RENDERED: JULY 5, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-001211-MR
&
NO. 2017-CA-001999-MR

ROBERT S. MORPHETT APPELLANT

v. APPEALS FROM HENDERSON CIRCUIT COURT
HONORABLE KAREN LYNN WILSON, JUDGE
ACTION NO. 14-CR-00312

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, NICKELL, AND L. THOMPSON, JUDGES.

NICKELL, JUDGE: Challenging evidentiary rulings made at trial, Robert S. Morphett attacks a judgment of conviction and sentence entered by the Henderson Circuit Court on August 17, 2016. Conviction followed a three-day trial in 2015 at which jurors found Morphett guilty of assaulting Scott Hardsock ("Scott") in the

first-degree,[1] and assaulting his son, Jeffrey Hardsock ("Jeffrey"), in the second-degree.[2] Morphett claimed he sliced both men with a hatchet while defending himself and others during a melee at the Hardsock home. Consistent with the jury's verdict, Morphett was sentenced to concurrent terms of twelve years and five years. Morphett filed a *pro se* notice of appeal of the judgment. While the direct appeal was pending, new counsel joined the case and moved the trial court to vacate the underlying conviction–a motion the trial court denied on October 23, 2017–and from which counsel filed a second notice of appeal. On February 9, 2018, this Court[3] granted counsel's motion to consolidate the two appeals. After reviewing the briefs, record and law, we affirm.

FACTS AND PROCEDURAL BACKGROUND

Around 10:00 p.m. on October 11, 2014, Morphett and his then-fiancée, Tammy Mills ("Tammy"), both convicted felons, arrived at the Double Dukes Saloon in Henderson, Kentucky. Michael Yates ("Yates"), the boyfriend of Morphett's half-sister, Crystal Rodway ("Crystal"), was also there. During their nearly two-hour stay at Double Dukes, Morphett played pool but neither he nor

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[1] Kentucky Revised Statutes ("KRS") 508.010, a Class B felony.

[2] KRS 508.020, a Class C felony.

[3] Morphett previously moved this Court to consolidate Appeal No. 2016-CA-001211 with a Kentucky Rules of Civil Procedure ("CR") 60.02 motion pending in the Henderson Circuit Court. This Court denied the request because no appeal of the motion to vacate had been filed.

Tammy drank. After Morphett and Yates scuffled with a group of men at the bar, Morphett and Tammy went to the home they shared.

Near midnight, Morphett received a phone call from Crystal who was tending bar at Algonquin's in Henderson. Crystal is a convicted felon. She and her children were living with Morphett and Tammy. Crystal needed a ride home from work. Morphett began driving to the bar.

Lacey Fletcher ("Lacey") was driving the same route to Algonquin's when Morphett tailgated her. At a stop sign, Lacey and Morphett exchanged words and each continued separately to the bar. At Algonquin's, Morphett waited for Crystal to complete her shift, taking off his jacket, playing pool and maybe having a beer.

Jesse Hardsock ("Jesse")–younger brother of Jeffrey, son of Scott, and an acquaintance of Lacey, was at Algonquin's at the same time as Morphett. Crystal knew Jesse as a regular bar patron, but Jesse was a stranger to Morphett who knew nothing of Jesse and his family. Jesse also knew nothing of Morphett.

Just after the bar closed, a commotion erupted in the bar's parking lot. Believing Morphett had disrespected Algonquin's elderly owner and accosted two women in the parking lot, Jesse punched Morphett in the face. Not knowing who had punched him or why, Morphett tripped on a bar step, struck a truck while trying to break his fall, and cut his face on a broken light on the truck.

Crystal told Jesse the man he had punched was her brother. Jesse apologized to Crystal and left Algonquin's with Lacey and her sister. The trio headed to the home of Jesse's grandmother where Jesse lives with Jeffrey, Scott and others. Jeffrey and Scott are both convicted felons. Jesse's friend, Nico Negron ("Negron"), was spending the night in the Hardsock home.

Crystal found Morphett's jacket in the bar's parking lot near Jesse's car and returned it to her brother. Morphett noticed money belonging to him and Tammy was missing from his jacket.

Morphett drove himself, Crystal, and Yates to Morphett's home. When Tammy learned of the missing money, and heard no explanation for Jesse punching Morphett, she became angry and drove[4] the quartet to Jesse's home following directions provided by Crystal. Tammy initially drove past the house but returned and parked nearby. Morphett, seeing the house brightly lit and the front door open, did not like the idea of confronting the man who had punched him at the bar but did not protest loudly. Yates was Jesse's childhood friend. Both Yates and Crystal knew the Hardsock family.

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[4] Tammy, described by Morphett as "strong-willed," testified she did not expect events to escalate so virulently. She expected the men to argue, but a "fourth degree assault at most." Unable to explain her actions, Tammy testified the escalating tension was "kinda my fault."

At home around 2:30 a.m., Jesse heard a car approach on the otherwise quiet street. He looked outside and saw the stranger he had punched in the face at Algonquin's–now knowing it to be Morphett–shirtless and shadowboxing in the street. Jesse also saw Crystal and Yates, both of whom he recognized.

Yelling for Jesse, Tammy stepped alone onto the home's front porch. Jesse awoke Jeffrey and Negron. Scott was tinkering with a 4-wheeler in the garage. Jeffrey and Lacey answered the door. Jeffrey scuffled with Tammy who accused him of spitting on her. In retaliation, Tammy spit at Jeffrey, but her spit landed on Lacey—prompting the two women to fight. When Tammy was astride Lacey, Morphett says he saw Jeffrey kick Tammy in the head several times, causing Morphett to yell at him to stop. Negron testified no one struck Tammy in the head and claimed he ended the altercation by separating Tammy and Lacey.

While Lacey and Tammy were tussling, Jesse walked into the street to talk to Morphett. Neither man was armed. They spoke civilly, with Jesse apologizing to Morphett for punching him at Algonquin's. Morphett would testify at trial all he wanted from Jesse was an apology and an explanation. When asked on cross-examination why he did not leave after receiving Jesse's apology, Morphett said he had also asked Jesse whether he had taken money from

Morphett's jacket. Morphett testified Jesse would not answer the question but "gave an indication he might have took the money" and "looked kinda guilty."

When Morphett yelled at Jeffrey to stop kicking Tammy in the head, Morphett claims Jesse said, "let's jump this guy." Morphett maintained ten people quickly surrounded him as he attempted to protect himself, Tammy, Crystal and Yates. Morphett bobbed and weaved trying to avoid being struck.

Witness accounts vary as to what happened next. Believing he heard someone say get the gun, and seeing someone run toward the house, Morphett–a tree trimmer by trade–announced, "I've got something for y'all," ran to the car and retrieved his "favorite hatchet." With the small, sharp hatchet in hand, he returned to the Hardsock yard swinging the hatchet waist-high to fend off attackers. As Jesse tried to jump out of the way, the hatchet's blade grazed his side causing him to fall backwards. As Jeffrey tried to bearhug Morphett from the rear, Morphett slashed Jeffrey in the ribs and chest. Morphett testified Jeffrey had a shiny object in his hand and believes this unidentified item cut Morphett's hand. As Scott tried to tackle Morphett from the front, the hatchet struck Scott in the right side of the skull, felling him to the ground where he crawled to a ditch.

After being sliced by the hatchet, Jeffrey went to Negron's car, retrieved Negron's gun, and fired shots into the ground and air to disperse the groups. Jeffrey testified he fired the gun to scare, not to kill, anyone.

A newspaper carrier, mistakenly believed to be police by the brawlers due to a flashing orange light atop her vehicle, interrupted the fight. She was the only disinterested witness and testified the group parted into two factions as she drove through the crowd. About a minute later she heard one or two gunshots and saw a car speed by her.

Crystal, Yates and Tammy got into their car with Crystal at the wheel. Morphett testified he tried to draw gunfire away from the car to protect his family and friends saying six–or maybe twenty–shots whizzed past him. Morphett then got into the moving car and the quartet left the scene.

After the episode, the car used by Tammy, Morphett, Crystal and Yates was parked at a school rather than at Tammy and Morphett's home. Morphett gave his bloody hatchet to Yates and Crystal accompanied Yates to the Green River where Yates threw the hatchet into the water. The hatchet was never recovered. Crystal was convicted of tampering with physical evidence for her part in the hatchet's disappearance. Yates was not called as a witness at trial.

Neither Morphett's quartet nor the Hardsocks revealed all during their initial interviews with Henderson Police Detective Alto Lee, leading to a second round of questioning which the officer testified is not uncommon. Morphett said nothing about the hatchet or the gun until asked. The Hardsocks volunteered

nothing about the gun until asked. Detective Lee recovered the gun from Negron. No spent cartridges were collected from the scene.

Jeffrey required staples and stitches to close his wounds. Scott, a robust working man at the time of the encounter–endured four surgeries and is paralyzed on his left side. He is unable to work and requires assistance with daily activities such as tying his shoes. When asked about Scott's injuries, Morphett told Detective Lee "maybe [the Hardsocks] hit themselves with the hatchet."

Twelve hours after the melee, Tammy went to the hospital. Her primary diagnosis was adjustment disorder with a secondary diagnosis of concussion. A brain scan showed no abnormality. She was referred to a behavioral facility.

Morphett was indicted on two counts of first-degree assault for attacking Jeffrey and Scott. No other charges resulted from the encounter at Algonquin's or the fracas at the Hardsock home. According to Detective Lee, Morphett never requested charges be filed against Jesse for punching him at Algonquin's; "he considered it all done." Detective Lee further testified Morphett told him Tammy was being stomped and shown no mercy, forcing Morphett "to do what I had to do" to protect himself and his friends. It is against this backdrop we analyze these consolidated appeals.

ANALYSIS

> Morphett challenges a series of evidentiary rulings on appeal.
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> The standard of review of an evidentiary ruling is abuse of discretion. The test for an abuse of discretion "is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." This Court will not disturb the trial court's decision to admit evidence absent an abuse of discretion.

Anderson v. Commonwealth, 231 S.W.3d 117, 119 (Ky. 2007) (footnotes omitted).

Morphett's first complaint is the trial court improperly prohibited Tammy from testifying someone–she did not know whom–shouted, "get the gun" after the newspaper carrier drove through the crowd. Tammy was the first witness called by the defense. Nearly fifteen minutes into her testimony, defense counsel approached the bench and explained what Tammy was about to say, if allowed. The Commonwealth objected stating it was the ultimate in hearsay because there was no one to cross-examine.

Defense counsel said Tammy's testimony was not being offered for the truth of the matter asserted–that she heard someone yell, "get the gun" –rather it was admissible to show the impact it had on Tammy, even though he never established what that impact was, or that Tammy[5] took specific action on hearing

[5] No proof was offered by way of avowal. Although Tammy confirmed she saw no gun and saw no one with a gun, she testified the shooter "emptied the clip" –firing six shots in rapid succession.

the statement other than becoming fearful. As the bench conference continued, defense counsel's argument evolved into Tammy and Crystal's state of mind being relevant to establishing Morphett acted to defend them and accurately believed he needed to do so. The trial court sustained the Commonwealth's objection, finding a gap in defense counsel's analysis because at that point there had been no showing Morphett heard the statement or retrieved his hatchet in reaction to someone yelling, "get the gun." There had also been no testimony Morphett knew Tammy or Lacey feared for her life.

On appeal, Morphett's theory of error has evolved again. Now he claims Tammy's desired testimony was either not hearsay or was admissible under an unspecified exception to the rule against hearsay–neither of which was argued to the trial court with specificity. Morphett now argues Tammy's testimony was critical to show he retrieved the hatchet in response to hearing the threat of a gun and did so to protect himself and others.

Morphett claims he preserved the error by objecting to the trial court's exclusion of Tammy's statement, but in the alternative, requests palpable error review. In contrast, the Commonwealth argues the issue is unpreserved because Morphett's argument on appeal differs from the argument he made to the trial court and he cannot change his theory of error on appeal. *Jefferson v. Eggemeyer*, 516 S.W.3d 325, 339-40 (Ky. 2017) (citing *Kennedy v. Commonwealth*, 544 S.W.2d

219, 222 (Ky. 1976)). Because Morphett's argument has evolved, it was not preserved, and we will review only for palpable error.

> When reviewing an unpreserved error, we may grant relief of a palpable error if we find that "manifest injustice has resulted from the error." RCr 10.26. Such injustice occurs only when the alleged error "seriously affected the fairness, integrity, or public reputation of the proceeding." *Newcomb v. Commonwealth*, 410 S.W.3d 63, 79 (Ky. 2013) (quoting *Martin v. Commonwealth*, 207 S.W.3d 1, 4 (Ky. 2006)) (internal quotations omitted). In other words, we inquire as to whether the result of the proceeding would have been different absent the alleged error. *See Brewer v. Commonwealth*, 206 S.W.3d 343, 349 (Ky. 2006).

Evans v. Commonwealth, 544 S.W.3d 166, 169 (Ky. App. 2018).

As Morphett states in his brief, the command–"get the gun" –is not hearsay. It is a verbal act. *Daugherty v. Commonwealth*, 467 S.W.3d 222, 229 (Ky. 2015) (citing *White v. Commonwealth*, 5 S.W.3d 140, 141 (Ky. 1999)). "The significance of the statement comes not from that which is asserted–the declarant's desire that the person carry out the commanded act–but from the making and hearing of the statement." *Id*. at 229-30. Had counsel argued this to the trial court, Tammy may have been allowed to say she heard someone yell, "get the gun." However, counsel did not make the argument at trial and we will not fault the trial court for not considering a point counsel never argued. Moreover, as suggested by the Commonwealth's citation to *Jefferson* and *Kennedy*, discovering an argument in time to file an appeal shows the value of research but does not mandate reversal.

Additionally, hearing someone yell, “get the gun,” does not appear to have prompted Tammy to act. When she took the witness stand there had been no proof Tammy–or anyone else–responded to the command. Her testimony did not change that although she did say someone ran toward the house and then returned. Furthermore, at that point, there had been no proof Morphett heard the same command, reacted to it, or knew Tammy and Crystal were in peril. When offered, Tammy’s desired testimony was premature and there was no attempt to recall her when her testimony could have been admissible.

Still, Morphett’s desired theories of both self-defense and defense of others were presented to the jury. Crystal appeared as the sixth defense witness. Without objection she testified someone said, “go get the gun, we’re fixing to put this M-F to sleep” as she and Morphett attempted to help Tammy reach the car after battling with Lacey and Jeffrey. According to Crystal, Morphett left her and Tammy and ran ahead to the car, got the hatchet and returned to the corner of Lambert and Fifth Street where he waved the hatchet giving the women time to reach the car.

Crystal’s testimony indicated she reached the car with Tammy before hearing gunshots. Scott charged Morphett from the front, Jeffrey came up on Morphett from the rear, and Morphett struck both men with the hatchet. Once Tammy and Yates were in the car, Crystal started the car and put it in reverse. At

that point, Crystal heard gunshots, but did not know their origin, and saw Morphett running. As Crystal drove alongside him, Morphett got in the car and she drove the quartet home. Crystal parked the car at a nearby school because the Hardsocks knew where she was living. She feared they would come looking for her brother. Crystal established a basis for Morphett having acted in defense of others.

Morphett testified in his own defense. He stated someone said, "go get the fucking gun," after the newspaper carrier drove through the crowd followed by someone darting toward the front of the house. The court admonished jurors to consider the statement not for the truth of the matter asserted, but only for its effect on Morphett. Defense counsel did not object to the court's admonition.

Morphett stated fear kicked in at that point, he was outnumbered and now there was going to be a gun. While Crystal was helping Tammy to the car, Morphett went to the car alone, retrieved the hatchet and began drawing the crowd's attention to himself so his group could leave. The crowd became more aggressive. Jeffrey snuck up behind Morphett with something shiny in his hand. Morphett swung the hatchet at waist-level cutting Jeffrey and Jeffrey fell. Scott then said, "I'm gonna kill you M-F" and came at him from the front in a low football tackle. Morphett swung the hatchet again at waist-level striking Scott in the head. Scott fell. On cross-examination, Morphett reiterated hearing someone

say, "go get the gun," believing he was going to be jumped. He confirmed he got his hatchet after a gun was mentioned.

Evidence Morphett armed himself *after* mention of a gun was introduced through Crystal and echoed by Morphett. Jurors heard the desired testimony. There was no error, no abuse of discretion and no manifest injustice.

Morphett's second complaint is the trial court prevented him from impeaching Commonwealth witnesses with prior inconsistent statements. Morphett's brief claims this issue was preserved at "(VR Trial: 6/24/16; 03:44:45)." At that point, guilt phase jury deliberations were underway. Hence, there was no opportunity to preserve an evidentiary issue and no chance for a correction if needed. More importantly, recording ceased at 2:59:62 p.m. and did not resume until 5:41:34 p.m. with return of the guilty verdict. Nothing was recorded at 3:44:45. It is unclear how Morphett believes he preserved this issue, but he seeks palpable error review should we reject his claim of preservation. Due to the lack of preservation, the most we do is undertake palpable error review.

A more accurate characterization of this claim is the trial court required defense counsel to impeach witnesses with prior inconsistent statements–if at all–in conformity with KRE[6] 613. Rather than heed the trial court's directive and preserve any disagreement with the process for appellate review, defense

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[6] Kentucky Rules of Evidence.

counsel persisted in trying to impeach witnesses without advising them of the time, place and manner they made prior statements–perceived to be inconsistent–and giving them an opportunity to review the statement outside the jury's presence and explain any differences. KRE 613(a) and *Brock v. Commonwealth*, 947 S.W.2d 24, 31 (Ky. 1997) (citing *Thacker v. Commonwealth*, 401 S.W.2d 64 (Ky. 1966)). Twice the trial court offered counsel a rule book to familiarize himself with the rules. Twice counsel declined. It is not the trial court's job to practice the case for parties or school attorneys on how to question witnesses. We say only the trial court did not err.

Morphett's third complaint is the trial court prevented him from showing the Hardsocks were the initial aggressors. Morphett sought to establish this theory by introducing prior bad acts committed by Jesse, Jeffrey and Scott. No statement of preservation is provided for this argument in Morphett's brief–a clear violation of CR 76.12(4)(c)(v). Compliance with the rule gives us confidence the argument was made to the trial court and is proper for our review. It also bears on the nature of our review. Noncompliance, however, is so serious it may result in a brief being stricken. *Oakley v. Oakley*, 391 S.W.3d 377, 378 (Ky. App. 2012) (citing CR 76.12(8)(a); *Elwell v. Stone*, 799 S.W.2d 46 (Ky. App. 1990)).

Curiously, the Commonwealth supplies the missing information, noting the issue was preserved by a pretrial defense motion to admit reverse KRE

404(b) evidence.[7] The trial court overruled the motion because Morphett and the Hardsocks were strangers prior to the skirmish. Knowing nothing of Jesse, Jeffrey or Scott or their histories, Morphett had no reason to fear them, to act in self-defense or to act in defense of another.

The trial court's ruling was based in part on *Moorman v. Commonwealth*, 325 S.W.3d 325, 332 (Ky. 2010), from which we quote.

> The principles relevant to prior violent acts and threats by the victim in a self-defense case were addressed in *Saylor v. Commonwealth*, 144 S.W.3d 812, 815-816 (Ky. 2004), and are fairly summarized as follows. Generally, a homicide defendant may introduce evidence of the victim's character for violence in support of a claim that he acted in self-defense or that the victim was the initial aggressor. KRE 404(a)(2). Such evidence may only be in the form of reputation or opinion, not specific acts of misconduct. KRE 405(a). An exception exists, however,

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[7] KRE 404(b) is a general rule which is subservient to the more specific KRE 404(a)(2) which reads:

> (a) Character evidence generally. Evidence 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, except:
>
> . . .
>
> (2) Character of victim generally. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, other than in a prosecution for criminal sexual conduct, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor[.]

See Montgomery v. Commonwealth, 320 S.W.3d 28, 46 (Ky. 2010).

> when evidence of the victim's prior acts of violence, threats, and even hearsay evidence of such acts and threats, is offered to prove that the defendant so feared the victim that he believed it was necessary to use physical force (or deadly physical force) in self-protection, "provided that the defendant knew of such acts, threats, or statements at the time of the encounter." Robert G. Lawson, The Kentucky Evidence Law Handbook, § 2.15[4][d] (4th ed. 2003). "Obviously, such evidence could not be used to prove fear by the accused without accompanying proof that the defendant knew of such matters at the time of the alleged homicide or assault." *Id.* (citing *Baze v. Commonwealth*, 965 S.W.2d 817, 824-25 (Ky. 1997)).

Considering the foregoing, Morphett's premise–he could introduce specific prior bad acts committed by the Hardsocks–is severely flawed. He himself testified he did not know them or anything about them. He had never seen them, did not know where they lived, or that they lived together. The Hardsocks being strangers to Morphett, specific bad acts committed by them were inadmissible. The trial court did not abuse its discretion in excluding the desired evidence. *Anderson,* 231 S.W.3d at 119.

Morphett's final complaint on appeal is the trial court denied his request for a new trial without convening an evidentiary hearing. That is the argument heading, but it is addressed only in the first paragraph of the argument and contains no citation to the record. Another clear violation of CR 76.12(4)(c)(v). The next four paragraphs discuss four disparate topics. Two paragraphs cite a lengthy affidavit prepared by trial attorney Hon. Jon R. Fritz

memorializing his trial impressions. The other two paragraphs each cite one case but connect neither case to the facts at hand.

The Commonwealth maintains the particular claims raised should have been argued pretrial or within five days of verdict under RCr 10.02(1) and RCr 10.06(1). Because that did not happen—the motion was filed more than one year after trial–the Commonwealth argues nothing is preserved. We agree.

Gross v. Commonwealth, 648 S.W.2d 853 (Ky. 1983), sets forth the steps in appealing a criminal conviction. The steps flow in a specific sequence with CR 60.02 being reserved for issues which were not and could not have been raised on direct appeal or in an RCr 11.42 motion. Stated otherwise, CR 60.02 is not a second chance to reargue issues that could have and should have been raised on direct appeal or RCr 11.42. *McQueen v. Commonwealth*, 948 S.W.2d 415, 416 (Ky. 1997). In its order denying relief, the trial court noted the claims raised were the type usually made on direct appeal—not collateral attack. Again, we agree.

No evidentiary hearing was required because movant did not "affirmatively allege facts which, if true, justify vacating the judgment and further allege special circumstances that justify CR 60.02 relief." *Gross*, 648 S.W.2d at 856. The one-page motion to vacate lists the following as grounds for relief:

> mistake, inadvertence, surprise, excusable neglect, error, ***perjury or falsified evidence; fraud affecting the proceedings, other than perjury or falsified evidence; newly discovered evidence.*** Furthermore, it is not

> equitable that the Judgement [sic] should have
> prospective application.

(Emphasis added.) The motion states no particular claim, contains no legal citations, and provides no factual basis for any claim. Instead, it merely references Fritz's affidavit as well as a one-page affidavit executed by Morphett. Such is inadequate. No evidentiary hearing was required[8] and no relief was justified.

For the foregoing reasons, we affirm the trial court's evidentiary rulings and its denial of the new trial motion.

ALL CONCUR.

BRIEFS FOR APPELLANT:

R. Brian Ousley
Henderson, Kentucky

BRIEF FOR APPELLEE:

Andy Beshear
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[8] The motion to vacate requested an evidentiary hearing. One was scheduled and rescheduled more than once at defense counsel's request. The record index shows "other hearing" as a scheduled event on September 25, 2017, with the notation "vacate and set aside judgment of conviction & sentence." We located no corresponding video recording of such an event and in its order denying the motion to vaccate the trial court did not comment on the scheduled hearing or why it may not have gone forward.