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Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000438-MR

WILLIAM R. ROBERTS APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MARY M. SHAW, JUDGE
ACTION NO. 16-CR-003094

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: MAZE, NICKELL, AND K. THOMPSON, JUDGES.

NICKELL, JUDGE: After a night of playing cards and drinking in the renovated house they shared, William R. Roberts ("Roberts") shot and killed Michael Richardson ("Sarge"), the boyfriend and father of his sister's[1] eleven-month-old

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[1] Christine Roberts.

daughter. Christine owned the home which had been converted into a duplex. All three adults—and most of the witnesses who testified in this case—were affiliated with the Horseshoe Casino in southern Indiana. Roberts and Sarge worked together in the kitchen. Roberts stood trial on a single count of murder, admitting he shot and killed Sarge, but claiming he did so while fearing for his life and acting in self-defense. After a multi-day trial, a Jefferson County jury convicted Roberts of reckless homicide, the least severe of three options.[2] When jurors deadlocked during the penalty phase, Roberts waived jury sentencing and agreed to accept the Commonwealth's offer of two years. At sentencing, the trial court ordered Roberts to serve one year, allowing him to remain free on bond pending appeal. After reviewing the briefs, law and record, we affirm.

ANALYSIS

We begin with Roberts' allegation of the bailiff improperly answering juror questions without input from the trial court, inaccurately answering a jury inquiry, and failing to convey to the judge all written jury requests—specifically one for a television to review part of Roberts' two hours of trial testimony.

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[2] Kentucky Revised Statutes (KRS) 507.050, a Class D felony. The jury acquitted Roberts of murder and second-degree manslaughter.

Roberts also claims the trial court's failure to convey all jury requests to counsel and the defendant—as required by RCr[3] 9.74—demands reversal. We disagree.

The claims arise in the context of the trial court's denial of Roberts' new trial motion—a motion for which Roberts had to establish adequate grounds. *See Truitt v. Commonwealth*, 177 Ky. 397, 197 S.W. 797, 798 (1917). We review denial of a new trial motion for abuse of discretion, *Commonwealth v. Clark*, 528 S.W.3d 342, 345 (Ky. 2017), the test being "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). Not every rule violation demands reversal; harmless error analysis applies. *Commonwealth v. Pollini*, 437 S.W.3d 144, 151 (Ky. 2014); *McAtee v. Commonwealth*, 413 S.W.3d 608, 627 (Ky. 2013); *Welch v. Commonwealth*, 235 S.W.3d 555, 557 (Ky. 2007).

We start with a few basic principles. KRS 29A.320(1) dictates:

> When the case is finally submitted to the jury, they shall retire for deliberation. When they retire, they shall be kept together in some convenient place, under the charge of an officer, until they agree upon a verdict or are discharged by the court, subject to the Supreme Court rules permitting them to separate temporarily at night and for their meals. The officer having them under his charge shall not allow any communications to be made to them, nor make any himself, except to ask them if they have agreed upon their verdict, unless by order of the court; and he shall not, before their verdict is rendered,

[3] Kentucky Rules of Criminal Procedure.

> communicate to any person the state of their deliberations, or the verdict agreed upon.

In a similar vein, RCr 9.74 directs:

> No information requested by the jury or any juror after the jury has retired for deliberation shall be given except in open court in the presence of the defendant (unless the defendant is being tried in absentia) and the entire jury, and in the presence of or after reasonable notice to counsel for the parties.

McGuire v. Commonwealth, 368 S.W.3d 100, 115 (Ky. 2012), holds:

> Pursuant to RCr 9.74, the replaying of witness testimony is to be on the record in open court in the presence of the defendant. *Mills v. Commonwealth*, 44 S.W.3d 366, 371–372 (Ky. 2001); *Lett v. Commonwealth*, 284 Ky. 267, 144 S.W.2d 505 (1940).

(Footnote omitted.) *See also McAtee*, 413 S.W.3d at 627-28. With the foregoing in mind, on December 13, 2017, immediately after seating the jury, the trial court told jurors to submit all questions to the court in writing.[4] The judge then told the panel not to discuss the case with anyone or allow anyone to discuss the case with them.

All jury communications challenged by Roberts allegedly occurred after proof closed on December 18, 2017. Just before sending jurors to deliberate at 5:00 p.m., and consistent with RCr 9.68, the trial court swore the bailiff

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[4] During a subsequent hearing on the new trial motion, the judge confirmed all jury requests must be written and on receipt of a written request calls counsel to the courtroom to discuss the inquiry.

> to keep the jurors together, and to suffer no person to speak to, or communicate with, them on any subject connected with the trial, and not to do so [himself].

Thereafter, the trial court provided a few directions to the jury on how to proceed. Select a foreperson to preside; let everyone speak who wants to speak; turn off cell phones; if you need to make a call, knock on the door and advise the sheriff; take your notes and go with the sheriff to the jury room.

At some point during guilt phase deliberations, jurors asked to see the murder weapon. The judge directed the bailiff to take the handgun to the jury room where he waited while jurors examined it. The trial court apprised counsel of this development around 5:49 p.m., during discussion of a jury note the bailiff had delivered to the judge. That note posed four questions which the trial court read into the record in the presence of defense counsel, the prosecutor and Roberts. All agreed the proper response was, "you must rely on the testimony in evidence," which the trial court wrote on the bottom of the note and had the bailiff return to the jury. No specific claim of impropriety is made about the bailiff taking the gun to the jury room for examination, the trial court writing its response to the four questions at the bottom of the jury's note, nor about a second note the bailiff delivered to the trial court at 10:08 p.m. during penalty phase deliberations revealing the jury was deadlocked. These are the only two jury notes in the record.

At 8:06 p.m., still during guilt phase deliberations, the trial court learned from the bailiff—and conveyed to all counsel and Roberts—the jurors "think they're hung." The judge asked whether the attorneys wanted the jury to return to the courtroom and receive an *Allen*[5] charge. While discussing the matter with counsel, the court revealed "some" jurors had previously asked to review Roberts' testimony. No written request to that effect ever reached the court after the bailiff—at the trial court's direction—reminded jurors to put requests in writing. It is unclear when or how the verbal request to replay testimony was made or whether it was reduced to writing. No such note is in the record.

Defense counsel asked whether any questions were in writing, to which the court replied,

> No, they knocked on the door and asked the [bailiff] to come in to say they were hung. I could have 'em write it down if that's . . . . I think we'll go off record and tell 'em to write it down. We'll have it for appeal purposes and everything else.

Defense counsel agreed the jury should be directed to put all requests in writing. Minutes later, the court resumed recording, stating,

> I told the [bailiff] to have the jury write it down. He starts walking in, jury said, "No, No, No. Go. Go. Don't say a word, don't say anything, we think we've got this worked out. Get out. So, he's out."

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[5] *Allen v. United States*, 164 U.S. 492, 17 S.Ct. 154, 41 L.Ed. 528 (1896).

At 8:20 p.m., defense counsel moved for a mistrial, arguing the judge is not to know the actual vote of a hung jury. Counsel cited no authority for the premise but seemed to base the argument on the bailiff having told the court one juror had told the bailiff another juror had voted "not guilty" upon entering the jury room and would not change his position. Three minutes later, defense counsel requested a mistrial because the jury was communicating via the bailiff rather than in writing.

Defense counsel then asked for the bailiff to be called to the bench to explain his contact with the jury. The judge stated she believed the bailiff had one conversation with the jury and confirmed she, as judge, never talked with the jury—she spoke only with the bailiff. The judge also expressed doubt she knew the actual vote because all she had been told was one juror said "not guilty" when deliberations started.

At 8:30 p.m., the bailiff appeared at the bench to share his recollection of events. He said a male juror—not the female foreperson—exited the jury room saying "three-fourths" of the jurors have something, "but one person not guilty and wasn't gonna budge." The lone juror returned to the jury room, closing the door behind him. Ten to fifteen minutes later, the same juror emerged from the jury room saying, "they had something." The bailiff described this single event. He was never asked whether jurors requested a television to replay Roberts' testimony, nor if they did, whether or how he responded. The bailiff was not asked

how many jury notes he received, how he handled them, nor whether he personally answered jury questions without direction from the court.

Roberts' allegations of improper juror communications center on requests that were either never reduced to writing or if written, cannot be located. He takes the bailiff to task for not delivering to the trial court an unspecified number of written jury requests and argues all requests must be given to the trial court. *Young v. State Farm Mut. Auto. Ins. Co*., 975 S.W.2d 98, 99 (Ky. 1998) (jury requests should be "immediately conveyed to the trial judge. . . . Bailiffs are cautioned to follow the law and bring any question to the attention of the court.").

During the hearing on the new trial motion, the trial court said there were missing notes, but stated she had read into the record each note received. Our review shows the note asking four questions during the guilt phase was read into the record in full. While the trial court discussed the penalty phase note in open court with all counsel, she did not read that note into the record verbatim.

Roberts called one witness in support of his new trial motion—a juror who had determined his fate. "A juror cannot be examined to establish a ground for a new trial, except to establish that the verdict was made by lot." RCr 10.04. This juror testified "several" jury requests were put in writing during deliberations and sent outside the jury room via the bailiff. She did not quantify the word "several." In particular, she said late in the evening, jurors sent a written request

for a television to replay a portion—she could not recall the precise portion—of Roberts' testimony. The note was given to the bailiff and the answer received was, no television would be brought to the jury room, but all jurors could return to the courtroom and watch Roberts' entire testimony with everyone. The juror was not asked—and did not say—whether she personally wrote the note, handed the note to the bailiff, or received the answer from the bailiff. She was also not asked how the jury reached its guilty verdict shortly after indicating it was hung. Nor was the juror asked whether she believed the jury was hung. Roberts surmises the guilty verdict was reached quickly because the hour was late and the jury did not want to watch a two-hour replay—as the bailiff supposedly told them would happen—when only a few wanted to watch a sliver of Roberts' testimony. The juror's memory was not echoed by any other evidence. Speculation is not proof.

When the juror completed her testimony and left the courtroom, the trial court combed through the record, locating no written request for a television or a replay of testimony. The judge stated she did not recall receiving such a note and did not believe the request was ever reduced to writing, although she did recall the bailiff saying something about *some* jurors wanting to watch something again. The judge further recalled directing the bailiff to tell the jury, "put it in writing," but the record does not show the timing of a jury request—neither verbal nor written—for a television or a replay. The judge also noted jurors are told not to

discard anything but did not say how or when that directive is communicated. The video record does not show the judge stating such from the bench in open court.

Curiously, the bailiff was not called to testify during the new trial hearing. Thus, we do not know whether he received a written request for a television or to re-watch testimony. We do not know how he communicated with the jury, how many notes he received, nor how he handled them. We do not know whether he—of his own volition—told an individual juror or the jury as a whole no television would be brought to the jury room, but the entire panel could return to the courtroom and review Roberts' complete testimony as a group with everyone. Testimony from the bailiff would have avoided the speculation on which Roberts now relies. We will not assume the bailiff breached his sworn duty.

Furthermore, defense counsel characterizes the request to review part of Roberts' testimony as "critical" to his client and something RCr 9.74 required be communicated to him and his client. Defense counsel claims he was never told jurors wanted to review trial testimony. He misstates the record. At 8:07 p.m. the trial court revealed "some" jurors had expressed a desire to review Roberts' testimony. Had the trial court not mentioned it, counsel would have no basis for raising it on appeal, but the trial judge did mention it. However, on learning of the request, defense counsel did not ask the judge to rule on it—perhaps because it was not delivered to the court in writing—which counsel himself argued at trial and

now on appeal—is the only way the jury may communicate with the court. Around 8:35 p.m., the bailiff alerted the judge the jury had reached a decision. Four minutes later, the jury returned to the courtroom and the foreperson read the guilty verdict aloud. Thereafter, defense counsel asked for a poll of the jury wherein each juror claimed the verdict as his own.[6] Defense counsel had a window of nearly thirty minutes in which to urge the trial court to arrange for a replay of Roberts' testimony—either in whole or in part. He did not seek the ruling he now portrays as being crucial to his client and requiring reversal.

> A basic general principle of the Rules of Civil Procedure is that a party is not entitled to raise an error on appeal if he has not called the error to the attention of the trial court and given that court an opportunity to correct it. *See Commonwealth, Department of Highways v. Williams*, Ky., 317 S.W.2d 482; Clay, CR 46, Comments 3, 4. We believe that counsel have an obligation to assist the trial judge in the avoidance of error and we concur in the view expressed in Clay, CR 51, Comment 5, p. 92, that:
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> > '* * * Unless there may be attributed to every trial judge an omniscience which few possess, it is necessary to impose on the attorney the responsibility of assisting the judge * * *. He should not be permitted on appeal to claim an abortive trial to which he has materially contributed by failure * * * to assist the trial judge past the pitfall of error.'

[6] "A unanimous verdict is required in all criminal trials by jury." KRS 29A.280(3).

Little v. Whitehouse, 384 S.W.2d 503, 504-05 (Ky. 1964). No basis exists for relief.

Defense counsel made several assertions at trial, supporting none with authority—not then; not now. He claims all communication from the jury to the judge must be in writing. While creating a paper trail is wise, we are cited no authority mandating it. If a judge chooses to require all jury inquiries to be written, such a policy should be conveyed to the jury before it retires to deliberate. Roberts' jury was advised of such between being sworn and hearing opening statements. The bailiff was also directed to remind jurors of the requirement amid deliberations, around 8:14 p.m.

On appeal, Roberts suggests it was error not to give jurors the option of reviewing only a portion of his lengthy testimony. Such a suggestion is patently wrong. "Any decision to allow the jury to have testimony replayed during its deliberations is within the sound discretion of the trial judge." *Baze v. Commonwealth*, 965 S.W.2d 817, 825 (Ky. 1997). Whether any testimony, or how much testimony, would be replayed was to be decided by the trial court, not the jury. The trial court never reached this question because no written request for a television or a replay of trial testimony was ever received. While "some" jurors may have thought a replay would be helpful, we must conclude that was not a unanimous view and no such request was reduced to writing. The trial court had

no responsibility to address an incomplete request. Moreover, when the new trial motion was heard, the trial court stated had jurors returned to the courtroom to review Roberts' testimony, her likely ruling would have been, "we're gonna watch it all."

During the penalty phase, defense counsel renewed his mistrial motion arguing a random juror—not the foreperson—had absented himself from jury deliberations to speak to the bailiff. We are again cited no rule or case allowing only the foreperson to communicate with the court or anyone outside the jury room. A strict reading of RCr 9.74, mandating in relevant part, "[n]o information requested by the jury *or any juror* . . .[,]" contradicts such a view. (Emphasis added.) Defense counsel also argued deliberations must cease unless all jurors are present but seemed to make an exception for bathroom breaks. Again, no authority was cited for this premise.

Winstead v. Commonwealth, 327 S.W.3d 386, 401-02 (Ky. 2010), *as modified* (Dec. 16, 2010), *as corrected* (Dec. 17, 2010), endorses a "flexible approach" to handling juror misconduct and reinforces trial court discretion to determine whether a mistrial or other relief is necessary. Applying *Winstead* to this case, we cannot say the trial judge abused its discretion in denying the requested mistrial and the new trial motion. The prosecutor argued any error was harmless because jurors received accurate information—they could review

testimony in the courtroom—but apparently decided to forego formally requesting a replay of Roberts' testimony. There is simply no clear showing the bailiff influenced deliberations or failed to convey jury communications to the court. Nor is there proof the trial court failed to convey jury requests to counsel and the accused. We discern no error, but if any occurred, it was harmless. *McAtee*, 413 S.W.3d at 626-27.

Roberts' second claim is he was erroneously prevented from introducing—through his sister and others—greater detail about Sarge's specific bad acts and threats. Roberts sought to introduce instances of Sarge's violent temper directed at others he had either personally observed or heard about to counter the Commonwealth's theory Roberts was merely creating a defense.

Roberts personally testified to many of Sarge's transgressions, casting him as always angry, "real loud," and having a violent temper. According to Roberts, Sarge was distressed upon returning from visiting his young son in Missouri because a restraining order had been entered against him for trying to break a window with a chair; Sarge regularly bragged about breaking the jaw of his ex-wife's boyfriend; after breaking a second window, Sarge was not allowed to work at the casino; Sarge hated co-worker Aaron Hupp and threatened to kill him; and Sarge physically abused Christine, inflicting her worst beating on her last birthday.

Of particular importance to Roberts was playing a 9-1-1 call recorded on July 30, 2016. On that day, Sarge, Christine, their baby, and Roberts attended a cookout hosted by Ryan Day and his girlfriend at their Indiana home. After eating and socializing, Roberts left and made the forty-minute return drive to Louisville. About fifteen minutes after Roberts arrived at home, he received a frantic distress call from Day saying Sarge had interrupted him having sex with Christine. Fearing Sarge would kill him, Day armed himself with a gun and locked himself in the bathroom. Roberts told Day to call police and immediately drove back to Day's home where he found Sarge on the porch holding the baby; Christine with blood streaming down her side; and Day still locked in the bathroom talking with 9-1-1 until police arrived. After smashing the window to Christine's Explorer with a rock, Sarge left. Christine was transported to the hospital by ambulance where she received ten staples to close a head wound. Christine originally said she had fallen, but later admitted Sarge had pushed her into a dresser causing her to hit her head. Roberts testified to all these details, many of which were corroborated by Christine, but maintains it was error to exclude Day's recorded 9-1-1 call.

We review evidentiary rulings for an abuse of discretion. *Mason v. Commonwealth*, 559 S.W.3d 337, 339 (Ky. 2018). "No error in . . . the admission . . . of evidence . . . is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order unless it

appears to the court that the denial of such relief would be inconsistent with substantial justice." RCr 9.24. Any error or defect not affecting a party's substantial rights will be disregarded. *Id.* Harmless error analysis applies to nonconstitutional evidentiary missteps not affecting substantial rights of the parties. *Murray v. Commonwealth*, 399 S.W.3d 398, 404 (Ky. 2013) (citing *Kotteakos v. United States*, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946)).

A criminal defendant is guaranteed "a meaningful opportunity to present a complete defense." *Crane v. Kentucky*, 476 U.S. 683, 690, 106 S.Ct. 2142, 2146, 90 L.Ed. 2d 636 (1986) (quoting *California v. Trombetta,* 467 U.S. 479, 485, 104 S.Ct. 2528, 2532, 81 L.Ed.2d 413 (1984)). For Roberts, this included—within limits—evidence supporting his theory of self-defense.

A victim's character is rarely relevant in a criminal case. ROBERT G. LAWSON, THE KENTUCKY EVIDENCE LAW HANDBOOK § 2.20[3][b] at 109 (5th ed. 2013) (Lawson, *Kentucky Evidence Law*). However, when the accused claims self-defense, "aggression of alleged victims is material and character is one way of proving that aggression." *Id*. at 110. But, not all evidence is admissible.

> 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[7] 404(a)(2); *Johnson v. Commonwealth*, Ky., 477 S.W.2d 159, 161 (1972); Robert G. Lawson, *The Kentucky Evidence Law*

[7] Kentucky Rules of Evidence.

> *Handbook* § 2.15[4][b], at 104 (4th ed. LexisNexis 2003). However, such evidence may only be in the form of reputation or opinion, not specific acts of misconduct. KRE 405(a); *Lawson, supra*, § 2.20 [4], at 116 ("By providing only for the use of reputation or opinion evidence in this situation, the rule plainly implies a prohibition on evidence of particular acts of conduct."). Specifically, in *Johnson*, our predecessor court held that a homicide defendant could not introduce the victim's police record for the purpose of showing his propensity for violence. *Johnson*, 477 S.W.2d at 161.
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> An exception exists, however, 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." Lawson*, supra*, § 2.15[4][d], at 105-06. *See also Commonwealth v. Higgs*, Ky., 59 S.W.3d 886, 892 (2001); *Commonwealth v. Davis*, Ky., 14 S.W.3d 9, 14 (2000); *Wilson v. Commonwealth*, Ky. App., 880 S.W.2d 877, 878 (1994). In that scenario, the evidence is not offered to prove the victim's character to show action in conformity therewith but to prove the defendant's state of mind (fear of the victim) at the time he acted in self-defense. "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." Lawson*, supra*, § 2.15[4][d], at 106 (citing *Baze v. Commonwealth*, Ky., 965 S.W.2d 817, 824-25 (1997)).

Saylor v. Commonwealth, 144 S.W.3d 812, 815-16 (Ky. 2004). Roberts' claim of self-defense triggered the above-mentioned exception, making Sarge's character

relevant for a specific purpose, but it did not change the type of proof Roberts could introduce and from whom.

In *Saylor*, the accused was allowed to testify about "six specific incidents of prior violent conduct by [the victim] of which [Saylor] had knowledge when he killed [the victim]." *Id*. at 816. Similarly, Roberts was allowed to testify about specific incidents of violent acts and threats by Sarge of which he was aware when he fatally shot Sarge. Roberts testified about two personal encounters with Sarge. During the July 2016 cookout at Day's Indiana home, Sarge had become angry at Roberts and had grabbed him by the collar. The evening Roberts shot Sarge, Roberts posted a photo of Sarge's daughter on Facebook while playing Cards Against Humanity.[8] Sarge found the picture offensive and became upset prompting Roberts to remove the posting. Not wanting to agitate Sarge further, Roberts went downstairs to go to bed. After watching television and talking to his girlfriend on the telephone, Roberts fell asleep. Roberts heard yelling upstairs followed by silence, so he knew Sarge had left the house. Roberts figured Sarge would be gone for hours, so he dressed, went upstairs, found Christine passed out on the toilet and placed her in bed.

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[8] Described as a party game relying on "offensive, risqué or politically incorrect" language. *https://en.wikipedia.org/wiki/Cards_Against_Humanity* (last visited May 8, 2019).

Roberts also testified Sarge physically abused Christine, including tossing her across the bedroom floor and inflicting her worst beating on her birthday in 2016. Roberts testified about Sarge threatening to kill Day and Day being so scared he armed himself with a gun and locked himself in a bathroom while waiting for police to arrive. Several other defense witnesses—Christine, Christian Walker and Dorrie Blevins—to name a few—portrayed Sarge as being known to have a violent streak. Blevins described Sarge as an "angry man." Plenty of witnesses commented on Sarge's propensity for violence. Christine testified Sarge did not have a gun, but Roberts had a concealed carry deadly weapon permit and was usually armed.

The unpublished case of *Ordway v. Commonwealth*, No. 2014-SC-000535-MR, 2016 WL 5245099 (Ky. Sept. 22, 2016), is on point.[9] Standing trial for murder in a drug trafficking deal gone awry, Ordway claimed self-protection and offered defense witnesses who would testify to specific acts of violence by the two victims. Just as in this case, the Commonwealth objected, arguing witnesses

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[9] Kentucky Civil Rule (CR) 76.28(4)(c) allows us to consider unpublished opinions when no published opinion adequately addresses the issue.

In discussing admissibility of Sarge's character we reference the unpublished *Ordway* case rendered in 2016. In addressing whether a police officer impermissibly testified as an expert witness, we cite *Ordway v. Commonwealth*, 391 S.W.3d 762 (Ky. 2013), which resulted in reversal for the new trial which is the basis of the opinion subsequently rendered in 2016. The 2013 case will be referenced as *Ordway I* and the 2016 case as *Ordway II*.

could testify only about the general reputation of the victims. In *Ordway II*, the trial court prevented defense witnesses from testifying about specific acts of the victims, but

> permitted Ordway to testify about his personal knowledge of [the victim's] prior acts of violence, including the homicide conviction, and how that that knowledge contributed to his fear of [the victim] and his belief in the need to use physical force in self-protection.

Ordway II, 2016 WL 5245099, at *4.

Ordway cried foul, but the Supreme Court rejected his theory KRE 405(c) authorizes general witnesses to testify about specific instances of a victim's conduct to prove his character for violence, stating:

> Ordway misinterprets KRE 405(c) as the [victim's] character is not an essential element to Ordway's self-defense claims. "In criminal cases, it is rare (almost unheard of) to find that character is an element in a charge or defense." *Sherroan v. Commonwealth*, 142 S.W.3d 7, 21 (Ky. 2004) (quoting Lawson, *Kentucky Evidence Law* § 2.15[6] at 108 n.45 (4th ed.)). Only where the existence of the character trait determines the rights and liabilities of the parties, is character considered to be an essential element, which can be established by specific instances of conduct. Further, the types of cases in which character is an essential element are rare. Examples of the latter provided by Professor Lawson include: (1) a civil action for defamation, (2) a criminal action involving extortion, and (3) criminal cases where the defense is entrapment. *Id*. at 21-22 (citing Lawson, *Kentucky Evidence Law* § 2.15[6] at 108-09 (4th ed.)). Evidence of [the victim's] violent character is not an essential element of the claim of self-protection. Rather Ordway's awareness of [the victim's] character was

> merely circumstantial evidence relevant to whether Ordway believed he was entitled to or needed to act in self-protection. As such, proof of that trait in the form of specific prior acts of the victim vis-à-vis other people many years before is not admissible under KRE 405(c). Accordingly, the trial court properly excluded the offered evidence.

Ordway II, 2016 WL 5245099, at *5 (footnotes omitted). Sarge's actions were not as remote as those in *Ordway II*, but we see no reason to reach a different result. Roberts put his claim of self-defense, and the basis of his fear, squarely before the jury. They were unconvinced. No error occurred.

Roberts' third complaint pertains to Detective Richard Burns, the lead detective on this case for Louisville Metro Police. He testified he continued investigating the case after learning Roberts was claiming self-defense. Detective Burns stated he would not have been doing his job had he just stopped collecting evidence, and when asked whether he was able to corroborate Roberts' claim of self-defense responded, "No Sir." Counsel sought an admonition more than once, but each request was denied. Roberts wanted the judge to tell jurors whether he acted in self-defense was ultimately their decision.

Roberts' allegation of error is based entirely on *Ordway I*, wherein a death penalty conviction was reversed because a police detective opined, over objection, Ordway did not behave like people who legitimately take a life in self-defense. According to the detective who testified in Ordway's first trial, after

shooting two associates in the stolen vehicle in which all were riding, Ordway tried to carjack at gunpoint two other drivers in an attempt to leave the scene; did not personally call 9-1-1 for assistance or ask someone to call 9-1-1 on his behalf; did not put down his weapon and wait for officers to arrive; and did not cooperate with police—all things the detective, based on his experience, would expect someone honestly claiming self-defense to do. In reversing Ordway's conviction, our Supreme Court characterized the detective's testimony as a "type of expert behavioral testimony." *Ordway I*, 391 S.W.3d. at 776. Declaring reversible error, the Court wrote,

> Detective Wilson's testimony contrasting his opinion on the habits of suspects who, as a class, have truthfully invoked the defense of self-protection against the class of those who have lied about it, and how [Ordway's] post-shooting conduct was consistent with the latter, should have been excluded as improper opinion testimony and irrelevant. As in [*Johnson v. Commonwealth*, 885 S.W.2d 951 (Ky. 1994)], the admission of such evidence was reversible error.

The Supreme Court had previously held,

> a party may not introduce evidence of the habit of a class of individuals either to prove that another member of the class acted the same way under similar circumstances or to prove that the person was a member of that class because he acted the same way under similar circumstances.

Id. (citing *Miller v. Commonwealth*, 77 S.W.3d 566, 572 (Ky. 2002)).

Roberts' trial unfolded differently than Ordway's, and Detective Burns' testimony focused entirely on how he investigated the case. He was neither asked—nor volunteered—how Roberts acted; how Detective Burns would expect a person acting in self-defense to react; nor whether Roberts appeared to be guilty. Moreover, on cross-examination, defense counsel initiated the following exchange with the witness:

> Defense Counsel: Now, when you talk about self-defense, ultimately, you'll have to agree with me, the issue of self-defense is decided not by police, it's decided by the jury. Would you agree with that? (Pause). You can't send him to prison. Correct?
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> Detective Burns: No, we've had cases that we've determined are self-defense without a jury deciding that, but no, I can't determine this is not self-defense.
>
> Defense Counsel: The jury determines that.

Roberts' point reached the jury. We discern no reversible error. *Ordway I*, 391 S.W.3d at 776-77.

The fourth error alleged is—on both cross-examination of Roberts and during summation—the Commonwealth improperly commented on Roberts' right to remain silent in violation of *Doyle v. Ohio*, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976). Under *Doyle*, a prosecutor violates due process by impeaching an accused's exculpatory story, revealed for the first time at trial, by cross-

examining him about having told a different story after receiving *Miranda*[10] rights. *Anderson v. Charles*, 447 U.S. 404, 408, 100 S.Ct. 2180, 2182, 65 L.Ed.2d 222 (1980), refined *Doyle*, holding it does not "apply to cross-examination that merely inquires into prior inconsistent statements."

During his 9-1-1 call summoning help for Sarge immediately after the shooting, Roberts said Sarge attacked him and Roberts shot him. Likewise, when police arrived at the scene, Roberts told the officer, "he attacked me. . . . He threw me on the ground." In the immediate wake of the shooting, Roberts said nothing about Sarge having threatened him—that part of his story surfaced for the first time at trial during the defense case-in-chief.

In cross-examining Roberts, the prosecutor thought it odd that in recorded telephone calls to family members from the jail Roberts never mentioned Sarge threatening him, and asked Roberts about the contradictions in the story he told immediately after the shooting, and the story he was telling jurors at trial—more than a year later. Defense counsel approached the bench and requested the jury be admonished to disregard the question. The trial court gave no admonition but directed the Commonwealth to move on.[11]

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[10] *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

[11] According to the Commonwealth's brief, the Commonwealth withdrew the question, but we did not hear that during our review of the trial recording—perhaps due to poor sound quality and the use of white noise during bench conferences.

In closing argument, the Commonwealth revisited the dichotomy in Roberts' stories. Defense counsel again approached the bench and requested an admonition. This time, the trial court told jurors Roberts was not required to make any statement. On appeal, Roberts claims the admonition was insufficient. However, he did not request a mistrial *after* the trial court admonished the jury. "[F]ailure to move for a mistrial following an objection and an admonition from the court indicates that satisfactory relief was granted." *Blount v. Commonwealth*, 392 S.W.3d 393, 398 (Ky. 2013) (quoting *West v. Commonwealth*, 780 S.W.2d 600, 602 (Ky. 1989)). "It is well within the realm of valid assumption that counsel was satisfied with the court's admonition to the jury." *Id*. (quoting *Hunter v. Commonwealth*, 479 S.W.2d 4, 6 (Ky. 1972)). We presume counsel was satisfied.

Roberts called 9-1-1 at 1:09 a.m. on November 11, 2016. He was not arrested until 3:00 a.m. Upon his arrest, Roberts received *Miranda* warnings and invoked his right to remain silent. Defense counsel posits the Commonwealth could not comment on any aspect of the defense that developed after he was read his *Miranda* rights. We disagree.

In *Anderson*, the United States Supreme Court held:

> The quoted colloquy, taken as a whole, does "not refe[r] to the [respondent's] exercise of his right to remain silent; rather [it asks] the [respondent] why, if [his trial testimony] were true, he didn't tell the officer that he stole the decedent's car from the tire store parking lot instead of telling him that he took it from the street." 58

> Mich. App., at 381, 227 N.W.2d, at 354. Any ambiguity in the prosecutor's initial questioning was quickly resolved by explicit reference to Detective LeVanseler's testimony, which the jury had heard only a few hours before. The questions were not designed to draw meaning from silence, but to elicit an explanation for a prior inconsistent statement.
>
> We conclude that *Doyle* does not apply to the facts of this case. Each of two inconsistent descriptions of events may be said to involve "silence" insofar as it omits facts included in the other version. But *Doyle* does not require any such formalistic understanding of "silence," and we find no reason to adopt such a view in this case.

Anderson, 447 U.S. at 408-09, 100 S.Ct. at 2182. As in *Anderson*, the prosecutor's cross-examination and summation did not improperly reference Roberts' right to say nothing at all. The prosecutor merely noted Roberts was telling different versions of the events precipitating his shooting of Sarge.

We draw further support from *Moss v. Commonwealth*, 531 S.W.3d 479, 481 (Ky. 2017), wherein Moss told a "[9-1-1] operator that he had been attacked in his home and had to shoot his assailant. . . ." When officers arrived on the "chaotic scene," Moss and two women were taken inside the home to talk. As Moss explained what happened, one of the women screamed, "You shot him in the back for no reason." *Id*. at 482. Moss did not respond, but later voluntarily went to the sheriff's office where he gave a formal statement which included far more detail than his original comments. Relying on *Anderson*, the Supreme Court of Kentucky held comparing inconsistencies in Moss' pre-trial statements did not

constitute improper comment on his "pre-arrest exercise of his right to remain silent," writing:

> In *Anderson v. Charles*, 447 U.S. 404, 408-409, 100 S.Ct. 2180, 65 L.Ed.2d 222 (1980), the United States Supreme Court held that a police officer's testimony about the inconsistencies between a defendant's trial testimony and his pre-trial statement was not "designed to draw meaning from silence, but to elicit an explanation for a prior inconsistent statement," and that the omission of facts, when comparing two inconsistent statements, will not be viewed as silence under *Doyle v. Ohio*, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976).

Moss, 531 S.W.3d at 487. In light of *Anderson* and *Moss*, we hold the prosecutor's comparison of Roberts' inconsistent statements—that given before arrest and that given on the witness stand at trial—did not impeach the accused with silence. No error occurred.

Arguing his use of deadly force was justified, Roberts next claims he was wrongly denied the directed verdict he sought at the close of the Commonwealth's proof and renewed at the close of all proof. "Rarely is a defendant relying upon self-defense entitled to a directed verdict. Only in the unusual case in which the evidence conclusively establishes justification and all of the elements of self-defense are present is it proper to direct a verdict of not guilty." *West*, 780 S.W.2d at 601.

An accused's claim of self-defense or his explanation of events supporting such a claim need not be taken "at face value" where there is

conflicting proof or other evidence from which the jury may infer absence of "one or more of the elements necessary to qualify for self-defense[.]" *Id.* A defendant claiming "self-defense bears the risk that the jury will not be persuaded of his version of the facts." *Id.* (citing *Collins v. Commonwealth*, 309 Ky. 572, 218 S.W.2d 393 (1949)).

We will reverse only if after considering the evidence as a whole we determine it was clearly unreasonable for the jury to convict Roberts. *Hall v. Commonwealth*, 551 S.W.3d 7, 12 (Ky. 2018) (quoting *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991) (citing *Commonwealth v. Sawhill*, 660 S.W.2d 3, 5 (Ky. 1983) (quoting *Trowel v. Commonwealth*, 550 S.W.2d 530, 533 (Ky. 1977))). In reviewing Roberts' challenge, we construe all evidence in the light most favorable to the Commonwealth, *Commonwealth v. Jones*, 283 S.W.3d 665, 668 (Ky. 2009), and draw all fair and reasonable inferences from the proof in favor of the Commonwealth. *Benham*, 816 S.W.2d at 187.

Roberts described Sarge as angry, loud, and violent, especially when drunk. Roberts knew Sarge would leave the house for several hours after each argument with Christine. Living in the same house as Christine, Sarge, and their baby, Roberts knew Sarge was "very attached" to the child and should have realized posting a photo of the child holding an inappropriate Cards Against Humanity card could anger Sarge.

Roberts testified he heard Christine and Sarge arguing upstairs after the card game before the house fell silent, signaling to Roberts that Sarge had left the house. Roberts dressed—donning pants with a handgun clipped to the back—went upstairs to check on Christine, found her passed out on the toilet, and put her to bed. Christine heard nothing the remainder of the evening—no scuffle, no shots, and testified she did not recall Sarge striking her that night.

Much of the defense focused on acts between Sarge and others. Day feared Sarge would kill him after he caught Day having sex with Christine. Sarge hated Hupp and threatened to kill him. Sarge broke the jaw of his ex-wife's new boyfriend. Sarge physically abused Christine. While Roberts was aware of each act, the Commonwealth argued they were relevant only as bearing on Roberts' state of mind at the time he shot and killed Sarge.

Roberts portrayed himself as an intervenor between Day and Sarge, and between Christine and Sarge. However, very little contact between Roberts and Sarge was alleged. At Day's July 2016 cookout, Sarge unexpectedly grabbed Roberts by the collar. Their next one-on-one encounter occurred the night of the card game on November 10, 2016. When Sarge returned to the home, Roberts was in the kitchen preparing a late-night snack. Roberts, the only person alive to tell what happened, testified Sarge charged at him, trapping him in a corner. Roberts tried to push past Sarge, but Sarge said, "I'll kill anyone who messes with my

daughter," which Roberts interpreted as a threat to kill him. When recounting the night's events to the 9-1-1 operator and in a subsequent police interview, Roberts said Sarge attacked him. In responding to the directed verdict motion, the Commonwealth noted Roberts had suffered no serious physical injury.

The Commonwealth must prove its case, but it need not rebut the defense. KRS 500.070(1). *Brock v. Commonwealth*, 947 S.W.2d 24, 26-27 (Ky. 1997). Here, there was conflicting proof from which jurors could reasonably conclude Roberts' use of deadly force was unjustified. *West*, 780 S.W.2d at 601. That Roberts perceived Sarge as having threatened him was a factor for jurors to consider but it did not require entry of a directed verdict. *Brock*, 947 S.W.2d at 27.

> "A threat of violence seriously made does not in and of itself justify the man threatened in killing the one who made it, because the threat alone does not put the threatened party in imminent danger." *Davidson v. Commonwealth*, 261 Ky. 158, 87 S.W.2d 119, 122 (1935). Such threats "may help the jury . . . in determining the good faith of the accused in arriving at his asserted belief of impending danger." *Id*.

Id. The trial court did not err.

Finally, Roberts claims cumulative error requires reversal. Having determined none of the individual claims raised necessitates reversal, the combination of alleged non-errors cannot require reversal.

For the foregoing reasons, the judgment of the Jefferson Circuit Court is AFFIRMED.

MAZE, JUDGE, CONCURS.

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