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RENDERED: JUNE 25, 2009
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2006-SC-000785-MR

QUINCY BAILEY — APPELLANT

V.

ON APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE R. JEFFREY HINES, JUDGE
NO. 04-CR-00361

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

The McCracken Circuit Court convicted Appellant, Quincy Bailey, of murder and sentenced him to life in prison. He appeals to this Court as a matter of right, raising seven errors for our review. For the reasons set forth herein, we affirm.

Background

Appellant was convicted of killing Billy Askew. Appellant and Askew were at an area of Paducah known as "The Set" on the evening of August 2, 2004. A large crowd was present. Askew, angry that Bailey had refused to sell drugs for Askew's gang, confronted Appellant. After pulling a gun, Askew then patted down Appellant's pockets and removed $500. He ordered Appellant to leave and threatened to kill him if he returned to the area. Appellant left, but returned about forty-five minutes later to pick up his wife at her request, as

she was fearful after the prior confrontation. Appellant carried a loaded .9mm pistol in his pocket.

According to Appellant's testimony, as he walked around The Set looking for his wife, he spotted Askew. He testified that Askew approached him quickly and flashed a weapon tucked into his waistband. He drew his own weapon and shot Askew in the leg to stop him. However, as Askew continued to advance, Appellant continued to fire shots. He then fled. Two other defense witnesses testified that just prior to Appellant's arrival, Askew made comments about Appellant to the effect that he would harm Appellant if he returned.

Uvander Hunter, Askew's cousin, contradicted this version of events. She testified that Askew was talking to friends when Appellant returned to The Set, and that he did not see Appellant approaching him from behind. Immediately before the first shot was fired, she heard Appellant say, "Now what? I'm back." Askew only fired his weapon after Appellant had fired, according to Hunter. Two other witnesses testified that Askew was lying on his stomach firing his gun, not advancing towards Appellant.

The Commonwealth also called Johnny Harmon, who had given a prior recorded interview to police. In that statement, Harmon said that Appellant walked towards the victim and said: "Do you want to pull a pistol? Or wanna pull a pistol, or gun, or something?" Harmon then heard gunshots. In the interview, Harmon told police that Askew "never knew what was coming." At trial, however, Harmon recanted his entire prior statement, saying that he was coerced into making it after investigators told him they could "make stuff go

away." Harmon interpreted this statement to mean the police had information upon which they could potentially bring criminal charges against him. He testified that he did not see anything that night, despite the fact that he identified himself as an eyewitness to police officers responding to the scene and gave a brief interview to police the day after the incident. Harmon, though, also admitted that he and his family were threatened about testifying at the trial. Due to the continual need to refresh Harmon's memory with the recorded statement, the jury heard its substance, though it was not introduced into evidence.

The physical evidence established that Askew died of multiple gunshot wounds, though it was undetermined in what order the shots were fired. Gunshot residue testing revealed that he was twice shot from a distance of two feet or less.

Following the shooting, Uvander Hunter took Askew's gun from the scene, though she gave it to investigators about two days later. Appellant fled Paducah and was apprehended a year later in Texas. Following a jury trial, he was found guilty of murder and sentenced to life in prison. This appeal followed.

Continuance

Appellant first complains that he was entitled to a continuance due to the Commonwealth's failure to timely disclose all discoverable material. Defense counsel's motion, filed the day before trial, was denied. We find no error in the trial court's decision.

The basis of defense counsel's motion to continue was that the Commonwealth failed to provide complete discovery. A review of the hearing on the motion, however, reveals that defense counsel's complaints were primarily directed towards the manner of disclosure and a supposed lack of organization of the discovery materials. Ultimately, the trial court found that defense counsel was provided all discoverable material in a timely fashion, except for three photographs of the crime scene and a handwritten map made by Detective Scott Aycock. The photographs depict a crowd around the crime scene. All names of all persons depicted in the photographs were provided to defense counsel, except for one, Beatrice White. Ms. White did not witness the crime, but arrived shortly after the police to look for a family member. None of these photographs were admitted at trial.

A continuance will be granted upon a showing of sufficient cause. RCr 9.04. The decision to grant a continuance lies within the sound discretion of the trial court, and it should be based on the particular circumstances of the case. Snodgrass v. Commonwealth, 814 S.W.2d 579, 581 (Ky. 1991), overruled on other grounds by Lawson v. Commonwealth, 53 S.W.3d 534, 542 (Ky. 2001).

> Factors the trial court is to consider in exercising its discretion are: length of delay; previous continuances; inconvenience to litigants, witnesses, counsel and the court; whether the delay is purposeful or is caused by the accused; availability of other competent counsel; complexity of the case; and whether denying the continuance will lead to identifiable prejudice.

Id.

The circumstances of this case did not warrant a continuance. Defense counsel failed to articulate any identifiable prejudice resulting from the late disclosure, and we find none. Detective Aycock's handwritten map is not exculpatory, nor does it constitute an "official police report" pursuant to RCr 7.24. Also, the photographs of the crime scene bore no exculpatory value, but merely depicted the crowd that had gathered after the shooting. Defense counsel was provided with the names of all persons present in the photographs months before trial, except for Ms. White. Ms. White was not at The Set when the shooting occurred, but only came to the area upon hearing of the shooting. Further, when questioned by police, she stated that she did not witness or know anything about the shooting.

Although no prior continuances had been requested or ordered, this motion was filed the day before trial was to commence. The Commonwealth and the court were prepared to begin the following day and several out-of-state witnesses were scheduled to appear. Considering the lack of any identifiable prejudice to Appellant as a result of the untimely disclosure of the photographs and handwritten map, we find no abuse of discretion in the trial court's decision to proceed with trial. See Moody v. Commonwealth, 170 S.W.3d 393, 396 (Ky. 2005). There was no error.

Jury Instructions

Appellant next challenges the jury instructions on four grounds: (1) that the initial aggressor and provocation qualifications were unsupported by the evidence; (2) that these qualifications were improperly presented as separate

instructions; (3) that the self-protection instruction was improperly presented after the offenses to which it applied; and (4) that the self-protection instruction failed to include a statement that Appellant had no duty to retreat. Upon review of the instructions, we find no error.

The evidence supported an initial aggressor instruction. A defendant is not justified in using physical force against another when the defendant acted as the initial aggressor. KRS 503.060(3). The official commentary to KRS 503.050 states that this instruction applies where a defendant, "not having an intent to cause death or serious physical injury, starts an encounter with another and subsequently finds himself believing in a need to use physical force, perhaps deadly, to protect himself from the other's attack."

Appellant had an embarrassing encounter with Askew and left The Set, fearful and humiliated. He was aware that Askew was carrying a weapon and later returned to The Set with his own loaded handgun. According to Uvander Hunter, Appellant surprised Askew and said, "Now what? I'm back." The two then exchanged gunfire, although she did not know who fired first. Harmon testified that he told police he had overheard a similar comment. Appellant himself testified that he shot first at Askew's leg, after seeing Askew's weapon, and that Askew then fired back. Appellant continued to fire his weapon. It is entirely reasonable, based on these facts, to believe that Appellant returned to The Set to exact revenge on Askew, and that he approached him in a threatening manner. When Askew showed his gun, Appellant then believed it necessary to protect himself with the use of physical force. Cf. Stepp v.

Commonwealth, 608 S.W.2d 371, 374 (Ky. 1980) (it was reversible error to deliver initial aggressor instruction where defendant and victim had altercation, victim left but later returned with a loaded weapon, and there was no evidence that defendant provoked or initiated second encounter).

A slightly different interpretation of these same facts supports the provocation qualification instruction as well. The comment heard by Ms. Hunter is reasonably interpreted as a taunt. Harmon told investigators that as Appellant came up to Askew, he said: "Do you want to pull a pistol? Or wanna pull a pistol, or gun, or something?" This statement is also fairly understood as an attempt to goad Askew into an altercation. KRS 503.060(2) prohibits the justification of self-defense where "the defendant, with the intention of causing death or serious physical injury to the other person, provokes the use of physical force by such other person[.]" Based on Appellant's taunts and the fact that he returned to The Set armed, the jury could reasonably conclude that Appellant provoked Askew into a physical altercation with the intention of killing or seriously injuring him.

The trial court's duty is to correctly instruct the jury on every theory of the case supported by the evidence. RCr 9.54(1); Taylor v. Commonwealth, 995 S.W.2d 355, 360 (Ky. 1999). Where the evidence is convoluted and does not "conclusively establish [the defendant's] state of mind at the time he killed the victim, it is appropriate to instruct on all degrees of homicide and leave it to the jury to sort out the facts and determine what inferences and conclusions to draw from the evidence." Commonwealth v. Wolford, 4 S.W.3d 534, 539-40

(Ky. 1999). In this case, the testimony supported many different conclusions as to Appellant's state of mind at the time he returned to The Set and killed Askew. There were contradictory accounts as to who fired the first shot. The trial court correctly included initial aggressor and provocation qualifications in its instructions to the jury. There was no error.

Appellant further argues that the instructions on these qualifications to self-protection, as well as the wanton or reckless belief qualification instruction, were erroneously presented to the jury as separate, stand-alone instructions. According to Appellant, the qualification instructions should have been part of the self-protection instruction itself. While initial aggressor and provocation qualification instructions are only proper when a self-defense instruction is given, there is no requirement that the instructions be presented on the same page. Reading this group of justification instructions together, and as a whole, they are neither confusing nor misleading. Thomas v. Commonwealth, 412 S.W.2d 578, 581 (Ky. 1967). The qualification instructions make clear reference to the self-defense instruction. Moreover, Appellant has failed to identify any prejudice resulting from the presentation of the instructions. Commonwealth v. Higgs, 59 S.W.3d 886, 890 (Ky. 2001) (in order to warrant reversal based on erroneous jury instructions, both error and prejudice must be demonstrated). There was no error.

In a similar vein, Appellant argues that the self-protection instruction and its accompanying qualification instructions should have been presented before the offense instructions. The self-protection instruction made

unambiguous reference to the offense instructions, and the purpose and effect of the self-protection instruction was clearly stated. The jury is assumed to be of sufficient intelligence to understand that the instructions are to be read as a whole. Bowman v. Commonwealth, 284 Ky. 103, 143 S.W.2d 1051, 1053 (1940). Further, we discern no prejudice to Appellant flowing from the order in which instructions were presented. There was no error.

Lastly, Appellant claims error where the self-protection instruction did not include a statement that no duty to retreat existed. KRS 503.030(4) requires such an instruction, though this subsection was not enacted until three years after Askew's death. Appellant nonetheless argues that he was prejudiced by this omission.

Because KRS 503.030(4) was not in effect at the time of the offense and it has not been given retroactive applicability, our holding in Hilbert v. Commonwealth controls. 162 S.W.3d 921 (Ky. 2005). In Hilbert, we held that Kentucky "[follows] the principle 'that when the trial court adequately instructs on self-defense, it need not also give a no duty to retreat instruction.'" Id. at 926 (internal citations omitted). See also Rodgers v. Commonwealth, ___ S.W.3d ___ (Ky. 2009) ("We decline to revisit Hilbert, therefore, a decision not even four years old, and continue to hold that as enacted in 1975 the Penal Code incorporated the pre-code rule that while Kentucky does not condition the right of self-defense on a duty to retreat, retreat remains a factor amidst the totality of circumstances the jury is authorized to consider and a 'no duty to retreat' instruction is not required."). See also Wines v. Commonwealth, ___

S.W.3d ___ (Ky. 2009) ("Nor [is] a 'no duty to retreat' instruction required by pre-existing law or by the constitutional right to present a defense."). The jury was correctly instructed on the theory of self-protection. Also, the fact that Appellant had no duty to retreat was made very clear during defense counsel's closing statement. We find no prejudice resulting from the trial court's failure to include a no duty to retreat statement in the jury instructions.

Verdict

Appellant asserts that the verdict was irregular and contradictory and, therefore, void. The issue is not preserved for review and Appellant requests palpable error review pursuant to RCr 10.26. As a basis for this claim, Appellant points to typographical errors in the instruction packet provided to the jury and in the verdict form. A review of the facts is necessary to understanding Appellant's claim.

The jury instructions were numbered in this case, with Instructions 1 and 2 relating to the presumption of innocence and statutory definitions, respectively. Four homicide instructions were given: murder (Instruction 3); first-degree manslaughter (Instruction 4); second-degree manslaughter (Instruction 5); and reckless homicide (Instruction 6). Instructions 7 through 11 contained the self-protection instruction and its accompanying qualification instructions (wanton or reckless belief, initial aggressor, and provocation). The final instruction required a unanimous verdict. Each instruction was printed on a separate sheet of paper. The trial court correctly read the jury instructions to the jury and a packet of instructions was provided to each

juror. However, in that packet, the first-degree manslaughter instruction was erroneously placed before the murder instruction. That is, the first six written instructions were given to the jury in the following order: Instruction 1 (presumption of innocence); Instruction 2 (definitions); Instruction 4 (first-degree manslaughter); Instruction 3 (Murder); Instruction 5 (second-degree manslaughter); and Instruction 6 (reckless homicide). Undoubtedly, this was an administrative mistake.

Unfortunately, the verdict form compounded this error. The written verdict form directed the jury to execute only one of five possible verdicts. The jury executed, and the foreperson signed, the first verdict statement: "We, the jury, find the Defendant, Quincy D. Bailey, guilty of Murder under Instruction No. 4." As stated above, Instruction 4 relates to first-degree manslaughter, not murder, though it was the first homicide instruction in the packet. Thus, on the face of the verdict form, two equally plausible interpretations exist: that the jury found Appellant guilty of murder, though the instruction erroneously refers to Instruction No. 4; or that the jury found Appellant guilty of first-degree manslaughter under Instruction No. 4, though the instruction erroneously refers to murder.

The ambiguity in the verdict form was not recognized at trial. The trial court accepted the verdict without objection from either party and polled the jury as to their finding of murder. Judgment was entered. Apparently, the trial court later realized the error in the verdict and issued an order the following week which stated: "The jury was polled as to their finding. Although,

there is a typographical error in the verdict form, that both the Commonwealth and the defense counsel over looked (sic), it does not effect (sic) the outcome of the jurors (sic) clear verdict of murder." Appellant's final sentencing occurred about a month later and, again, defense counsel made no objection regarding the verdict form.

Where a jury's verdict is unclear or open to multiple interpretations, a criminal defendant's substantial rights are certainly implicated. For this reason, we will review Appellant's claim of palpable error, though completely unpreserved for appellate review. See Brown v. Commonwealth, 445 S.W.2d 845, 847-48 (Ky. 1969) (patent ambiguity in jury's recommendation of death sentence required reversal, even though objection was not made prior to jury's discharge or in subsequent motion for a new trial).

It has long been recognized in Kentucky that failure to object to an inconsistent, ambiguous or unclear verdict constitutes a waiver for purposes of appeal:

> If a verdict is not as specific as desired, the correct practice is to then and there, before the jury is discharged, have them reform it. Allowing the jury to be discharged without objection, and without motion to have them correct or extend their verdict, will be deemed a waiver of formal defects in it. And it must then affirmatively appear that the substantial rights of the accused have been prejudiced by the informality. The presumption will not be indulged that his rights were prejudiced.

Gillum v. Commonwealth, 121 S.W. 445, 446 (Ky. 1909). This rule balances the competing interests of the defendant and the public: "Certainty is highly

important to a proper administration of the criminal law; but it should not go so far as to sacrifice substance to form." Hays v. Commonwealth, 12 Ky.L.Rptr. 611, 14 S.W. 833, 834 (1890) (verdict correctly adopted by the court though it failed to specify if defendant was found guilty of murder or manslaughter, where jury's corresponding recommendation as to punishment could only apply to manslaughter). "This [rule] prevents a dissatisfied party from misusing procedural rules and obtaining a new trial for an asserted inconsistent verdict." Beaty v. Commonwealth, 125 S.W.3d 196, 215 (Ky. 2003), quoting Lockard v. Mo. Pac. R.R. Co., 894 F.2d 299, 304 (8th Cir. 1990).

This Court has identified three exceptions to the requirement that any defect in the verdict is waived if not addressed while the jury is still empanelled. A reviewing court will consider a claim, despite a failure to object before the jury is discharged, where the verdict fails to determine a particular claim. Smith v. Crenshaw, 344 S.W.2d 393, 395 (Ky. 1961). We will likewise consider such an unpreserved claim where the verdict is "so ambiguous that it cannot be ascertained what determination has been made of the claim[.]" Id. Finally, if the unpreserved claim alleges both a substantive error *and* it was presented to the trial court, though sometime after the jury was discharged, it will nonetheless be considered on appeal. Caretenders, Inc. v. Commonwealth, 821 S.W.2d 83, 85 (Ky. 1991).

Appellant argues that the verdict in this case is ambiguous and should be considered on appeal pursuant to the second exception to the preservation requirement. Accordingly, we must consider whether the verdict form is so

ambiguous that the jury's ultimate decision cannot be ascertained. When making this determination, "the court may make use of anything in the proceedings that serves to show with certainty what the jury intended, and, for this purpose, reference may be had, for example, to the pleadings, the evidence, the admissions of the parties, the instructions, or the forms of verdict submitted." 75B Am. Jur. 2d Trial § 1545 (2008).

Here, on its face, the verdict form is open to two distinct interpretations. However, the jury's intention to find Appellant guilty of murder can be ascertained from the circumstances of the trial. Contrary to Appellant's arguments, we believe the jury was aware that manslaughter and murder are distinct offenses. In its closing arguments, both the Commonwealth and defense counsel thoroughly explained the degrees of homicide. During the sentencing phase, repeated and continual reference was made to murder and the penalties allowed for that offense. See State v. Froiland, 910 So.2d 956, 971 (La.App. 2005) (where verdict form was ambiguous on its face, "Considering the numerous times that the offense was referred to as theft, as opposed to theft of goods, we find that the verdict reflects the jury's intent to find the defendant guilty of theft, not theft of goods . . . .").

Furthermore, when the jury was polled, specific reference was made to its having "found defendant guilty of murder." All jurors individually affirmed that this was, indeed, their verdict. See Bush v. Commonwealth, 839 S.W.2d 550, 556 (Ky. 1992) (informal polling of jury after contradiction in verdict was noticed, during which all nodded in agreement to foreperson's statement of the

jury's intention, cured any defect in the otherwise ambiguous verdict).

We also find significant the jury's recommended sentence. The jury originally returned a sentencing recommendation of "25 years to life." The trial court explained that the allowable sentences for murder were either a term of years between 20 and 50 years or life imprisonment. KRS 532.060(2)(a). The jury returned a revised recommendation of "life." We believe that, had the jury intended to convict Appellant of the lesser offense of first-degree manslaughter, it is improbable that it would then recommend the harshest possible sentence.

Most importantly, we cannot ignore the fact that no objection was made to the trial court concerning the verdict. Evidently, the typographical error went unnoticed at trial. However, the trial court *sua sponte* clarified the verdict in its order issued a week later. Defense counsel received a copy of this order and was, therefore, on notice of the verdict's defect. Still, at the final sentencing proceeding a month later, no objection was made to the verdict. The trial court specifically asked defense counsel if any lawful reason existed why sentence should not be imposed, and defense counsel responded in the negative. We reiterate these circumstances not to highlight the lack of preservation of this issue, but to evidence the general understanding held by defense counsel, the Commonwealth, and the trial court, that Appellant was found guilty of murder, *even after the apparent defect was brought to light.*

The circumstances surrounding this jury verdict are highly unusual, and Appellant's arguments implicate the most fundamental rights of a criminal defendant: the right to a unanimous verdict and the absolute necessity of clear

and unambiguous verdicts, particularly in criminal cases. For this reason, we have undertaken an especially thorough review of the record in this case.

It is our conclusion that the jury intended to find Appellant guilty of murder. The evidence adduced at trial strongly supported the finding that Appellant returned to The Set with the intention of killing Askew in revenge. When polled as to the finding of murder, no juror objected or attempted to correct the trial court. The jury's recommended sentence reflects a belief that the crime was so egregious as to warrant the highest possible sentence. Even after the verdict's deficiency was revealed, all parties proceeded with final sentencing under the belief that Appellant was found guilty of murder. In light of these circumstances, the jury's intent can be fairly ascertained. Therefore, Appellant's claim has been waived and is unpreserved for appellate review. Beaty, id.

Directed Verdict

Appellant claims that the trial court erred in denying his motion for a directed verdict of acquittal. When considering a motion for a directed verdict, "[T]he trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given." Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991). Our duty, as the appellate court, is to determine "if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal." Id.

There is no doubt that this case was properly submitted to the jury. Having established that Appellant killed Askew, the primary question for the jury was the validity of Appellant's claim of self-protection and his state of mind at the time of the shooting. There was ample evidence upon which to believe that Appellant returned to The Set to seek revenge. Eyewitnesses testified that Askew was effectively ambushed and that he only fired his weapon after Appellant shot him. Circumstantial evidence supported this conclusion. Appellant returned with a loaded gun. He shot Askew *eight* times and then fled the scene. He remained a fugitive for a year. The trial court did not err in denying Appellant's motion for a directed verdict. See West v. Commonwealth, 780 S.W.2d 600, 601 (Ky. 1989) ("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.").

Other Claims

Appellant raises five additional claims of error, all of which are without merit. He asserts that the Commonwealth improperly referred to Harmon's recorded statement during its closing argument, although it was not admitted as error. No contemporaneous objection was made and Appellant requests palpable error review.

Undoubtedly, any supposed error was harmless. The Commonwealth properly impeached Harmon with his prior inconsistent statement and, in so doing, was able to convey its substance to the jury. Any subsequent reference to Harmon's interview was not prejudicial. RCr 10.26.

Appellant claims that the Commonwealth's Attorney misrepresented the initial aggressor qualification during his closing argument by stating: "If you're the initial aggressor, then you can't claim self-defense." This is not a misstatement of the law; counsel simply paraphrased the statute in making his point. At any rate, the jury instructions correctly stated the initial aggressor qualification, curing any supposed error. See Matheney v. Commonwealth, 191 S.W.3d 599, 606 (Ky. 2006).

Reversible error did not occur where the Commonwealth's Attorney twice told Harmon that he "[wasn't] going to get off that easy." The comments were made in response to Harmon's refusal to testify in accordance with his prior statement. Though somewhat unclear, it appears from the record that defense objections to these comments were sustained. To the extent that Appellant argues his substantial rights were nonetheless affected, we find no manifest injustice. RCr 10.26. While these comments are hardly the model of courtroom decorum, they cannot be considered prejudicial. Neither do they constitute an "unauthorized assault" on a witness as addressed in Terry v. Commonwealth, 471 S.W.2d 730, 733 (Ky. 1971). The Commonwealth's understandable frustration with Harmon was readily apparent to all present, even without the extraneous commentary.

Appellant claims error where the trial court prohibited certain testimony from Detective Aycock, who drove Appellant from Texas to Kentucky following his apprehension. During an interview, Detective Aycock told Appellant that he "thought this was self-defense." Defense counsel attempted to elicit this fact

from Aycock at trial, but an objection by the Commonwealth was sustained.

Assuming, without deciding, that error occurred, it was harmless. RCr 9.24. Defense counsel was permitted to ask Aycock if he had "spun the truth" during his interview with Appellant, which he answered affirmatively. This question was asked again when defense recalled Aycock during its case-in-chief. Aycock also testified that police investigators frequently "spin the truth" to elicit a statement or confession. This point having been made, little more could be gained by identifying the specific "white lies" Aycock made during the interview. Appellant's substantial rights were not prejudiced by the exclusion of this testimony. RCr 10.26.

Finally, having reviewed the entire record in this case, we believe Appellant was afforded due process of the law. Of the errors that did occur, their cumulative effect did not operate to deny Appellant a fair trial. Foster v. Commonwealth, 827 S.W.2d 670, 683 (Ky. 1991).

Accordingly, the judgment of the McCracken Circuit Court is affirmed.

Minton, C.J.; Abramson, Cunningham, Schroder, and Venters, JJ., concur. Noble and Scott, JJ., concur with the majority opinion on all other issues, but concur in result only on the "no duty to retreat" issue for reasons it is not applicable since Appellant accosted the victim here, not the other way around.

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