looking . . . ." Johnson again objected and asked for an admonition to the jury. The trial court sustained the objection and granted the requested relief. The trial court admonished the jury that it should disregard any attempt by either Stambaugh or Wilson to "characterize" Johnson in their testimony since such "characterization" is irrelevant to the issue of Johnson's guilt or innocence.

Kentucky law is clear that a mistrial should be granted only where there exists a "'manifest necessity for such action or an urgent or real necessity.'"[38] As explained in Wiley v. Commonwealth,[39] "'[w]here, for reasons deemed compelling by the trial judge, who is best situated intelligently to make such a decision, the ends of substantial justice cannot be attained without discontinuing the trial, a mistrial may be declared . . . .'"[40] Despite this broad discretion to grant a mistrial, a trial court should do so only "under urgent circumstances, and for very plain and obvious causes."[41]

It is the general rule in this Commonwealth that an admonition by the trial court after it sustained an objection to

[38] Gosser v. Commonwealth, Ky., 31 S.W.3d 897, 906 (2000) (quoting Skaggs v. Commonwealth, Ky., 694 S.W.2d 672, 678 (1985), cert denied, 476 U.S. 1130, 106 S.Ct. 1998, 90 L.Ed.2d 678 (1986)).

[39] Ky.App., 575 S.W.2d 166 (1978).

[40] Id. at 169 (quoting Gori v. United States, 367 U.S. 364, 81 S.Ct. 1523, 6 L.Ed.2d 901 (1961)).

[41] Commonwealth v. Scott, Ky., 12 S.W.3d 682, 685 (2000).

improper testimony is sufficient to avoid any resulting prejudice.[42] A jury is presumed to follow an instruction to disregard inadmissible evidence unless there is an overwhelming probability that the jury will be unable to follow the trial court's admonition and the inadmissible evidence is likely to be devastating to the defendant.[43] Our review of the record disclosed no overwhelming probability that the jury was unable to follow the trial court's clear admonition. Because the admonition was sufficient to cure any error, the trial court properly denied Johnson's motion for a mistrial.

At the sentencing phase of the trial, the Commonwealth, during the cross-examination of Johnson, asked him about a sticker that was on the motorcycle he had ridden to the bar. The sticker read, "Support Your Local Hell's Angels, Chicago." Defense counsel's objections were overruled and Johnson testified that the sticker was put on the bike by a friend who had worked on his bike and that he was not a member of the Hell's Angels. While we agree with Johnson that it was error for the trial court to overrule his objection to this

[42] Willoughby v. Commonwealth, Ky., 510 S.W.2d 11, 12 (1974).

[43] Alexander v. Commonwealth, Ky., 862 S.W.2d 856, 859 (1993) overruled on other grounds by Stringer v. Commonwealth, Ky., 956 S.W.2d 883 (1997).

irrelevant question, we nonetheless conclude under RCr 9.24[44] that the error was harmless. As stated in Abernathy v. Commonwealth,[45] "we are enjoined by RCr 9.24 . . . to disregard [error] unless we are of the opinion that it affected the 'substantial rights' of the defendants. . . . If upon a consideration of the whole case, this court does not believe there is a substantial possibility that the result would have been any different, an irregularity will be held nonpredjudicial."[46] In reviewing the entire record of this case, we cannot conclude that this one minor piece of evidence affected the jury's decision on Johnson's sentence. Thus, the error does not require reversal.

DIRECTED VERDICT

Finally, we reject Johnson's argument that the trial

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[44] RCr 9.24 provides:

> No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order, or in anything done or omitted by the court or by any of the parties, is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order unless it appears to the court that the denial of such relief would be inconsistent with substantial justice. The court at every state of the proceeding must disregard any error or defect in the proceeding that does not affect the substantial rights of the parties.

[45] Ky., 439 S.W.2d 949 (1969) overruled on other grounds by Blake v. Commonwealth, Ky., 646 S.W.2d 718 (1983).

[46] Id. at 952.

court erred by failing to grant him a directed verdict of acquittal based on self-protection. On a motion for directed verdict, all fair and reasonable inferences from the evidence are to be drawn in favor of the Commonwealth.[47] "On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal."[48]

In West v. Commonwealth,[49] the Supreme Court discussed at length the interplay between self-defense and a motion for directed verdict of acquittal:

> Only in the unusual case in which the evidence conclusively establishes justification and all of the elements of self-defense are present is it proper to direct a verdict of not guilty. . . . [A] defendant's statement that he acted in self-defense or his description of events which show such to be the case need not be accepted at face value where the jury may infer from his incredibility or the improbability of the circumstances that one or more of the elements necessary to qualify for self-defense is missing. . . . [I]f the evidence relied upon to establish self-defense is contradicted or if there is other evidence from which the jury could reasonably conclude that some element of self-defense is absent, a directed verdict should not be given. While the Commonwealth always bears the burden of proving every

[47] Commonwealth v. Benham, Ky., 816 S.W.2d 186, 187 (1991).

[48] Id.

[49] Ky., 780 S.W.2d 600, 601 (1989).

> element of the crime charged, a defendant relying upon self-defense bears the risk that the jury will not be persuaded of his version of the facts [citations omitted].

Johnson's defense strategy was to depict himself and his son as victims of continuous attacks by the bar patrons. Johnson asserts that both Lovelace and Hicks were large men who were in his path as he was trying to exit the bar and check on his son. Johnson claims that he responded, as anyone would, in protecting his son and himself. Johnson sought to persuade the jury that when he came back into the bar with the gun and the knife, that he was responding to the violence in the bar; that it was his perception that Lovelace was going to harm him as Lovelace tried to get past him as Lovelace tried to exit the bar; and that the fatal shot was fired only after he had fired two warning shots and only in response to Lovelace blocking his path in a threatening manner. Johnson made similar claims regarding the stabbing of Hicks.

However, the record contains evidence that Johnson had already had an altercation with others at the bar and that he had been told to leave. In addition, none of the witnesses saw Lovelace with a gun, knife or other weapon, nor did any witness see Lovelace attempt to harm or threaten Johnson. Moreover, the variances between Johnson's statements at the scene and the testimony at trial give rise to the possibility of fabrication.

In convicting Johnson of the offense of manslaughter in the second degree, the jury was required to believe, beyond a reasonable doubt, that when he killed Lovelace by shooting him with a gun he acted wantonly in his belief in self-protection or in protection of his son. In convicting Johnson of the offense of assault in the fourth degree, the jury was required to believe, beyond a reasonable doubt, that when he injured Hicks by stabbing him with a knife he acted recklessly in his belief in self-protection or in protection of his son. As has been frequently noted, "[c]redibility and weight of the evidence are matters within the exclusive province of the jury."[50] Based on all the testimony presented at the trial, it was not clearly unreasonable for the jury to find Johnson guilty of both charges. Thus, the trial court properly denied Johnson's motion for a directed verdict of acquittal.

For the foregoing reasons, the final judgment of the Kenton Circuit Court is affirmed.

ALL CONCUR.

[50] Commonwealth v. Smith, Ky., 5 S.W.3d 126, 129 (1999).

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