IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: JANUARY 21, 2010
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2007-SC-000392-MR

FINAL
DATE 2/11/10 Kelly Klaber D.C.

SHAWNTELE CORTEZ JACKSON — APPELLANT

V.

ON APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JUDITH E. MCDONALD-BURKMAN, JUDGE
NO. 06-CR-001673

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Shawntele Cortez Jackson, was found guilty by a Jefferson Circuit Court jury of murder and tampering with physical evidence. For these crimes, Appellant was sentenced to fifty years imprisonment. He now appeals his convictions as a matter of right. Ky. Const. § 110(2)(b).

I. Background

In May of 2006, Richard Lee Washington was fatally shot in the area of the Iroquois housing projects in Louisville. He was twenty-seven years-old. Appellant, twenty years old at the time, was living in one of the apartments with his girlfriend, Dominique Rudolph. At trial, it was the Commonwealth's theory that Appellant intentionally shot and killed Washington without excuse or justification. Appellant's defense was that

Washington first assaulted him and that Washington was unintentionally shot in the course of defending and struggling over a handgun.

Between midnight and 12:15 a.m. on May 16, 2006, Appellant received a phone call from an unidentified individual who owed him money. Accompanied by a recent acquaintance, D'Angelo Scott, Appellant sought a ride to a local convenience store in order to meet the caller. Appellant then approached Dora Ditto and her boyfriend, Washington, standing by a parked car. Though he knew Ditto, Appellant had only seen Washington around the neighborhood. According to Appellant, he approached Ditto and offered to pay her ten dollars to take him to the convenience store. She agreed and Washington drove the group.[1]

When they arrived at the convenience store, Appellant met the caller and received his payment. Before leaving, however, Appellant and Washington began a verbal argument which continued until the group returned to Iroquois. According to Appellant, Washington started the argument because he wanted more "dope." According to Ditto, Appellant accused Washington of stealing his cell phone. Scott testified that he remembered the two arguing over a missing cell phone.

[1] Prior to and during the trip, all four individuals consumed various drugs. Appellant allegedly received twenty to twenty-five Xanax pills from Washington in exchange for two rocks of crack cocaine. After giving ten of the pills to Scott, Appellant claimed he chewed up the rest. Ditto testified that she had drunk a one-half pint of gin and smoked a marijuana joint laced with cocaine, adding that Washington had smoked a similar "dirty blunt" while in the car.

Back at Iroquois, Washington pulled the car into a parking spot. According to Appellant, who was still seated in the back seat, Washington and Ditto exited the car and walked toward the trunk. He stated that Ditto then removed a black handgun from the trunk and handed it to Washington. At this point, Appellant claimed that he awoke Scott and told him to get up. Appellant then exited the car and stepped up onto the sidewalk before resuming his argument with Washington. Washington allegedly approached Appellant and Appellant told Washington that he saw Ditto hand him the gun. Appellant stated that Washington threatened to kill him before the two began to yell and shove one another, with Washington pushing Appellant first and Appellant then pushing back. At some point thereafter, Appellant saw Washington draw a handgun and Appellant immediately grabbed Washington's wrists and the two men struggled for possession of the handgun. During this struggle, Appellant explained that the gun was in Washington's right hand when it fired, striking Washington in the back of the head.

The testimony of the other witnesses differed markedly from Appellant's version of events. Ditto stated that Appellant was the first to exit the car and that he went toward a group of apartments before returning, saying that he had found his cell phone. He then asked Washington for another ride, but Washington refused. Appellant insisted that Washington would do so, and Washington again refused. According to Ditto, Appellant then hit Washington with a handgun that she assumed came from his pocket. Washington ordered Ditto to get on the

sidewalk, after which Appellant told Washington that he "ought to kill him." With the handgun in his right hand, Appellant then hit Washington again with the gun and it fired, killing Washington. Similarly, Scott stated that he remembered the two fighting, though he recalled Washington yelling more than Appellant. He testified that Appellant backed up and charged at Washington, swinging his right arm and hitting Washington in the face. Scott then heard a gun fire, though he did not recall seeing anyone in the group with a firearm that night.

Appellant stated that after the shooting he ran to Rudolph's apartment because he was scared and high. Once there, he claimed that he passed out on her bed, not waking or leaving for approximately thirty-six hours.[2] According to Ditto, Appellant immediately ran from the scene with a gun in his hand. Scott testified that he, too, went to Rudolph's apartment and slept, but remembered Appellant arriving sometime later. On this point, the Commonwealth presented the testimony of Amber Baker, a former girlfriend of Appellant. Baker stated that she was at her apartment when Appellant arrived within ten to fifteen minutes of the shooting looking scared. She claimed that he looked out of her screen door for approximately twenty minutes before leaving.

It was determined that the shooting occurred at around 12:42 a.m. and the cause of Washington's death was a gunshot wound to the lower back right part of his skull, with the bullet traveling toward the left eye

---

[2] Later, while interviewing Rudolph and searching her apartment, police stopped her son from removing two trash bags from the bedroom. Inside one of the bags was the clothing that Appellant wore the night of the shooting.

and slightly downward without exiting. He died instantaneously. Though police never recovered a weapon, the bullet was consistent with a .45 caliber automatic handgun. The medical examiner noted that Washington did not have any defensive wounds but did have a contusion over his left eyebrow and lacerations over his left cheekbone.

At the conclusion of trial, the jury found Appellant guilty of murder and tampering with physical evidence. The jury fixed his punishment at fifty years imprisonment for the count of murder and one year imprisonment for the count of tampering with physical evidence, recommending that the sentences run concurrent with one another. On appeal, Appellant raises ten allegations of error in his underlying trial. For the reasons that follow, we affirm Appellant's convictions.

II. Analysis

A. Failure to Strike Juror for Cause

Appellant's first argument on appeal is that the trial court abused its discretion in denying his motion to strike a prospective juror for cause and that such error is reversible because it forced Appellant to use all of his peremptory challenges. We find no error in this regard.

Appellant identifies three isolated responses by Juror #24 to defense counsel's hypothetical questions and contends that they demonstrate that the juror could not presume innocence. While defense counsel was explaining the presumption of innocence to the panel, she asked whether anyone would agree that a defendant "was a little guilty of something" if his case progressed past an indictment and to trial. Juror

#24 nodded in agreement and answered that "once a person has gotten this far along, there's bound to be some justification for it to start with." When defense counsel asked the juror whether he could still presume the defendant innocent or treat the parties "on an even playing field," he first indicated that it would be significant if the evidence showed the defendant carried a handgun, but his statement thereafter was largely inaudible. The juror then agreed with defense counsel's summary of the juror's statement that if the evidence showed that the defendant was carrying a handgun, he would be more likely to commit a crime. Defense counsel subsequently asked the juror whether he could put aside that feeling and still consider the evidence. His response, however, was again mostly inaudible, at one point stating that "it was hard to say." Counsel followed, "because you don't know what the evidence is," to which the juror agreed. Later in voir dire, Juror #24 nodded his head in agreement with defense counsel's statement that someone carrying a concealed handgun without a permit would be more likely to commit a crime. And then, finally, Juror #24, when asked whether a defendant's illegal drug possession would indicate that he would be more likely to commit other crimes, the juror nodded in agreement (with many others on the panel) and stated that drug possession often leads to other crimes.

"RCr 9.36(1) provides that the trial judge shall excuse a juror [for cause] when there is reasonable ground to believe that the prospective juror cannot render a fair and impartial verdict." Smith v. Commonwealth, 734 S.W.2d 437, 444 (Ky. 1987) (quoting Peters v.

Commonwealth, 505 S.W.2d 764, 765 (Ky. 1974)). "[T]he party alleging bias bears the burden of proving that bias and the resulting prejudice." Cook v. Commonwealth, 129 S.W.3d 351, 357 (Ky. 2004) (citing Caldwell v. Commonwealth, 634 S.W.2d 405, 407 (Ky. 1982)). Where there is such a showing, "[t]he court must weigh the probability of bias or prejudice based on the entirety of the juror's responses and demeanor." Shane v. Commonwealth, 243 S.W.3d 336, 338 (Ky. 2007).

The established "test for determining whether a juror should be stricken for cause is 'whether . . . the prospective juror can conform his views to the requirements of the law and render a fair and impartial verdict.'" Thompson v. Commonwealth, 147 S.W.3d 22, 51 (Ky. 2004) (quoting Mabe v. Commonwealth, 884 S.W.2d 668, 671 (Ky. 1994)). This Court has

> long recognized that 'a determination as to whether to exclude a juror for cause lies within the sound discretion of the trial court, and unless the action of the trial court is an abuse of discretion or is clearly erroneous, an appellate court will not reverse the trial court's determination.'

Fugett v. Commonwealth, 250 S.W.3d 604, 613 (quoting Pendleton v. Commonwealth, 83 S.W.3d 522, 527 (Ky. 2002)).

Having reviewed the entire voir dire, we do not believe the trial court abused its discretion in failing to strike Juror #24. None of his statements revealed an inability to conform his views to the requirements of the law – here, an alleged inability to indulge the presumption of innocence – and to render a fair and impartial verdict. Rather, the statements that Appellant complains of were specific responses to

leading hypothetical questions posed by defense counsel, all of which asked the juror to assume certain facts consistent with criminal behavior. See Patton v. Young, 467 U.S. 1025, 1039 (1984) ("The trial judge properly may choose to believe those statements that were the most fully articulated or that appeared to have been least influenced by leading."). When asked whether he could put aside the significance of a defendant possessing a firearm, the juror's audible response was equivocal at best, agreeing that his decision would depend upon the evidence presented. To the extent that Appellant argues that the juror's statement that a felony trial was "bound to" have "some justification for it," we think that is an accurate intuition (e.g., a finding of probable cause) and it does not follow that the juror could not presume the defendant's innocence for purposes of a trial. We, therefore, hold that the trial court did not abuse its discretion in overruling Appellant's motion to strike Juror #24 for cause.

B. Inadmissible Opinion Testimony

Appellant next argues that the trial court erroneously permitted two of the Commonwealth's witnesses to offer opinion testimony. We review his claims here, but cannot agree.

Officer Robert King was the first to respond to the scene. At trial, the Commonwealth questioned King regarding several photographs displaying the positioning of Washington's body. During the questioning, the Commonwealth asked King whether, in his opinion and experience, the body appeared to have been in a struggle. King replied, "No," and

Appellant objected, claiming the question called for speculation. Though the trial court overruled Appellant's subsequent motion to strike King's response, his objection was sustained insomuch as the opinion lacked a proper foundation. The Commonwealth subsequently asked King the basis of his opinion, with King replying that he first observed the body at the scene with intact clothing, being free of rips, tears, or dirt. King concluded that he saw no evidence consistent with a struggle.

Appellant also argues that the trial court erroneously admitted the opinions of Detective Cohen. At trial, Cohen explained that he investigated the scene and that part of his routine crime investigation included visually inspecting a body for wounds, paying close attention to detail and any relevant evidence. Cohen stated that he found small drops of blood on Washington's shirt, that his sweatshirt was slightly soiled, that his jacket was still on his shoulders, and that his hat was still on his head.

When the Commonwealth began to lay a foundation as to Cohen's experience, Appellant objected and asked the court to prohibit Cohen from expressing an opinion as to whether there was a struggle prior to Washington's death. Though the court believed that Cohen could not properly state such a conclusion, it ruled that he could conclude whether he believed the scene was consistent with a struggle, provided the Commonwealth established the necessary foundation. In addition, and over Appellant's objection, the trial court concluded that Cohen's extensive experience in similar investigations qualified him as an expert

in his field. Cohen's testimony proceeded, wherein he explained that he had seen the aftermath of approximately one hundred fights during his ten years' experience as a police officer. He concluded that the positioning of Washington's body was inconsistent with a fight or struggle based upon the hat being close to his head, his clothing being intact, and a bag of chips and drink in his possession.[3]

Pursuant to KRE 701, a witness may testify "in the form of an opinion or inference" if: 1) it is "[r]ationally based on the perception of the witness;" 2) "[h]elpful to a clear understanding of the witness' testimony or the determination of a fact in issue;" and, 3) it is "[n]ot based on scientific, technical, or other specialized knowledge."[4] Testimony offered under KRE 701 is constrained by KRE 602, which "further refines the scope of permissible lay opinion testimony, limiting it to matters of which the witness has personal knowledge." Cuzick v. Commonwealth, 276 S.W.3d 260, 265 (Ky. 2009); see also Mills v. Commonwealth, 996 S.W.2d 473, 488 (Ky. 1999) ("KRE 701 must be read in conjunction with KRE 602, which limits a lay witness's testimony

---

[3] Appellant now asserts that testimony at trial suggested that the scene may have been tampered with in this respect, thus undercutting the reliability of the officers' opinions. This argument, however, does not appear to have been raised below and thus we do not consider it here. See e.g. Commonwealth v. Pace, 82 S.W.3d 894, 895 (Ky. 2002) ("The general rule is that a party must make a proper objection to the trial court and request a ruling on that objection, or the issue is waived.").

[4] In Hampton v. Commonwealth, we explained that Kentucky's adoption of KRE 701 "signaled this Court's intention to follow the modern trend clearly favoring the admission of such lay opinion evidence," which "reflects the philosophy of this Court, and most courts in this country, to view KRE 701 as more inclusionary than exclusionary." 133 S.W.3d 438, 440-41 (Ky. 2004) (quoting Clifford v. Commonwealth, 7 S.W.3d 371, 377 (Ky. 1999)).

to matters to which he has personal knowledge."). A trial court's admission of lay opinion testimony is a decision committed to its sound discretion and is thus reviewed for an abuse of discretion. See e.g. United States v. Pierce, 136 F.3d 770, 773 (11th Cir. 1998); see also Robert G. Lawson, The Kentucky Evidence Law Handbook, § 6.05[6], p. 416 (4th ed. 2003) ("Judgments that have to be made in using KRE 701 are difficult (especially the helpfulness decision) and more susceptible to sound decisions at trial than on appeal.").

Here, we conclude that both witnesses' opinions were clearly admissible as lay opinion and thus find no abuse of discretion in this regard. In forming their opinions that Washington's body did not reflect that he had been in a struggle, the witnesses rationally drew an inference from their first-hand perceptions at the scene. Though, as Appellant contends, it is true that the jury had photographs of the scene, King and Cohen, as eyewitnesses to their subject matter, could, nevertheless, help the jury in their interpretation, all going toward determining a fact in issue – namely, Appellant's claim of self-defense.

C. Inadmissible Reference to Possession of Handgun

Appellant contends that the trial court erred in allowing Amber Baker to testify that she had seen Appellant in possession of a small, "silver" handgun three to four days before the night of the shooting when the statements of Ditto and Scott indicated that a different, "black" handgun was actually used in causing Washington's death. Because of this discrepancy and because a handgun was never recovered, Appellant

argues that the trial court erroneously concluded that Baker's statement was relevant and that its probative value substantially outweighed its prejudicial effect. We agree that the trial court abused its discretion in this regard, but believe that its effect was, ultimately, harmless.

That all evidence must be relevant in order to be admissible is perhaps the most fundamental rule of evidence. See KRE 402; see also Lawson, The Kentucky Evidence Law Handbook, at § 2.00, p. 27 ("The first critical determination to be made concerning the admissibility of any item of evidence is its relevance; no other principle or concept is of any significance in the absence of a positive determination on this issue."). KRE 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Relevant evidence may, nevertheless, be inadmissible where "its probative value is substantially outweighed by the danger of undue prejudice." KRE 403. In both respects, we review a trial court's determination for an abuse of discretion. See Love v. Commonwealth, 55 S.W.3d 816, 822 (Ky. 2001) (citing Commonwealth v. English, 993 S.W.2d 941, 945 (Ky. 1999); Barnett v. Commonwealth, 979 S.W.2d 98 (Ky. 1998)).

Because the probativeness of Baker's statement – in the context of the evidence – was so minimal via KRE 403, we conclude that the trial court abused its discretion in admitting it. The Commonwealth makes no attempt to justify its admission, other than to claim (without reference

to any authority) that it properly established Appellant's state of mind. We cannot agree. In stating that Appellant carried a gun on his person a few days prior to the shooting, Baker described a handgun that differed markedly in its characteristics than the handgun described by eyewitnesses to the shooting. Indeed, by Appellant's own testimony, the handgun that killed Washington was not his, but Washington's. In light of the fact that a handgun was never recovered, Baker's statement tended only to show Appellant's general propensity to carry a handgun – a use prohibited by KRE 404(b).

Nevertheless, in context, the error was harmless because we believe that it did not have "substantial influence" upon Appellant's trial such that it "substantially swayed" his conviction. Winstead, 283 S.W.3d at 688-89. Independent evidence strongly suggested Appellant's guilt. While in custody prior to trial, Appellant telephoned Baker and a recording of that call was played for the jury. Therein, Appellant warned Baker not to tell investigators that he was known for having a gun and told her to claim that she was forced or threatened to testify if she could not ignore the subpoena. This evidence taken with the fact that neither Appellant nor Washington had defensive wounds, that Appellant fled the scene of the crime, that no murder weapon was recovered, that Appellant attempted to dispose of the clothes he was wearing, and that Ditto saw Appellant threaten and intentionally strike an unarmed Washington with a loaded handgun all demonstrates that Baker's reference had little effect on Appellant's conviction.

D. Inadmissible Evidence in Jury Deliberations

Appellant's next claim of error is unpreserved. Prior to trial, Appellant moved that the audio from a crime scene DVD be excluded from play at trial. The Commonwealth agreed and the trial court sustained the motion. At trial, the Commonwealth played the muted DVD for the jury without objection. The Commonwealth then moved to admit the DVD into evidence and Appellant did not object. Though Appellant now argues that the jury was able to make use of inadmissible evidence during its deliberations, he made no attempt to raise the issue at trial. See Pace, 82 S.W.3d at 895; Brown v. Commonwealth, 890 S.W.2d 286, 290 (Ky. 1994). Appellant does not request palpable error review and we do not address it further.

E. Limited Impeachment of Prosecution Witness

Appellant also argues that the trial court erroneously limited his ability to impeach Baker with a prior inconsistent statement. We agree, but hold the error to be harmless.

At trial, Baker testified that ten to fifteen minutes after hearing gunshots and sirens, Appellant came to her apartment for approximately ten to twenty minutes acting scared and looking out her screen door. Baker stated that the time was between 11:30 pm and 1:30 am, as that was the time when a popular television program aired that she remembered viewing that night. During Appellant's cross-examination of Baker, defense counsel established that Baker had given a similar statement to police. Defense counsel then proceeded to ask Baker

whether she recalled giving a prior statement to investigator Joyce Aldrich, to which Baker stated that she did not. Defense counsel informed Baker as to the date and time of that interview, but she still claimed having no memory of any statement to Aldrich.

At the request of the Commonwealth, a bench conference ensued in which defense counsel explained that she was attempting to impeach Baker with a prior inconsistent statement – namely, that Baker had allegedly stated in her interview with Aldrich that Appellant arrived at her apartment at 11:00 pm and omitted whether she heard gunshots or observed Appellant acting scared. The trial court noted that the prior statement had been incorporated into a written synopsis by Aldrich and that defense counsel simply could not read the writing aloud to Baker to accomplish impeachment. Rather, the trial court concluded that Aldrich would have to testify as to its contents, to which defense counsel agreed.

Defense counsel resumed her cross-examination of Baker and began asking whether she recalled giving certain statements to Aldrich and, apparently, began reading from Aldrich's summary to identify Baker's exact statement. As soon as it became clear that defense counsel was about to do so, the Commonwealth objected on hearsay grounds. The trial court agreed with the Commonwealth, stating that because Baker could not recall the statement, defense counsel could not ask her about it.

The next day, Aldrich testified and confirmed that she had spoken with Baker on the date and time previously indicated during Baker's

cross-examination. Perhaps anticipating an objection from the Commonwealth, defense counsel then approached the bench and argued that Baker's previous denial and inability to recall speaking with Aldrich allowed her impeachment with the prior inconsistent statement. In response, the Commonwealth argued that defense counsel could not pursue impeachment where the denial was not evasive but simply an inability to recall. The trial court agreed and ruled that Aldrich could not read Baker's statement aloud in order to impeach her. The trial court concluded that defense counsel could only ask Aldrich whether she had spoken to Baker.

Impeachment by prior inconsistent statement is a common technique used in discrediting witness credibility. In order to introduce a prior inconsistent statement, a proper foundation must first be established, whereby the witness is "inquired of concerning it, with the circumstances of time, place, and persons present, as correctly as the examining party can present them." KRE 613; see also Noel v. Commonwealth, 76 S.W.3d 923, 929-931 (Ky. 2002) (noting strict compliance with the foundation requirements). Where a proper foundation is laid, in Kentucky, the prior inconsistent statement represents a hearsay exception and may also be received as substantive evidence. KRE 801A(a)(1); Jett v. Commonwealth, 436 S.W.2d 788 (Ky. 1969).

Though, generally, a trial court "has a broad discretion in deciding whether or not to permit the introduction of such contradictory

evidence," Wise v. Commonwealth, 600 S.W.2d 470, 472 (Ky. App. 1978), here we must conclude that the court clearly erred in prohibiting Baker's impeachment because her inability to recall speaking with Aldrich constituted inconsistency for purposes of the rule. In Brock v. Commonwealth, this Court held that "[a] statement is inconsistent . . . whether the witness presently contradicts or denies the prior statement, or whether he claims to be unable to remember it." 947 S.W.2d 24, 27-28 (Ky. 1994) (citing Wise, 600 S.W.2d at 472). Indeed, as Wise observed, "No person should have the power to obstruct the truth-finding process of a trial and defeat a prosecution by saying, 'I don't remember.'" 600 S.W.2d at 472.

In any event, the error was harmless. Notably, the substantive value of Baker's prior statement was quite low. If taken as true, it only briefly placed Appellant in her home some two hours before Washington's death – a fact of little relevance to Appellant's claim of self-defense. As to its impeachment value, Baker's testimony was, nevertheless, later called into question: the defense later recalled Detective Cohen to testify to prior statements that Baker had made that were substantially similar to those Appellant sought to introduce through the testimony of Aldrich. Taken with the other evidence against Appellant, we cannot say that Baker's limited impeachment in this respect "substantially swayed" Appellant's conviction. Winstead, 283 S.W.3d at 688-89.

F. Exclusion of Photographic Evidence

Appellant argues that the trial court erroneously excluded certain photographic evidence which would have corroborated his defense. We find no error.

During the testimony of Officer Woolen, Appellant sought to introduce into evidence his "mug shot," taken just after his arrest for the crimes. When the Commonwealth questioned its relevance, Appellant argued that the picture showed redness along his wrists and thus supported his claim that Washington held him by his wrists as the two struggled over the handgun. The Commonwealth objected and contended that the photo was of a low quality, as it was generated from a non-photographic printer. The trial court reviewed the print-out and noted that the printer production rendered Appellant's skin tone very yellow in appearance. Though the Commonwealth suggested that Appellant introduce from discovery a similar police photograph documenting Appellant's wrists just after his arrest at the scene (and prior to the prolonged wearing of handcuffs), he would not stipulate to their admission. Ultimately, the trial court concluded that the print-out was inadmissible due to its poor quality and Officer Woolen later testified by avowal as to the authenticity of the mug shot.

Having reviewed the photograph, we hold that the trial court's exclusion of the evidence was not "arbitrary, unreasonable, unfair, or unsupported by sound legal principals." English, 993 S.W.2d at 945; see also Love, 55 S.W.3d at 822. It appears that the print-out did, indeed,

produce a yellowing-effect, giving greater contrast to areas of darker pigmentation or low light. Thus, even if we assumed that the evidence were relevant in spite of these inaccuracies, see KRE 401, we believe that, pursuant to KRE 403, the print-out left the evidence so inaccurate that its probative value was "substantially outweighed by the danger of . . . misleading the jury."

G. Jury Instructions

Appellant challenges several aspects of his jury instructions, arguing that such errors generally denied him a fair trial and his right to due process. We address each contention, but find no cause for reversal.

1. Failure to Instruct on Self-Protection

Appellant first argues that the trial court erroneously denied his request for a self-protection instruction as to the lesser offenses of second-degree manslaughter and reckless homicide. Though we agree that such an omission was an abuse of discretion, see Ratliff v. Commonwealth, 194 S.W.3d 258, 274 (Ky. 2006) (abuse of discretion standard of review) (citing Johnson v. Commonwealth, 134 S.W.3d 563, 569-70 (Ky. 2004)), we believe that the error was harmless in this instance.

At the conclusion of trial, the court instructed the jury on the offenses of murder, second-degree manslaughter, and reckless homicide. Though the murder instruction included an additional element that required the Commonwealth to prove that Appellant did not act in self-protection, both the second-degree manslaughter and reckless homicide

instructions lacked that additional element. Appellant tendered instructions that included the self-protection instruction as to all three offenses and argued that it was legally required. The trial court disagreed and concluded that self-protection was not an available defense to the "non-intentional" offenses of second-degree manslaughter and reckless homicide.

Generally speaking, "[o]nce evidence is introduced which justifies an instruction on self-protection or any other justification defined in KRS chapter 503, the Commonwealth has the burden to disprove it beyond a reasonable doubt, and its absence becomes an element of the offense." Commonwealth v. Hager, 41 S.W.3d 828, 833 n.1 (Ky. 2001) (citing KRS 500.070(1), (3), and 1974 Commentary thereto; Brown v. Commonwealth, 555 S.W.2d 252, 257 (Ky. 1977)). In practice, "[t]he burden of proof is assigned by including as an element of the instruction on the offense 'that he was not privileged to act in self-protection.'" Id. In Elliott v. Commonwealth, 976 S.W.2d 416, 422 (Ky. 1998), this Court, in a thorough analysis, departed from a line of authority that had once precluded the assertion of a self-protection defense to the charges of wanton murder, second-degree manslaughter, and reckless homicide (among other unintentional offenses). Since Elliott, this Court has found error where a trial court, nevertheless, denies an otherwise warranted self-protection instruction within a homicide instruction requiring a mens rea short of intent or specific intent. See Hager, 41 S.W.3d at 837-38 (instruction given with respect to murder and first-degree

manslaughter but not given with respect to second-degree manslaughter and reckless homicide). Here, too, we think it quite clear that the trial court abused its discretion in denying Appellant's requested self-protection instruction within the instructed offenses of second-degree manslaughter and reckless homicide.

Yet, we believe that this error was harmless, as we cannot say that "'the error itself had substantial influence'" upon Appellant's trial. Winstead, 283 S.W.3d at 688-89 (Ky. 2009). Indeed, we believe it quite insignificant. Though it is generally true an erroneous instruction is presumed prejudicial, see Harp v. Commonwealth, 266 S.W.3d 813, 818 (Ky. 2008) and that "an erroneous instruction on a lesser included offense can be grounds for reversal even if the defendant was convicted of the higher offense," Love, 55 S.W.3d at 826 n.3, the practical effect here was to *lessen the Commonwealth's burden* with respect to the second-degree manslaughter and reckless homicide instructions. In spite of that error, the jury, nevertheless, chose to convict Appellant under the correctly phrased instruction of murder, one which properly incorporated the Commonwealth's additional burden to disprove Appellant's self-protections claim beyond a reasonable doubt. As a result, the jury concluded that Appellant was not entitled to the self-protection defense at all. While Appellant argues that we should still find reversible error here, he identifies no authority requiring such a result. The fact remains that Appellant was convicted under a correct instruction. If the jury had convicted him of either second-degree manslaughter or reckless

homicide, we would not hesitate to reverse his conviction here. See e.g. Elliott, 976 S.W.2d at 422 (reversal where defendant was convicted under instruction lacking self-protection element); Mondie v. Commonwealth, 158 S.W.3d 203, 210 (Ky. 2005) (same). That, however, is not the case.

2. Erroneous Initial Aggressor Instruction

Appellant next contends that the evidence did not support an instruction setting forth the provocation exception to the defense of self-protection, pursuant to KRS 503.060(2), and thus the trial court abused its discretion in accepting the instruction over Appellant's objection. Having reviewed the record, we cannot agree.

It is well-established that "[a] trial court is required to instruct the jury on every theory of the case that is reasonably deducible from the evidence." Fredline v. Commonwealth, 241 S.W.3d 793, 797 (Ky. 2007) (citing Manning v. Commonwealth, 23 S.W.3d 610, 614 (Ky. 2000)); see also RCr 9.54(1). Indeed, "[i]n a criminal case, it is the duty of the court to prepare and give instructions on the whole law. This general rule requires instructions applicable to every state of case covered by the indictment and deducible from or supported to any extent by the testimony." Lee v. Commonwealth, 329 S.W.2d 57, 60 (Ky. 1959). This Court reviews "a trial court's rulings regarding instructions for an abuse of discretion." Ratliff, 194 S.W.3d at 274.

KRS 503.060(2), in pertinent part, provides that a defendant's otherwise valid self-protection defense is "not justifiable when . . . [t]he 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." In other words, "the privilege of self-defense is denied to an individual who provokes another into an assault for the purpose of using the assault as an excuse to kill or seriously injure that person." KRS § 503.050 Commentary (1974). The exception "may apply to a defendant who is a mental or physical aggressor." Leslie W. Abramson, 10 Kentucky Practice, Substantive Criminal Law, § 5.24 (2009-2010).

Because the testimony at trial indicated that Appellant may have intentionally provoked Washington, we find no error in the trial court instructing the jury to that effect. Notably, Ditto testified that she saw Appellant first strike Washington with a handgun and heard him threaten Washington that he "ought to kill him." Moreover, Appellant admitted that the two engaged in an aggressive verbal exchange and shoved one another just prior to Washington's death. Taken together, an issue of fact was raised as to whether Appellant intentionally provoked Washington to assault him and precipitate his murder.

3. Failure to Instruct on Voluntary Intoxication

Appellant argues that it was reversible error for the trial court to deny his tendered voluntary intoxication instruction, as the evidence demonstrated that his intoxication prevented him from forming the requisite mental state for commission of the crimes. Again, we cannot agree.

Just as "[a] trial court is required to instruct the jury on every theory of the case that is reasonably deducible from the evidence,"

Fredline, 241 S.W.3d at 797, a criminal defendant has the right "to have the jury instructed on the merits of any lawful defense which he or she has," Grimes v. McAnulty, 957 S.W.2d 223, 226 (Ky. 1997) (citing Sanborn v. Commonwealth, 754 S.W.2d 534 (Ky. 1988); Curtis v. Commonwealth, 169 Ky. 727, 184 S.W. 1105 (1916)). It, too, though "is dependant upon the introduction of some evidence justifying a reasonable inference of the existence of a defense." Id. (citing Brown v. Commonwealth, 555 S.W.2d 252, 257 (Ky. 1977); Jewell v. Commonwealth, 549 S.W.2d 807, 812 (Ky. 1977)).

Pursuant to KRS 501.080(1), voluntary intoxication may be a defense where it negates "the existence of an element of an offense" – most often, the mens rea, but, even then, only that of specific intent. See McGuire v. Commonwealth, 885 S.W.2d 931, 934 (Ky. 1994) ("Voluntary intoxication does not negate culpability for a crime requiring a culpable mental state of wantonness or recklessness, but it does negate specific intent."). This Court has held that a voluntary intoxication instruction is warranted where, "from the evidence presented, a jury could reasonably conclude that the defendant was so intoxicated that he could not have formed the requisite mens rea for the offense." Fredline, 241 S.W.3d at 797 (citing Nichols v. Commonwealth, 142 S.W.3d 683, 689 (Ky. 2004)). Yet, "there must be evidence not only that the defendant was drunk, but that [he] was so drunk that [he] did not know what [he] was doing." Springer v. Commonwealth, 998 S.W.2d 439, 451-52 (Ky. 1999) (citing Stanford v. Commonwealth, 793 S.W.2d 112, 117-18 (Ky. 1990);

Meadows v. Commonwealth, 550 S.W.2d 511 (Ky. 1977); Jewell, 549 S.W.2d at 807). Thus, it is often said that "mere drunkenness will not raise the defense of intoxication." Rogers v. Commonwealth, 86 S.W.3d 29, 44 (Ky. 2004) (citing Jewell, 549 S.W.2d at 812).

Though Appellant may have been under the influence of narcotics, the trial court properly denied his requested voluntary intoxication instruction because no evidence indicated that he was so impaired or intoxicated at the time the offenses were committed such that he was unable to form the requisite mens rea for murder (KRS 507.040) or tampering with physical evidence (KRS 524.100). Appellant orally ingested approximately ten to fifteen Xanax pills prior to leaving for the convenience store, but that fact alone was insignificant. While Appellant's testimony, in conjunction with Ditto and Scott's, suggested that Appellant was "high" when the offenses were committed, it does not show that he was so impaired at the time of the altercation and subsequent flight to Rudolph's home that he did not know what he was doing – indeed, at trial, Appellant's defense rested upon his detailed account of what exactly happened.

4. Failure to Instruct on No Duty to Retreat

As to the jury instructions, we believe that Appellant's final contention is without merit. He argues that the trial court should have instructed the jury that he had no duty to retreat and that such an omission misled the jury in evaluating his claim of self-protection. Though it is generally true that Appellant had no duty to retreat, see

Gibson v. Commonwealth, 237 Ky. 33, 34 S.W.2d 936 (1931) ("It is the tradition that a Kentuckian never runs. He does not have to."), he concedes that we have addressed and rejected the very argument he now makes in Hilbert v. Commonwealth, 162 S.W.3d 921, 925-26 (Ky. 2005) – namely, that "[a]n instruction on retreat . . . was necessary to counter the inference that Appellant was under a duty to avoid, if at all possible, the altercation with the victims." In Hilbert, this Court "explained that the Penal Code had incorporated prior Kentucky law concerning retreat and under that law a specific retreat instruction was not required," Rogers v. Commonwealth, 285 S.W.3d 740, 756 (Ky. 2009) (reaffirming Hilbert),[5] as an adequate self-protection instruction makes unnecessary a "no duty of retreat" instruction.[6] See id. at 926 (citing cases); see also Bush v. Commonwealth, 335 S.W.2d 324, 326 (Ky. 1960) ("In fact, an instruction which does set out particular facts has been condemned, and it has been held that an instruction on self-defense should be in the usual form, leaving the question to be determined by the jury in the light

[5] We note that the conduct for which Appellant was prosecuted occurred before July 12, 2006 – the effective date of Senate Bill 38 and the 2006 self-defense amendments – and, as in Rogers, we see no need to address their effect, if any, upon Hilbert at this time.

[6] Though we have acknowledged here that the trial court erroneously omitted a self-protection instruction as an element within the instructed offenses of second-degree manslaughter and reckless homicide, we do not believe this to be the type of "inadequacy" contemplated by Hilbert and its progeny which could necessitate a separate retreat instruction. See e.g. Crawford v. Commonwealth, 281 Ky. 557, 136 S.W.2d 754, 758 (1940) ("The instruction in the instant case did not require the defendants to retreat and allowed them to defend themselves."). That is to say, the murder instruction under which Appellant was convicted incorporated a legally proper self-protection instruction.

of all the facts and circumstances of the case, rather than in the light of certain particular facts."); Rogers, 285 S.W.3d at 757 ("[R]etreat remains a factor amidst the totality of circumstances the jury is authorized to consider."). Accordingly, the trial court did not err by refusing Appellant's tendered instruction.

H. Cumulative Error

Finally, Appellant contends that even if we do not find any individual issue sufficient to require reversal, as is the case, we should still reverse his convictions on the basis of the cumulative errors he has identified. Our review of the entire case, however, persuades us that Appellant received a fair trial and that the errors we have discussed were not so cumulative in their effect as to, nevertheless, mandate reversal. See Funk v. Commonwealth, 842 S.W.2d 476, 483 (Ky. 1992); Byrd v. Commonwealth, 825 S.W.2d 272, 278 (Ky. 1992) (overruled on other grounds by Shadowen v. Commonwealth, 82 S.W.3d 896 (Ky. 2002)).

III. Conclusion

Therefore, for the above stated reasons, we hereby affirm Appellant's convictions and sentence.

All sitting. All concur.

COUNSEL FOR APPELLANT:

Daniel T. Goyette
Louisville Metro Public Defender
Advocacy Plaza
717-719 West Jefferson St.
Louisville, KY 40202

Cicely Jaracz Lambert
Assistant Appellate Defender
Office of the Louisville Metro Public Defender
717-719 West Jefferson St.
Louisville, KY 40202

COUNSEL FOR APPELLEE:

Jack Conway
Attorney General

Gregory C. Fuchs
Assistant Attorney General
Office of Attorney General
Criminal Appellate Division
1024 Capital Center Drive
Frankfort, KY 40601-8204