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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001226-MR

VINCENT DOOLEY — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JAMES M. SHAKE, JUDGE
ACTION NO. 15-CR-000588

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, NICKELL AND SMALLWOOD, JUDGES.

SMALLWOOD, JUDGE: Vincent Dooley appeals from his conviction for manslaughter in the second degree raising multiple arguments on appeal: that a mistrial was required when the Commonwealth stated to the jury that Appellant sought to speak to an attorney; that the Commonwealth improperly played a 911 tape during its opening statement; that the Commonwealth improperly vouched for

the credibility of a witness; that the Commonwealth misstated the law of self-defense during closing arguments; that the jury was not properly instructed; that incorrect information was given during the sentencing phase; and that the trial court erred in not granting Appellant immunity due to his claim of self-defense. We find that Appellant received a fundamentally fair trial and affirm.

Thomas McKinney and Edward Freeze met Appellant at a bar in Louisville, Kentucky. Although the two had never met Appellant before, the three struck up a conversation while at the bar. When the bar closed, Appellant invited McKinney and Freeze to his house to do drugs. The three then went to Appellant's house where they drank alcohol and did drugs.

Eventually, McKinney began acting erratically and Appellant became agitated. Appellant demanded the two men leave his house. Freeze was willing to leave, but McKinney was not. Appellant retrieved a handgun and again demanded the two leave. Appellant and Freeze were unable to convince McKinney to leave. Eventually, Freeze left Appellant's residence on his own. After Freeze left, Appellant shot and killed McKinney. Appellant called 911 and told the operator what had occurred. After an investigation, Appellant was arrested and indicted for murder.

Prior to trial, Appellant moved to dismiss the indictment and that he be granted immunity pursuant to Kentucky Revised Statute (KRS) 503.085 which states in relevant part:

> (1) A person who uses force as permitted in KRS 503.050, 503.055, 503.070, and 503.080 is justified in using such force and is immune from criminal prosecution and civil action for the use of such force. . . . As used in this subsection, the term "criminal prosecution" includes arresting, detaining in custody, and charging or prosecuting the defendant.
>
> (2) A law enforcement agency may use standard procedures for investigating the use of force as described in subsection (1) of this section, but the agency may not arrest the person for using force unless it determines that there is probable cause that the force that was used was unlawful.

Appellant claimed that he shot McKinney in self-defense after McKinney struggled with him, trying to take his gun. The Commonwealth claimed that Appellant overreacted and did not need to shoot McKinney. The trial court denied the motion. Appellant raised the motion again after additional discovery, but it too was denied.

At trial, Appellant testified that he shot McKinney in self-defense. The Commonwealth argued that Appellant shot and killed McKinney because McKinney was annoying, not because he attacked Appellant. The jury rejected the Appellant's account of the incident and found him guilty of second-degree

manslaughter and recommended a sentence of ten years. The court followed the jury's recommendation. This appeal followed.

A number of Appellant's claims on appeal were not preserved at the trial level. We will address those first. Generally, "[t]he Court of Appeals is without authority to review issues not raised in or decided by the trial court." *Regional Jail Authority v. Tackett*, 770 S.W.2d 225, 228 (Ky. 1989); *see also Shelton v. Commonwealth*, 928 S.W.2d 817, 818 (Ky. App. 1996). "[E]rrors to be considered for appellate review must be precisely preserved and identified in the lower court." *Skaggs v. Assad, by and through Assad*, 712 S.W.2d 947, 950 (Ky. 1986) (citation omitted).

> We can, however, review these issues for palpable error.
>
> A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.

Kentucky Rule of Criminal Procedure (RCr) 10.26. "[I]f upon consideration of the whole case the reviewing court does not conclude that a substantial possibility exists that the result would have been any different, the error complained of will be held to be nonprejudicial." *Jackson v. Commonwealth*, 717 S.W.2d 511, 513 (Ky. App. 1986) (citation omitted). "To discover manifest injustice, a reviewing court must plumb the depths of the proceeding . . . to determine whether the defect in the

proceeding was shocking or jurisprudentially intolerable." *Martin v. Commonwealth*, 207 S.W.3d 1, 4 (Ky. 2006).

> For an error to be palpable, it must be "easily perceptible, plain, obvious and readily noticeable." A palpable error "must involve prejudice more egregious than that occurring in reversible error[.]" A palpable error must be so grave in nature that if it were uncorrected, it would seriously affect the fairness of the proceedings. Thus, what a palpable error analysis "boils down to" is whether the reviewing court believes there is a "substantial possibility" that the result in the case would have been different without the error. If not, the error cannot be palpable. Finally, when reviewing claims of prosecutorial misconduct, we must focus on the overall fairness of the trial and may reverse only if the prosecutorial misconduct was so improper, prejudicial, and egregious as to have undermined the overall fairness of the proceedings.

Brewer v. Commonwealth, 206 S.W.3d 343, 349 (Ky. 2006) (footnotes omitted).

The first unpreserved error we will address is Appellant's argument that the Commonwealth improperly played the 911 recording during its opening statements.[1] Citing *Fields v. Commonwealth*, 12 S.W.3d 275, 281 (Ky. 2000), Appellant claims it is impermissible for the Commonwealth to play prerecorded witness statements during opening argument. The 911 recording was of Appellant telling the operator what had occurred.

[1] The Appellant's statement that he wanted to speak to an attorney was excised from the 911 call when later played to the jury during the trial.

Fields does indeed support the Appellant's argument, but only in the context of unsworn and inadmissible evidence. In *Fields*, the prerecorded statement was the audio portion of a video recording of a crime scene where a police officer was describing the scene. In finding this was reversible error, the Kentucky Supreme Court focused on the fact that it was inadmissible hearsay and was played multiple times in court. This error was also preserved by the defense.

Fields is distinguishable from the case at hand. Here, we have statements of the defendant, which are admissible pursuant to Kentucky Rule of Evidence (KRE) 801A as a statement of a party. Finally, this error was unpreserved. There was no palpable error in playing the 911 recording during opening argument because Appellant admitted shooting McKinney at trial and his statements on the 911 recording did not prejudice his defense of self-defense.

The next unpreserved error is that the Commonwealth impermissibly vouched for the credibility of Freeze during closing arguments. "Improper vouching occurs when a prosecutor supports the credibility of a witness by indicating a personal belief in the witness's credibility thereby placing the prestige of the office of the United States Attorney behind that witness." *United States v. Francis*, 170 F.3d 546, 550 (6th Cir. 1999); *see also Lewis v. Commonwealth*, 475 S.W.3d 26, 39 (Ky. 2015). During closing arguments, the Commonwealth stated of Freeze that "[y]ou can rely on his testimony."

Freeze's credibility was put into question during the defense's case. During the trial, Freeze was questioned by defense counsel about his drug use and criminal history. Also, during defense counsel's closing argument, counsel argued that Freeze was biased and wanted to paint McKinney in a good light. This case is similar to *Brown v. Commonwealth*, 313 S.W.3d 577 (Ky. 2010), wherein the Commonwealth stated in its closing argument that certain witnesses who testified "came up here and told the truth." Therein the Court held that this was not improper vouching, but a comment by the Commonwealth regarding an issue of veracity which was raised throughout the trial. *Id.* at 630.

We find that based on *Brown*, the Commonwealth's comment was not improper due to Freeze's credibility being questioned by the defense. *Arguendo,* even if this was improper, it would not amount to palpable error because the comment was fleeting and not overly prejudicial.

Appellant's next unpreserved argument on appeal is that the Commonwealth misstated the law of self-defense during closing arguments. During closing arguments, the Commonwealth stated that Appellant was not trapped in his home and could have deescalated the situation by leaving or calling the police. Also, the Commonwealth stated: "To be justified in self-defense, you have to meet force with force. You don't get to shoot a person because they won't

leave." Appellant alleges these were improper statements and misled the jury as to the elements of self-defense.

We will first address the "meet force with force" statement. This was not an incorrect interpretation of self-defense law as Appellant believes. KRS 503.055(3) specifically states that a person may "meet force with force, including deadly force, if he or she reasonably believes it is necessary to do so to prevent death or great bodily harm to himself or herself or another or to prevent the commission of a felony involving the use of force." This statement by the Commonwealth was not improper.

What was improper, however, was the statement by the Commonwealth that Appellant could have left his house or called the police. The Kentucky Supreme Court has stated:

> We do hold that the parties in the case may not encourage the jury to draw the inference that, because an avenue of retreat was apparently available, the defendant's use of force in self-defense was not reasonably necessary, or that because a defendant was aware of an avenue of escape, he did not subjectively believe that his use of force was necessary.

Commonwealth v. Hasch, 421 S.W.3d 349, 363 (Ky. 2013). As this error was unpreserved, we must determine if the comments were so outrageous as to amount to palpable error.

We find that these comments do not amount to palpable error. The jury instructions specifically stated that Appellant had no duty to retreat from McKinney, thereby curing any error. Further, Appellant's ability to retreat was not the focus of the Commonwealth's closing argument, but was merely a fleeting comment. The Commonwealth's closing argument focused on Appellant's lack of credibility and the Commonwealth's belief that McKinney was not acting in such a threatening manner as to necessitate deadly force. The Commonwealth's comments did not amount to manifest injustice.

Appellant's final unpreserved error is that the trial court should have included a definition for burglary in the jury instructions. Paragraph C of the self-defense instruction submitted to the jury stated:

> If at the time the Defendant shot Thomas McKinney (if he did so), he believed that Thomas McKinney had remained in the Defendant's dwelling without the permission of the Defendant, and that Thomas McKinney's intention in so doing was to commit a burglary therein, the Defendant has no duty to retreat and was privileged to use such physical force against Thomas McKinney as he believed to be immediately necessary in order to prevent it.

Appellant argues that Kentucky's definition of burglary is broader than the everyday meaning requiring a definition of the term.

KRS 503.080 allows for a person to use deadly physical force against a person who is committing or attempting to commit a burglary in his dwelling. A

burglary can be committed in Kentucky when someone unlawfully enters or remains in a dwelling with the intent to commit a crime. KRS 511.040. In other words, Person A may use deadly force against Person B when Person B unlawfully enters or remains in Person A's dwelling with the intent to commit any felony or misdemeanor. In *Mondie v. Commonwealth*, 158 S.W.3d 203, 208 (Ky. 2005), the Kentucky Supreme Court held that the broad definition of burglary and the self-defense from burglary statute allowed a person to use deadly force against another person to prevent a felony or misdemeanor in a dwelling.

While it may have been prudent in this case to include a definition of burglary in the jury instructions, such a definition was not requested. Therefore, we cannot review this issue even for palpable error. RCr 9.54(2) states:

> No party may assign as error the giving or the failure to give an instruction unless the party's position has been fairly and adequately presented to the trial judge by an offered instruction or by motion, or unless the party makes objection before the court instructs the jury, stating specifically the matter to which the party objects and the ground or grounds of the objection.

In *Martin v. Commonwealth*, 409 S.W.3d 340 (Ky. 2013), our Supreme Court discussed the interplay between RCr 9.54(2) and RCr 10.26. The Court indicated that these two rules have been at odds with each other. RCr 9.54 was adopted in 1963. When palpable error review via RCr 10.26 was introduced in 1981, appellate courts began ignoring the mandate of RCr 9.54(2) and allowed

defendants to seek palpable error review of jury instruction issues that had not been raised in the trial court. In *Martin*, the Court sought to clarify these rules. The Court held that "RCr 9.54(2) puts the burden on the parties to make their instructional preferences known to the trial judge." *Id.* at 345. The Court then held that "[a]lthough palpable error under RCr 10.26 may be available for certain kinds of instructional error . . . we now conclude RCr 9.54(2) bars palpable error review for unpreserved claims that the trial court erred in the giving or the failure to give a specific instruction." *Id.* Since Appellant did not request that a definition of burglary be included in the instructions, we cannot review this issue for error.

We will now address Appellant's preserved issues. The first is that the trial court erred in not granting a mistrial when the Commonwealth twice presented evidence that Appellant, during the investigation, wanted to talk to an attorney. The first instance of this occurred during opening arguments when the Commonwealth played the 911 recording. During the 911 call, the operator is asking Appellant questions about the shooting when Appellant states, "I need to talk to my attorney." The second instance occurred during the testimony of Officer Robert Ward, the second officer on the scene. While being questioned, Officer Ward stated that Appellant "began to speak a little bit, but the most that I could understand him say was something about self-defense and wanting an attorney."

Appellant's trial attorney objected both times and requested a mistrial. The trial court denied the motion for mistrial both times.

"A trial court has discretion in deciding whether to declare a mistrial, and its decision should not be disturbed absent an abuse of discretion." *Clay v. Commonwealth*, 867 S.W.2d 200, 204 (Ky. App. 1993) (citing *Jones v. Commonwealth*, 662 S.W.2d 483 (Ky. App. 1983)).

> It is universally agreed that a mistrial is an extreme remedy and should be resorted to only when there is a fundamental defect in the proceedings which will result in a manifest injustice. The occurrence complained of must be of such character and magnitude that a litigant will be denied a fair and impartial trial and the prejudicial effect can be removed in no other way.

Gould v. Charlton Co., Inc., 929 S.W.2d 734, 738 (Ky. 1996) (citations omitted).

Appellant is correct that a defendant's invocation of his or her Fifth Amendment right to remain silent and speak with an attorney is inadmissible, even when done prior to arrest or prior to *Miranda* warnings. *Baumia v. Commonwealth*, 402 S.W.3d 530, 535-39 (Ky. 2013). We must now determine if this was harmless error.

> Under the harmless error standard, we must determine whether "absent the prosecutor's allusion to [Appellant's desire to talk to an attorney], is it clear beyond a reasonable doubt that the jury would have returned a verdict of guilty." In the context of comments on

> silence,[2] we consider three factors: "[1] the extent of comments made by the witness, [2] whether an inference of guilt from silence was stressed to the jury, and [3] the extent of other evidence suggesting defendant's guilt."

United States v. Velarde-Gomez, 269 F.3d 1023, 1034-35 (9th Cir. 2001) (citations omitted).[3]

Here, we find that these errors were harmless and the court did not abuse its discretion in denying the motion for a mistrial. Moreover, the Appellant did not invoke his right to remain silent, instead testifying at trial. The two instances of Appellant's desire to speak to an attorney were isolated and the Commonwealth did not press the issue in order to infer guilt.

Appellant's next argument on appeal is that the trial court erred by combining the two self-defense instructions. The self-defense instruction provided to the jury had three sections, A), B), and C). A) and B) discussed self-protection and C) discussed protection against burglary. Appellant argues that the self-protection and protection against burglary instructions should have been separate, stand-alone instructions. Further, Appellant argues that combining these two

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[2] Silence in this context means both a defendant's right to remain silent and the right to speak with an attorney. *Wainwright v. Greenfield*, 474 U.S. 284, 295 n.13, 106 S.Ct. 634, 640, 88 L.Ed.2d 623 (1986).

[3] *United States v. Velarde-Gomez* has been cited with approval by the Kentucky Supreme Court. *See Baumia, supra*.

different self-defense instructions was confusing for the jury because "AND" or "OR" was not inserted between them.

"Appellate review of jury instructions is a matter of law and, thus, *de novo*." *Reece v. Dixie Warehouse and Cartage Co.*, 188 S.W.3d 440, 449 (Ky. App. 2006). We find that there was no error as to this issue. Appellant does not claim that the instructions were inadequate or misstated the law, merely that they might have confused the jury. We do not believe these instructions are misleading as they clearly set forth two separate theories of self-defense.

Appellant also argues on appeal that the trial court erred in not granting a mistrial when incorrect information was given to the jury during the sentencing phase of the trial. Charlotte Vowels, an assistant supervisor for the district court, testified that Appellant had a prior case from 2006 which was a felony case with three charges and a conviction for a probation violation. This was incorrect as Appellant only had a misdemeanor conviction. Defense counsel objected, a bench conference was held, and the Commonwealth admitted the information was incorrect. The defense moved for a mistrial and the Commonwealth asked for an admonition. The trial court denied the motion for a mistrial and admonished the jury that the information they just heard was incorrect. The court then set forth the correct information. The witness also indicated she had testified incorrectly.

> [A]n admonition is usually sufficient to cure an erroneous admission of evidence, and there is a presumption that the jury will heed such an admonition. A trial court only declares a mistrial if a harmful event is of such magnitude that a litigant would be denied a fair and impartial trial and the prejudicial effect could be removed in no other way. Stated differently, the court must find a manifest, urgent, or real necessity for a mistrial. The trial court has broad discretion in determining when such a necessity exists because the trial judge is "best situated intelligently to make such a decision." The trial court's decision to deny a motion for a mistrial should not be disturbed absent an abuse of discretion.

Matthews v. Commonwealth, 163 S.W.3d 11, 17 (Ky. 2005) (footnotes omitted).

We find that the admonition was sufficient in this case because the incorrect testimony was quickly resolved by the trial court and the witness. The trial court did not abuse its discretion in overruling the motion for a mistrial.

Appellant's final argument on appeal is that the trial court erred in denying his pretrial motions for immunity. As previously stated, Appellant twice motioned for the court to grant him immunity based on self-defense and KRS 503.085. Both times the court denied his motion. Appellant argues this was error and asks that we reverse his conviction.

> When the defendant "has been tried and convicted by a properly instructed jury in a trial with no reversible error," this Court has held that questions raising the propriety of the trial court's immunity determination become "purely academic." Under such circumstances, the defendant's "self-defense claim has been thoroughly examined by both the trial judge under the directed-

> verdict standard and the jury under the court's instructions and his entitlement to self-defense has been rejected." In such cases, when a jury has already convicted the defendant—and, thus, found that his use of physical force in fact was unlawful beyond a reasonable doubt—and that conviction has not been shown to be flawed, the appellate court will not revisit whether there was probable cause to believe that a defendant's use of force was unlawful to allow prosecution under KRS 503.085.

Ragland v. Commonwealth, 476 S.W.3d 236, 246 (Ky. 2015) (citations and footnote omitted). Based on this precedent, we are without authority to review this issue because we have found no reversible error in Appellant's conviction.[4]

For the foregoing reasons, we affirm Appellant's conviction.

ALL CONCUR.

BRIEFS AND ORAL ARGUMENT FOR APPELLANT:	BRIEF AND ORAL ARGUMENT FOR APPELLEE:
Tricia F. Lister David A. Lambertus Louisville, Kentucky	Andy Beshear Attorney General of Kentucky Joseph A. Beckett Assistant Attorney General Frankfort, Kentucky

[4] In order to assist members of the Kentucky Bar, we will note that the proper way to appeal a trial court's denial of immunity based on self-defense is to file an original writ petition in the Court of Appeals. *Ragland*, 476 S.W.3d at 246 n.5.