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Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000972-MR

DEVLIN BURKE APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE PATRICIA M. SUMME, JUDGE
ACTION NO. 10-CR-00563

COMMONWEALTH OF KENTUCKY APPELLEE

<u>OPINION</u>
<u>AFFIRMING</u>

** ** ** ** **

BEFORE: CLAYTON, COMBS, AND NICKELL, JUDGES.

NICKELL, JUDGE: Jurors found Devlin Burke guilty of kicking Katie Meyer in the back, and knifing three men who attempted to rescue her in the early morning hours of August 15, 2010. Sentences of sixty days on the fourth-degree assault[1] of Meyer and ten years on each of the three counts of second-degree assault[2] on the

[1] Kentucky Revised Statutes (KRS) 508.030, a Class A misdemeanor.

[2] KRS 508.020, a Class C felony.

three men were recommended. Jurors further recommended Burke's sentence be enhanced to seventeen years due to his status as a persistent felony offender in the second degree (PFO II).[3] The Kenton Circuit Court ordered all terms to run concurrently with each other, but consecutively to a prior federal conviction for conspiracy to violate civil rights.[4] Burke appeals claiming the trial court erroneously admitted prejudicial and irrelevant evidence, inaccurately instructed the jury, and, wrongly restricted his right to present a defense.

Coupled with the alleged trial errors is an attack on the constitutionality of Kentucky's hate crime statute—KRS 532.031—a matter of first impression for this Court. Burke claims he should have received pretrial notice of the Commonwealth's intention to pursue the finding of a hate crime; jurors should have been told how a hate crime impacts parole eligibility; and, rather than a judge finding Burke's actions to be a hate crime by a preponderance of the evidence, jurors should have been required to make that finding beyond a reasonable doubt. Having reviewed the record, the briefs and the law, we affirm.

FACTS

Trial testimony revealed that on Saturday, August 14, 2010, Meyer hosted a housewarming party at her new apartment in Covington, Kentucky. Her

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[3] KRS 532.080.

[4] About a year before this incident, Burke had been placed on supervised release from a federal conviction for intimidating/harassing a black family based on race. *United States v. Burke,* Case No. 02-CR-00058-1-JBC. At the time of sentencing, he had two years to serve on the federal conviction.

guests were men and women of various sexual orientations. Around midnight, the gathering broke up and Meyer accompanied eight of her guests—including Deidre Sprague, Ondine Quinn and Connie Kohlman—to Mainstrasse Village.

As the group of men and women walked from the Village Pub to the Yadda Club in small clusters, they crossed a gas station parking lot on Pike Street. At the same time, an unrelated group of five people left Mr. T.'s Bar and got into a white Pontiac Firebird parked on the same lot. Charles Clark was the driver and his front seat passenger was Erica Abney, Burke's cousin. In the back seat were Burke, Pam Keller and her boyfriend, Timothy Searp. Clark started the car and backed up quickly, nearly hitting Quinn and Sprague, which prompted Quinn to quickly rap twice on the car trunk to alert the driver to her presence. Quinn and Sprague continued walking, unaware of any lingering issue.

Suddenly, Abney exited the passenger door of the Firebird, closely followed by Keller, and began hurling antigay slurs at Quinn and Sprague. At about the same time, Searp and Burke exited the driver's door. As Burke slammed the car door shut, Sprague heard him say "fucking dykes." Searp chased Quinn around the corner of a building. Sprague watched Burke follow Searp around the corner, laugh and say, "You gonna run?"

Once around the corner, Searp grabbed Kohlman by the hair, kicked her, punched her, slammed her against a brick wall, and threw her into the street.[5]

[5] Searp is a convicted felon with five tattoos. Seven days after the incident, he was charged with the fourth-degree assault of Kohlman, for which he pled guilty and served sixty days. The Commonwealth did not seek a finding that Searp's actions were motivated by hate. At Burke's trial, Searp testified for the defense—admitting he attacked Kohlman, and claiming he did so

Upon hearing screams, Sprague ran around the corner of the building to find Kohlman lying on the ground, partially propped against a trash can, crying. Sprague turned briefly, and upon turning back to Kohlman, saw Meyer lying on top of Kohlman—attempting to protect her—with Burke standing over both of the women—his arms up and his fists clenched. Meyer heard Burke say "fucking dykes" and "clit lickers." Burke was the only person nearby when Meyer was kicked in the back. Burke was unfazed when Meyer hit him in the leg with a wine bottle. By this time, about two dozen people had gathered across the street and Burke ran toward the crowd.

As Meyer made her way to a gas pump for shelter and to call 911, James Patton drove by in a van. With Patton were his girlfriend—Jessica Ladd—Justin Sizemore and Preston Akemon, a sixteen-year-old boy. As Patton approached Pike Street, he noticed a large group of people gathered on the corner and heard a scream. Ladd recognized Keller in the crowd. Sizemore thought he saw an acquaintance in trouble and suggested they stop and help.

Patton pulled into the gas station parking lot. When asked by the van's occupants if help was needed, Meyer said, "Yes." Unbeknownst to Patton, Sizemore had already exited the van. Patton saw Sizemore run by the van being chased by Searp and Burke. Patton recognized Burke, having seen him once in

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without any involvement from Burke. He said he did not see Meyer that evening and did not see Burke cut anyone.

Mr. T's Bar. According to Patton, Searp was older than Burke and had fewer tattoos.

Patton did not see Sizemore—who was unarmed—provoke anyone or swing at Burke. He did, however, see Burke swing at Sizemore. Patton—also unarmed—exited the van and said to Sizemore, Searp and Burke—all of whom appeared to be in fighting mode—"Guys, it ain't gotta be like this." Burke swung at Patton, causing Patton to jump back and take cover behind the van. Patton felt a stinging sensation in his left abdomen and realized he had been cut. The injury would later require twenty-eight stitches to close.

Patton reached into the van and pulled a homemade hammer[6] from a tool bin. While circling the van in search of Burke, Patton spotted Burke chasing Sizemore. Patton saw no one attack Burke.

When Burke came back toward the van, Patton noticed Burke had a knife in his hand. Burke approached Patton, but Patton raised the hammer as if to strike Burke and said, "back off," causing Burke to back up slightly. Then, Burke motioned toward Patton with the knife saying, "Come here Pussy, come on."

Akemon testified that as Patton parked the van, he saw Burke—whom he described as a tall, skinny, white guy with lots of tattoos—yelling at a woman. As Akemon sat in the van looking out the window, Burke ran toward the van, swung at Akemon cutting the boy's arm, and continued running. The cut did not hurt, but it did require twelve stitches. Upon being cut, Akemon exited the van,

[6] A three-pound solid steel block welded to a sixteen-inch long black pipe.

placing a pocket knife with a three-inch blade on the van in case he needed it. Akemon saw Sizemore running in the middle of the street with Burke chasing him. Akemon testified Burke could not have seen his pocket knife before cutting his arm. Akemon testified he saw Sizemore swing at Burke and jump a fence.

Chris Pfeiffer was also in the area that night. He was waiting with a friend to pick up Pfeiffer's sister from the Yadda Club. Upon hearing a female scream, and fearing it might be his sister, Pfeiffer went to Pike Street to investigate. There, he encountered Burke, whom he described as a white man with tattoos "everywhere" and short hair. When Pfeiffer's friend yelled, "he's got a blade," Pfeiffer looked at Burke and saw a knife in Burke's hand. Seconds later, Burke swung at him and as Pfeiffer ducked, Burke stabbed him in the nape of the neck. Pfeiffer stated he did not provoke Burke who attacked him "out of the blue." Pfeiffer did not want to get into trouble and left the scene to avoid police. It was not until Pfeiffer appeared at the hospital for treatment that police realized he was another of Burke's victims.

Police in plain clothes and unmarked vehicles were already in the area on stepped-up patrols due to a rash of recent assaults. Upon being dispatched to a fight that was upgraded to a stabbing, Specialist Justin Bradbury saw a large crowd in the gas station parking lot, a chaotic situation, and five people entering a white Pontiac Firebird. A woman in the crowd began identifying suspects.

All five occupants of the car complied with the officer's requests and denied involvement in the episode. None of the five accused anyone of bothering

them. Burke was arrested for second-degree and fourth-degree assault; Searp was arrested for alcohol intoxication; Abney was arrested for disorderly conduct; and Clark was arrested for drug possession. Keller was detained.

After taking statements from victims and witnesses, Detective Derrick Uhl interviewed Burke at 5:22 a.m. on August 15, 2010. A redacted version of the videotaped interview was played at trial over defense objection. In it, Burke stated he and his friends were ready to leave when people walking behind the Firebird banged on the car and rocked it forward. Abney jumped out of the car and Burke followed in an attempt to calm Abney and get her back in the car. Burke said he wanted to leave, but Abney's words only heightened the tension. Burke said someone hit him in the mouth drawing blood briefly. Burke said he had undergone facial reconstructive surgery five days earlier due to a motorcycle crash.

Burke stated the "dudes and chicks" that night all looked alike. One girl, a "dude-ish chick," said sorry; a "dude" wanted to fight him and took off his shirt; another "dude" came around the corner with a pipe and ran circles around him. Burke stated he hit no one; although he has a reputation for using knives, he was unarmed that night; and, despite Det. Uhl giving him several opportunities to claim self-protection, he had no need to defend himself. Burke said, "I don't cut, I stab," and, "I don't back down."

Searp was the first witness called by the defense. He testified he consumed eight to ten beers at the bar, the group got in the car, and while backing

up, Clark nearly hit two females with the Firebird. After assaulting Kohlman,[7] Searp returned to the car, a van stopped, and three men offered help. Searp heard screaming and yelling, but did not know by whom. Searp testified the three men from the van yelled at Burke, but Burke did not respond or retaliate. Searp denied calling Quinn and Sprague "dykes" or "lesbians."

Clark also testified for the defense. He acknowledged drinking two beers that evening, not seeing much, but hearing a lot of "screaming and hollering." He said he had been with Abney at the bar, where she introduced him to Searp, Keller and Burke. Upon leaving the bar, the quintet got into Clark's Firebird. As he put the car into reverse, he saw two girls walking behind the car. The girls beat loudly on his car trunk two or three times. In response, Abney got out of the car and said to the girls, "What the f--- are you all doing?" Everyone else followed Abney out of the car and the scene became chaotic with a lot of "cussing." Abney and the two girls were mildly aggressive toward each other. As Clark tried to get Abney back inside the car, he did not recall Burke's saying anything. Suddenly, everyone was gone, except for Clark, who stayed by his car. Clark did not follow Searp and Burke and did not hear or see the attack on Kohlman and Meyer.

A short time later, Abney, Keller, Searp and Burke returned to Clark and got in the car. As Clark prepared to drive away a second time, a white van

[7] Searp testified no one told him to attack Kohlman, and she did not scare him or do anything to prompt the attack. Searp said he had a few words with Kohlman that angered him.

parked on the lot. The van's driver, Patton—a stranger to Clark—jumped out with a hammer and hollered as he headed toward the Firebird. As Patton approached, swinging the hammer in the air, everyone exited the car again. By now, there were lots of people on the parking lot. Clark testified he never heard, nor spoke, any antigay slurs and never saw a fight. Police arrived just as the quintet was entering the Firebird for the third time.

On cross-examination, without objection, the Commonwealth asked Clark about a green-handled knife found in the car's console. Clark admitted the knife was his and stated he had not given the knife to Burke. The green-handled knife was not tested for fingerprints, blood or fibers. In contrast, a brown-handled knife—identified by Burke as the weapon he used to cut Patton, Akemon and Pfeiffer—was tested for fingerprints and visually inspected for blood and fibers, but nothing of value was found. Clark testified he did not see Burke with a knife that evening and was unaware Burke was armed.

The Commonwealth cross-examined Clark about his arrest for a pill bottle found in the car bearing the name "Stacy Crail." Defense counsel renewed a motion *in limine* to exclude mention of the bottle. At the bench, the prosecutor argued a pill bottle bearing a prescription for someone else was relevant to Clark's credibility. The trial court agreed it was "part and parcel" of Clark's choosing not to drive away from trouble and overruled the objection. Thereafter, Clark admitted he was arrested for possession of Xanax. Resolution of that charge was not revealed. Clark explained that three weeks prior to this incident, he had loaned his

car to Crail, she was arrested in Cincinnati, he retrieved his car, and did not know the bottle had been left in his car.

Also on cross-examination, the Commonwealth asked Clark why he did not just drive away when Patton approached the Firebird with the hammer. Clark had no answer, but agreed leaving was an option, and confirmed Burke had not asked him to leave. On redirect, defense counsel asked whether he was afraid when he saw Patton with the hammer. Clark said he was, and agreed someone could have been seriously injured or killed by the hammer. On recross, the prosecutor stated, "Despite this man wielding this serious instrument, you all got out of the car to confront him. Is that accurate?" Without hesitation, Clark responded, "Yes." This question and response drew a defense request for a third round of questioning. The trial court stated re-redirect is not normally allowed, but invited counsel to approach the bench and explain the need for an exception. Defense counsel argued the Commonwealth's final question had left a misleading impression because Clark did not know anyone's intention but his own. When the trial court said the Commonwealth's question had actually clarified a matter opened by the defense on redirect, and the point could be argued in summation, defense counsel asked for an admonition which was overruled.

In a brief two-minute avowal, Clark said he and his passengers did not really exit the Firebird to fight Patton, but rather to see what Patton wanted since "he was wanting to start trouble." Clark admitted he did not know anyone's mindset but his own, and no one from the Firebird physically went after anyone.

Burke testified in his own defense. He said he had finished the eighth grade and grew up distrusting police. In response to questioning from his lawyer, Burke stated he doubted police believed him, probably because of his appearance.

In describing the event, Burke stated Clark and Abney picked him up Saturday and took him to a bar where they ran into Searp and Keller. Burke said he was still in pain from Tuesday's surgery and consumed half a beer at Mr. T's Bar. According to Burke, the quintet left the bar, got into the Firebird to go home, and as Clark backed up, someone hit the trunk. Abney exited the car and argued with two women. Soon, everyone exited the car. As Burke tried to calm Abney and coax her back inside the Firebird, people came from around the corner and all directions. Burke said he made no homophobic comments and was not involved in any assault.

When Burke had just about separated Abney from the two women, two men came toward him; one of them—Pfeiffer—wanted to fight. Just as Burke told Pfeiffer "get away from me" and turned to walk away, three men from a van came toward him—yelling; Patton had a hammer and Akemon had a knife. When Burke saw the hammer and knife, he pulled his own brown-handled knife from his pocket. About the same time, Pfeiffer tried to tackle Burke and Burke cut Pfeiffer on the neck as Pfeiffer ducked. Burke then cut Akemon on the arm, and sliced Patton in his side before Patton could strike him with the hammer. When Burke heard sirens, he threw the knife on the ground and got in the Firebird. Burke said he thought he might be killed.

On direct examination, Burke testified he thought police may have disbelieved him because of his appearance. On cross-examination, Burke confirmed he had told his attorney he was concerned about his treatment by police as a result of his tattoos. Burke's hands, arms, shoulders and upper torso are cluttered with a continuous sweep of tattoos—including a prominent skull and gun sight in dark ink on his Adam's apple. A much lighter-inked swastika appears on his left shoulder. Although not depicted in the record, his abdomen bears a tattoo of Adolph Hitler and the word "skinhead." The letters "SAC"[8] appear over his left eye. With the exception of images on his hands and some on his neck, all his tattoos were concealed from jurors by a long-sleeved shirt with a buttoned collar and tie.

The Commonwealth approached the bench and argued defense counsel's question to Burke about being treated differently due to his appearance had opened the door to discussion of the tattoos and made them—specifically the swastika—relevant. The trial court agreed the defense had opened the door by referencing Burke's appearance, but required the Commonwealth to lay a better foundation before talking about the swastika. When cross-examination resumed, the prosecutor asked Burke what concerned him about his appearance. He responded, "my tattoos." When asked what concerned him about his tattoos leading to different treatment, defense counsel objected, stating the tattoos were irrelevant. The trial court overruled the objection and Burke responded, "I'm not

[8] A reference to Soldiers of Aryan Culture.

your ordinary looking person." He acknowledged some people are scared or threatened by his appearance, and strange men have approached him wanting to fight. The prosecutor never mentioned the swastika to the jury, nor to Burke.

PROCEDURAL BACKGROUND

On September 16, 2010, Burke was indicted on three counts of second-degree assault and one count of fourth-degree assault. On December 2, 2010, he was indicted as a PFO II.

On February 14, 2011, defense counsel filed three motions *in limine.* The first one sought to prohibit mention of nine phrases—"Hate crime," "You're not welcome here," "Mind your own business," "White man, white power," "Lesbian," "Bitch," "Homo," "Faggot," and, "You fucking dykes." The Commonwealth had asserted its intention to prove one or more witnesses had attributed the last eight phrases to Burke. Defense counsel noted that while several witnesses had said they heard antigay slurs, they did not attribute them to a specific person. Defense counsel argued the phrases were hearsay; irrelevant; inadmissible character evidence; their probative value was substantially outweighed by the danger of undue prejudice and jury confusion; and, their admission would deny Burke due process. The defense suggested jurors would be inflamed by Burke's alleged use of denigrating terms related to sexual orientation, and would base their decision on emotion rather than facts due to some of Burke's many tattoos, particularly the swastika and image of Hitler. Burke maintained jurors would equate the phrase "hate crime" with the assaults and be unable to separate the two.

The Commonwealth argued any statement a witness heard Burke utter was not hearsay and was, therefore, admissible. The Commonwealth went on to say the words Burke wanted to exclude established his:

> motive for such a senseless act. To not allow the jury to hear the Defendant's words would be misleading and confusing to them. The jurors would have no idea as to what precipitated this attack.

The second motion *in limine* sought to exclude any reference to three items found in Clark's car—the prescription pill bottle; a hammer found between the driver's side door and seat; and the green-handled folding knife.[9] The same grounds asserted in the first motion were repeated in the second, minus the claim of hearsay. The Commonwealth responded it did not intend to introduce the hammer and pill bottle during its case-in-chief, but reserved the ability to argue the point in rebuttal if those items became relevant. The Commonwealth argued the green-handled knife was relevant and should be admitted because police found both it and Burke inside the Firebird, and three of the assaults were committed with a knife.

The third motion *in limine* sought to exclude testimony about—and photos of—Burke's tattoos, their perceived meanings and his affiliation with

[9] While searching the perimeter of the Firebird, K-9 Officer Michael Lusardi's dog alerted, prompting a search of the car's interior and leading to discovery of the knife and pill bottle. At trial, defense counsel objected to questioning on this point on grounds of relevance. At the bench, the prosecutor said the witness had been warned not to mention the pill bottle or the hammer, and would testify only that the search revealed a green-handled knife in the console. The trial court overruled the objection, stating the officer could explain he searched the car's interior because he had reason to do so. After further questioning, the green-handled knife was admitted over Burke's objection.

discriminatory groups. Again, defense counsel cited four reasons in support of exclusion and specifically asked that Burke's mug shot be excluded and any mention of tattoos be limited to that necessary for identification purposes. In response, the Commonwealth stated only one witness had known Burke before the assaults, and all the other witnesses had described Burke as "the man with a lot of tattoos." Some witnesses recalled seeing a swastika or other specific tattoo. The Commonwealth asserted the tattoos were relevant to establish motive as the quintet used words of hate and discrimination corresponding with Burke's white supremacist tattoos. The Commonwealth also argued photos showing Burke's tattoos would be relevant if Burke claimed self-protection or injury because the photos showed no injuries. The Commonwealth stated it did not intend to explore the meaning of any of Burke's tattoos or reveal the tattoo of Hitler and the word "skinhead" on his abdomen unless Burke claimed injury to that part of his body.

The motions *in limine* were heard February 14, 2011, with the main topic being exclusion of the tattoos. The trial court noted the Commonwealth would have to link the tattoos to something meaningful to make them admissible. The Commonwealth said the tattoos were relevant for identification purposes since witnesses would identify Burke by his tattoos. Defense counsel stated he was willing to make certain "concessions" to minimize the relevance of the tattoos, but did not elaborate. The trial court determined the Commonwealth could talk about identifiers Burke had openly shown to the public. Defense counsel responded he

would strenuously object to showing Burke's tattoos to the jury, prompting the trial court to rule it would balance any prejudice from a tattoo used as an identifier.

Both the Commonwealth and the defense tendered instructions prior to trial. The Commonwealth's proposed instructions permitted verdicts of not guilty, guilty of second-degree assault (three counts), and guilty of fourth-degree assault. There was no mention of self-protection or imperfect self-protection,[10] two theories incorporated in the version tendered by Burke.

Trial commenced March 15, 2011. As a preliminary matter, the trial court ruled the photo of Burke taken soon after the incident and revealing his tattoos would not be redacted; would be "quickly" published to the jury; and, would not be sent to the jury room during deliberations. Additionally, witnesses were to be instructed not to comment on specific tattoos (*i.e.,* the swastika) unless such a comment became important. The Commonwealth stated it would warn the witnesses who had noticed the swastika not to mention it at trial, and it would introduce only one photo of Burke.

During voir dire, both the Commonwealth and the defense explored self-protection with prospective jurors. The Commonwealth revealed the testimony would include derogatory words, and the defense discussed deadly force and imperfect self-protection. Defense counsel also revealed Burke had lied

[10] To claim "imperfect self-protection," a defendant acts "in self-protection under a mistaken belief in the need therefor[.]" *Commonwealth v. Hager,* 41 S.W.3d 828, 831 (Ky. 2001). *See* KRS 501.020(4) and KRS 503.120(1).

during his interview with Det. Uhl; tattoos would be an issue; Burke has tattoos on his hands; and, tattoos can have negative connotations.

Sprague was the first witness called by the Commonwealth. When asked whether she was comfortable revealing her address for the record, she stated she was not. When the prosecutor asked why, defense counsel objected. At the bench, Burke argued Sprague's comfort was irrelevant, prejudicial, assumed Burke was guilty, and should not be pursued. The Commonwealth explained the female witnesses did not want to make their addresses public knowledge. The trial court noted the witnesses might have been assuming Burke's guilt, but the court was not. Ultimately, the trial court overruled the objection and allowed the Commonwealth to ask Sprague if she did not want to share her address "because of the circumstances surrounding the case" to which she responded, "Yes" and said she lived in Cincinnati. Similar questions posed to Meyer elicited the same objection. Meyer ultimately said she lived in the tri-state area.

During their testimony, Sprague, Kohlman and Meyer were shown a photo of Burke as he looked just after the incident. Defense counsel objected to use of the photo, asked that it be redacted (*i.e.,* blur the tattoos), and asked that it not be published to the jury. The trial court allowed the photo to be shown quickly to the jury. Other witnesses identified Burke from the photo, too, but it was shown briefly to the jury only three times. Ultimately, jurors found Burke guilty on all charges.

During the sentencing phase of trial, Megan Schubert, a probation and parole officer, testified good time credit may be statutory, meritorious or educational. She explained second-degree assault is a Class C felony carrying a sentence of five to ten years for which a person becomes parole eligible after serving twenty percent (four years of a twenty-year sentence) of the term. She discussed concurrent versus consecutive sentencing. She went on to say, if Burke were found to be a PFO II, his sentence would be enhanced to a Class B felony, which carries a penalty of ten to twenty years. In relating Burke's criminal history, she testified at the time of the latest episode he was on supervised release from a federal conviction for which he had been sentenced to eighty-seven months in July of 2003. He had also been convicted of fourth-degree assault, a misdemeanor, in April 2002, and reckless homicide, a felony, in November 1997. Defense counsel cross-examined Officer Schubert briefly about parole eligibility and good time credit.

After the Commonwealth closed its case, Burke's mother, Kim Burkhill, testified. She said her husband had been a thief and made crystal meth at home. The family moved frequently, trying to stay one step ahead of the law. Burkhill painted a picture of a violent marriage in which she used drugs daily, drank heavily, gave birth to Burke when she was nineteen, and served two prison terms herself. She testified she was taught not to mix races and that is how she taught her children. She stated she had several gay friends and a gay woman had

lived in her home for several years. She testified Burke is not homophobic and was confident he committed the assaults because he felt threatened.

On March 17, 2011, jurors recommended a punishment of seventeen years—less than the twenty-year maximum for an enhanced sentence. On March 21, 2011, the trial court formally found Burke guilty in conformity with the jury's verdict. Final sentencing was postponed until April 26, 2011, pending completion of the presentence investigation report.

On April 19, 2011, the Commonwealth filed a written motion asking the trial court to find hate had been Burke's primary motivation in committing the assaults. The motion specifically stated:

> The evidence submitted at trial was that the entire incident started because [Burke] and his friends encountered women who appeared to be lesbians. Derogatory names was (sic) yelled at the women such as "dykes" and "clit lickers" and two women were physically assaulted – one for which [Burke] was convicted of Assault Fourth Degree. But for (sic) attack, both physical and verbal, on the lesbian women, the three men who were stabbed would not have been assaulted.

On April 26, 2011, Burke filed a written objection to the constitutionality of the hate crime statute, KRS 532.031. Notice was sent to the Office of the Attorney General, but no response was filed. Burke alleged application of the statute would violate his Fifth, Sixth and Fourteenth Amendment rights and Section 11 of the Kentucky Constitution. Flaws alleged included lack of pretrial notice; the jury's acting on inaccurate information about parole eligibility; and Burke's not having a pretrial opportunity to oppose the finding of a hate crime.

The motion and objection were discussed briefly on April 26, 2011, and fully explored during the sentencing hearing on May 17, 2011. Following argument, the trial court found the statute was constitutional, writing in the judgment entered May 27, 2011:

> [t]he current statutory scheme for sentencing requires the court to consider the facts of the case, the defendant's history, and any mitigating or aggravating factors prior to sentencing. KRS 532.031 requires a court to make specific written findings if it considers that the actions of a defendant are motivated by a hate which would generally be an aggravating factor. This statute entitles the defendant to know the facts the court relied upon and how it impacted the court in determining a sentence. This is not a change in the statutory scheme but an additional requirement. The statute does not add time to the defendant's sentence nor does it change the regulatory scheme under which his parole will be reviewed. Clearly, the legislature considered the court's view of the facts of a case and the reasons for tagging the defendant's actions as a "hate crime" as important information for the Department of Corrections. The court finds that the statute does not suffer from the constitutional impediments that were argued by the defendant.

Thereafter, probation was denied, not because of the finding of a hate crime, but because it would "unduly deprecate (sic) the seriousness of the crime, and the (sic) several of the victims suffered a serious physical injury." With the foregoing history in mind, we address Burke's specific issues.

ANALYSIS

FINDING A HATE CRIME

Adopted in 1998, and amended in 2000, KRS 532.031 directs:

(1) A person may be found by the sentencing judge to have committed an offense specified below as a result of a hate crime if the person intentionally because of race, color, religion, sexual orientation, or national origin of another individual or group of individuals violates a provision of any one (1) of the following:

(a) KRS 508.010, 508.020, 508.025, or 508.030;

(b) KRS 508.050 or 508.060;

(c) KRS 508.100 or 508.110;

(d) KRS 509.020;

(e) KRS 510.040, 510.050, 510.060, 510.070, 510.080, 510.090, 510.100, or 510.110;

(f) KRS 512.020, 512.050, or 512.060;

(g) KRS 513.020, 513.030, or 513.040; or

(h) KRS 525.020, 525.050, 525.060, 525.070, or 525.080.

(2) At sentencing, the sentencing judge shall determine if, by a preponderance of the evidence presented at the trial, a hate crime was a primary factor in the commission of the crime by the defendant. If so, the judge shall make a written finding of fact and enter that in the court record and in the judgment rendered against the defendant.

(3) The finding that a hate crime was a primary factor in the commission of the crime by the defendant may be utilized by the sentencing judge as the sole factor for

> denial of probation, shock probation, conditional discharge, or other form of nonimposition of a sentence of incarceration.
>
> (4) The finding by the sentencing judge that a hate crime was a primary factor in the commission of the crime by the defendant may be utilized by the Parole Board in delaying or denying parole to a defendant.

Having set forth the statutory language in full, we make the following points about this provision.

First, a jury plays no role in determining whether a crime is a hate crime—that decision is made by the sentencing judge alone, based upon a review of evidence developed at trial. Citing *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), Burke argues the hate crime determination must be made by a jury beyond a reasonable doubt to pass constitutional muster. While having jurors make the determination was certainly an option, the legislature opted for a different route, and that route is sound. Because a finding of a hate crime in Kentucky has only minimal effect—creating just one more factor a sentencing judge may use to deny probation, and another factor the parole board may use to deny or defer parole—it need not be made by a jury. More to the point, because the statute does not increase the maximum penalty for any crime, the constitution does not require it to be made by a jury.

Apprendi struck down a New Jersey statute because it allowed a judge to impose an "extended" prison term without jury input. The Supreme Court held:

> under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth

> Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.

(*Id*. 530 U.S. at 476, 120 S.Ct. at 2355 (quoting *Jones v. United States,* 526 U.S. 227, 243, n. 6, 119 S.Ct. 1215, 1224, 143 L.E.2d 311 (1999)). Unlike the statute in *Apprendi,* which provided for an "extended" term of imprisonment, KRS 532.031 does not increase the maximum penalty for any crime—a fact Burke admits. Its impact is limited to the amount of time one actually serves once sentence is pronounced.

Comparison to KRS 439.3401, Kentucky's violent offender statute, is not a perfect match. If one is convicted of a violent crime, he "shall not be released on probation or parole" until he has served a specified portion of his sentence. A finding of a hate crime is not so definite—it may have no impact whatsoever since it is just one more factor that *may* be considered by the sentencing court and parole board.

For similar reasons, the Commonwealth is not required to reveal its intention to seek a hate crime finding in the indictment. Because a "hate crime" is not a separate offense and does not enhance the penalty, it does not have to be included in the indictment. *Soto v. Commonwealth,* 139 S.W.3d 827, 841 (Ky. 2004), analyzed whether a capital indictment provided sufficient notice of the charges and aggravating circumstances to the accused. Commenting upon *Apprendi,* it noted the indictment did not reference New Jersey's hate crime

statute. However, because that omission was not alleged as error, it was not addressed by the United States Supreme Court. In *Soto,* our state Supreme Court declined to adopt federal law on the proper structure of an indictment and chose instead, to "apply existing Kentucky law" on this issue. *Id.* at 842. As expressed in *Soto,*

> Criminal Rule (RCr) 6.10(2) provides that an indictment is sufficient if it contains "a plain, concise and definite statement of the essential facts constituting the specific offense with which the defendant is charged." Further, RCr 6.10(1) requires only that the indictment provide sufficient information to give the defendant *notice* of the charge(s). *Caudill v. Commonwealth*, Ky., 120 S.W.3d 635, 650 (2003); *Thomas v. Commonwealth*, Ky., 931 S.W.2d 446, 449 (1996).

Id. at 842. Here, the two indictments adequately apprised Burke of the allegations against him. He was tried on three counts of second-degree assault and one count of fourth-degree assault. Those are the only offenses of which he was convicted and for which he was sentenced. His sentence was enhanced by virtue of his status as a PFO II. The jury recommended a sentence of seventeen years—less than the maximum allowed—and that is the term the trial court imposed. Thus, the jury set his punishment, as Burke argues was his statutory right. *Wilson v. Commonwealth*, 765 S.W.2d 22 (Ky. 1989). Burke's sentence was not lengthened by the trial court's finding of a hate crime.

We see no harm in the Commonwealth's announcing its intention before trial, but we have no basis upon which to impose such a requirement, and certainly no basis upon which to require the announcement to be included in the

indictment.[11] We will not put the Commonwealth in the position of having to predict, prior to indictment, whether proof of hate in the commission of a crime will be forthcoming, and then prevent the Commonwealth from seeking the finding of a hate crime if such proof develops unexpectedly. Here, the defense was aware of the existence and potential applicability of KRS 532.031 as evidenced by its first motion *in limine*, which sought to exclude mention of the term "hate crime."

Second, whether a crime constitutes a hate crime is determined *after* a defendant has been convicted of a specified offense. Burke characterizes the finding of a hate crime as a "sentencing factor." We disagree. The jury recommends the appropriate sentence *before* the hate crime determination is made. The finding of a hate crime potentially impacts only the amount of time actually served, not the length of sentence imposed.

Burke argues he may have proceeded differently had he known before trial the Commonwealth would seek a finding of a hate crime. Based on the facts, we conclude he knew that was a possibility. Moreover, while it is true that had the Commonwealth announced an intention to pursue a hate crime finding from the start, Burke may have approached the case differently, it is also true the proof that developed at trial may not have supported such a finding.

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[11] We question Burke's citation to *Hendrix v. Commonwealth,* 2005 WL 2107648 (Ky. App. 2005)(2004-CA-000842-MR). While unpublished cases may be cited for our consideration pursuant to Kentucky Rules of Civil Procedure 76.28(4), *Hendrix* neither requires, nor even discusses, including a notice of intent to pursue a hate crime finding in an indictment. That merely happens to be the way the Commonwealth proceeded in that case. Contrary to Burke's brief, *Hendrix* has no precedential value.

Burke maintains that had he known the Commonwealth's plan before trial, **he may have** pled guilty, objected more strenuously to certain evidence—such as the photo showing his tattoos that was later used to show his hatred, testified about his motivation for the assaults, stressed the impact of a hate crime finding on parole eligibility, and emphasized the three men he assaulted were strangers to Meyer. The fact is, he was not foreclosed from doing any of those things. He strenuously objected to use of his photo. KRS 532.055(2)(b) specifically allows a defendant to offer proof "in mitigation or in support of leniency" during the truth-in-sentencing portion of trial. Nothing prevented him from introducing proof that if the crimes were found to be hate crimes, the parole board could deny parole. Burke made a calculated decision that ultimately failed. His fate is not the result of error or constitutional infirmity.

Third, if the sentencing judge is convinced by a preponderance of the evidence that a particular set of facts demonstrates an offense was intentionally perpetrated upon an individual or group due to "race, color, religion, sexual orientation or national origin," that crime may be declared a "hate crime," but only if the judge is convinced hate was the primary motivation for the crime. Burke makes

much of the fact that there was no proof of the sexual orientation of any of the victims and witnesses. He claims it was just as likely he launched his attack because he was out of control rather than because he hated lesbians.

While there was no proof any of the women involved were lesbians, we have been cited no clear authority requiring such proof. Moreover, to impose such a requirement would unnecessarily further invade the privacy of the women—and the men who tried to help them.

Burke reads KRS 532.031 to require proof of the sexual orientation of the victim of a hate crime based on one's sexual orientation. This puts the focus on the victim when the focus must be on Burke and his actions. According to Burke, he was a peacemaker, trying to calm Abney and coax her back into the car so they could leave. In contrast, Sprague quoted Burke as saying, "fucking dykes," laughing, and saying, "You gonna run," then standing over Meyer and Kohlman with his hands up and his fists clenched. Meyer was kicked in the back as she attempted to protect Kohlman. Meyer quoted Burke as saying, "fucking dykes" and "clit lickers." On appeal, Burke suggests he was just out of control in a chaotic situation. But no one testified to that at trial. Importantly, when Burke testified he did not say he acted to intimidate his victims, or because he was angry and out of control—explanations he offers for the first time on appeal.

Fourth, there is no requirement that the actor's motivation be accurate, only that it prompted him to act. Whether Meyer and her female friends were lesbians is not the key. Whether accurate or not, Burke's belief that they were, as expressed by his own words, suggested his intention to act based on sexual orientation and convinced the trial court of his hatred by a preponderance of the evidence. Meyer was Burke's first victim, followed by Pfeiffer, Patton and

Akemon—three men who tried to help. Once the attack began, it did not stop until police arrived and placed Burke in handcuffs. As found by the trial court, four people were assaulted as a result of Burke's hatred of lesbians. We endorse the trial court's rationale that Burke engaged in a single episode that began with an assault on a woman, and ended with assaults on three men who offered her assistance.

Fifth, if the trial court is convinced hate was the primary motivator, it must make written findings on the record and incorporate those findings into the judgment. Following the sentencing hearing, the court made specific written findings supporting its belief that the assaults were primarily motivated by hatred of lesbians. The court wrote:

> [t]he defendant who was seated in the back passenger seat exited the vehicle just behind the woman who occupied the front passenger seat. The male driver stayed at the vehicle after he exited. A third male exited the vehicle from the back driver's seat. These individuals exited the car after and because a woman hit the trunk of the car with her hands to alert the driver to her presence. No words had been exchanged prior to the defendant's exit from the vehicle, although the woman passenger may have yelled some expletives. The woman who hit the car was walking in a group with one to two other women. These women kept on walking because they had no reason to divert their course of travel. The defendant, after getting out of the car, made a derogatory statement about the sexual orientation of the women and, after rounding the corner onto Pike Street, assaulted a woman in the group. At that time there were no other persons yet on the scene. The assault by the defendant and the other male as well as the argument between the female passenger and another woman in the walking group caused several groups of individuals to stop and

> attempt to break up the situation. The defendant then cut three men who arrived on the scene to assist.
>
> The facts demonstrate that [Burke] intentionally left the vehicle to assault women he believed to be lesbians. All his other actions including all of the assaults stem from his intention to harm a person because of their sexual orientation. Based on these trial facts, the court finds by a preponderance of the evidence that a hate crime was the primary factor in the commission of [all four assaults].

The trial court's findings were sufficient. Based on the foregoing, we hold KRS 532.031 is constitutional and no error occurred in its application.

ALLEGED TRIAL ERRORS

Burke claims the trial court erroneously permitted the introduction of irrelevant evidence that may have resulted in a guilty verdict based on his character rather than his actions. We review evidentiary rulings for an abuse of discretion. The test of abuse "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) (internal citations omitted). We give the trial court great deference in its exercise of discretion. *Fugate v. Commonwealth,* 993 S.W.2d 931, 939 (Ky. 1999) (internal citations omitted).

Burke's first complaint concerns a photo of him taken as he appeared at the time of the assaults. He claims the photo was irrelevant, unduly prejudicial, and inadmissible because it was proof of bad character or other crimes. Specifically, he claims showing jurors an unredacted photo in which a swastika is visible on his left shoulder violated KRE[12] 401, 402, 403 and 404, as well as his

[12] Kentucky Rules of Evidence.

constitutional rights to free speech and due process, and may have resulted in the jury convicting him based on his many tattoos and their unexplained meaning rather than on the evidence.

The trial court permitted the Commonwealth to use the photo for identification purposes. It was identified by the Commonwealth's first three witnesses—all of whom testified early on the opening day of the three-day trial. After each witness identified the photo, it was quickly published to the jury. We discern no error.

Although indicted alone, Burke and Searp were both active during the episode. Witnesses distinguished the two men on three characteristics. Searp had longer hair, only a few tattoos and wore a white tank top; Burke had a buzz cut, a continuous maze of tattoos on his upper body, and wore a gray tank top. One photo of each man was introduced at trial. Witnesses described the two men differently, but all agreed the heavily tattooed man inflicted the knife wounds and stood over Meyer when she was kicked in the back. Throughout trial, Burke wore a long-sleeved shirt buttoned at the collar to conceal his tattoos. Thus, just looking at Burke in the courtroom, jurors could not tell whether he was more heavily tattooed than Searp.

Relevant evidence is that which tends "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." KRE 401. Relevant evidence is

generally admissible. KRE 402. Relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of undue influence, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence." KRE 403.

With some exceptions, "[e]vidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion[.]" KRE 404(a). "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith[,]" unless offered for another purpose or so inextricably bound, the two cannot be separated. To be admissible, other crimes evidence must pass a three-part test announced in *Bell v. Commonwealth,* 875 S.W.2d 882, 889 (Ky. 1994). It must be relevant, probative, and the risk of prejudice must be outweighed by the probativeness.

More than a month before trial began, the trial court recognized it would have to balance potential prejudice from Burke's tattoos against the need for solid identification of the culprit. The trial court did just that by allowing introduction of a single photo of Burke and a single photo of Searp. While Burke's photo was published briefly to the jury on just three occasions, jurors had no access to the photo while deliberating—thus eliminating the opportunity for them to study the photo. Witnesses who had noticed and commented on the swastika were warned not to mention it and no one ever did. It is disingenuous for Burke to argue

no one identified him based on the swastika because at least one, Pfeiffer, did—but not in front of the jury.

Additionally, there was some confusion about whether the man who attacked Meyer wore a white or gray top, which made the photos of both men more relevant. The trial court's ruling is consistent with *Bell.* The photo was relevant on the issue of identification. It was probative because it showed how Burke appeared at the time of the episode and demonstrated Burke was heavily tattooed in comparison to Searp. Finally, the probative value of the photo far outweighed the risk of prejudice. Burke seizes upon the swastika—which is fainter than many of Burke's other tattoos—and is not the first tattoo to which the eye is drawn. None of the tattoos were singled out for comment or explanation. Even if, *arguendo*, the trial court's use of the photo was error, we would deem it harmless under *Brown v. Commonwealth*, 313 S.W.3d 577, 618 (Ky. 2010), especially in light of the overwhelming proof of guilt. All four victims positively identified Burke in the courtroom as the man who attacked them and Burke admitted cutting the three men.

Burke's next complaint is about items associated with Clark and his Firebird—a drug dog alert that prompted a search of the car's interior, discovery of a green-handled folding knife and a pill bottle inside the car, and Clark's arrest for possession of the pill bottle. Burke had filed a motion *in limine* to exclude the knife and pill bottle. Only the green-handled knife was introduced during the Commonwealth's case-in-chief. The knife was relevant because three of the four

assaults were committed with a knife, and the knife was found in the same car Burke was entering when police arrived on scene. Clark admitted he could have driven away when Patton came toward his car while swinging a hammer in the air. As the trial court noted, the knife was "part and parcel" of Clark's decision to remain. Clark's subsequent testimony that the green-handled knife was his negated any potential prejudice to Burke. In light of the overwhelming proof of Burke's guilt, jurors did not convict him because Clark, the quintet's chauffeur, kept a knife in his car.

The drug dog alert was relevant because it explained why the search of the car's interior occurred. Without that testimony, as argued by the prosecutor, jurors may have been skeptical about police authority to search the vehicle.

By testifying differently than other witnesses, Clark made his credibility an issue. KRE 608(a) specifies a witness's character may be attacked with evidence of opinion or reputation, but only as to truthfulness or untruthfulness. KRE 608(b) permits specific instances of conduct—other than criminal convictions—to be explored on cross-examination when probative of truthfulness or untruthfulness and must focus on "the witness' character for truthfulness or untruthfulness." We are convinced the trial court erred in allowing Clark's arrest for possession of a pill bottle bearing Stacy Crail's name to be brought out, but this error was harmless at most. *Crossland v. Commonwealth,* 291 S.W.3d 223, 233 (Ky. 2009). Clark offered a perfectly reasonable explanation for the bottle—Crail had borrowed his car a few weeks earlier and must have left the

bottle in the car. Upon receiving this explanation, the prosecutor ceased her cross-examination. Under *Crossland*, we cannot say the few minutes devoted to this topic in a three-day trial—where multiple eyewitnesses identified Burke as the man who cut three men with a knife and kicked a woman in the back—substantially swayed the jury's verdict.

Burke's next claim is that the trial court allowed the prosecutor to ask Sprague and Meyer if they were comfortable stating their addresses for the record knowing they were not, and giving the impression they were afraid of Burke because he was dangerous and guilty. We disagree. While the address of a witness was not an element of any of the crimes charged, it is normal for a witness upon taking the stand to state her name and address. The prosecutor knew Sprague and Meyer did not want to make their addresses public knowledge. In this day and age of privacy and security concerns, that is not an unreasonable request since courtrooms and court records are open to public view.

Burke suggests the women's fear reflected adversely on him. However, their concern may have been wholly unrelated to him, and as the Commonwealth argues, this exchange happened early in the trial and jurors would have recognized their concern. Again, applying *Crossland,* we cannot say Sprague and Meyer's desire not to reveal their addresses due to the circumstances and the ultimate resolution of allowing them to state a general location resulted in Burke's conviction. Contrary to Burke's position, any error was harmless at most.

Next, Burke complains the trial court's denial of his request for re-redirect examination of Clark improperly restricted his right to present a defense. We disagree. KRE 611(a) gives a trial court control over the mode and presentation of evidence. The rule is consistent

> "with the wide discretion trial courts have always had over the nature and scope of redirect and recross examination." Robert G. Lawson, *The Kentucky Evidence Law Handbook*, § 3.20[5], at 245 (4th ed. LexisNexis 2003) (quoting KRE 611(a)) (internal footnotes omitted).

Brown v. Commonwealth, 174 S.W.3d 421, 431 (Ky. 2005).

Burke claims the ruling denied him the right to present a defense because he would not be entitled to claim self-protection if he were the initial aggressor. Clark's direct testimony established Patton walked to the Firebird swinging a hammer. Thus, Clark's direct testimony having laid the groundwork for the self-protection claim, the defense was presented and the instruction was given.

Ultimately, Clark's avowal testimony added nothing other than confirmation he did not exit the car intending to fight anyone and he knew no one's mindset but his own. We fail to see how this point was critical to the defense, and as the trial court stated, the point could be argued in summation. The trial court properly exercised its discretion under KRE 611(a). Nothing more need be said.

Burke's final argument combines three complaints about the jury instructions. He admits the argument is only partially preserved and requests

palpable error review under RCr 10.26. The Commonwealth admits the fourth-degree assault instructions given as lesser included offenses of the second-degree assault instructions were flawed, but maintains the error was harmless.

First, Burke claims the trial court erred in giving jurors the option in the second-degree and fourth-degree assault instructions of finding the knife used to cut Pfeiffer, Patton and Akemon was a dangerous instrument. Characterizing the object as a pocket knife, and citing KRS 500.080(4), Burke argues the knife could not be a dangerous instrument because knives are specifically mentioned in the definition of deadly weapon; *ergo*, as a matter of law, the trial court had to find the knife was a deadly weapon. He claims the flaw resulted in a non-unanimous verdict.

We disagree with Burke's premise. The term deadly weapon includes "[a]ny knife other than an ordinary pocket knife or hunting knife[.]" KRS 500.080(4)(c). While an "ordinary pocket knife" or "hunting knife" cannot be a deadly weapon, it can be a dangerous instrument. Sprague testified Burke's weapon was "not a pocket knife;" but jurors may have thought otherwise. Hence, it was important to give jurors the option of finding the object Burke used to be a dangerous instrument which is defined in KRS 500.080(3) as:

> any instrument, including parts of the human body when a serious physical injury is a direct result of the use of that part of the human body, article, or substance which, under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or serious physical injury[.]

Since the knife caused serious physical injury to three men, requiring stitches and leaving scars, it qualified as a dangerous instrument, and the trial court was not required, as a matter of law, to deem it a deadly weapon. *See Commonwealth v. Potts,* 884 S.W.2d 654, 657 (Ky. 1994) (scissors as dangerous instrument).

While Burke maintains his knife was an ordinary pocket knife, Sprague testified it was not a pocket knife at all. Jurors saw the knife firsthand and could decide for themselves. There being sufficient evidence from which jurors could find the knife Burke used was either a deadly weapon or a dangerous instrument, we reject the argument that the jury verdict may not have been unanimous.

Burke next claims the second-degree assault and self-protection instructions misstated the law and confused the jury. According to Burke, from the final instructions, jurors were unaware they had to consider and reject theories of perfect and imperfect self-protection and fourth-degree assault and could not simply find him guilty of second-degree assault. Citing *Jackson v. Commonwealth,* 147 S.W.2d 715, 718 (Ky. 1941), the Commonwealth argues jury instructions must be read as a whole, not dissected into pieces and parts, and the "road map" instruction given by the trial court specified all the available options for each charged offense. We agree with the Commonwealth.

For the three counts of second-degree assault, jurors were told they could find Burke not guilty, or guilty of:

A) Assault in the Second Degree;

OR,
B) Assault in the Fourth Degree, intentional action and mistaken belief of right to self-protection;
OR,
C) Assault in the Fourth Degree, intentional action and no dangerous instrument;
OR,
D) Assault in the Fourth Degree, reckless action and dangerous instrument.

When coupled with the verdict forms for each count, which repeated the same four options for guilt—and not guilty—we are convinced jurors knew they were to consider both perfect and imperfect self-protection. Juries are "presumed to follow any instruction given to them." *Owens v. Commonwealth,* 329 S.W.3d 307, 315 (Ky. 2011) (internal citations omitted).

Finally, Burke requests palpable error review of the fourth-degree assault instructions given as lesser included offenses of the three second-degree assault charges. Although modeled on Cooper & Cetrulo, *Kentucky Instructions to Juries (Criminal),* §§11.07, 11.09 and 11.10 (5th ed. 2006), the mental state instruction was not linked to the corresponding imperfect self-protection instruction. As a result, it was unclear jurors could convict Burke of fourth-degree assault solely if they doubted the knife used to stab the three male victims was a deadly weapon or dangerous instrument.

To decide if an unpreserved error is palpable, we must consider "whether the defect is so manifest, fundamental and unambiguous that it threatens the integrity of the judicial process." *Martin v. Commonwealth*, 207 S.W.3d 1, 5 (Ky. 2006). We cannot say that is true of this case. The likelihood of the jury

believing Burke's self-protection claim—whether perfect or imperfect—was nil. While he portrayed himself as a peacemaker, his words and actions spoke otherwise. Before attacking Pfeiffer, Patton and Akemon, he had already attacked Meyer as she tried to protect Kohlman. The evidence that Burke attacked the men without provocation was simply too strong to overcome. Even with perfect instructions, Burke would still have been convicted of three counts of second-degree assault. No palpable error occurred.

For the foregoing reasons, we affirm the judgment of the Kenton Circuit Court.

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