IN THE COUNCIL COURT
OF LOUISVILLE METRO COUNCIL

IN RE REMOVAL HEARING)
OF COUNCILMAN ANTHONY)
PIAGENTINI)

CHARGING COMMITTEE'S MEMORANDUM REGARDING EVIDENTIARY ISSUES

The Charging Committee offers this brief memorandum of law to offer authority on two evidentiary issues that would be time-consuming to resolve in the middle of the next session of the removal hearing. First, it explains an issue that sometimes arises in the cross-examination of a law enforcement officer or investigator. As explained below, a plaintiff or prosecutor may introduce portions of the statement of a defendant or respondent under the "party-opponent" exception to the hearsay rule. The Respondent may not introduce his own statements, though, unless he takes the witness stand and testifies to them himself. Second, it explains the required procedure for asserting a Fifth Amendment privilege at a trial.

Argument

I. THE RESPONDENT MAY NOT INTRODUCE OTHER PORTIONS OF HIS OUT OF COURT STATEMENTS.

The Charging Committee introduced portions of the Respondent's statements without objection. They were admissible under the "party-opponent rule," because the Kentucky Rules of Evidence provide that "[a] statement is not excluded by the hearsay rule, even though the declarant is available as a witness, if the statement is offered against a party and is … [t]he party's own statement, in either an individual or a representative capacity . . . ." Ky. R. Evid. 801A(b)(1) (emphasis added). *See, e.g., McAtee v. Commonwealth*, 413 S.W.3d 608, 624 (Ky. 2013) (a

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defendant's statement is always admissible under KRE 801) (attached). Thus, the portions of the Respondent's statements that were presented to the Council Court were clearly admissible, and they were admitted without controversy.

That rule does not permit the Respondent to introduce the other portions of his statements, however. Sometimes defendants seek to use the "rule of completeness" in KRE 106 to argue that they can introduce other portions of their statements without taking the witness stand. That is not permissible. *McAtee,* 413 S.W.23d at 630 ("Contrary to Appellant's position, KRE 106 does not 'open the door' for introduction of the entire statement or make other portions thereof admissible for any reason once an opposing party has introduced a portion of it"). As the Kentucky Supreme Court stated in *Rodgers v. Commonwealth*, 285 S.W.3d 740, 748 (Ky. 2009) (attached),

> The objective of that doctrine [from KRE 106] is to prevent a misleading impression as a result of an incomplete reproduction of a statement. *This does not mean that by introducing a portion of a defendant's confession in which the defendant admits the commission of the criminal offense, the Commonwealth opens the door for the defendant to use the remainder of that out-of-court statement for the purpose of asserting a defense without subjecting it to cross-examination.*

(alteration in original) (quoting *Schrimsher v. Commonwealth*, 190 S.W.3d 318, 331 (Ky. 2006))

Therefore, if the Respondent wishes to introduce other portions of his statements, he must take the witness stand and submit to cross-examination.

II. THE RESPONDENT MUST ASSERT THE FIFTH AMENDMENT PRIVILEGE WITH PARTICULARITY.

The Fifth Amendment privilege may be invoked in a variety of settings, including in "any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory . . ." *Kastigar v. United States,* 406 U.S. 441, 444 (1972). But the Fifth Amendment privilege against self-incrimination is not a self-executing mechanism. The Respondent is not permitted to apply a "blanket" invocation of the privilege. Instead, he must invoke the privilege on a question-by-

question basis. *See Roberts v. United States*, 445 U.S. 552, 559 (1980). The Sixth Circuit has held:

> A blanket assertion of the privilege by a witness is not sufficient to meet the reasonable cause requirement and the privilege cannot be claimed in advance of the questions. The privilege must be asserted by a witness with respect to particular questions, and in each instance, the court must determine the propriety of the refusal to testify.

In re Morganroth, 718 F.2d 161, 167 (6th Cir. 1983) (attached). That means the Charging Committee must be given the opportunity to examine the Respondent and pose the questions to which he is invoking the privilege. Counsel believes he can satisfy the rule relatively quickly, in less than twenty questions. But if the Respondent does not invoke the privilege on each question, then the Charging Committee would be entitled to a full cross-examination.

Respectfully submitted,

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413 S.W.3d 608
Supreme Court of Kentucky.

Derrick K. McATEE, Appellant
v.
COMMONWEALTH of Kentucky, Appellee.

No. 2011–SC–000259–MR
|
Sept. 26, 2013.
|
Rehearing Denied Dec. 19, 2013.

Synopsis

Background: Defendant was convicted in the Jefferson Circuit Court, Barry Willett, J., of murder and tampering with physical evidence, and he appealed.

Holdings: The Supreme Court, Scott, J., held that:

[1] evidence was insufficient to support defendant's conviction for tampering with physical evidence;

[2] out–of–court testimonial statements made by witnesses to detective, identifying defendant as the shooter, were admissible under the prior inconsistent statements exception to the hearsay rule;

[3] confrontation clause is not implicated by a witness claiming memory loss if he or she takes the stand at trial and is subject to cross-examination;

[4] trial court erred when it permitted the jury to take a recorded testimonial witness statement to the jury room;

[5] trial court's error in permitting the jury to take a recorded testimonial witness statement to the jury room was harmless;

[6] trial court violated rule, addressing communications between the court and the jury after it has retired for deliberation, when it formulated and delivered response outside defendant's presence; and

[7] trial court's violation of rule, addressing communications between court and jury after it has retired for deliberation, constituted harmless error.

Affirmed in part and reversed in part.

Keller, J., concurred in result only.

Cunningham, J., concurred in result only and filed opinion.

West Headnotes (45)

[1] **Criminal Law** Nature of Decision Appealed from as Affecting Scope of Review

On appellate review, the test of a directed verdict is, 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.

3 Cases that cite this headnote

[2] **Obstructing Justice** Offenses relating to evidence

Evidence was insufficient to support defendant's conviction for tampering with physical evidence; although there was testimony that defendant was at his girlfriend's home the night of the murder, that he was arrested at his girlfriend's home, and that police knew defendant's home address, there was no testimony that police searched for the gun at defendant's home or his girlfriend's home (or anywhere else), or that the police discovered that the gun had been disposed of, concealed, destroyed or altered in any way, and without such evidence, it was unreasonable for the jury to find defendant guilty of tampering with physical evidence. KRS 524.100(1)(a).

6 Cases that cite this headnote

[3] **Obstructing Justice** Offenses relating to evidence

Merely leaving the scene with the murder weapon was insufficient evidence from which

a reasonable jury could fairly find defendant guilty of tampering with physical evidence. KRS 524.100(1)(a).

6 Cases that cite this headnote

[4] **Constitutional Law** Sixth Amendment

Sixth Amendment's confrontation clause applies to state prosecutions through the Fourteenth Amendment. U.S.C.A. Const.Amend. 6, 14.

[5] **Criminal Law** Substantive use of statements corroborating or impeaching testimony

Criminal Law Availability of declarant

Witnesses Forgetful witnesses

Out–of–court testimonial statements made by witnesses to detective, identifying defendant as the shooter, were admissible under the prior inconsistent statements exception to the hearsay rule, given that, at trial, both witnesses alleged to have no memory of the events in question, and admission of witnesses' statements did not violate confrontation clause; witnesses' prior inconsistent statements could be introduced as an impeachment device and as substantive evidence, and testifying witnesses alleging memory loss appeared at trial for purposes of cross-examination. U.S.C.A. Const.Amend. 6; Rules of Evid., Rules 613, 801A(a)(1).

5 Cases that cite this headnote

[6] **Criminal Law** Substantive use of statements corroborating or impeaching testimony

Statement is inconsistent, for purposes of allowing it to be admitted as substantive evidence with respect to the matter asserted, whether the witness presently contradicts or denies the prior statement, or whether he claims to be unable to remember it. Rules of Evid., Rule 801A(a)(1).

[7] **Criminal Law** Substantive use of statements corroborating or impeaching testimony

Witnesses Nature of Statement in General

Prior inconsistent statements may be introduced as an impeachment device and as substantive evidence. Rules of Evid., Rule 801A(a)(1).

4 Cases that cite this headnote

[8] **Criminal Law** Out-of-court statements and hearsay in general

Witnesses' statements to detective, identifying defendant as the shooter, qualified as "testimonial" statements for confrontation clause purposes. U.S.C.A. Const.Amend. 6.

[9] **Criminal Law** Availability of declarant

Testifying witness alleging memory loss "appears at trial" for purposes of cross-examination and does not implicate a Sixth Amendment violation. U.S.C.A. Const.Amend. 6.

[10] **Criminal Law** Cross-examination and impeachment

Confrontation clause guarantees only an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish. U.S.C.A. Const.Amend. 6.

[11] **Criminal Law** Availability of declarant

Confrontation clause is not implicated by a witness claiming memory loss if he or she takes the stand at trial and is subject to cross-examination. U.S.C.A. Const.Amend. 6.

2 Cases that cite this headnote

[12] **Witnesses** Absent witness

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When a hearsay declarant appears on the witness stand at trial, he may be impeached with a prior inconsistent statement.

4 Cases that cite this headnote

[13] **Criminal Law** Substantive use of statements corroborating or impeaching testimony

Out-of-court statement made by any person who appears as a witness, which statement is material and relevant to the issues of the case, may be received as substantive evidence through the testimony of another witness, and need not be limited to impeachment purposes.

[14] **Criminal Law** Documents or demonstrative evidence

Although rule addressing evidence in the jury room uses permissive language and invests the trial court with the discretion to send (or not send) certain items of evidence to the jury room, in practice, some testimonial exhibits, such as expert opinion letters or summaries, depositions, recorded witness statements, and the like may be marked and admitted for preservation purposes, but not given to the jury because doing so would be akin to sending a witness back to the jury room. Rules Crim.Proc., Rule 9.72.

3 Cases that cite this headnote

[15] **Criminal Law** Documents or demonstrative evidence

Although, on its face, rule addressing evidence in the jury room invests the trial court with discretion, it is error to permit the jury to take certain testimonial exhibits to the jury room. Rules Crim.Proc., Rule 9.72.

1 Case that cites this headnote

[16] **Criminal Law** Documents or demonstrative evidence

Trial court erred when it permitted the jury to take a recorded testimonial witness statement to the jury room; although rule addressing evidence in the jury room permitted the trial court to exercise discretion over the evidence the jury could take with it to deliberations, the court abused that discretion when it permitted the jury to take testimonial witness statements to the jury room. Rules Crim.Proc., Rule 9.72.

10 Cases that cite this headnote

[17] **Criminal Law** Documents or demonstrative evidence

Although rule addressing evidence in the jury room permits the trial court to exercise discretion over the evidence the jury may take with it to deliberations, the court abuses that discretion when it permits the jury to take testimonial witness statements to the jury room. Rules Crim.Proc., Rule 9.72.

4 Cases that cite this headnote

[18] **Criminal Law** Taking documents or evidence to jury room

Trial court's error in permitting the jury to take a recorded testimonial witness statement to the jury room was harmless; witness's statement was properly admitted as a trial exhibit and could not be characterized as inaccurate, testimonial nature of the evidence itself injected the error, and court's judgment was not substantially swayed by the error. Rules Crim.Proc., Rule 9.72.

3 Cases that cite this headnote

[19] **Criminal Law** Documents or demonstrative evidence

Criminal Law Reading minutes of or restating testimony

Videotaped testimonial witness statements that are properly admitted into evidence as trial exhibits may not be reviewed in the privacy of the jury room; this must occur in the courtroom. Rules Crim.Proc., Rules 9.72, 9.74.

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[20] **Criminal Law** Substantive use of statements corroborating or impeaching testimony

Criminal Law Documents or demonstrative evidence

Criminal Law Reading minutes of or restating testimony

Witness's recorded prior inconsistent statement is admissible, provided the proper foundation is laid, and a properly admitted recording of a witness's prior inconsistent statement may not be reviewed privately by the jury during deliberations; however, if the jury wishes to review the recording, it may, upon request, do so in the courtroom in the presence of all parties and the judge. Rules Crim.Proc., Rules 9.72. 9.74.

[21] **Criminal Law** Substantive use of statements corroborating or impeaching testimony

Criminal Law Hearsay

Defendant's confession is always admissible and is never hearsay, whereas other witnesses' prior statements are only admissible under the circumstances set forth in rule governing prior statements of witnesses. Rules of Evid., Rules 801A(a, b).

[22] **Criminal Law** On giving instructions to or otherwise communicating with jury

Criminal Law Communications between judge and jury

Rule addressing communications between the court and the jury after it has retired for deliberation requires that information requested by the jury be given in open court in the presence of the defendant, and in the presence of (or after reasonable notice to) counsel. Rules Crim.Proc., Rule 9.74.

3 Cases that cite this headnote

[23] **Criminal Law** On giving instructions to or otherwise communicating with jury

Criminal Law Communications between judge and jury

Trial court violated rule addressing communications between the court and the jury after it has retired for deliberation when, after receiving a request for information from the jury, it formulated and delivered a response outside defendant's presence and outside the presence of (and without reasonable notice to) defense counsel; both defendant and defense counsel were entitled to be present when the court was formulating a response and when it delivered its response. Rules Crim.Proc., Rule 9.74.

2 Cases that cite this headnote

[24] **Criminal Law** On giving instructions to or otherwise communicating with jury

Criminal Law Documents or demonstrative evidence

Criminal Law Reading minutes of or restating testimony

Trial court violated rule addressing communications between the court and the jury after it has retired for deliberation when it permitted the jury to review witness's videotaped statement in the privacy of the jury room; this event should have occurred in open court and in defendant's presence. Rules Crim.Proc., Rule 9.74.

[25] **Criminal Law** Taking documents or evidence to jury room

Trial court's violation of rule addressing communications between court and jury after it has retired for deliberation constituted harmless error because, although trial court should have secured presence of defendant and defense counsel while formulating and delivering a response to the jury's inquiry, court's erroneous ex parte communication—sending a DVD player to jury room, followed by a “clean” computer on which to re-watch witness's statement did not directly concern issue central to case, nor go to the heart of an indicted charge; the communication was innocuous, and it did not impugn the fundamental fairness of an

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otherwise constitutionally acceptable trial, and thus, defendant's substantial rights were not affected. Rules Crim.Proc., Rules 9.24, 9.74.

4 Cases that cite this headnote

[26] **Criminal Law** Communications by or with jurors

Supreme Court may deem trial court's violation of rule addressing communications between the court and jury after it has retired for deliberation as harmless if Supreme Court can say with fair assurance that the judgment was not substantially swayed by the error; the inquiry is not simply whether there was enough evidence to support the result, apart from the phase affected by the error, and it is rather, even so, whether the error itself had substantial influence, and if so, or if one is left in grave doubt, the conviction cannot stand. Rules Crim.Proc., Rule 9.74.

1 Case that cites this headnote

[27] **Criminal Law** Taking documents or evidence to jury room

Trial court's violation of rule addressing communications between court and jury after it has retired for deliberation when it permitted the jury to review witness's videotaped statement in the privacy of the jury room, was harmless; had proper procedure been followed, the jury would have been permitted to re-watch the videotape in its entirety, in open court, and appellate court did not believe that the error that occurred—that is, permitting the jury to re-watch the video privately—substantially swayed their verdict. Rules Crim.Proc., Rule 9.74.

[28] **Criminal Law** Absence of accused

Any error in trial court's failure to secure defendant's presence when the jury re-watched witness's videotaped statement during deliberations was harmless; defendant was present when the video was originally played for the jury, and he was afforded a constitutionally adequate opportunity to defend against the statements made therein. Rules Crim.Proc., Rule 8.28(1).

1 Case that cites this headnote

[29] **Criminal Law** Absence of accused

Assuming that re-watching a witness's videotaped statement during deliberations is a critical stage of the trial, failing to secure defendant's presence constitutes harmless error at worst; that is, there is no reasonable possibility that it contributed to the conviction. Rules Crim.Proc., Rule 8.28(1).

1 Case that cites this headnote

[30] **Criminal Law** Self-serving statements

Defendant's entire hearsay statement to police was not admissible under the rule of completeness, and trial court properly exercised its discretion by permitting defense counsel ample latitude on cross-examination to contextualize the statements elicited by the Commonwealth; defendant was attempting to thwart hearsay rules and admit his entire statement without being subject to cross-examination, defendant sought to bolster his own hearsay statements by showing the jury that, despite techniques designed to elicit a confession, he maintained his innocence for over three hours, and the rule of completeness did not permit him to do so. Rules of Evid., Rule 106.

[31] **Criminal Law** Particular cases

Defendant's statements to detectives, although hearsay, were admissible under hearsay exception for admissions of a party opponent. Rules of Evid., Rule 801A(b)(1).

[32] **Criminal Law** Admission of whole conversation, transaction, or instrument because of admission of part or reference thereto

Party purporting to invoke the "rule of completeness" for the admission of otherwise inadmissible hearsay statements may only do so to the extent that an opposing party's introduction

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of an incomplete out-of-court statement would render the statement misleading or alter its perceived meaning; the issue is whether the meaning of the included portion is altered by the excluded portion. Rules of Evid., Rule 106.

2 Cases that cite this headnote

[33] **Criminal Law** Admission of whole conversation, transaction, or instrument because of admission of part or reference thereto

For purposes of the "rule of completeness," the single purpose of considering the inadmissible hearsay utterance as a whole is to be able to put a correct construction upon the part which the first party relies upon, and to avoid the danger of mistaking the effect of a fragment whose meaning is modified by a later or prior part. Rules of Evid., Rule 106.

[34] **Criminal Law** Admission of whole conversation, transaction, or instrument because of admission of part or reference thereto

"Rule of completeness" does not "open the door" for introduction of the entire hearsay statement or make other portions thereof admissible for any reason once an opposing party has introduced a portion of it. Rules of Evid., Rule 106.

2 Cases that cite this headnote

[35] **Criminal Law** Admission of whole conversation, transaction, or instrument because of admission of part or reference thereto

Rule of completeness for the admission of otherwise inadmissible hearsay statements is based upon the notion of fairness—namely, whether the meaning of the included portion is altered by the excluded portion; objective of the rule is to prevent a misleading impression as a result of an incomplete reproduction of a statement. Rules of Evid., Rule 106.

2 Cases that cite this headnote

[36] **Criminal Law** Particular cases

Rule of completeness does not mean that, by introducing a portion of a defendant's confession in which the defendant admits the commission of the criminal offense, the Commonwealth opens the door for the defendant to use the remainder of that out-of-court statement for the purpose of asserting a defense without subjecting it to cross-examination. Rules of Evid., Rule 106.

[37] **Criminal Law** Comments by prosecution on failure of accused to present evidence

Prosecutor's statement during closing argument that defense counsel was able to bring out anything that she wanted in defendant's statement to police and that, if there was something important, it would have come out, did not constitute misconduct; defense counsel was permitted to elicit exculpatory statements defendant made to detectives, defendant did not demonstrate how the prosecutor's statement was incorrect, and defendant failed to demonstrate prejudice.

[38] **Criminal Law** Arguments and conduct of counsel

Any consideration on appeal of alleged prosecutorial misconduct must center on the overall fairness of the trial.

[39] **Criminal Law** Conduct of counsel in general

In order to justify reversal, the misconduct of the prosecutor must be so serious as to render the entire trial fundamentally unfair.

[40] **Criminal Law** Comments on Evidence or Witnesses

Criminal Law Inferences from and Effect of Evidence

Criminal Law Rebuttal Argument; Responsive Statements and Remarks

While the prosecutor has a duty to confine his or her argument to the facts in evidence,

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the prosecutor is entitled to draw reasonable inferences from the evidence, make reasonable comment upon the evidence and make a reasonable argument in response to matters brought up by the defendant.

1 Case that cites this headnote

[41] **Criminal Law** Conduct of counsel in general

If Supreme Court determines that a prosecutor engaged in misconduct in closing argument, reversal is required when the misconduct is flagrant or if each of the following three conditions is satisfied: (1) proof of defendant's guilt is not overwhelming; (2) defense counsel objected; and (3) the trial court failed to cure the error with a sufficient admonishment to the jury.

[42] **Sentencing and Punishment** Use of jury

Rule governing deadlocked jury and statute, providing that, in the event that the jury is unable to agree as to the sentence or any portion thereof and so reports to the judge, the judge shall impose the sentence within the range provided elsewhere by law, can, and should, be read together. KRS 532.055(4); Rules Crim.Proc., Rule 9.57.

[43] **Sentencing and Punishment** Use of jury

When a jury indicates to a trial court that it is unable to come to a unanimous verdict on the sentence, it is not improper for the court to probe the jury to determine whether further deliberation may be useful; however, if the probing reveals that further deliberation will likely not be useful, statute requires the court to impose the sentence within the range provided elsewhere by law. KRS 532.055(4); Rules Crim.Proc., Rule 9.57.

[44] **Sentencing and Punishment** Use of jury

When a jury indicates to a trial court that it is unable to come to a unanimous verdict on the sentence, whether further deliberations may be useful is a determination best left within the sound discretion of the trial court, and where a majority of the jurors indicate that further deliberation may be useful, the judge properly exercises his discretion to order further deliberation. KRS 532.055(4); Rules Crim.Proc., Rule 9.57.

[45] **Sentencing and Punishment** Use of jury

Trial court was not required to impose the sentence within the range provided elsewhere by law once the jury reported it was not going to be able to come to a unanimous decision, and instead, court properly probed the jury to determine whether further deliberations would be useful. KRS 532.055(4); Rules Crim.Proc., Rule 9.57.

Attorneys and Law Firms

***614** Bruce P. Hackett, Chief Appellate Defender, Daniel T. Goyette, Louisville, Ashley Ruth Edwards, for Appellant.

Jack Conway, Attorney General of Kentucky, Courtney J. Hightower, Assistant Attorney General, for Appellee.

Opinion

Opinion of the Court by Justice SCOTT.

A Jefferson Circuit Court jury found Appellant, Derrick K. McAtee, guilty of murder and tampering with physical evidence. For these crimes, Appellant was sentenced to twenty-five years in prison. He now appeals as a matter of right, Ky. Const. § 110(2)(b), arguing that (1) he was entitled to a directed verdict of acquittal on the tampering charge, (2) the trial court erroneously permitted the introduction of out-of-court testimony, (3) the trial court erroneously permitted the jury to review a videotaped witness statement in the deliberation room, (4) the trial court erroneously prohibited him from introducing his entire statement to police, (5) the prosecutor's closing argument was misleading and denied him his right to a fair trial, and (6) the trial court improperly coerced a verdict from a hung jury.

For the reasons that follow, we reverse Appellant's conviction for tampering with physical evidence and vacate his sentence

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for that conviction, but affirm his murder conviction and corresponding sentence.

I. BACKGROUND

On July 9, 2009, Rodney Haskins was murdered in front of Pamela Beals's Louisville home. Four days later, Detective Kevin Trees interviewed Beals over the telephone. Beals told Detective Trees that she "saw the whole thing." Beals was on her front porch with her daughter and their neighbor, Gregory Kilgore, when they witnessed an altercation between Haskins and another man. The altercation ended when the other man shot Haskins multiple times. Beals identified the shooter as "YG," a young man she knew from the neighborhood.

Detective Trees interviewed Kilgore in September 2009. Kilgore confirmed that he was standing on the porch with Beals and her daughter when the argument between "YG" and the victim began. Kilgore told the detective that when the argument escalated he left Beals's porch to return home (two houses away). As he was walking home he heard shots. Later in the interview, when asked if he could identify "YG" from a photopack identification lineup, Kilgore identified Appellant's photograph. Detective Trees then asked: "Is that the guy who shot Rodney Haskins that evening?" Kilgore admitted it was.

***615** A Jefferson County Grand Jury indicted Appellant for murder and tampering with physical evidence. At trial, the Commonwealth called both Beals and Kilgore to testify, but both alleged to have no memory of the events in question. Beals testified that the first time she saw Haskins he was lying in front of her house. She denied all of the following: seeing Haskins in an altercation prior to the shooting, seeing him get shot, knowing Gregory Kilgore, and knowing anyone named "YG." She also denied having any recollection of speaking with Detective Trees.

Likewise, Kilgore testified at trial that he did not remember the night of the murder. Moreover, although he remembered meeting with Detective Trees in September 2009, he did not recall anything that they talked about during the interview. Nor did he remember identifying Appellant in the photopack lineup as the individual who murdered Haskins.

The trial court, however, permitted the Commonwealth to impeach Beals and Kilgore with their prior statements to Detective Trees: Beals with notes contained in Detective Trees's investigative letter and Kilgore with the transcript of his videotaped interview. Additionally, the trial court permitted the Commonwealth to introduce the videotaped recording of Kilgore's interview with Detective Trees, which was played for the jury in open court. During deliberations, the jury requested and was again permitted to review Kilgore's recorded interview in the deliberation room.

Ultimately, the jury found Appellant guilty of murder and tampering with physical evidence. However, while deliberating Appellant's sentence the jury sent the trial court a note asking: "What degree of agreement is required of the jury?" The trial court informed the parties of the inquiry and prepared a one-word memo in response: "Unanimous."

Less than an hour later, the jury sent the following note to the trial court: "We are not going to be able to come to a unanimous decision on the sentence." The court then brought the jury back to the courtroom, determined that further deliberations might be useful, and, pursuant to RCr 9.57, sent the jury back for further deliberations. Two hours later, the jury returned with a unanimous recommendation of twenty-five years' imprisonment for the murder charge and five years' imprisonment for the tampering charge, to be served concurrently. The trial court adopted the recommended sentence and this appeal followed.

Additional facts will be developed where required for our analysis.

II. ANALYSIS

A. Tampering with physical evidence and motion for directed verdict

[1] **[2]** Appellant argues that he was entitled to a directed verdict of acquittal on the tampering with physical evidence charge, citing insufficient evidence to support a conviction thereon.[1] "On appellate review, the test of a directed verdict is, 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." ***616** *Commonwealth v. Benham,* 816 S.W.2d 186, 187 (Ky.1991) (citation omitted).

"A person is guilty of tampering with physical evidence when, believing that an official proceeding is pending or may be instituted, he ... [d]estroys, mutilates, conceals, removes or alters physical evidence which he believes is about to be

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produced or used in the official proceeding with intent to impair its verity or availability in the official proceeding....” KRS 524.100(1)(a). The Commonwealth contends that when drawing all fair and reasonable inferences in its favor, *Benham,* 816 S.W.2d at 187, it would not clearly be unreasonable for a jury to find guilt under this statute. Specifically, the Commonwealth argues that the evidence reflected that: (1) Appellant shot Haskins; (2) he either walked away or ran away from the scene; and (3) the gun was not found at the scene. It further argues that Appellant should have known that a murder would trigger an official proceeding, and alleges that the jury could therefore have reasonably inferred that Appellant removed the gun “with intent to impair its verity or availability in the official proceeding.” KRS 524.100(1)(a).

In *Mullins v. Commonwealth,* this Court held that “walking away from the scene with the gun is not enough to support a tampering charge without evidence of some additional act demonstrating an intent to conceal.” 350 S.W.3d 434, 442 (Ky.2011). In *Mullins,* the evidence reflected that (1) the appellant shot the victim, (2) he immediately entered a vehicle which left the scene, (3) he brought the murder weapon with him into the vehicle, and (4) no shell casings or gun were found at the murder scene. *Id.* We rejected the Commonwealth's argument that this was sufficient evidence from which a reasonable juror could have found the appellant guilty of tampering. *Id.* at 444. Instead, we noted that when it is a murder suspect who is fleeing the murder scene with the murder weapon, “it is reasonable to infer that the primary intent ... is to get *himself* away from the scene and that carrying away evidence that is on his person is not necessarily an additional step, or an active attempt to impair the availability of evidence.” *Id.* at 443. Thus, although it was reasonable to infer that the appellant in *Mullins* was holding the gun when he shot the victim, and that the appellant was “[c]learly ... attempting to flee the scene[,]” *id.,* “[t]he fact he carried the gun away from the scene with him was merely tangential to the continuation of that crime.” *Id.*

Having determined that merely leaving the scene of a crime with evidence used to commit the crime was insufficient by itself to support a tampering charge, we turned our attention to whether the tampering charge was supported “where the gun was ultimately found or based on evidence of an additional act.” *Id.* We first noted that “there was no evidence of an intentional act of concealment, or even of flight from the police.” *Id.* at 444. Additionally, the fact that the gun was never found did not “mean it was placed in an unconventional location.” *Id.* Rather, we noted that the gun could have been placed in a conventional location (e.g., the vehicle in which he was seen leaving the murder scene, his home), but that the record did not indicate that the police searched either of these places. *Id.* The police had inexplicably only searched for the murder weapon at the scene of the crime five months after the murder took place. *Id.* The gun's absence from that location at that late date was insufficient evidence to support a tampering charge. *Id.*

[3] The facts of the case before us are remarkably analogous to those in *Mullins*. The Commonwealth argues that *Mullins* ***617** “ignores very pertinent facts which supported the tampering charge in this case. The appellant did not keep the gun and wait for the police to arrive, lay the gun down for the police to find or deliver the gun to the police. The appellant either walked away or ran away with the gun.” However, this is the precise argument we rejected in *Mullins*:

> If a defendant walks away from the scene in possession of evidence, this does not necessarily lead to a violation of the statute. When a crime takes place, it will almost always be the case that the perpetrator leaves the scene with evidence. If this amounted to a charge of tampering, the result would be an impermissible “piling on.”

Id. at 443. Thus, we conclude that merely leaving the scene with the murder weapon was insufficient evidence from which a reasonable jury could fairly find Appellant guilty of tampering with physical evidence.

The second part of the analysis is whether the gun was ultimately found in a location which would support a guilty verdict or whether there is evidence of an “additional act” that would support intent to conceal (or otherwise “tamper”). We are unable to deduce any such evidence, and the Commonwealth points us to none.

There was testimony that (1) Appellant was at his girlfriend's home the night of the murder, (2) he was arrested at his girlfriend's home on September 3, 2009, and (3) the police knew Appellant's home address. However, there was no testimony that police searched for the gun at his home or his girlfriend's home (or anywhere else), or that the police

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discovered that the gun had been disposed of, concealed, destroyed or altered in any way. Without such evidence, it was Unreasonable for the jury to find Appellant guilty of tampering with physical evidence. *See id.* A directed verdict of acquittal should therefore have been entered on the tampering charge. *See Benham,* 816 S.W.2d at 187. Accordingly, we reverse Appellant's conviction for tampering with physical evidence, and vacate his sentence for that conviction.

B. Introduction of Out–of–Court Testimonial Statements

[4] **[5]** Appellant next argues that the trial court erroneously permitted the Commonwealth to introduce the statements Pamela Beals and Gregory Kilgore gave to Detective Trees in 2009. Specifically, he contends that admitting unsworn, out-of-court testimonial statements as substantive evidence violates his Sixth Amendment right "to be confronted with the witnesses against him,"[2] U.S. Const. amend. VI,[3] as interpreted by the U.S. Supreme Court in *Crawford v. Washington,* 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). Appellant therefore asks us to reexamine our predecessor court's decision in *Jett v. Commonwealth* which allows a witness's prior inconsistent statement to be introduced not only to impeach his credibility, but as substantive evidence. 436 S.W.2d 788 (Ky.1969).

***618** **[6]** **[7]** In this instance, the trial court permitted the Commonwealth to introduce Beals's and Kilgore's statements to Detective Trees under the "prior inconsistent statements" exception to the hearsay rule. *See* KRE 613; KRE 801A(a)(1). "A statement is inconsistent for purposes of KRE 801A(a)(1) whether the witness presently contradicts or denies the prior statement, *or whether he claims to be unable to remember it.*" *Brock v. Commonwealth,* 947 S.W.2d 24, 27 (Ky.1997) (emphasis added). Under Kentucky law, prior inconsistent statements may be introduced as an impeachment device *and* as substantive evidence. *Jett,* 436 S.W.2d at 792; KRE 801A(a)(1). Appellant contends that this rule violates the Confrontation Clause when the witness whose prior inconsistent statements are introduced testifies at trial that he or she does not remember making them. We disagree.

[8] **[9]** In *Crawford,* the Supreme Court held that testimonial statements of a witness who does not appear at trial are inadmissible, regardless of hearsay rules, unless he is (1) unavailable to testify and (2) his statements were previously subject to cross-examination. 541 U.S. at 53–54, 68, 124 S.Ct. 1354. Both Beals's and Kilgore's statements to Detective Trees qualify as "testimonial" statements. *See Davis v. Washington,* 547 U.S. 813, 822, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006) ("Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution."). Thus, the question becomes whether, despite his memory loss, an amnesic witness "appears at trial" to the satisfaction of the Confrontation Clause. *See McIntosh v. Commonwealth,* No. 2006–SC–000421–MR, 2008 WL 2167894, at *3–4 (Ky. May 22, 2008). We once again hold that a testifying witness alleging memory loss "appears at trial" for purposes of cross-examination, and does not implicate a Sixth Amendment violation. *Id.* at *4.

In *McIntosh,* a testifying witness, who had previously pleaded guilty to being involved in a bank robbery with the appellant, "denied having any recollection of the bank robbery whatsoever." *Id.* at *2. Pursuant to KRE 801A(a)(1), the Commonwealth, having laid the proper foundation, was permitted to admit the video recordings of the prior police interrogations where the witness had implicated the appellant. On appeal, the appellant argued that "although [the witness] was present at trial he did not truly 'appear for cross-examination' because his evasiveness rendered meaningful cross-examination impossible." *Id.* We disagreed, first noting that *Crawford* itself explains that the Confrontation Clause is not implicated when a witness appears on the witness stand and is subject to cross-examination. *See id.* To wit:

> [W]hen the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements.... The Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it.

Crawford, 541 U.S. at 59 n. 9, 124 S.Ct. 1354 (citation omitted).

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[10] Next, we noted that, in *United States v. Owens,* the U.S. Supreme Court held that a witness's memory loss does not deprive the defendant of a constitutionally ***619** adequate opportunity for cross-examination. 484 U.S. 554, 559, 108 S.Ct. 838, 98 L.Ed.2d 951 (1988). "[T]he Confrontation Clause guarantees only an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Id.* (internal quotation marks and some citations omitted) (*quoting Kentucky v. Stincer,* 482 U.S. 730, 739, 107 S.Ct. 2658, 96 L.Ed.2d 631 (1987) (*quoting Delaware v. Fensterer,* 474 U.S. 15, 20, 106 S.Ct. 292, 88 L.Ed.2d 15 (1985))). "The weapons available to impugn the witness' statement when memory loss is asserted will of course not always achieve success, but successful cross-examination is not the constitutional guarantee." *Id.* Thus, *Owens* supported our conclusion that "a witness's inability or refusal to recall the events recorded in a prior statement or the events surrounding the making of the statement does not implicate the Confrontation Clause." *McIntosh,* 2008 WL 2167894, at *4.

Finally, while we noted in *McIntosh* that *Crawford* does "not discuss what it means for a witness to 'appear for cross-examination,' " 2008 WL 2167894, at *4, we acknowledged that "*Crawford* did not overrule *Owens,*[4] and several courts have held that under *Owens* a witness 'appears for cross-examination' if he willingly takes the stand, answers questions in whatever manner, and exposes his demeanor to the jury, thus giving the defense an opportunity to address the witness's prior testimonial statements," *id.* (*citing United States v. Ghilarducci,* 480 F.3d 542 (7th Cir.2007); *Connecticut v. Pierre,* 277 Conn. 42, 890 A.2d 474 (2006); *Arizona v. Real,* 214 Ariz. 232, 150 P.3d 805 (Ariz.App.2007)).

[11] **[12]** **[13]** Consistent with *McIntosh*, we hold that the Confrontation Clause is not implicated by a witness claiming memory loss if he or she takes the stand at trial and is subject to cross-examination. *See McIntosh,* 2008 WL 2167894, at *4; *Crawford,* 541 U.S. at 59 n. 9, 124 S.Ct. 1354; *Owens,* 484 U.S. at 559, 108 S.Ct. 838. Thus, when a hearsay declarant appears on the witness stand at trial, he may be impeached with a prior inconsistent statement. Additionally, we reaffirm, as consistent with *Crawford,* the rule in *Jett* that "an out-of-court statement made by any person who appears as a witness, which statement is material and relevant to the issues of the case, may be received as substantive evidence through the testimony of another witness, and need not be limited to impeachment purposes," 436 S.W.2d at 792. *See Brown v. Commonwealth,* 313 S.W.3d 577, 623 (Ky.2010) (reaffirming *Jett* post-*Crawford*).

As such, we conclude that the trial court committed no error in permitting the Commonwealth to introduce the statements Beals and Kilgore gave to Detective Trees.

C. Jury's Deliberation–Room Review of Kilgore's Recorded Statement

During its deliberations, the jury wished to review Gregory Kilgore's videotaped statement to Detective Trees and sent the trial court[5] a note with the following request: "Can we get video equipment to watch one of the videos[?]" Without contacting either party, the trial court provided the jury a DVD player. Shortly thereafter, ***620** however, the jury sent the court another note indicating that the DVD player would not read the disc on which Kilgore's statement was recorded. At that point, the trial court called the Commonwealth and asked it to provide a "clean" computer on which the jury could review Kilgore's recorded statement. After providing the computer, the prosecutor contacted defense counsel to inform her of the jury's request and that the Commonwealth had provided the computer on which to watch the video. The court next reconvened when the jury returned its verdict.[6]

Appellant argues that the trial court improperly communicated information to the jury in violation of RCr 9.74 when it permitted the jury to review Kilgore's videotaped statement to Detective Trees in the deliberation room. He further alleges that permitting the jury to review the videotaped statement privately violated RCr 8.28 and his Constitutional right to a public trial. In response, the Commonwealth contends that no error occurred because RCr 9.72 permitted the jury to review the recorded statement in the jury room. We hold that this was error, yet such error was harmless.

1. RCr 9.72

[14] RCr 9.72 addresses evidence in the jury room and provides, in pertinent part: "Upon retiring for deliberation the jury may take all papers and other things received as evidence in the case." Although RCr 9.72 uses permissive language and invests the trial court with the discretion to send (or not send) certain items of evidence to the jury room,[7] in practice, some testimonial exhibits such as expert opinion letters or

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summaries, depositions, recorded witness statements, and the like may be marked and admitted for preservation purposes but not given to the jury because doing so would be akin to sending a witness back to the jury room. *See Berrier v. Bizer,* 57 S.W.3d 271, 277 (Ky.2001). Accordingly, this "Court has carved out exceptions to [RCr 9.72]." *Tanner v. Commonwealth,* No. 2011–SC–000364–MR, 2013 WL 658123, at *9 (Ky. Feb. 21, 2013).

[15] In *Berrier,* for example, this Court reversed an opinion of the Court of Appeals that upheld a verdict for the defendant because defense counsel had been permitted to introduce written summaries of witness interviews as exhibits. 57 S.W.3d at 276. Although our reversal in *Berrier* rested, in large part, on circumstances not present in the case at bar,[8] it ***621** provides valuable guidance here because the error "was compounded when the jury was permitted to take the 'witness interview' summaries to the jury room for consideration during deliberations." *Id.* at 277. We continued:

> Generally, a jury is not permitted to take even a witness's sworn deposition to the jury room. *Young v. State Farm Mut. Auto. Ins. Co.,* Ky., 975 S.W.2d 98, 99 (1998); *Louisville, H. & St. L. Ry. Co. v. Morgan,* 110 Ky. 740, 62 S.W. 736, 737 (1901); *Thompson v. Walker,* Ky.App., 565 S.W.2d 172, 174 (1978). The primary reason for the rule is that jurors may give undue weight to testimony contained in such a deposition and not accord adequate consideration to controverting testimony received from live witnesses. 75B Am.Jur.2d, *Trial* § 1671, at 454 (1992).
>
> > [B]ecause jurors may give undue weight to the testimony contained within a deposition which they take with them and may not accord adequate consideration to controverting testimony received from live witnesses, it is the universal rule that depositions may not be reviewed by a jury on an unsupervised basis.
>
> *People v. Montoya,* 773 P.2d 623, 625 (Colo.Ct.App.1989); *see also Young v. State,* 645 So.2d 965, 966–67 (Fla.1994); *cf. Tibbs v. Tibbs,* 257 Ga. 370, 359 S.E.2d 674, 675 (1987). It is even worse to permit the jury to take with them to the jury room an unsworn statement of a witness, *e.g., State v. Poe,* 119 N.C.App. 266, 458 S.E.2d 242, 248 (1995)....For a similar case involving audiotapes of witness interviews, see *Mills v. Commonwealth,* Ky., 44 S.W.3d 366, 371–72 (2001).

Berrier, 57 S.W.3d at 277. Thus, although RCr 9.72, on its face, invests the trial court with discretion, it is error to permit the jury to take certain *testimonial* exhibits to the jury room. *See id.; see also Tanner,* 2013 WL 658123, at *9–10.

More analogous to the case before us, we recently held that a trial court erred by permitting the jury to take a sixty-second clip of a recorded interview between the appellant and a detective back to the jury room. *Tanner,* 2013 WL 658123, at *9. Although we ultimately concluded the error was harmless, we recognized "that the jury may not take 'testimonial' evidence with them to deliberations." *Id.* (*citing Burkhart v. Commonwealth,* 125 S.W.3d 848, 850 (Ky.2003) (" 'undue emphasis' claims involve juror review of exhibits which are 'testimonial' in nature, such as a witness statement or depositions."); *Berrier,* 57 S.W.3d at 277; *Wright v. Premier Elkhorn Coal Co.,* 16 S.W.3d 570, 572 (Ky.Ct.App.1999)). We stated:

> Like a witness statement, the recorded interview between Appellant and Detective Bailey is the type of 'testimonial' statement covered by [*Burkhart, Berrier*, and *Wright*]. The problem with this type of exhibit is that there is danger that the jury will place 'undue emphasis' on the 'testimony re-examined during deliberations, as compared to the live' evidence heard at trial, because the unreviewed testimony 'can only be conjured up by memory.' "

***622** *Tanner,* 2013 WL 658123, at *9 (*quoting Burkhart,* 125 S.W.3d at 850 (*quoting Wright,* 16 S.W.3d at 572)).

[16] **[17]** **[18]** Like *Tanner,* the case before us presents a situation in which the trial court permitted the jury to take a recorded testimonial witness statement to the jury room. We once again hold that the trial court erred in doing so. To be clear: although RCr 9.72, by its terms, permits the trial court to exercise discretion over the evidence the jury may take with it to deliberations, *see Johnson,* 134 S.W.3d at 567, the court abuses that discretion when it permits the jury to take testimonial witness statements to the jury room, *see Tanner,* 2013 WL 658123, at *9; *Burkhart,* 125 S.W.3d at 850; *Berrier,* 57 S.W.3d at 277; *Wright,* 16 S.W.3d at 572. We now turn to whether this error may be deemed harmless.

The cases involving prejudicial RCr 9.72 error include "additional factors and errors, beyond the mere error in allowing the jury to take the evidence into deliberations...." *Tanner,* 2013 WL 658123, at *9. For example, in *Berrier,* this Court held that "the trial court erred because admitting the witness interview summaries was akin to allowing counsel to

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testify on behalf of the witnesses, and the summaries were also inadmissible hearsay evidence." *Id.* (*citing* *Berrier,* 57 S.W.3d at 276); *see also* footnote 8 *supra.* Those errors were "compounded" by permitting the jury to take the summaries to the jury room during deliberations. *Berrier,* 57 S.W.3d at 277. Additionally, the *Berrier* Court noted that it could not deem the error harmless because of "the prejudicial content of [counsel]'s 'witness interview' summary and the fact that similar summaries were introduced during [the appellee]'s direct examination of eight witnesses." *Id.*

Unlike *Berrier,* we noted that the at-issue statement in *Tanner* "was not an inaccurate summary prepared by counsel ..., [but] a recording that the jury properly heard during the trial. It was that additional factor, the inaccuracy, that led to prejudice in *Berrier.*" 2013 WL 658123, at *10. Here, too, *Berrier* is distinguishable because Kilgore's statement was properly admitted as a trial exhibit and cannot be characterized as "inaccurate." Rather, as in *Tanner,* "the trial court obeyed the letter of RCr 9.72, but the 'testimonial' nature of the evidence itself injected the error." *Id.* We are satisfied that the RCr 9.72 error committed in this case was harmless. That is, we can say with fair assurance that the judgment was not substantially swayed by the error. *Winstead v. Commonwealth,* 283 S.W.3d 678, 689 (Ky.2009) (establishing the "substantially swayed" standard of reviewing for harmless error when federal constitution is not implicated) (*citing* *Kotteakos v. United States,* 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946)). Thus, in this instance, we find the error harmless.

[19] We pause here to address Justice Cunningham's separate opinion concurring in result. He misreads our opinion as "turn[ing] *Jett v. Commonwealth* on its head and, by implication, even creat[ing] confusion as to the proper use of written or videotaped confessions." This opinion does nothing of the sort; it merely holds that videotaped testimonial *witness* statements that *are* properly admitted into evidence as trial exhibits may not be reviewed in the privacy of the jury room; this must occur in the courtroom pursuant to RCr 9.74. Our opinion says nothing about the admissibility of a defendant's confession and it explicitly *reaffirms* the holding in *Jett. See* Section II.B, *supra.*

[20] As previously discussed, *Jett* holds that a witness' prior inconsistent statement is admissible (1) to impeach the witness and (2) as substantive evidence. *See id.* ***623** And, as Justice Cunningham notes, under *Jett,* recorded evidence has been deemed admissible to establish the prior inconsistent statement. *See* *Shepherd v. Commonwealth,* 251 S.W.3d 309, 322 (Ky.2008) (audio-taped witness interview); *Porter v. Commonwealth,* 892 S.W.2d 594, 597 (Ky.1995) (videotaped guilty plea); *Alexander v. Commonwealth,* 862 S.W.2d 856, 860–61 (Ky.1993), *overruled on other grounds by* *Stringer v. Commonwealth,* 956 S.W.2d 883 (Ky.1997) (written record). Today's opinion does not leave "[t]he jury ... to strive to remember what the recorded out-of-court statement said," and nor does it "impede[ ] truth and justice because it forces the jury to simply rely upon its fallible recollection," as Justice Cunningham suggests; in fact, a witness' recorded prior inconsistent statement is still admissible (provided the proper foundation is laid). Rather, today's opinion establishes that a properly admitted recording of a witness' prior inconsistent statement may not be reviewed privately by the jury during deliberations. However, if the jury wishes to review the recording it may, upon request, do so in the courtroom in the presence of all parties and the judge.

To lend guidance to the trial courts, we offer the following examples of recorded testimonial evidence that have been held impermissible to send to the jury room: depositions, *Kansas v. Wilson,* 188 Kan. 67, 360 P.2d 1092, 1098 (1961), *Missouri v. Brooks,* 675 S.W.2d 53, 57 (Mo.Ct.App.1984); expert witness reports, *Davolt v. Highland,* 119 S.W.3d 118, 135 (Mo.Ct.App.2003); eyewitness' videotaped statement to law enforcement officers, *Lewis v. Delaware,* 21 A.3d 8, 14 (Del.2011); eyewitness' written statement to law enforcement officers, *Montana v. Herman,* 350 Mont. 109, 204 P.3d 1254, 1260–61 (2009), *impliedly overruled on other grounds by* *Montana v. Ariegwe,* 338 Mont. 442, 167 P.3d 815 (2007), *Schwenke v. Wyoming,* 768 P.2d 1031, 1037 (Wyo.1989); transcript of defendant's prior trial testimony, *Barnes v. Florida,* 970 So.2d 332, 339 (Fla.2007); transcript of expert witness' trial testimony, *New Hampshire v. Littlefield,* 152 N.H. 331, 876 A.2d 712, 724 (2005);[9] attorney's written summary of witness' trial testimony, *Hodgdon v. Frisbie Mem'l Hosp.,* 147 N.H. 286, 786 A.2d 859, 865 (2001); trial testimony presented by video recording, *Young v. Florida,* 645 So.2d 965, 967 (Fla.1994); and state agency's recorded interview of child victim, *id.; Stephens v. Wyoming,* 774 P.2d 60, 70 (Wyo.1989), *overruled on other grounds by* *Large v. Wyoming,* 177 P.3d 807 (Wyo.2008).

Today, contemporaneous with this case, we rendered *Springfield v. Commonwealth,* No. 2012–SC–000370 (Ky. Aug. 29, 2013), in which we held that an audio and video recording of an actual drug transaction is not deemed to be testimonial in nature, and, thus, properly allowed into the jury room during deliberations. To lend further guidance, we

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offer the following as examples of recorded evidence that has been held *not* to be testimonial in nature and therefore properly sent to the jury room: store surveillance video, *New Hampshire v. Dugas,* 147 N.H. 62, 782 A.2d 888, 896 (2001), *Mathews v. Georgia,* 258 Ga.App. 29, 572 S.E.2d 719, 721 (2002);[10] video documenting the fruits of a ***624** controlled drug transaction, *Liggins v. Texas,* 979 S.W.2d 56, 65 (Tex.App.1998); secretly audio-taped recording of drug transaction, *Washington v. Castellanos,* 132 Wash.2d 94, 935 P.2d 1353, 1356–57 (1997) (en banc), *Pino v. Wyoming,* 849 P.2d 716, 719 (Wyo.1993), *Iowa v. Hernandez,* No. 12–0219, 832 N.W.2d 384, 2013 WL 1452958, at *6 (Iowa Ct.App. Apr. 10, 2013); soundless video documenting law enforcement's search of defendant's property and seizure of evidence therefrom, *Montana v. Christenson,* 250 Mont. 351, 820 P.2d 1303, 1310 (1991); video of defendant watering marijuana plants, *Pfaff v. Oklahoma,* 830 P.2d 193, 195 (Okla.Crim.App.1992).

[21] Finally, we turn to Justice Cunningham's assertion that: "The admission of written or videotaped confessions into evidence, and their review in the jury room, is a long standing practice in this Commonwealth. We do violence to, and seriously undermine, that practice here today." The Kentucky Rules of Evidence treat prior statements of witnesses differently than prior statements of parties. KRE 801A provides:

> (a) Prior statements of witnesses. A statement is not excluded by the hearsay rule, even though the declarant is available as a witness, if the declarant testifies at the trial or hearing and is examined concerning the statement, with a foundation laid as required by KRE 613, and the statement is:
>
> (1) Inconsistent with the declarant's testimony;
>
> (2) Consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive; or
>
> (3) One of identification of a person made after perceiving the person.
>
> (b) Admissions of parties. A statement is not excluded by the hearsay rule, even though the declarant is available as a witness, if the statement is offered against a party and is:
>
> (1) The party's own statement, in either an individual or a representative capacity....

Accordingly, a defendant's confession is *always* admissible and is never hearsay under KRE 801A(b), whereas other witnesses' prior statements are only admissible under the three circumstances defined in KRE 801A(a). Justice Cunningham's suggestion that our opinion today could "undermine" "[t]he admission of written or videotaped confessions into evidence" is simply incorrect.

What is still unclear, perhaps, is whether a party's recorded confession—which is obviously testimonial in nature—may be taken to the jury room upon deliberation. Although this Court has not addressed that specific issue, the majority of jurisdictions allow a recorded confession—written or electronic—to go to the jury room during deliberations.[11] We reserve judgment on the issue until it is properly before us.

625** ***2. RCr 9.74

RCr 9.74 addresses communications between the court and the jury after it has retired for deliberation, and provides:

> 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.

As a threshold matter, we consider the jury's request for video equipment to re-watch Kilgore's statement to Detective Trees to be "information requested by the jury" under RCr 9.74. *See Malone v. Commonwealth,* 364 S.W.3d 121, 132 (Ky.2012). In *Malone,* we treated a jury's request to rehear a witness's audiotaped statement to police as "information requested by the jury" and analyzed the court's response under RCr 9.74 and 8.28. *Id.* at 132–34; *see also McGuire v. Commonwealth,* 368 S.W.3d 100, 115 (Ky.2012). Although we recognize that in *Malone* the jury *directly* requested to rehear taped evidence, the jury's request for video equipment in this case is functionally identical to that in *Malone,* as it was *indirectly*

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asking to rehear evidence under the presumption that it was so entitled.

[22] RCr 9.74 requires that information requested by the jury be given in open court in the presence of the defendant, and in the presence of (or after reasonable notice to) counsel. In *Malone,* we interpreted this rule as requiring the defendant's presence "both as the response is being formulated and when it is delivered." *Id.* at 133. We further concluded that "if the deliberating jury receives additional instruction or is allowed to rehear testimony, the instruction or the rehearing should take place in open court before the entire jury, and the defendant should be present, unless he chooses not to be." *Id.* at 134. *See also McGuire,* 368 S.W.3d at 115 ("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.") (citations omitted).

[23] **[24]** With this in mind, we hold that the trial court committed two RCr 9.74 violations. First, it violated RCr 9.74 when, after receiving a request for information from the jury, it formulated and delivered a response outside Appellant's presence and outside the presence of (and without reasonable notice to) defense counsel. Both Appellant and defense counsel were entitled to be present when the court was formulating a response and when it delivered its response. *See Malone,* 364 S.W.3d at 133. Second, the trial court ***626** again violated RCr 9.74 when it permitted the jury to review Kilgore's videotaped statement in the privacy of the jury room; this event should have occurred in open court, and in Appellant's presence. *See id.* at 134; *McGuire,* 368 S.W.3d at 115; *Mills,* 44 S.W.3d at 371. Thus, we turn our attention to whether these errors can be deemed harmless. *See* RCr 9.24. [12]

With respect to the first RCr 9.74 violation—formulating and delivering a response to a jury inquiry outside of Appellant's and defense counsel's presence—there is no authority from this Court directly on point. However, in *Welch v. Commonwealth,* we deemed a communication similar to the one in the case before us to be harmful error. 235 S.W.3d 555, 558–59 (Ky.2007). In that case,

> [a]fter retiring to the jury room for deliberations, the jury sent the trial court a cryptic note that said, "Willie Allen's testimony regarding their activity when they left White Castle." The trial judge's written ex parte response was "[w]e are finding the tape and the portion of the testimony after they left White Castle. Is there a particular statement you are looking for? S/Gary Payne." The jury then wrote, "Was Rob Welch in the car when Willie Allen hid the guns the first time?" And the trial judge's written ex parte response sent back to the jury room was "[y]es—he was in the car. S/Gary Payne."

Id. at 557. As in the present case, the jury requested information that had already been introduced as evidence and neither the appellant nor defense counsel were present or provided reasonable notice of the jury's request. *See id.* After concluding in *Welch* that the trial court's exchange with the jury violated RCr 9.74, we reviewed for harmless error, *id.,* which, in the context of ex parte communications between judge and jury, we defined as "contact [that] does not impugn the fundamental fairness of an otherwise constitutionally acceptable trial." *Id.* at 558.

We first noted that opportunities for ex parte communication between judge and jurors are "[e]xpected in the course of a jury trial," *id.,* but that most of these contacts "are innocuous because they do not concern issues central to the case," *id.* We then held that the communication at issue in that case was not of the "innocuous" type because the jury's question —whether the defendant was in the car when a co-accused allegedly hid guns—"went to the heart of the tampering with physical evidence charge against Welch." *Welch,* 235 S.W.3d at 558. Although the court's answer to the jury's question was supported by evidence, we held that the RCr 9.74 violation could not be deemed harmless "because the contact involved the jury's deliberation concerning a central issue in the case." *Id.*

[25] Here, the trial court's communications are clearly less serious than the trial court's response in *Welch.* While the court should have secured the presence of Appellant and defense counsel while formulating and delivering a response to the jury's inquiry, its erroneous ex parte communication—sending a DVD player to the ***627** jury room, followed by a "clean" computer on which to re-watch Kilgore's statement—although an RCr 9.74 violation, constitutes harmless error. It did not directly concern an issue central to the case, nor go to the heart of an indicted charge. In short, the communication was innocuous, it did not "impugn the fundamental fairness of an otherwise constitutionally acceptable trial," *Welch,* 235 S.W.3d at 558, and Appellant's "substantial rights" were therefore not affected, RCr 9.24.

[26] **[27]** The second RCr 9.74 violation—permitting the jury to review Kilgore's videotaped statement in the privacy of the jury room—presents a more difficult question. We

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acknowledged in *Malone* that this violation could, in certain circumstances, be deemed harmless error; *Malone,* however, did not present an opportunity for this Court to articulate the proper standard with which to review this factual scenario for harmless error. Although this type of RCr 9.74 violation will sometimes implicate constitutional rights, *see, e.g., Mills,* 44 S.W.3d at 372 (implicating federal constitutional right to be confronted with the witnesses against oneself), [13] this case does not present such a scenario; [14] thus, we may deem the error harmless if we "can say with fair assurance that the judgment was not substantially swayed by the error." *See Winstead,* 283 S.W.3d at 688–89 (*citing Kotteakos,* 328 U.S. 750, 66 S.Ct. 1239). "The inquiry is not simply 'whether there was enough [evidence] to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.' " *Id.* (*quoting Kotteakos,* 328 U.S. at 765, 66 S.Ct. 1239).

As discussed in Section II.C.I, *supra,* the primary concern with permitting a jury to review testimony in the privacy of the jury room is that it will accord that testimony "undue emphasis." *See Burkhart,* 125 S.W.3d at 850. [15] "With such [testimonial] exhibits, there is concern that ***628** jurors may accord great weight to testimony re-examined during deliberations, as compared to the 'live' evidence heard at trial, because the unreviewed testimony 'can only be conjured up by memory.' " *Id.* (*quoting Wright,* 16 S.W.3d at 572).

Although this Court takes concerns of undue emphasis seriously, we cannot conclude that the error that occurred was harmful. Had proper procedure been followed, the jury would have been permitted to re-watch the videotape in its entirety, in open court. We do not believe that the error that occurred—that is, permitting the jury to re-watch the video *privately*—substantially swayed their verdict. Indeed, we can say with fair assurance that it would have come to the same verdict had it re-watched the video in open court. We therefore hold that the second RCr 9.74 error was harmless.

3. RCr 8.28

[28] RCr 8.28(1) provides, in pertinent part, that "[t]he defendant shall be present at the arraignment, at every critical stage of the trial including the empaneling of the jury and the return of the verdict, and at the imposition of the sentence." Appellant argues that the trial court violated his right to be present when it permitted the jury to review the video in private. In *Watkins v. Commonwealth,* this Court noted:

> This right is rooted in the confrontation clause of the Sixth Amendment to the United States Constitution as well as the due process clause when a defendant is not actually being confronted by witnesses or evidence against him. The United States Supreme Court has explained that a defendant has a right to be present "whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge ... [and it] is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, *and to that extent only.*"

105 S.W.3d 449, 452–53 (Ky.2003) (emphasis added) (citations omitted) (*quoting Snyder v. Massachusetts,* 291 U.S. 97, 107–08, 54 S.Ct. 330, 78 L.Ed. 674 (1934), *overruled on other grounds by Malloy v. Hogan,* 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964)).

[29] Assuming, without deciding, that re-watching a witness's videotaped statement during deliberations is a "critical stage of the trial," we conclude that failing to secure Appellant's presence constitutes harmless error at worst. [16] That is, there is "no reasonable possibility that it contributed to the conviction." *Winstead,* 283 S.W.3d at 689 n. 1 (*quoting Anderson v. Commonwealth,* 231 S.W.3d 117, 122 (Ky.2007)) (recognizing the "no reasonable possibility" test as the "harmless-error standard applicable to constitutional errors"). Appellant was present when the video was originally played for the jury, and he was afforded a constitutionally adequate opportunity to defend against the statements made therein. *See* Section II.B. *supra.* We therefore hold that failure to secure Appellant's presence when the jury re-watched Kilgore's statement, if RCr 8.28 error at all, is "harmless beyond a reasonable doubt." *Winstead,* 283 S.W.3d at 689 n. 1 (*quoting Chapman v. California,* 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)).

***629 D. Appellant's Statement to Police and the Rule of Completeness**

[30] Appellant next contends that the trial court violated the "rule of completeness" and denied him his rights to present a defense, due process of law, and a fair trial when it prohibited him from introducing his entire statement to police. Appellant concedes that resolving this issue in his favor would require us to overrule *Schrimsher v. Commonwealth,* 190 S.W.3d 318 (Ky.2006) and *Rodgers v. Commonwealth,* 285 S.W.3d 740 (Ky.2009). Finding no compelling reason to do so, we decline his invitation.

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During its case-in-chief, the Commonwealth called Detectives Kyle Willet and John Lesher to testify. Detectives Willett and Lesher interrogated Appellant the afternoon of his arrest in September 2009. The Commonwealth elicited statements Appellant made to the detectives which were duly admitted through the hearsay exception concerning admissions of a party opponent, KRE 801A(b)(1). In a pretrial motion *in limine,* Appellant argued that if the Commonwealth planned to question the detectives about statements he made during his interrogation, the "rule of completeness," KRE 106, required the Commonwealth to play Appellant's recorded statement in full (with certain redactions). At trial, the court did not require the Commonwealth (or permit Appellant) to play the entire recorded statement (approximately three hours in duration), but granted defense counsel substantial leeway in her cross-examination of the Detectives. Appellant assigns error to the trial court's decision not to require his entire statement to be played for the jury.

[31] Appellant's statements, although hearsay, were properly admitted under the admissions of a party opponent exception codified in KRE 801A(b)(1). [17] The so-called "rule of completeness," KRE 106, provides: "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it." Appellant apparently believes that his entire statement to the detectives "ought in fairness to be considered" by the jury. We are unpersuaded.

[32] **[33]** **[34]** **[35]** **[36]** We addressed this very issue in *Schrimsher* and thoroughly analyzed and interpreted the interplay between hearsay statements and KRE 106. Because of its relevance to the case before us, and because we cannot improve upon its analysis, we reproduce a significant portion of *Schrimsher* below:

> [A] party purporting to invoke KRE 106 for the admission of otherwise inadmissible hearsay statements may only do so to the extent that an opposing party's introduction of an incomplete out-of-court statement would render the statement misleading or alter its perceived meaning. "The issue is whether 'the meaning of the included portion is altered by the excluded portion.' " *Young* [*v. Commonwealth*], 50 S.W.3d [148,] 169 [(Ky.2001)] (quoting *Commonwealth v. Collins,* 933 S.W.2d 811, 814 (Ky.1996)).
>
> The single purpose of considering the utterance as a whole is to be able to put a correct construction upon the part which the first party relies upon, and to avoid the danger of mistaking the effect of a fragment whose meaning is modified by a later or prior part....
>
> ***630** [Robert G.] Lawson, [*The Kentucky Evidence Law Handbook*], § 1.30[2], at 67 (quoting 7 Wigmore, *Evidence in Trials at Common Law,* § 2550 (Chadbourne rev.1978)). Contrary to Appellant's position, KRE 106 does not "open the door" for introduction of the entire statement or make other portions thereof admissible for any reason once an opposing party has introduced a portion of it.
>
> The completeness doctrine is based upon the notion of fairness—namely, whether the meaning of the included portion is altered by the excluded portion. The objective of that doctrine is to prevent a misleading impression as a result of an incomplete reproduction of a statement. *This does not mean that by introducing a portion of a defendant's confession in which the defendant admits the commission of the criminal offense, the Commonwealth opens the door for the defendant to use the remainder of that out-of-court statement for the purpose of asserting a defense without subjecting it to cross-examination.*
>
> *Gabow v. Commonwealth,* 34 S.W.3d 63, 69 n. 2 (Ky.2000) (citations and quotations omitted) (emphasis added). That is precisely what Appellant was endeavoring to do by attempting to introduce the exculpatory portions of the videotape, *i.e.,* introduce his own exculpatory statements without subjecting them to cross-examination. (Appellant did not testify at trial.) His statements made during the interrogation were inadmissible hearsay—admissible when offered by the Commonwealth as admissions of a party opponent, KRE 801A(b), but inadmissible when offered by himself. *Id.* Accordingly, KRE 106 applied only to the extent that fairness required the introduction of additional portions of the interrogation to correct or guard against any likely misperception that would be created by an opponent's presentation of a fragmented version of the statement.

Schrimsher, 190 S.W.3d at 330–31. [18]

Here, Appellant is attempting to thwart hearsay rules and admit his entire statement ***631** without being subject to cross-examination. Appellant wishes to show the jury that

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police interrogation techniques are designed to induce a confession, and that the application of those techniques for over three hours made his repeated denials reliable. We do not believe that the police's interrogation techniques, however, render the statements elicited by Detectives Willett and Lesher misleading or alter their perceived meaning. Rather, Appellant seeks only to *bolster* his own hearsay statements by showing the jury that despite techniques designed to elicit a confession, he maintained his innocence for over three hours. KRE 106 does not permit him to do so under the facts presented in this case. And, in any event, the trial court granted defense counsel substantial latitude in her cross-examination of Detectives Willett and Lesher. In our view, she was quite successful in exposing police interrogation techniques for their confession-inducing qualities.

Thus, we hold that the trial court properly denied Appellant's request to introduce his entire statement, and properly exercised its discretion by permitting defense counsel ample latitude on cross-examination to contextualize the statements elicited by the Commonwealth. *See id.* at 330 ("A trial court's ruling under KRE 106 (*i.e.,* the 'rule of completeness') is discretionary." (*citing* KRE 106 Drafters' Commentary 1989; *United States v. Mussaleen,* 35 F.3d 692, 696 (2d Cir.1994); *United States v. Maccini,* 721 F.2d 840, 844–45 (1st Cir.1983); Lawson, *supra,* § 1.20[3][b], at 68–69 (4th ed.2003))).

E. Commonwealth's Closing Argument and Right to a Fair Trial

[37] During closing arguments, the Commonwealth made the following statement:

> Now I did not go over the entire statement that Mr. McAtee had. Certainly, as you saw, [defense counsel] was able to bring out anything that she wanted in that statement. She asked several questions of the detectives who questioned him. If there was something important, it would have come out, either from us or the defense.

Defense counsel objected arguing that the prosecutor's statement was improper. She reminded the court that her questioning was limited by hearsay rules and argued that the prosecutor was making it sound like she *chose* not bring out any other part of Appellant's three-hour interrogation. She then requested that the court admonish the jury that she did not, in fact, get to bring out everything that she wanted about Appellant's statement. She also requested that the prosecutor's statement be stricken from the record.[19] The court then overruled the objection.

The prosecutor continued his closing argument:

> Ladies and gentlemen, I believe I left off saying that we were given an opportunity to ask detectives what Mr. McAtee ***632** said. Defense was given that opportunity as well. And as [defense counsel] brought up, ladies and gentlemen, there is three hours of testimony. [Defense counsel] was asking Detective Lesher and Detective Willett, "What kind of questions did you ask?" And even Detective Lesher said, "Yes, there is a lengthy period when they weren't even talking about the case at all." I figured I would spare you, ladies and gentlemen, that part of the statement.

Appellant argues that the Commonwealth's closing argument deprived him of a fair trial. Specifically, he contends that the prosecutor's statement that defense counsel was able to "bring out anything that she wanted in [Appellant's] statement to police" and that "[i]f there was something important, it would have come out" misled the jury into believing that the statement contained only a few parts favorable to the defense, consisted of inculpatory admissions, and the defense had the ability to admit any part of the statement that was favorable.

[38] **[39]** **[40]** "Any consideration on appeal of alleged prosecutorial misconduct must center on the overall fairness of the trial. In order to justify reversal, the misconduct of the prosecutor must be so serious as to render the entire trial fundamentally unfair." *Stopher v. Commonwealth,* 57 S.W.3d 787, 805 (Ky.2001) (citations omitted). "While the prosecutor has a duty to confine his or her argument to the facts in evidence, *Caretenders, Inc. v. Commonwealth,* 821 S.W.2d 83, 89 (Ky.1991), the prosecutor is entitled to draw reasonable inferences from the evidence, make reasonable comment upon the evidence and make a reasonable argument in response to matters brought up by the defendant, *Hunt v. Commonwealth,* 466 S.W.2d 957, 959 (Ky.1971)." *Childers v. Commonwealth,* 332 S.W.3d 64, 73 (Ky.2010).

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[41] We have identified two grounds for which reversal is required for prosecutorial misconduct:

> If this Court (first) determines that a prosecutor engaged in misconduct in closing argument, reversal is required where "the misconduct is 'flagrant' *or* if each of the following three conditions is satisfied: (1) Proof of defendant's guilt is not overwhelming; (2) Defense counsel objected; and (3) The trial court failed to cure the error with a sufficient admonishment to the jury."

Hannah v. Commonwealth, 306 S.W.3d 509, 518 (Ky.2010) (*quoting Matheney v. Commonwealth,* 191 S.W.3d 599, 606 (Ky.2006) (*citing Barnes v. Commonwealth,* 91 S.W.3d 564, 568 (Ky.2002))). Under either scenario, we must first determine as a threshold matter whether the prosecutor "engaged in misconduct in closing argument." *Id.* We conclude that he did not.

To begin with, although defense counsel was precluded by the hearsay rules from playing Appellant's entire videotaped statement for the jury, the trial court did not preclude her from introducing *any* part of the statement that she attempted to introduce through cross-examination of Detectives Lesher and Willett.[20] In fact, during a sidebar prompted by a Commonwealth's ***633** objection on *Schrimsher* grounds, see Section II.D. *supra,* defense counsel acknowledged that she was not permitted to elicit exculpatory hearsay from the detectives; however, the trial court's ruling to that objection was to *permit* defense counsel to "get into specific denials that [Appellant] made."[21] In other words, defense counsel was permitted to elicit *exculpatory* statements Appellant made to Detectives Lesher and Willett. Additionally—and importantly—Appellant identifies no part of his statement that he would have introduced had he not been precluded by the hearsay rules from doing so. Thus, Appellant has not demonstrated how the prosecutor's statement that defense counsel "was able to bring out anything she wanted" was incorrect. Indeed, it appears to this Court that defense counsel was able to (and did) bring out anything she wanted.

Second, Appellant's assertion that the prosecutor's closing argument misled the jury into believing Appellant's statement consisted of inculpatory admissions is unsupported and unfounded. In fact, we believe this argument is belied by what the prosecutor *actually* said: "[i]f there was something important [in Appellant's statement], it would have come out, either from us or the defense." One would expect that if Appellant had confessed or otherwise inculpated himself in the murder, it would have been "important" enough for the Commonwealth to introduce. However, as defense counsel repeatedly noted, Appellant did nothing but *deny* any involvement in Rodney Haskin's murder. Thus, Appellant's contention that "the jury was free to infer that [Appellant] had confessed or made admissions" is baseless.

Finally, Appellant argues that the prosecutor's statement "was prejudicial because the jury was free to infer that the statement did not help the defense," and that "[t]he jury was left with the false impression that the lengthy, recorded statement contained only a few parts favorable to the defense." He fails, though, to point to *any* part of the statement that *was* favorable to him that he was prevented from introducing to the jury. Rather, the argument seems to be, as it was in Section II.D. *supra,* that his repeated denial of any involvement in the murder, despite over three hours of interrogation practices designed to elicit a confession, was *generally* "favorable" to him. However, as previously mentioned, the trial court extended defense counsel wide latitude in questioning the detectives about their interrogation tactics and defense counsel successfully exposed those techniques for their confession-inducing qualities.

In sum, Appellant has failed to convince this Court that the Commonwealth's closing argument was incorrect; or that even if we were to assume it was incorrect, that it prejudiced him and compromised the fundamental fairness of his trial. *See Stopher,* 57 S.W.3d at 805. Defense counsel was given an opportunity to ask the detectives ***634** what Appellant said; she was permitted to elicit exculpatory statements and introduce other statements regarding his family and employment that she deemed important and favorable; and insofar as the rules of hearsay prevented Appellant from playing his entire statement to the jury, he fails to identify a single sentence that he was prevented from introducing at trial. Rather, he seems to complain that his inability *show* the jury how successful he was at denying involvement for three hours despite interrogation techniques designed to elicit a confession rendered the prosecutor's statement misleading. We disagree. Accordingly, we conclude that the prosecutor's statements during closing argument do not constitute misconduct. Appellant's right to a fair trial was therefore not compromised.

F. KRS 532.055(4), RCr 9.57, and Ordering Further Deliberation

Finally, Appellant argues that the trial court's decision to order further deliberation after the jury indicated that it could not

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agree on sentencing resulted in a coerced verdict. Specifically, he argues that KRS 532.055(4) required the trial court to impose the sentence once the jury reported it could not come to an agreement. In response, the Commonwealth argues that the court correctly sent the jury back for further deliberations pursuant to RCr 9.57.

Shortly after sentencing-phase deliberations began, the jury sent a note to the trial court asking "[w]hat degree of agreement is required of the. jury?" After consulting with counsel in open court, the judge sent the jury the reply: "Unanimous." Less than an hour later, the jury sent a second note to the judge: "We are not going to be able to come to a unanimous decision on the sentence." After again conferring with counsel in open court, the Commonwealth requested the jury be given an *Allen-type* charge.[22] Defense counsel argued that KRS 532.055(4) required the judge to impose the sentence. The judge indicated that he would bring the jury back to the courtroom and give them an *Allen* charge "to see if there is any hope that further deliberations may be helpful."

After bringing the jury back to the courtroom, the judge asked the jury by a show of hands: "Do you think it's possible that with further deliberation—maybe a lunch break—that further deliberation might be helpful." The judge indicated that "most" of the jury thought progress might be made with more time and a lunch break. After deciding to send the jury back for further deliberations, the judge read the text of RCr 9.57(1)(a)—(e) verbatim ***635** to the jury. Approximately two hours later, the jury returned with a unanimous verdict recommending a twenty-five year sentence for the murder conviction and a five year sentence for the tampering conviction, to run concurrently. Appellant alleges that this verdict was coerced.

RCr 9.57 provides, in pertinent part:

> (1) If a jury reports to a court that it is unable to reach a verdict and the court determines further deliberations may be useful, the court shall not give any instruction regarding the desirability of reaching a verdict other than one which contains only the following elements:
>
> (a) in order to return a verdict, each juror must agree to that verdict;
>
> (b) jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment;
>
> (c) each juror must decide the case, but only after an impartial consideration of the evidence with the other jurors;
>
> (d) in the course of deliberations, a juror should not hesitate to reexamine his or her own views and change his or her opinion if convinced it is erroneous; and
>
> (e) no juror should surrender his or her honest conviction as to the weight or effect of the evidence solely because of the opinion of other jurors, or for the mere purpose of returning a verdict.

KRS 532.055(4) provides: "In the event that the jury is unable to agree as to the sentence or any portion thereof and so reports to the judge, the judge shall impose the sentence within the range provided elsewhere by law."

[42] **[43]** **[44]** We conclude that RCr 9.57 and KRS 532.055(4) can, and should, be read together. When a jury indicates to a trial court that it is unable to come to a unanimous verdict on the sentence, it is not improper for the court to probe the jury to determine whether further deliberation may be useful. If, however, the probing reveals that further deliberation will likely not be useful, KRS 532.055(4) requires the court to impose the sentence "within the range provided elsewhere by law." Whether further deliberations may be useful is a determination best left within the sound discretion of the trial court. We believe, however, that where, as here, a majority of the jurors indicate that further deliberation may be useful, the judge properly exercises his discretion to order further deliberation.

[45] Thus, we reject Appellant's contention that the court was required to impose the sentence once the jury reported it was not going to be able to come to a unanimous decision. Rather, we believe Judge Willett properly probed the jury to determine whether further deliberations would be useful pursuant to RCr 9.57. Moreover, once determining that they would, we believe he properly read RCr 9.57 to the jury. *See Williams v. Commonwealth,* 147 S.W.3d 1, 9 (Ky.2004); *Commonwealth v. Mitchell,* 943 S.W.2d 625 (Ky.1997).[23] In *Williams,* we noted that "any possibility of coercion was vitiated by the trial court's instruction to the jurors that they should not relinquish honest convictions for the mere purpose of obtaining a verdict." 147 S.W.3d at 9 (*citing Mitchell,* 943 S.W.2d 625). Judge Willett gave an identical instruction in the case before us. Accordingly, we conclude ***636** that the trial court did not coerce a verdict from the jury.

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III. CONCLUSION

In conclusion, we hold that Appellant was entitled to a directed verdict of acquittal on his tampering with physical evidence charge. We therefore reverse his conviction and vacate his sentence for that charge. However, we affirm his murder conviction and its corresponding sentence.

MINTON, C.J., ABRAMSON, NOBLE, and VENTERS, JJ., concur. KELLER, J., concurs in result only without separate opinion. CUNNINGHAM, J., concurs in result only by separate opinion.

CUNNINGHAM, J., Concurring in Result:
I concur in result only. I respectfully submit that the majority goes to great length in its expansive dicta to turn *Jett v. Commonwealth* on its head and, by implication, even creates confusion as to the proper use of written or videotaped confessions.

On July 9, 2009, Rodney Haskins was murdered in front of Pamela Beals and Gregory Kilgore. Both gave incriminating statements against Appellant. Beals gave her statement by telephone. Kilgore gave his statement during a videotaped interview. Both changed their stories at trial and said they could not remember. The trial court properly allowed the Commonwealth to impeach both witnesses by their prior statements. As the majority correctly notes in citing KRE 801(a)(1), a statement is inconsistent if the witness simply "claims to be unable to remember it." The trial court allowed into evidence the notes of Detective Trees' telephone interview with Beals and the videotaped interview with Kilgore.

Perhaps what most disturbs me about the majority opinion is its totally misplaced reliance on *Berrier v. Bizer.* That case is in no way germane to the discussion at hand. It was a wrongful discharge from employment case. The employer went through the store getting statements from employees and. reduced them to written summaries. Before trial, the employer asked the employees to review the statements for correctness and initial them. At trial, the employees were called to testify. The defendant employer then asked that the summaries be introduced into evidence to bolster and supplement their testimony. Objections were made, but they were admitted anyway. This Court ruled it was error to admit the summaries because no foundation had been established for their admission. There were also matters in the summaries which the witnesses did not testify to at trial, making their content hearsay.

The *Berrier* court went to great lengths to explore different ways the reports might have been admissible. One option where they would have been admissible was if they had been inconsistent statements from the witnesses' testimony at trial, as allowed by KRE 801. The Court said that the witnesses "did not testify inconsistently with the contents of the 'witness interview' summaries." Of course, that is exactly what we have here. So, the *Berrier* decision does not contravene the trial court's ruling here, but actually supports it.

I am especially concerned with our Court's direction here today in regard to the videotaped interview with Kilgore and the transcript. Unlike the detective's notes, this was the actual verbatim statement of the witness without any opportunity for an error in reporting of its content.

The majority makes it clear that evidence of the contents of inconsistent ***637** statements of witnesses—be they written, orally recorded, or videotaped—may be "introduced" by way of witnesses; but the statements themselves do not come in as exhibits and go to the jury room.

For almost 45 years, the landmark case of *Jett v. Commonwealth* has stood in good stead to assist litigants in capturing the truth out of witnesses who, for various reasons, try to lie in court. The progeny of that historic decision includes a myriad of cases where the recordings —either written, oral or videotaped—have been deemed admissible. *See, e.g., Alexander v. Commonwealth,* 862 S.W.2d 856, 860–61 (Ky.1993) (overruled on other grounds by *Stringer v. Commonwealth,* 956 S.W.2d 883 (Ky.1997) (stating that a written record was appropriately introduced as an inconsistent statement)); *Porter v. Commonwealth,* 892 S.W.2d 594, 597 (Ky.1995) (determining that the introduction of a videotaped guilty plea was properly allowed as an inconsistent statement); *Shepherd v. Commonwealth,* 251 S.W.3d 309, 322 (Ky.2008) (allowing the introduction of a recorded police interview as an inconsistent statement).

The jury will now be left to strive to remember what the recorded out-of-court statement said. This impedes truth and justice because it forces the jury to simply rely upon its fallible recollection.

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I digress just a bit to express a most realistic concern about how our opinion here today will affect the prosecution of domestic violence. In a large number of cases, the victim will recant. Several prosecutors in this state have established special investigative units to record the truthful and spontaneous complaint freshly made by the victim. When weeks later the victim recants, the playing and introduction of the audio tape at trial becomes critical. Just as critical is the introduction of the taped interview for the jury to review in the jury room. Otherwise, the perjured and misleading in-court testimony overwhelms the truth. Our opinion here today severely impedes that important process.

Most troublesome to me is the majority's opinion that, even after the admission of the videotape into evidence, it was error to allow the jury to watch it in the privacy of the jury room.

RCr 9.74 states as follows:

> 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 present 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.

No information was requested by the jury after it had retired in this case. The jury only requested a means to re-view the information that had already been admitted into evidence and taken to the jury room. What is the point of introducing an exhibit into evidence and allowing the jury to take the exhibit to. the jury room unless it can be examined by the jury in the jury room? Such logic would dictate that any evidence examined in the courtroom must be left in the courtroom.

For some reason, the majority has anchored its reasoning on the theory that the videotaped statement in question was testimonial. Confessions are certainly testimonial. In many instances, a confession may be of such powerful import as to send a person to prison. It is sometimes fully written, but many times is tape recorded or videotaped. Of the thousands of cases which have been tried in this Commonwealth dealing with confessions, I challenge this Court to cite one case where a challenge was made to a transcribed confession going to the jury room. Yet, today, ***638** we extend an open invitation to even undermine that ancient practice.

Writes Justice Scott for the majority: "What is still unclear, perhaps, is whether a party's recorded confession—which is obviously testimonial in nature—may be taken to the jury room upon deliberation.... We reserve judgment on this issue until it is properly before us."

The admission of written or videotaped confessions into evidence, and their re-view in the jury room, is a long standing practice in this Commonwealth. We do violence to, and seriously undermine, that practice here today.

Furthermore, most of the case law cited by the majority is not germane.

McGuire and *Malone* have no relevance as they deal with the issue of the in-court testimony of a trial witness being replayed in open court without the defendant being present.

Mills has no relevance because it deals with the erroneous admission of taped interviews with witnesses that had not been played at trial nor had a proper foundation been laid.

Welch has no relevance because it deals with the judge's ex parte answering of questions sent out by the jury during deliberations.

Berrier we have already discussed. It supports the trial court, not the majority's view.

The majority goes to great length to respond to this dissent. I find no solace in that effort. I would simply ask the Court to pause and consider the practical effect of our decision here today; There is no testimonial distinction between videotaped statements of witnesses, as in this case, and written statements and transcripts. So, in the future, when a written inconsistent statement is introduced into evidence, that exhibit will remain in the courtroom. If the jury wishes to review it, they will be required to do so in open court. There, in the muted presence of the judge at the bench, with the lawyers seated at tables and the defendant returned from the jail, the jurors will silently read and pass the exhibit among themselves. Eleven jurors will be staring into space the entire time. I find this a cumbersome and unnecessary waste of time. And, yes, it "turns *Jett* on its head."

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For all the foregoing reasons, I ask to be exonerated from these portions of the majority opinion. Otherwise, I concur.

All Citations

413 S.W.3d 608

Footnotes

1 This issue was properly preserved by a motion for a directed verdict at the conclusion of the Commonwealth's case-in-chief, a renewed motion for a directed verdict at the conclusion of the defense's case-in-chief, and a third motion for a directed verdict upon tendering of proposed jury instructions objecting to the jury being instructed as to "any offense." (Appellant argued for a directed verdict of acquittal on all charges, but only appeals the denial of the motion for a directed verdict on the tampering charge.)

2 This issue is preserved with respect to Kilgore's testimony. Appellant objected to the Commonwealth's introduction of Kilgore's prior statement on hearsay grounds and also argued that introducing them as substantive evidence violates the Confrontation Clause. Having determined that the issue is preserved with respect to Kilgore's testimony, we reach the merits of the issue. Therefore, we need not determine whether it was preserved with respect to Beals's testimony.

3 The Sixth Amendment's Confrontation Clause applies to state prosecutions through the Fourteenth Amendment. *Pointer v. Texas,* 380 U.S. 400, 406, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965).

4 Although *Owens* predates *Crawford* by some sixteen years, Justice Scalia authored both opinions for the Court.

5 The Honorable Barry Willett was presiding judge for Appellant's trial. However, when the events giving rise to this issue occurred, Senior Judge Conliffe was temporarily sitting in place of Judge Willett. By the time the jury announced it had reached a verdict, Judge Willett had returned and was once again presiding over the proceedings.

6 After dismissing the jury for the day, defense counsel objected to the jury's review of the video—this was the first opportunity she had to object on the record. Although the Commonwealth argues that this issue is unpreserved, we conclude that defense counsel's objection "to the way in which [the jury was] permitted to re-watch part of this testimony" was sufficiently specific to preserve this allegation of error.

7 *See Johnson v. Commonwealth,* 134 S.W.3d 563, 567 (Ky.2004) ("RCr 9.72 gave the trial court the discretion to send the letter with the jury during its deliberation.") (*citing Taylor v. Commonwealth,* 92 S.W. 292 (Ky.1906)).

8 In *Berrier,* defense counsel interviewed several witnesses, made notes during the interviews and

> reduced the notes to separate typewritten "witness interview" summaries. He then furnished each witness with a copy of her "witness interview" summary for suggestions or corrections. Most of the summaries were returned with handwritten notes or corrections added. Prior to the November 1997 trial, each witness was again given a copy of her "witness interview" summary to refresh her recollection. So far, so good. However, at the conclusion of the direct examination of each witness at trial, Bizer's attorney produced that witness's "witness interview" summary, had the witness authenticate it, and, over the continuing objection of Berrier's attorneys, introduced it into evidence as a marked exhibit. The jury was permitted to take these exhibits to the jury room for consideration during deliberations.

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Id. at 276–77. We concluded that these witness interview summaries were inadmissible for multiple reasons including that: (1) they contained several prejudicial statements, written in the attorney's words, and not elicited from the witnesses at trial; and (2) even if the witnesses had written the summaries they would have been inadmissible hearsay. *See id.*

9 Although the issue was not preserved in *Littlefield,* the Supreme Court of New Hampshire approved of the trial court's decision to deny the jury's request for a transcript of the expert's testimony, noting its testimonial nature. *Id.* On appeal, the defendant argued that the trial court should have provided the jury with the transcript.

10 Georgia refers to the prohibition against permitting testimonial evidence to go to the jury room as the "continuing witness rule." *Id.* "Documents that are prohibited by the 'continuing witness' objection from going out with the jury are usually testimonial documentary evidence and include affidavits, answers to written interrogatories, written dying declarations, and written confessions or statements of criminal defendants." *Id.* Georgia is one in a minority of states that does not permit the jury to take recorded confessions to the jury room. *See* note 11, *infra.*

11 *See Flonnory v. Delaware,* 893 A.2d 507, 528 (Del.2006); *Jackson v. Virginia,* 267 Va. 178, 590 S.E.2d 520, 533 (2004); *New Hampshire v. Monroe,* 146 N.H. 15, 766 A.2d 734, 736–37 (2001); *Harris v. Indiana,* 659 N.E.2d 522, 527 (Ind.1995); *Maine v. Mannion,* 637 A.2d 452, 456 (Me.1994); *West Virginia v. Dietz,* 182 W.Va. 544, 390 S.E.2d 15, 28–29 (1990); *Wisconsin v. Jensen,* 147 Wis.2d 240, 432 N.W.2d 913, 921–22 (1988); *Stone v. Wyoming,* 745 P.2d 1344, 1349–50 (Wyo.1987); *Massachusetts v. Fernette,* 398 Mass. 658, 500 N.E.2d 1290, 1295 (1986); *North Dakota v. Halvorson,* 346 N.W.2d 704, 712 (N.D.1984); *Washington v. Frazier,* 99 Wash.2d 180, 661 P.2d 126, 130–32 (1983); *Missouri v. Evans,* 639 S.W.2d 792, 795 (Mo.1982) (en banc); *Hampton v. Alaska,* 569 P.2d 138, 146 (Alaska 1977); *Illinois v. Caldwell,* 39 Ill.2d 346, 236 N.E.2d 706, 713 (1968); *Oregon v. Reyes,* 209 Or. 595, 308 P.2d 182, 196 (1957); *Iowa v. Triplett,* 79 N.W.2d 391, 398–99 (Iowa 1956); *Minnesota v. Gensmer,* 235 Minn. 72, 51 N.W.2d 680, 685–86 (1951); *Connecticut v. Castelli,* 92 Conn. 58, 101 A. 476, 480 (1917); *Ohio v. Doty,* 94 Ohio St. 258, 113 N.E. 811, 813–14 (1916); *Thomas v. Florida,* 878 So.2d 458, 459 (Fla.Dist.Ct.App.2004); *Cleary v. Oklahoma,* 942 P.2d 736, 744 (Okla.Crim.App.1997). *See also* Jonathan M. Purver, Annotation, *Permitting documents or tape recordings containing confessions of guilt or incriminating admissions to be taken into jury room in criminal case,* 37 A.L.R.3d 238 (1971); 2 *McCormick on Evidence* § 220 (7th ed.2013) ("Written or recorded confessions in criminal cases, however, are in many jurisdictions allowed to be taken by the jury despite their obvious testimonial character.").

12 RCr 9.24 provides:

> No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order, or in anything done or omitted by the court or by any of the parties, 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. The court at every stage of the proceeding must disregard any error or defect in the proceeding that does not affect the substantial rights of the parties.

13 In *Mills,* this Court found harmful RCr 9.74 error in permitting a jury to review videotaped witness statements to police in the privacy of the jury room. 44 S.W.3d at 372. *Mills,* however, is distinguishable in that the tapes the jury was permitted to review were not played during trial, *id.* at 371, and no foundation "was laid for admitting the statements under KRE 613," *id.* at 372; thus, the videotaped statements were wholly inadmissible, *id.* We continued:

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> Perhaps more importantly, the error goes far beyond violating a rule of evidence.... [T]he interview tapes were never heard by the jury during the trial in the presence of Mills and his counsel. The statements were never subjected to adversarial testing. Allowing the jury to hear these tapes in the manner described above was an error of serious constitutional magnitude.

Id. Accordingly, we reversed and remanded for a new trial.

14 See Section II.B. *supra.* As previously noted, Kilgore's statement was introduced at trial, and was subjected to adversarial testing. Thus, Appellant's constitutional right to be confronted with the witnesses against him is not implicated here.

15 *See also* 75B Am.Jur. *Trials* § 1451 (2007) ("While a jury's viewing of an abridged version of a tape, rather than the tape in its entirety, may place an undue emphasis on the specific portion of testimony revealed for a second time, where, to the contrary, the tape is played in its entirety, in open court, under the supervision of the court with defendant and counsel present the problems arising from an abridged replay—undue emphasis—are not present."). *C.f. Berrier v. Bizer,* 57 S.W.3d 271, 277 (Ky.2001) (" '[B]ecause jurors may give undue weight to the testimony contained within a deposition which they take with them and may not accord adequate consideration to controverting testimony received from live witnesses, it is the universal rule that depositions may not be reviewed by a jury on an unsupervised basis.' ") (*quoting People v. Montoya,* 773 P.2d 623, 625 (Colo.Ct.App.1989)).

16 We are not convinced, however, that " 'a fair and just hearing [was] thwarted by [Appellant's] absence' " during the replaying of the videotaped statement. *Watkins,* 105 S.W.3d at 452–53 (*quoting Snyder,* 291 U.S. at 107–08, 54 S.Ct. 330).

17 KRE 801A(b)(1) provides: "A statement is not excluded by the hearsay rule, even though the declarant is available as a witness, if the statement is offered against a party and is [t]he party's own statement, in either an individual or a representative capacity...."

18 Appellant argues that *Schrimsher's* recitation of the "rule of completeness" conflicts with *Meadors v. Commonwealth* where our predecessor court explained:

> It is a rule of equal general recognition in the practice of criminal law that where the prosecution introduces statements of the defendant tending to show that he is guilty, he has the right, on cross-examination, to elicit from the witnesses relating those statements the whole of the relevant and material subject matter, even though the statements so drawn out are self-serving or favorable to him. 1 Greenleaf, *Evidence,* Section 218; Wharton, *Criminal Evidence,* p. 1299; 70 C.J. 632, 706; *Green v. Commonwealth,* 83 S.W. 638, 26 Ky. Law Rep. 1221 [(Ky.1904)]; *Powers v. Commonwealth,* 110 Ky. 386, 61 S.W. 735, 22 Ky. Law Rep. 1807, 53 L.R.A. 245 [(1901)]; *McCandless v. Commonwealth,* 170 Ky. 301, 185 S.W. 1100; *Collins v. Commonwealth,* 227 Ky. 349, 13 S.W.2d 263. Commenting on the rule as to admitting all the prisoner said on the subject at the time of making a confession, the court wrote in *Berry v. Commonwealth,* 73 Ky. 15, 10 Bush 15: "This rule is the dictate of reason as well as of humanity. The prisoner is supposed to have stated a proposition respecting his own connection with the crime; but it is not reasonable to assume that the entire proposition with all its limitations was contained in one sentence, or in any particular number of sentences, excluding all other parts of the conversation."

136 S.W.2d 1066, 1068 (Ky.1940). We are not convinced that *Meadors* is inconsistent with KRE 106: *Meadors* permits the defendant to elicit that part of the statement that is "relevant and material" to the part of the statement elicited by the prosecution, while KRE 106 permits the introduction of that part of the statement that "ought in fairness to be considered contemporaneously with" the part introduced by the adverse party. Stated differently, the "relevant and material" parts of the statement are arguably those parts of the statement

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that "ought in fairness to be considered contemporaneously with" the statements already elicited. In fact, this seems to be precisely how *Meadors* has been interpreted. *See* Commonwealth v. Collins, 933 S.W.2d 811, 814 (Ky.1996).

Insofar as they could be read as inconsistent, *Schrimsher's* interpretation of KRE 106 would supersede the rule in *Meadors. See* Burchett v. Commonwealth, 98 S.W.3d 492, 511 (Ky.2003) (" '[W]hen there is an adopted Rule of Evidence that speaks to the contested issue, the adopted Rule occupies the field and supersedes the former common law interpretation.' ") (*quoting* Garrett v. Commonwealth, 48 S.W.3d 6, 14 (Ky.2001) (*citing* Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 587–89, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993))).

19 For these reasons, this issue is properly preserved for our review.

20 During defense counsel's cross-examination of Detectives Lesher and Willett, the Commonwealth objected four times on grounds that counsel was impermissibly thwarting hearsay rules and introducing Appellant's hearsay statements. The trial court overruled all four objections, noting that the Commonwealth could introduce the videotaped statement if it wanted to; because it chose not to, the court was inclined to permit defense counsel wide latitude in contextualizing the parts of Appellant's statement introduced through direct examination of Detectives Lesher and Willett. *See* note 21 *infra* and accompanying text.

21 After hearing the Commonwealth's objection, the following exchange occurred:

> *Judge:* Well I agree with the defense on this issue. The Commonwealth has elected not to play the statement between Willett and McAtee or Lesher and McAtee. Detective Willett said on the stand that the interview became confrontational and I think it's appropriate for defense counsel to be able to cross-examine him on the issue of confrontation. So objection overruled.
>
> *Prosecutor:* Is the court ruling that the defense is allowed to get into the specific denials Mr. McAtee made?
>
> *Judge:* Yes, so far. It may change depending on the questions. But it's not like the taped statement is off-limits to the Commonwealth for any reason. The Commonwealth *could* play the tape for the jury.

Thereafter, the judge never prevented defense counsel from eliciting any of Appellant's denials.

22 See Commonwealth v. Mitchell, 943 S.W.2d 625, 626 (Ky.1997), where this Court explained:

> Prior to the adoption of RCr 9.57, effective August 1, 1992, the trial judges of this Commonwealth were afforded substantial discretion as to how to instruct a deadlocked jury, so long as the instruction did not attempt to coerce the jury or indicate the judge's own opinion as to the verdict. Abbott v. Commonwealth, Ky., 352 S.W.2d 552 (1961); McMillan v. Commonwealth, 258 Ky. 354, 80 S.W.2d 24 (1935); *cf.* Burnam v. Commonwealth, 283 Ky. 361, 141 S.W.2d 282 (1940). Most trial judges used the so-called "*Allen* charge," *see* Allen v. United States, 164 U.S. 492, 17 S.Ct. 154, 41 L.Ed. 528 (1896), and that instruction was specifically approved in Earl v. Commonwealth, Ky.App., 569 S.W.2d 686 (1978). However, in McCampbell v. Commonwealth, Ky.App., 796 S.W.2d 596 (1990), another Court of Appeals panel criticized the *Allen* charge and noted that the preferred view with respect to charging a deadlocked jury is that reflected in 3 *American Bar Association Standards for Criminal Justice,* Standard 15–4.4 (2d ed.1980). It is this standard which is now codified in RCr 9.57(1).

23 *Mitchell* provides a lengthy analysis of RCr 9.57 and American Bar Association Standard for Criminal Justice 15–4.4, from which RCr 9.57 was adopted.

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KeyCite Yellow Flag - Negative Treatment
Declined to Extend by State v. Hardy, Kan.App., March 27, 2015

285 S.W.3d 740
Supreme Court of Kentucky.

Frank RODGERS, Appellant,
v.
COMMONWEALTH of Kentucky, Appellee.

No. 2007–SC–000040–MR
|
June 25, 2009.

Synopsis

Background: Defendant was convicted after a joint trial in the Jefferson Circuit Court, W. Douglas Kemper, J., of first-degree manslaughter. He appealed.

Holdings: The Supreme Court, Abramson, J., held that:

[1] any violation of defendant's Sixth Amendment right of confrontation caused by the admission of portions of codefendant's statement during a police interview was harmless;

[2] trial court acted within its discretion under the rule of completeness when it allowed the admission of a certain portion of defendant's statement during a police interview;

[3] omission of a no-duty-to-retreat jury instruction on self defense did not infringe on defendant's constitutional right to present a defense;

[4] trial court acted within its discretion in finding that the prosecution's proffered race-neutral reason for striking an African–American prospective juror was not a pretext for discrimination; and

[5] defendant failed to show that the jury was not selected from a fair cross section of the community;

Affirmed.

Noble, J., concurred in part, concurred in result in part, and dissented in part and filed opinion.

Scott, J., concurred in part and dissented in part and filed opinion.

West Headnotes (23)

[1] **Criminal Law** Preliminary proceedings

Supreme Court reviews a trial court's denial of a motion to sever under the abuse-of-discretion standard. Rules Crim.Proc., Rules 6.20, 9.16.

2 Cases that cite this headnote

[2] **Criminal Law** Confessions or declarations of codefendants

At a joint trial, a pretrial confession of one defendant cannot be admitted against the other unless the confessing defendant takes the stand.

2 Cases that cite this headnote

[3] **Criminal Law** Confessions or declarations of codefendants

At a joint trial, if a pretrial confession of one defendant is redacted so as to remove all reference to the other defendant, including obvious inferential references, then the confession may be admitted against the confessing defendant.

2 Cases that cite this headnote

[4] **Criminal Law** Reception of evidence

Any violation of defendant's Sixth Amendment right of confrontation caused by the admission of portions of codefendant's statement during a police interview was harmless at a joint homicide trial, even if a redaction of the statement was insufficient to remove all facial implication of defendant; the statement was cumulative of eyewitness testimony that defendant drove to victim's house, argued with victim, and shot at victim and of defendant's own statement, which included the same admissions. U.S.C.A. Const.Amend. 6.

3 Cases that cite this headnote

[5] **Criminal Law** Admission of whole conversation, transaction, or instrument because of admission of part or reference thereto

Trial court acted within its discretion under the rule of completeness when it allowed the admission, at a joint homicide trial, of a certain portion of defendant's statement during a police interview; the state had sought to present the portion in which defendant asserted that he shot victim while omitting the portion in which defendant described a struggle over victim's gun, and trial court's ruling that the portion describing the struggle was admissible allowed defendant to complete what was arguably an incomplete and potentially misleading reproduction of his statement. Rules of Evid., Rule 106.

2 Cases that cite this headnote

[6] **Criminal Law** Amendment, revision, and codification

Unless the General Assembly unmistakably intends otherwise, substantive amendments to criminal statutes will not be retroactively applied and offenses committed against a statute before its repeal may thereafter be prosecuted and the penalties incurred may be enforced; "substantive amendments" are those that change and redefine the out-of-court rights, obligations, and duties of persons in their transactions with others.

10 Cases that cite this headnote

[7] **Statutes** Amendatory statutes

"Procedural amendments" to statutes, i.e., amendments that apply to the in-court procedures and remedies that are used in handling pending litigation, are to be retroactively applied.

7 Cases that cite this headnote

[8] **Sentencing and Punishment** Reduction or amelioration of punishment

Amendments to "penalty provisions," i.e., provisions pertaining to punishment, such as those creating terms of imprisonment, periods of probation or parole, fines, or forfeitures, may be retroactively applied if a defendant specifically consents to the application of the new law that is certainly or definitely mitigating.

5 Cases that cite this headnote

[9] **Action** Defenses in general

Criminal Law Amendment, revision, and codification

Certain amendments to the self-defense law in 2006 effect substantive changes to the law, not changes to penalty provisions or to procedures, and therefore apply only prospectively in the absence of the General Assembly's contrary direction. KRS 446.110, 503.050(2, 4), 503.055(1, 4), 503.070(3).

3 Cases that cite this headnote

[10] **Criminal Law** Liberal or strict construction; rule of lenity

As a rule of construction of criminal statutes, the rule of lenity applies only if the statute at issue is genuinely ambiguous and even then only if the ambiguity cannot be resolved by resort to the other traditional rules of construction.

1 Case that cites this headnote

[11] **Action** Defenses in general

Criminal Law Retroactive operation

New statutory provision granting immunity from criminal prosecution and civil action to persons who justifiably use self defense is procedural and, thus, is to be applied retroactively. KRS 503.085.

2 Cases that cite this headnote

[12] **Criminal Law** Grounds and Considerations

Criminal Law Self-defense

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Controlling standard of proof for whether a defendant is entitled to immunity from criminal prosecution based on a justifiable use of self defense is probable cause; thus, for a prosecutor to bring charges or seek an indictment, there must be probable cause to conclude that the force used by the defendant was not fully justified under the controlling provision or provisions of the justification statutes, and, similarly, once the matter is before a judge, if the defendant claims immunity, the court must dismiss the case unless there is probable cause to conclude that the force used was not legally justified. KRS 503.085.

35 Cases that cite this headnote

[13] **Criminal Law** Grounds and Considerations

When a defendant claims immunity from criminal prosecution based on a justifiable use of self defense, a judge must consider all of the circumstances then known to determine whether probable cause exists to conclude that a defendant's use of force was unlawful; if such cause does not exist, immunity must be granted and, conversely, if it does exist, the matter must proceed. KRS 503.085.

24 Cases that cite this headnote

[14] **Criminal Law** Proceedings; Dismissal with or Without Prejudice

Once a defendant raises a claim that he is immune from criminal prosecution based on a justifiable use of self defense, a court must proceed expeditiously on the issue. KRS 503.085.

[15] **Criminal Law** Presence and rights of accused

Criminal Law Grounds and Considerations

A defendant may assert a claim that he is immune from criminal prosecution based on a justifiable use of self defense and seek a determination at the preliminary hearing in district court or, alternatively, he may elect to await the outcome of the grand jury proceedings and, if indicted, present his motion to the circuit judge; a defendant may not, however, seek dismissal on immunity grounds in both courts. KRS 503.085.

3 Cases that cite this headnote

[16] **Criminal Law** Proceedings; Dismissal with or Without Prejudice

At a proceeding to determine whether a defendant is entitled to immunity from criminal prosecution based on a justifiable use of self defense, the burden is on the Commonwealth to establish probable cause that the defendant's use of force was unlawful, and it may do so by directing the court's attention to the evidence of record, including witness statements, investigative letters prepared by law enforcement officers, photographs, and other documents of record. KRS 503.085.

30 Cases that cite this headnote

[17] **Criminal Law** Self-defense

A jury instruction on self defense should be in the usual form, leaving the question to be determined by the jury in light of all the facts and circumstances of the case, rather than in light of certain particular facts.

1 Case that cites this headnote

[18] **Criminal Law** Necessity and scope of proof

Homicide Duty to retreat or avoid danger

Omission of a no-duty-to-retreat jury instruction on self defense did not infringe on defendant's constitutional right to present a defense at a homicide trial, even though defendant asserted a claim of self defense; trial court instructed the jury on self defense, and defendant was given an opportunity to argue that theory to the jury, including the no-duty-to-retreat principle.

11 Cases that cite this headnote

[19] **Jury** Peremptory challenges

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Trial court acted within its discretion in a homicide prosecution in finding that the prosecution's proffered race-neutral reason for striking an African–American prospective juror, which was that juror's personal knowledge of cases in which persons were convicted despite not having committed the alleged crimes was apt to bias her against the prosecution, was not a pretext for discrimination, even though several non-African–American prospective jurors expressed concern that racially biased juries posed a risk to fair trials; none of those jurors claimed personal knowledge of a wrongful conviction, and none indicated by his or her response that concern for racial fairness gave rise to a potential bias against the prosecution.

2 Cases that cite this headnote

[20] **Criminal Law** Jury selection

A trial court's ultimate decision on a *Batson* challenge is akin to a finding of fact, which must be afforded great deference by an appellate court.

15 Cases that cite this headnote

[21] **Jury** Peremptory challenges

Ultimate burden of showing unlawful discrimination in jury selection under *Batson* rests with the challenger.

13 Cases that cite this headnote

[22] **Jury** Race

Defendant failed to show that the jury in a homicide prosecution was not selected from a fair cross section of the community, even though the 50-person venire from which the jury was selected apparently included only three African–Americans; defendant made no attempt to show that African–Americans were regularly underrepresented on venires in the prosecuting county or that the jury-selection process systematically excluded them. U.S.C.A. Const.Amends. 6, 14.

9 Cases that cite this headnote

[23] **Jury** Representation of community, in general

Defendants are not entitled to a jury of any particular composition, but the jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof. U.S.C.A. Const.Amends. 6, 14.

3 Cases that cite this headnote

Attorneys and Law Firms

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Jack Conway, Attorney General, Perry Thomas Ryan, Assistant Attorney General, Office of Attorney General, Frankfort, KY, Counsel for Appellee.

Opinion

Opinion of the Court by Justice ABRAMSON.

Frank Rodgers appeals as a matter of right from a November 22, 2006 Judgment of the Jefferson Circuit Court convicting him of first-degree manslaughter and sentencing him as a second-degree persistent felon to twenty years in prison. The Commonwealth alleged that shortly after midnight on August 22, 2004, Rodgers and his co-defendant, Deshawn Eddings, shot and killed Dewhon McAfee in the course of an altercation that erupted in the backyard of McAfee's home on South 28th Street in Louisville. Two eyewitnesses identified Rodgers and Eddings as McAfee's assailants, and Rodgers himself, in his post-arrest statement to Louisville Metro Police Detective Leigh Whelan, admitted having shot at McAfee, but claimed that he did so in self-defense and without intending to kill. On appeal, Rodgers contends (1) that he was entitled to be tried separately from Eddings; (2) that the trial court misapplied the law of self-defense; (3) that one of the Commonwealth's peremptory juror strikes violated *Batson v. Kentucky,* 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986); (4) that the petit jury was not chosen from a fair cross section of the community; and (5) that the jury instructions understated the Commonwealth's burden of proof

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and commented on Rodgers's silence. Finding no reversible error, we affirm.

RELEVANT FACTS

The Commonwealth's case rested largely on the testimonies of two of McAfee's friends, Myrna Palmore and Tamara Eubanks. They testified that on the evening of August 21, 2004, they joined McAfee for a barbeque in his backyard and that later in the evening Eubanks, who was familiar with Rodgers and Eddings, invited them to join the get-together. Rodgers and Eddings, ***744** who claimed not to know McAfee, arrived at McAfee's house at some time between approximately 10:30 and 12:00. At first, according to the women, everything seemed fine. Rodgers and Eddings may have had some food and some beer, and they smoked some marijuana with the two women while everyone talked and listened to music.

Not long after midnight, however, according to Palmore, Eubanks went into the house briefly and while she was gone McAfee suddenly stood up and angrily asked Rodgers, "What did you say to me?" A heated argument ensued between the two men. Palmore testified that McAfee threatened to "whup" Rodgers, at which point she got between them and urged McAfee to calm down. Eubanks testified that she returned to the backyard to find McAfee and Rodgers arguing and that she joined Palmore, who was standing between the men, urging Rodgers to leave. During the argument Rodgers apparently backed out of the backyard and along the side of the house toward the front. When he had nearly reached the front yard, both men shoved the women aside and, according to Palmore and Eubanks, Rodgers produced a gun and fired several shots at McAfee. Palmore remembered four to eight shots; Eubanks remembered five. A neighbor who overheard the arguing testified that she heard three shots in rapid succession. Eubanks testified that McAfee fell to the ground and that Eddings, who had remained toward the back of the house during the argument, then came forward, pulled out a gun, and fired two additional shots at the prone McAfee. Palmore testified, however, that McAfee remained standing until Eddings produced a gun and shot at him from behind. According to the women, Rodgers and Eddings then both drove away in Rodgers's car. McAfee died at the hospital later that morning.

The medical examiner testified that McAfee had been shot three times, twice superficially—in the lip and in the shoulder—and once fatally. The fatal shot entered McAfee's lower left side, punctured his stomach and diaphragm, and exited his right side. The examiner recovered one of the bullets, which, according to ballistics experts, matched either of the two 9 mm shell casings found at the scene.

The Commonwealth also introduced portions of the statements Eddings and Rodgers gave to Detective Whelan upon their arrest. Prior to trial the statements were redacted in an attempt to comply with the dictates of *Bruton v. United States,* 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). With respect to both defendants, Detective Whelan quoted or paraphrased from the redacted versions. During Eddings's police interview, he admitted being present at the time of the shooting, admitted that Rodgers and McAfee argued, and admitted that he heard gunfire and saw flashes from the barrel of a gun. He denied, however, firing any shots himself, claimed not to know whether Rodgers had used a gun, denied that either he or Rodgers had had a gun, and denied leaving with Rodgers after the shooting, claiming that he ran from the scene on foot. Based on Eddings's redacted statement, Detective Whelan testified simply that Eddings told her he had been present, had heard an argument, and had heard and seen gunfire. On cross-examination by Eddings, she admitted that Eddings had denied firing any shots.

During Rodgers's interview, he admitted being present, admitted arguing with McAfee, and admitted shooting at McAfee, but he claimed that McAfee was the aggressor and that he did not know what had sparked McAfee's anger. He further claimed that at the height of the argument McAfee had produced a gun that they had ***745** wrestled over it, that he had succeeded in wresting the gun away from McAfee, that the gun had gone off once by accident and that he had then fired at McAfee's legs in an attempt to deter McAfee's assault. He and Eddings had then fled the scene in Rodgers's car, and he (Rodgers) had disposed of the gun in an alley. During her direct examination, Detective Whelan limited her testimony to Rodgers's admissions without his self-defense qualifications, but on cross-examination Rodgers was permitted to elicit his description of the struggle for the gun and his claim that he shot only once at McAfee's legs.

Neither Rodgers nor Eddings testified, but in closing argument Rodgers argued that he shot at McAfee in self-defense and under extreme emotional disturbance. Eddings argued that he had not shot at all. The jury instructions reflected those defenses. As noted, the jury found Rodgers guilty of first-degree manslaughter. It could not reach a

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verdict as to Eddings. In exchange for Rodgers's agreement to testify at Eddings's retrial, the thirty-year enhanced sentence recommended by the jury was reduced to twenty years.

ANALYSIS

I. The Trial Court Did Not Abuse Its Discretion by Joining Rodgers's and Eddings's Trials.

Rodgers's first contention on appeal is that he was entitled to be tried separately from Eddings and that their joint trial was rendered unfair by the use of their redacted statements. The use of Eddings's statement, he maintains, deprived him of his right to cross-examine adverse testimony, and the use of his own statement deprived him of his right to present a defense. The use of neither statement entitles Rodgers to relief.

[1] Rule of Criminal Procedure (RCr) 6.20 permits the joinder for trial of two or more defendants if "they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." Joint trials are a mainstay of our system, as they give the jury the best perspective on all the evidence and thus increase the likelihood of proper verdicts and avoid the possibility of inconsistent ones. Conflicting versions of what happened, we have thus noted, "is a reason for rather than against a joint trial." *Shepherd v. Commonwealth,* 251 S.W.3d 309, 313 (Ky.2008) (quoting from *Caudill v. Commonwealth,* 120 S.W.3d 635 (Ky.2003)). RCr 9.16, on the other hand, requires that trials be severed "if it appears that a defendant or the Commonwealth is or will be prejudiced" by the joinder. We review a trial court's denial of a motion to sever under the abuse of discretion standard. *Shepherd, supra.*

A. The Introduction of Eddings's Redacted Admissions Did Not Require Severance or Deprive Rodgers of a Fair Trial.

[2] As noted, Rodgers sought severance on two grounds. He argued first that the Commonwealth's use of Eddings's statement to Detective Whelan would violate his (Rodgers's) Confrontation Clause right to cross-examine adverse testimony. He correctly observed that in *Crawford v. Washington,* 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), the United States Supreme Court held that an unavailable declarant's out-of-court testimonial statement offered against a defendant is admissible only if the defendant has had a prior opportunity to cross-examine the declarant. In the context of a joint trial, therefore, "the pretrial confession of one [defendant] cannot be admitted against the other unless the confessing defendant takes the ***746** stand." *Richardson v. Marsh,* 481 U.S. 200, 206, 107 S.Ct. 1702, 95 L.Ed.2d 176 (1987). Indeed, the pretrial confession may not even be introduced against the confessor, the Supreme Court held in *Bruton, supra,* if on its face it implicates another defendant being jointly tried with the confessor.

[3] If, however, the confession is redacted so as to remove all reference to the co-defendant(s), including obvious inferential references, then the confession may be admitted against the confessor. *Richardson, supra; Gray v. Maryland,* 523 U.S. 185, 118 S.Ct. 1151, 140 L.Ed.2d 294 (1998). Thus *Richardson* concluded that "the Confrontation Clause is not violated by the admission of a nontestifying codefendant's confession with a proper limiting instruction when, as here, the confession is redacted to eliminate not only the defendant's name, but any reference to his or her existence." 481 U.S. at 211, 107 S.Ct. 1702. Under these latter cases, the Commonwealth proposed to redact Eddings's statement so as to remove all reference to Rodgers and to introduce the statement against Eddings alone. [1] The trial court agreed that Eddings's redacted statement could be used against him and thus did not provide Rodgers with a ground for severance. Rodgers now argues that with *Crawford* the United States Supreme Court implicitly overruled *Richardson* and *Gray,* and further argues that even if *Richardson* and *Gray* survive, Eddings's redacted statement still implicated Rodgers, and thus did not meet the standard of admission established in *Gray.* Neither argument entitles Rodgers to relief.

First, we agree with the trial court that *Crawford* did not implicitly overrule *Richardson* and *Gray.* If the Supreme Court had intended such a major departure from its recent precedent it would have said so expressly and not left it to implication. [2] Simply put, *Crawford* and its progeny address the use of testimonial hearsay against a non-declarant. Thus, in this case, if Myrna Palmore, a mere witness and not a co-defendant, had provided a statement to police but was unavailable to testify at trial and had not been previously available for cross-examination, *Crawford* would have precluded admission of her "testimonial hearsay" against Eddings and Rodgers. However, *Crawford* and its progeny do not address the use of a prior testimonial statement against the declarant himself, the question addressed in *Bruton, Richardson,* and *Gray* and the issue presented here when Eddings's statement was introduced against Eddings himself in a joint trial. We agree with the several courts that have held that this latter question continues to be controlled

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by the *Bruton* line of cases and that "[t]he same redaction that 'prevents *Bruton* error also serves to prevent *Crawford* error.' " *People v. Stevens,* 41 Cal.4th 182, 59 Cal.Rptr.3d 196, 158 P.3d 763, 776 (2007) (*quoting from United States v. Chen,* 393 F.3d 139 (2nd Cir.2004)). *See also United States v. Ramos–Cardenas,* 524 F.3d 600 (5th Cir.2008) (collecting cases). In reaching this conclusion, we note that joint trials differ from single defendant trials in at least one crucial way; the prosecution may offer certain items of evidence to be considered against only one of the defendants ***747** on trial just as Eddings's statement was offered only against him and not against Rodgers. Where a jury hears a non-testifying co-defendant's statement to be considered only against that particular defendant/declarant, both the redaction and the limiting instruction to the jury which Justice Scalia discussed in *Richardson* insure compliance with *Crawford, i.e.,* facially incriminating matters are removed and even if inferentially incriminating statements remain the admonition is presumed to be followed so that the testimonial hearsay is not being used against the defendant(s) who did not make the statement. The combination of redaction and limiting instruction satisfies *Crawford.* As previously noted, Rodgers did not request, and therefore waived, a limiting instruction.

Alternatively, Rodgers maintains that the redacted statement here did not meet the *Richardson/Gray* standard. In *Gray,* the Supreme Court held that in a joint trial, for a pre-trial statement to be admissible against a defendant/declarant under *Richardson,* the statement must be redacted so as to remove not just express reference to any other defendant, but also indirect references, such as omissions from the statement, which "obviously refer directly to someone, often obviously the defendant, and which involve inferences that a jury ordinarily could make immediately, even were the confession the very first item introduced at trial." 523 U.S. at 196, 118 S.Ct. 1151. Rodgers contends that although Eddings's statement was redacted to remove any express reference to Rodgers, the portions of Eddings's statement introduced at trial wherein he admitted that he traveled by car to McAfee's house and that he witnessed an argument and heard and saw gunfire, obviously imply the existence of a driver and a shooter and point immediately, in this two defendant case, to Rodgers as the unnamed individual who occupied those roles.

[4] We need not decide, however, whether the admission of these portions of Eddings's statement amounted to a *Bruton* error, for even if it did, *Bruton* errors are subject to harmless error analysis, *Shepherd, supra,* and any error here was clearly harmless beyond a reasonable doubt. *Sparkman v. Commonwealth,* 250 S.W.3d 667 (Ky.2008) (applying the "harmless beyond a reasonable doubt" standard to a Confrontation Clause violation). Not only did Palmore and Eubanks testify that Rodgers drove to McAfee's house, argued with McAfee, and shot at him, but Rodgers's own statement included the same admissions. Eddings's statement, therefore, even if its redaction was insufficient to remove all facial implication of Rodgers, as required by *Gray,* was harmlessly cumulative and so does not entitle Rodgers to relief.

B. The Limited Introduction of Rodgers's Redacted Statement Did Not Infringe Upon His Right to Present a Defense.

Rodgers also sought severance on the ground that the Commonwealth's proposed use of his own statement threatened to violate his right to present a defense. To the extent that Rodgers's contention is based on the redaction from his statement of any reference to Eddings and thus on his inability to use the statement to point the finger at Eddings, we rejected such a contention in *Shepherd, supra.* That is not the real thrust of Rodgers's contention, however.

The Commonwealth proposed to present to the jury Rodgers's admission that he shot at McAfee, but not to present those portions of his statement wherein he described the shooting as the culmination of an assault initiated by McAfee and a struggle over McAfee's gun. Rodgers argued ***748** that on cross-examination of Detective Whelan, who would introduce Rodgers's "I shot at him" admission, he should be permitted to elicit the self-defense portions of his statement.

Obviously, this is not truly a severance issue, as the same question would have arisen even had Rodgers been tried alone. Nevertheless, although not preserved by Rodgers's severance motion, the issue was preserved during trial when Detective Whelan did indeed testify that Rodgers admitted shooting at McAfee, and over Rodgers's objection the trial court limited Rodgers's cross-examination to the following portion of his statement, the portion that contained the admission:

> Rodgers: So I was standing here. He just ran up and grabbed me, and like wrestling. Then all of a sudden, he came out, seemed like he had a gun here. Then we was like wrestling over the gun. I remember that. I was like, "Man, get off of me, man; just get off of me, man. I don't want no problems. I'm trying to leave, man, get off me." Then the gun just went off.

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Whelan: Okay.

Rodgers: Boom! I heard one shot, and I didn't know where it came to. I was protecting myself. I didn't know if I was hit.

Whelan: Um-hmm.

Rodgers: We was wrestling, and [he] had me. Somehow I managed to grab the gun out of his hand, and, I just remember, I yanked it back, like that.

Whelan: Okay.

Rodgers: And I shot at his leg.

Whelan: Okay.

Rodgers contends that he should have been permitted to ask the detective about other self-defense portions of his statement, portions, for example, in which he claimed that McAfee threatened to kill him and in which he described himself as terrified by McAfee's assault. We disagree.

[5] As the Commonwealth noted during trial, the statements Rodgers made during his interrogation were inadmissible hearsay—admissible when offered by the Commonwealth as admissions of a party opponent under KRE 801(A)(b), but not admissible when offered by Rodgers himself. Rodgers argued, however, that KRE 106, the so-called rule of completeness, trumped the hearsay rule in this instance and permitted him to introduce those portions of his statement which would place the portion introduced by the Commonwealth into context and so prevent an unfair use of his "I shot at him" admission. We addressed this situation in *Schrimsher v. Commonwealth,* 190 S.W.3d 318 (Ky.2006), where we explained that

> a party purporting to invoke KRE 106 for the admission of otherwise inadmissible hearsay statements may only do so to the extent that an opposing party's introduction of an incomplete out-of-court statement would render the statement misleading or alter its perceived meaning.... The completeness doctrine is based upon the notion of fairness—namely, whether the meaning of the included portion is altered by the excluded portion. The objective of that doctrine is to prevent a misleading impression as a result of an incomplete reproduction of a statement. *This does not mean that by introducing a portion of a defendant's confession in which the defendant admits the commission of the criminal offense, the Commonwealth opens the door for the defendant to use the remainder of that out-of-court statement for the purpose of asserting a defense without subjecting it to cross-examination.*

190 S.W.3d at 330–31 (emphasis in original). The trial court did not abuse its ***749** discretion under KRE 106 in this case. By permitting Rodgers to introduce that portion of his statement quoted above, the portion which actually contained the "I shot at him" statement which the Commonwealth introduced, the court allowed him to complete what was arguably an incomplete and potentially misleading reproduction of that statement. By excluding Rodgers's other exculpatory statements, on the other hand, the court correctly limited the introduction of an uncross-examined defense. As explained in *Schrimsher,* this was a permissible balancing of the hearsay and completeness rules. On appeal, Rodgers further contends that the Due Process Clause of the United States Constitution also trumps the hearsay rule and that fundamental fairness required that he be allowed to introduce the exculpatory portions of his statement to Detective Whelan. He relies on *Chambers v. Mississippi,* 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973), in which the Supreme Court held that in certain "circumstances, where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice." *Id.* at 302, 93 S.Ct. 1038.

At issue in *Chambers* was the exclusion of certain statements by a non-defendant who had repeatedly admitted to friends and colleagues that he had committed the murder for which the defendant was on trial. The trial court excluded those statements as hearsay. The Supreme Court reversed, explaining that because the hearsay statements were "critical evidence" for the defense and the circumstances under which the statements were made "provided considerable assurance

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of their reliability," their exclusion violated due process. *Id.* at 300–02, 93 S.Ct. 1038.

Because Rodgers did not raise the *Chambers* issue at trial, our review is limited to determining whether the exclusion of his additional exculpatory statements amounted to palpable error. RCr 10.26. It did not. Rodgers's hearsay statements were not critical to his defense, since he was free to testify on his own behalf if he so desired, and unlike the third-party confession in *Chambers,* which in that case was clearly against the penal interest of the confessor, Rodgers's self-excusing statement to police was not made under circumstances giving "considerable assurance of [its] reliability." On the contrary, Rodgers evaded arrest for some three months after the shooting, by which time he had had ample opportunity to fabricate a defense, a circumstance underscoring the need for cross-examination of his self-defense claims, not establishing the propriety of dispensing with it. We have considered Rodgers's other unpreserved arguments and find them similarly inapt. The trial court did not err, in other words, by excluding any additional exculpatory portions of Rodgers's statement to Detective Whelan, nor, as discussed above, did it abuse its discretion by denying Rodgers's motion for a separate trial.

II. The Trial Court Correctly Limited Application of the 2006 Self–Defense Amendments.

Effective July 12, 2006, after Rodgers's alleged 2004 crime but before his September 2006 trial, the Kentucky General Assembly joined a trend urged by the National Rifle Association and, through Senate Bill 38, extensively amended the self-defense[3] provisions of ***750** KRS Chapter 503. *See generally* Renee Lerner, *The Worldwide Popular Revolt Against Proportionality in Self–Defense Law,* 2 J.L. Econ. & Pol'y 331 (2006); Daniel Michael, *Florida's Protection of Persons Bill,* 43 Harv. J. on Legis. 199 (2006). Among other changes Senate Bill 38 created presumptions that one "unlawfully and by force" entering a dwelling, residence, or occupied vehicle does so with the intent to commit an unlawful act involving force or violence, KRS 503.055(4), and that a person encountering such an intruder reasonably fears death or great bodily injury. KRS 503.055(1). It expanded the circumstances in which the use of deadly force is justified to include those instances when one reasonably believes that such force is necessary to prevent the commission of a felony involving the use of force. KRS 503.050(2). The bill expressly provided that the right to use force, including deadly force, in defense of self or others is not contingent upon a duty to retreat. *See, e.g.* KRS 503.050(4), KRS 503.070(3). Moreover, the bill declared that one who justifiably used defensive force "is immune from criminal prosecution," including arrest, detention, charge, or prosecution in the ordinary sense. KRS 503.085(1).

Pursuant to this latter provision, Rodgers claimed immunity from prosecution, moved to have the charges against him dismissed, and sought an evidentiary pre-trial hearing to address the immunity question. Denying Rodgers's motion to dismiss, the trial court ruled that the new immunity statute did not apply retroactively to Rodgers's case but that even if it did a review of the discovery record was sufficient to determine that Rodgers's assertion of self-defense was significantly controverted, precluding his immunity. Rodgers contends that these rulings were incorrect: that the new self-defense legislation does apply retroactively and that he was entitled to an evidentiary hearing to address his assertion of immunity. Although we agree with Rodgers that the immunity statute (KRS 503.085) applied to his trial, the trial court appropriately addressed the immunity question and otherwise correctly determined that the new self-defense laws do not apply retroactively.

A. The Substantive Provisions of the 2006 Self–Defense Law Apply Prospectively Only.

[6] **[7]** **[8]** As the parties correctly note, our savings statute, KRS 446.110, one of the oldest statutes carried forward into the current Kentucky Revised Statutes,[4] provides in pertinent part that

> [n]o new law shall be construed to repeal a former law as to any offense committed against a former law, ... or in any way whatever to affect any such offense or act so committed or done, ... before the new law takes effect, except that the proceedings thereafter had shall conform, so far as practicable, to the laws in force at the time of such proceedings. If any penalty, forfeiture or punishment is mitigated by any provision of the new law, such provision may, by the consent of the party affected, be applied to any

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> judgment pronounced after the new law takes effect.

This statute marks a departure from the common law, under which the repeal of a statute describing a criminal offense precluded prosecution for outstanding violations of the statute which had occurred prior to repeal. ***751** *Commonwealth v. Louisville & N.R. Co.,* 186 Ky. 1, 215 S.W. 938 (1919). Under KRS 446.110, unless the General Assembly unmistakably intends otherwise, substantive changes to criminal statutes will not be retroactively applied and "offenses committed against the statute before its repeal, may thereafter be prosecuted, and the penalties incurred may be enforced." *Lawson v. Commonwealth,* 53 S.W.3d 534, 550 (Ky.2001) (citation and internal quotation marks omitted). Substantive amendments are those "which change and redefine the out-of-court rights, obligations and duties of persons in their transactions with others." *Commonwealth of Kentucky Department of Agriculture v. Vinson,* 30 S.W.3d 162, 168 (Ky.2000). By contrast, procedural amendments—"[t]hose amendments which apply to the in-court procedures and remedies which are used in handling pending litigation" *id.* at 168–69—*are* to be retroactively applied (assuming no separation-of-powers concerns) so that the proceedings "shall conform, so far as practicable, to the laws in force at the time of such proceedings." Finally, amendments to penalty provisions—provisions pertaining to punishment, such as those creating terms of imprisonment, periods of probation or parole, fines, or forfeitures—*may* be retroactively applied if the defendant "specifically consents to the application of the new law which is 'certainly' or 'definitely' mitigating." *Lawson, supra,* 53 S.W.3d at 550; *Commonwealth v. Phon,* 17 S.W.3d 106 (Ky.2000). This is consistent with our approach to substantive, procedural, and remedial civil statutes under KRS 446.080. That statute provides in part that "[t]here shall be no difference in the construction of civil, penal and criminal statutes" and that "[n]o statute shall be construed to be retroactive, unless expressly so declared." Pursuant to these provisions, we have held, substantive civil statutes are not to be applied retroactively unless the General Assembly expressly declares otherwise, while procedural and remedial statutes are to be so applied. *Commonwealth of Kentucky Department of Agriculture, supra; Peabody Coal Co. v. Gossett,* 819 S.W.2d 33 (Ky.1991).

[9] With one exception, the new self-defense legislation effects substantive changes to our self-defense law, not changes to penalty provisions or to procedures. As noted above, the new amendments alter the circumstances constituting self-defense and create certain presumptions which will alter the burden of proof in self-defense cases. Those are amendments to the substantive law. *University of Louisville v. O'Bannon,* 770 S.W.2d 215, 217 (Ky.1989) ("Whether a particular circumstance constitutes a cause of action [or conversely a defense] ... is a matter of substantive law."); *Commonwealth of Kentucky Department of Agriculture,* 30 S.W.3d at 169 ("The change in the burden of proof was ... a change in substantive law.") Under the savings statute therefore, absent the General Assembly's contrary direction, the changes to substantive law apply prospectively only.

Rodgers asserts, nevertheless, that the 2006 amendments to Kentucky's self-defense provisions should apply retroactively in their entirety. He relies on the last sentence of the savings statute, the provision permitting retroactive application of amendments that mitigate punishments, and argues that by liberalizing the law of self-defense the new amendments tend to "mitigate" the effects of the former law. Clearly, however, this construction of the savings statute would swallow entirely the rule against retroactivity. Under Rodgers's construction, any changes to the criminal laws that either narrowed or repealed an offense or created or enlarged a defense—plainly substantive changes altering the rights and duties of citizens—would ***752** apply retroactively because by increasing a defendant's chance of either acquittal or conviction of a lesser offense, they "mitigate" the potential penalty. In the criminal context, at least, such an approach would render KRS 446.110, the savings statute, null. That statute is not needed to prevent the retroactive application of amendments creating new or expanded offenses, because the Ex Post Facto Clause of the Constitution accomplishes that. And under Rodgers's construction the savings statute's rule against retroactivity would have no effect on amendments repealing or narrowing offenses either, leaving the statute with no effect at all. Courts, of course, are to avoid if possible constructions of statutes that read them out of existence. *King Drugs, Inc. v. Commonwealth,* 250 S.W.3d 643 (Ky.2008). Rodgers's construction of the savings statute would do just that.

Rodgers's construction, moreover, has already been rejected by our cases applying the savings statute to legislation that repeals an offense altogether, the ultimate "mitigation" in Rodgers's sense. *Commonwealth v. Louisville & N.R. Co., supra,* (prosecution could proceed for violation of repealed statute that had prohibited shipping or transporting liquor into "dry" territories except in certain limited circumstances). If one remains subject to prosecution for the pre-repeal violation

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of a repealed criminal statute, then one must also remain subject to the pre-amendment version of a statute amended to strengthen a defense. In short, the new substantive self-defense provisions adopted in 2006 are not mitigating penalty provisions under KRS 446.110 and do not apply retroactively to Rodgers's case.

[10] Finally, with respect to the new substantive portions of the self-defense statutes, the rule of lenity does not apply. This rule, often invoked by criminal defendants seeking a more favorable construction of a statute, was recently described by the United States Supreme Court as requiring "ambiguous criminal laws to be interpreted in favor of the defendants subjected to them." *United States v. Santos,* 553 U.S. 507, 128 S.Ct. 2020, 2025, 170 L.Ed.2d 912 (2008). Most recently, in *White v. Commonwealth,* 178 S.W.3d 470 (Ky.2005), this Court unanimously invoked the rule to construe the "intentional killing of a public official" statutory aggravator which renders a defendant eligible for the death penalty. *See also Haymon v. Commonwealth,* 657 S.W.2d 239 (Ky.1983) (applying rule in construing statute governing eligibility for probation for certain offenses involving use of a weapon); *Commonwealth v. Stinnett,* 144 S.W.3d 829 (Ky.2004) (applying rule in construing statute regarding jury determination of concurrent/consecutive service of felony sentences). As a rule of construction, the rule of lenity applies only if the statute at issue is genuinely ambiguous and even then only if the ambiguity cannot be resolved by resort to the other traditional rules of construction. *United States v. Banks,* 514 F.3d 959 (9th Cir.2008); *United States v. Gosselin World Wide Moving, N.V.,* 411 F.3d 502 (4th Cir.2005). The rule of lenity is inapplicable here because there is nothing to construe, *i.e.,* there is no ambiguous language regarding the retroactivity of the new self-defense statutes which requires construction.

B. The Immunity Provision is Procedural and Applies Retroactively to Rodgers's Prosecution.

The one exception to the bar against retroactive application of the new law is KRS 503.085, the new provision granting immunity to those who justifiably use self-defense:

> ***753** (1) A person who uses force as permitted in KRS 503.050, 503.055, 503.070, and 503.080 is justified in using such force and is immune from criminal prosecution and civil action for the use of such force, unless the person against whom the force was used is a peace officer, as defined in KRS 446.010, who was acting in the performance of his or her official duties and the officer identified himself or herself in accordance with any applicable law, or the person using force knew or reasonably should have known that the person was a peace officer. As used in this subsection, the term "criminal prosecution" includes arresting, detaining in custody, and charging or prosecuting the defendant.
>
> (2) A law enforcement agency may use standard procedures for investigating the use of force as described in subsection (1) of this section, but the agency may not arrest the person for using force unless it determines that there is probable cause that the force that was used was unlawful.

* * *

[11] At least in cases such as this one, that do not involve a peace officer, the immunity provision does not constitute substantive law; it has nothing to do with who is entitled to use self-defense or under what circumstances self-defense is justified. It is, rather, purely procedural, and by prohibiting prosecution of one who has justifiably defended himself, his property or others, it in effect creates a new exception to the general rule that trial courts may not dismiss indictments prior to trial. [5] By declaring that one who is justified in using force "is immune from criminal prosecution," and by defining "criminal prosecution" to include "arresting, detaining in custody, and charging or prosecuting the defendant," the General Assembly has made unmistakably clear its intent to create a true immunity, not simply a defense to criminal charges. This aspect of the new law is meant to provide not merely a defense against liability, but protection against the burdens of prosecution and trial as well. With KRS 503.085, the General Assembly has created a new procedural bar to prosecution, and that bar, like other procedural statutes, is to be applied retroactively.

Before turning to implementation of the immunity afforded by KRS 503.085, it bears noting that the statute grants immunity to a person who "uses force as permitted in KRS 503.050, 503.055, 503.070, and 503.080". But KRS 503.055 is a wholly new substantive statute pertaining to "Use of defensive force regarding dwelling, residence, or occupied vehicle—Exceptions." and, as previously discussed, is not to be applied retroactively. Similarly, the 2006 amendments to KRS 503.050 (self-protection); 503.070 (protection of others); and 503.080 (protection of property) were substantive law changes and are not retroactive. Thus persons whose conduct occurred prior to the July 12, 2006 effective date

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of these amendments but whose trials were not concluded are entitled to immunity only for actions in conformity with the version of the applicable statute, (*i.e.* self-protection, protection of others, protection of property) in effect at the time they acted. Application of the pre–2006 self-defense statute presents no real issue here, however, because as the trial court ***754** found, conflicting evidence of record precluded a pretrial finding that Rodgers was clearly acting in self-defense and thus entitled to immunity.

Specifically, the trial court ruled that even if KRS 503.085 applied to Rodgers's case, Rodgers was not entitled to dismissal because the discovery record included conflicting evidence as to whether his use of deadly force was justified. Noting that the immunity statute does not specify who bears the burden of proof or what standard of proof applies, the trial court in effect imposed on the Commonwealth a directed verdict standard, which was met, the court held, because the discovery record, in particular Eubanks's and Palmore's statements accusing Rodgers of pulling a gun and firing several times at McAfee, was sufficient to raise a jury question concerning self-defense. Rodgers contends that the trial court's use of the discovery record and directed verdict standard failed to comport with KRS 503.085. Relying on *People v. Guenther,* 740 P.2d 971 (Colo.1987), in which the Supreme Court of Colorado was called upon to fill in the procedural gaps of that state's self-defense immunity provision, Rodgers contends that he was entitled to a pre-trial evidentiary hearing at which he would bear the burden of proving by a preponderance of the evidence that his use of deadly force was justified. We disagree.

[12] The trial judge's uncertainty regarding how to implement the immunity provision is understandable because the statute offers little guidance. Indeed, the only express indication of legislative intent is in KRS 503.085(2) which provides that immunity must be granted pre-arrest by the law enforcement agency investigating the crime unless there is "probable cause that the force used was unlawful." Because the statute defines the "criminal prosecution" from which a defendant justifiably acting in self-defense is immune to be "arresting, detaining in custody and charging or prosecuting," we can infer that the immunity determination is not confined to law enforcement personnel. Instead, the statute contemplates that the prosecutor and the courts may also be called upon to determine whether a particular defendant is entitled to KRS 503.085 immunity. Regardless of who is addressing the immunity claim, we infer from the statute that the controlling standard of proof remains "probable cause." Thus, in order for the prosecutor to bring charges or seek an indictment, there must be probable cause to conclude that the force used by the defendant was not fully justified under the controlling provision or provisions of KRS Chapter 503. Similarly, once the matter is before a judge, if the defendant claims immunity the court must dismiss the case unless there is probable cause to conclude that the force used was not legally justified.

[13] Probable cause is a standard with which prosecutors, defense counsel and judges in the Commonwealth are very familiar although it often eludes definition. Recently, in *Commonwealth v. Jones,* 217 S.W.3d 190 (Ky.2006), this Court noted the United States Supreme Court's definition in *Illinois v. Gates,* 462 U.S. 213, 232, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983): "[P]robable cause is a fluid concept-turning on the assessment of probabilities in particular factual contexts-not readily, or even usefully, reduced to a neat set of legal rules." Just as judges consider the totality of the circumstances in determining whether probable cause exists to issue a search warrant, they must consider all of the circumstances then known to determine whether probable cause exists to conclude that a defendant's use of force was unlawful. If such cause does not exist, immunity ***755** must be granted and, conversely, if it does exist, the matter must proceed.

[14] **[15]** Because immunity is designed to relieve a defendant from the burdens of litigation, it is obvious that a defendant should be able to invoke KRS 503.085(1) at the earliest stage of the proceeding. While the trial courts need not address the issue *sua sponte,* once the defendant raises the immunity bar by motion, the court must proceed expeditiously. Thus a defendant may invoke KRS 503.085 immunity and seek a determination at the preliminary hearing in district court or, alternatively, he may elect to await the outcome of the grand jury proceedings and, if indicted, present his motion to the circuit judge. A defendant may not, however, seek dismissal on immunity grounds in both courts. Once the district court finds probable cause to believe that the defendant's use of force was unlawful, the circuit court should not revisit the issue. In the case of a direct submission or where a defendant has elected to wait and invoke immunity in the circuit court, the issue should be raised promptly so that it can be addressed as a threshold motion.

[16] The sole remaining issue is how the trial courts should proceed in determining probable cause. The burden is on the Commonwealth to establish probable cause and it may do so

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by directing the court's attention to the evidence of record including witness statements, investigative letters prepared by law enforcement officers, photographs and other documents of record. Although Rodgers advocates an evidentiary hearing at which the defendant may counter probable cause with proof "by a preponderance of the evidence" that the force was justified, this concept finds no support in the statute. The legislature did not delineate an evidentiary hearing and the only standard of proof against which a defendant's conduct must be measured is the aforementioned probable cause. We decline to create a hearing right that the statute does not recognize and note that there are several compelling reasons for our conclusion.

First, the pretrial evidentiary hearings that are currently conducted, such as suppression hearings, do not involve proof that is the essence of the crime charged but focus instead on issues such as protection of the defendant's right to be free from unreasonable searches and seizures, right to be represented by counsel and right to *Miranda* warnings prior to giving a statement. Similarly, a competency hearing addresses the state of the defendant's mental health and his ability to participate meaningfully in the trial. Neither of these hearings requires proof of the facts surrounding the alleged crime. An evidentiary hearing on immunity, by contrast, would involve the same witnesses and same proof to be adduced at the eventual trial, in essence a mini-trial and thus a process fraught with potential for abuse. Moreover, it would result in one of the elements of the alleged crime (no privilege to act in self-protection) being determined in a bench trial. In RCr 9.26 this Court has evinced its strong preference for jury trials on all elements of a criminal case by providing specifically that even if a defendant waives a jury trial in writing, the court and the Commonwealth must consent to a bench trial. Thus, where probable cause exists in criminal matters the longstanding practice and policy has been to submit those matters to a jury and we find no rational basis for abandoning that stance.

As for the Colorado Supreme Court's adoption of an evidentiary hearing approach, there are several fundamental differences in the Colorado statute and KRS 503.085. The Colorado statute in essence, if not in express words, provides "there shall be immunity in home invasion cases." ***756** *People v. Guenther,* 740 P.2d at 975. The statute contains no reference to an immunity determination by law enforcement or the prosecutor, no reference to a standard of proof and no reference to how the courts should proceed to determine immunity. Writing on a blank slate and crafting a judicial procedure to be used only in home invasion cases (as opposed to all assaults and homicides wherein self-defense is raised as here in Kentucky), the Colorado court opted for an evidentiary hearing. Given the large volume of Kentucky cases for which immunity may be an issue, the probable cause standard expressly stated in KRS 503.085, and Kentucky's strong preference for jury determinations in criminal matters, we do not find the Colorado court's approach appropriate.

Finally, we note that the precise mechanism for judicial implementation of KRS 503.085 is purely academic as to Rodgers because he has been tried and convicted by a properly instructed jury in a trial with no reversible error. In short, his self-defense claim has been thoroughly examined by both the trial judge under the directed verdict standard and the jury under the court's instructions and his entitlement to self-defense has been rejected. While the trial court's approach to the immunity issue was not the one outlined by this Court, it was certainly sufficient and Rodgers suffered no discernible prejudice. Indeed if the trial court had divined the procedure outlined here, applying the probable cause standard would have produced the same conclusion, no entitlement to immunity and denial of Rodgers's motion to dismiss. Accordingly, there was no reversible error in the handling of the immunity determination.

C. Rodgers Was Not Entitled To Additional Self–Defense Jury Instructions.

[17] Rodgers also sought jury instructions based upon the substantive 2006 self-defense amendments, but because those substantive amendments do not apply retroactively to his case the trial court correctly declined to base the instructions on them. Rodgers maintains, however, that even under the prior law he was entitled to an instruction specifying that he had no duty to retreat from McAfee's alleged assault, but was authorized "to stand his ground and meet force with force." He acknowledges that in *Hilbert v. Commonwealth,* 162 S.W.3d 921 (Ky.2005), we rejected this very claim. There we explained that the Penal Code had incorporated prior Kentucky law concerning retreat and under that law a specific retreat instruction was not required: "An instruction on self-defense should be in the usual form, leaving the question to be determined by the jury in the light of all the facts and circumstances of the case, rather than in the light of certain particular facts." 162 S.W.3d at 926 (citing and quoting from *Bush v. Commonwealth,* 335 S.W.2d 324 (Ky.1960)). *Hilbert* expressly acknowledged the oft-cited *Gibson v. Commonwealth,* 237 Ky. 33, 34 S.W.2d 936 (1931) wherein the High Court stated: "[I]t is the tradition that a Kentuckian never runs. He does not have to." Despite what

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the *Hilbert* Court called "the defiant attitude toward retreat exhibited by the *Gibson* opinion," the Court found no sound basis in Kentucky law for giving a "no duty to retreat" instruction.

Rodgers contends, nevertheless, that the 2006 amendments are meant to codify prior law and to correct *Hilbert's* mistaken reading of it. He cites no prior-law cases which the *Hilbert* Court overlooked and fails to address any of the several cases the *Hilbert* Court considered. 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 ***757** 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.[6] To the extent the General Assembly has altered that rule with its 2006 amendments, a question we need not address at this time, the change affects "the out-of-court ... duties of persons in their transactions with others," *Commonwealth of Kentucky Department of Agriculture,* 30 S.W.3d at 168, and so constitutes a change to the substantive law. The trial court correctly did not apply it retroactively to Rodgers's case.

[18] Finally, Rogers contends that the "no duty to retreat" instruction was required to preserve his constitutional right to present a defense. That right may be violated, as he notes, where there is evidence of self-defense but the trial court refuses any instruction on that defense at all. *Taylor v. Withrow,* 288 F.3d 846 (6th Cir.2002). Here, however, the trial court instructed on self-defense, and Rogers was given an opportunity to argue that theory to the jury, including the "no duty to retreat" principle. The instructions did not infringe upon his constitutional right to present a defense.

III. The Trial Court Did Not Err In Seating Rodgers's Jury.

A. The Court Did Not Abuse Its Discretion When It Overruled Rodgers's *Batson* Challenge.

[19] **[20]** **[21]** Rodgers next contends that he was denied equal protection when the Commonwealth used a peremptory challenge to strike one of the two African–Americans who remained in the jury pool after a third African–American was struck for cause. He maintains that Juror 117985 was impermissibly struck on the basis of her race. As he correctly notes, in *Batson, supra,* the United States Supreme Court prohibited deliberate racial discrimination during jury selection. Under *Batson,* we recently explained,

> [a] three-prong inquiry aids in determining whether a prosecutor's use of peremptory strikes violated the equal protection clause. Initially, discrimination may be inferred from the totality of the relevant facts associated with a prosecutor's conduct during a defendant's trial. The second prong requires a prosecutor to offer a neutral explanation for challenging those jurors in the protected class. Finally, the trial court must assess the plausibility of the prosecutor's explanations in light of all relevant evidence and determine whether the proffered reasons are legitimate or simply pretextual for discrimination against the targeted class.

McPherson v. Commonwealth, 171 S.W.3d 1, 3 (Ky.2005) (citations and footnotes omitted). The trial court's ultimate decision on a *Batson* challenge "is akin to a finding of fact, which must be afforded great deference by an appellate court." *Chatman v. Commonwealth,* 241 S.W.3d 799, 804 (Ky.2007) (citation omitted). "Deference," of course, does not mean that the appellate court is powerless to provide independent review, *Miller–El v. Dretke,* 545 U.S. 231, 125 S.Ct. 2317, 162 L.Ed.2d 196 (2005) (holding that the trial court's finding of non-discrimination was erroneous in light of clear and convincing evidence to the contrary), ***758** *Snyder v. Louisiana,* 552 U.S. 472, 128 S.Ct. 1203, 170 L.Ed.2d 175 (2008) (same), but the ultimate burden of showing unlawful discrimination rests with the challenger. *Chatman, supra.*

In this case, when Rodgers raised his *Batson* challenge to the Commonwealth's allegedly suspect peremptory strike, the prosecutor recalled that during voir dire Eddings's counsel had asked the panel if anyone had ever heard of an unfair trial. Juror 117985 was the first to respond, and she stated that she knew several people who had been convicted and "done time" although they had not committed their alleged crimes. The prosecutor explained that Juror 117985's personal knowledge of such cases was apt to bias her against the Commonwealth. The trial court indicated that it would accept

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that explanation, at which point Rodgers's counsel objected. Counsel asserted that the Commonwealth's proffered reason for the strike was a mere pretext, as was apparent, counsel claimed, from the fact that certain non-African-American jurors had made similar responses to Eddings's voir dire question, but the Commonwealth had not struck them. The prosecutor responded that he did not recall any one else claiming personal knowledge of a wrongful conviction. The trial court could not remember any other such disclosures either, and its ruling stood.

On appeal, Rodgers reiterates his assertion that non-African-American members of the panel responded to the "unfair trial" question in much the same way as did Juror 117985 and yet were not struck. In fact, however, the record upholds the trial court. Several non-African-American panel members, including some who had seen recent news media coverage of racial disparities in the criminal justice system, did express concern that racially biased juries pose a risk to fair trials and that African–American defendants are more exposed to that risk than are non-African-American defendants. None of those panel members, however, claimed personal knowledge of a wrongful conviction, and none indicated by his or her response that concern for racial fairness gave rise to a potential bias against the Commonwealth.

Rodgers also points to a panel member who responded to another of Eddings's voir dire questions. Counsel explained that Eddings's defense was to be a denial of any wrongdoing, and he wondered if anyone believed that the fact of Eddings's indictment and trial made that defense incredible. "Does anyone believe," he asked, "that Eddings had to have done something or he wouldn't be here?" A panel member responded that some of the people arrested and tried must be, and must have been found to be, not guilty, or the jails "would overflow." Rodgers contends that this panel member's theoretical awareness that innocent persons might be put on trial suggested the same potential for bias as Juror 117985's personal knowledge of persons who were wrongfully convicted. We disagree. A reasonable distinction is to be made between personal knowledge and mere theoretical knowledge, and it seems to us clear that the former is a much likelier source of bias than the latter. Given this distinction and in light of the deference with which we review the trial court's *Batson* rulings, the trial court did not abuse its discretion when it found that the Commonwealth's proffered race-neutral reason for striking Juror 117985 was not a pretext for discrimination.

B. The Trial Court Properly Rejected Rodgers's "Fair Cross Section" Challenge.

[22] **[23]** Rodgers next contends that his jury was not selected from a fair cross section of the community. The fifty-person ***759** venire from which Rodgers's jury was selected apparently included only three African–Americans. Eddings and Rodgers both called the trial court's attention to this fact, argued that the panel thus did not represent the community, and moved that a new panel be called. The trial court denied the motion. Rodgers contends that the trial court erred and notes that the Sixth and Fourteenth Amendments to the United States Constitution entitle him to an impartial jury drawn "from a fair cross section of the community." *Duren v. State of Missouri,* 439 U.S. 357, 359, 99 S.Ct. 664, 58 L.Ed.2d 579 (1979) (*citing Taylor v. Louisiana,* 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975)). To establish a *prima facie* violation of this right, however, Rodgers was obliged to show

> (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

Id. at 364, 99 S.Ct. 664. It is not enough to allege merely that a particular jury or a particular venire failed to mirror the community, for, as the Supreme Court has explained, "[d]efendants are not entitled to a jury of any particular composition, ... but the jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof." *Taylor,* 419 U.S. at 538, 95 S.Ct. 692 (citations omitted).

Rodgers's motion did not meet this standard. Although African–Americans do indeed constitute a distinctive group for jury selection purposes, Rodgers made no attempt to show that they are regularly underrepresented on Jefferson County venires or that the jury selection process systematically excludes them. Absent these showings, the trial court did not err when it rejected Rodgers's objection to the venire.

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IV. The Trial Court Did Not Misinstruct The Jury.

A. The Instructions Did Not Misstate the Commonwealth's Burden Of Proof.

Rodgers next asserts that the jury instructions unfairly tended to dilute the presumption of innocence and to shift the burden of proof from the Commonwealth to the defense. The instructions' introductory paragraph informed the jury that it was to find the defendant "not guilty under these instructions unless you believe from the evidence beyond reasonable doubt that he is guilty of one of the following offenses...." It then listed the various degrees of homicide. A separate instruction, Instruction No. 7, also informed the jury that Rodgers was presumed to be innocent and that the jury "sh[ould] find the defendant not guilty unless you are satisfied from the evidence alone and beyond a reasonable doubt that he is guilty." The separate instructions on each degree of homicide, however, provided that "you will find the defendant guilty of [the particular offense] under this instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following ..." followed by the elements of the particular offense. Rodgers contends that the formulation "not guilty ... unless" better reflects the presumption of innocence and the burden of proof than the formulation "guilty ... if and only if," and that the use of the latter in the separate offense instructions was inconsistent with RCr 9.56, which employs the "not guilty ... unless" ***760** phrasing, and deprived him of a fair trial. We disagree.

The two formulations are logically equivalent, and whatever may be their rhetorical difference, if any, the "guilty ... if and only if" version adequately conveys to the jury the conditions the Commonwealth's proof must satisfy to authorize a guilty verdict. This is especially so, as the Commonwealth points out, in light of the introductory and "presumption of innocence" instructions which employed the "not guilty ... unless" formulation and thus underscored the two formulations' equivalence. "Instructions are proper," we have held, "if, when read together and considered as a whole, they submit the law in a form capable of being understood by the jury." *Halvorsen v. Commonwealth,* 730 S.W.2d 921, 925 (Ky.1986) (citation omitted). The "guilty ... if and only if" instructions here satisfy this standard.

B. The Instructions Did Not Comment On Rodgers's Silence.

Finally, Rodgers contends that the instructions implicitly commented on his election not to testify and thus rendered his trial unfair. As he notes, RCr 9.54(3) provides that

> [t]he instructions shall not make any reference to a defendant's failure to testify unless so requested by the defendant, in which event the court shall give an instruction to the effect that a defendant is not compelled to testify and that the jury shall not draw any inference of guilt from the defendant's election not to testify and shall not allow it to prejudice the defendant in any way.

In compliance with this rule, when Rodgers requested a "right to remain silent" instruction, the trial court instructed the jury that "[t]he defendant is not compelled to testify and the fact that he did not testify in this case cannot be used as an inference of guilt and should not prejudice him in any way." Notwithstanding the fact that the court's instruction was taken almost verbatim from the rule, Rodgers contends that the instruction should have excluded the opening clause and that by including "is not compelled to testify," the instruction improperly implied that the prosecutor wanted Rodgers to testify, but could not force him to do so.

We reject Rodgers's claim that as given the instruction amounted to a comment on his silence. On the contrary, the instruction merely explained to the jury that the law does not compel a defendant to testify—it implied nothing about the prosecutor—and correctly directed the jury not to use Rodgers's silence against him. The jury, of course, is presumed to follow that direction, *Dixon v. Commonwealth,* 263 S.W.3d 583 (Ky.2008), and the opening clause in no way tended to undermine that presumption.

CONCLUSION

In sum, the Commonwealth's use of Rodgers's and Eddings's post-arrest statements did not entitle Rodgers to a separate trial and did not infringe upon his right to present a defense. Rodgers's self-defense claim was correctly presented to the jury according to the law as it existed at the time of Rodgers's offense, and his claim of immunity under newly enacted KRS

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503.085 was properly denied. Rodgers's jury, finally, was fairly selected and was correctly instructed with respect to Rodgers's right not to testify, his presumed innocence, and the Commonwealth's burden of proof. Accordingly, we affirm the November 22, 2006 Judgment of the Jefferson Circuit Court.

MINTON, C.J.; CUNNINGHAM, SCHRODER, and VENTERS, JJ., concur. NOBLE, J., concurs in part, concurs in ***761** result in part, and dissents in part by separate opinion. SCOTT, J., concurs in part and dissents in part by separate opinion.

NOBLE, Justice, concurring in part, concurring in result in part, and dissenting in part:
I cannot entirely agree with either Justice Abramson or Justice Scott, but I do concur with the majority on all but two issues.

In my view, the immunity provision of KRS 503.085 is not procedural. In fact, the statute grants a new status, under certain circumstances, that did not exist before its enactment. This can only be a substantive change in the law. As such, this provision can have no retrospective application. While I otherwise agree with Justice Abramson's excellent discussion on how the immunity issue is to be determined, I do not believe it is appropriate to reach that issue in this case. However, she concludes that in fact the trial court conducted an adequate immunity hearing, and consequently the majority holding has no effect on the judgment in this case. Therefore, I concur in result.

On the other hand, the concept of "no duty to retreat" is not a substantive change in the law. Our case law has long recognized that "a Kentuckian never runs. He does not have to." *Gibson v. Commonwealth,* 237 Ky. 33, 34 S.W.2d 936 (1931). This Court, in *Hilbert v. Commonwealth,* 162 S.W.3d 921 (Ky.2005), discussed at length that "no duty to retreat" is a part of the law in Kentucky, but concluded that it was not necessary to include this language in an instruction on self defense. While clearly a part of the law, that notion had never been made a specific element of a statute until the 2006 amendments to the statutes. The majority states that whether this language must now be included in an instruction is not a question before the Court, but does say that the added language is a *substantive* change in the law. Given the reasoning applied to the immunity provision by the majority, it naturally follows that under that view it must be included *prospectively.*

The inclusion of the "no duty to retreat" concept in the 2006 amendments does nothing more than to state what the law has always been, and thus can only be procedural, from the standpoint of whether this language should be included in the instruction. Since I believe it should always have been included, and that this Court missed a good opportunity to correct that omission in Hilbert, I would reverse to require the inclusion of "no duty to retreat" in the self-defense instruction.

SCOTT, Justice, concurring in part and dissenting in part:
Although I concur on the other issues addressed by the majority, I must respectfully dissent from the majority's conclusion that the 2006 "no duty to retreat" self-defense amendments to KRS 503.050(4), KRS 503.055(3), and KRS 503.070(3), cannot be applied retroactively, even though they are mitigating and remedial and Appellant requested their application.

I say this because the majority, relying upon *Lawson v. Commonwealth,* 53 S.W.3d 534, 550 (Ky.2001); *Commonwealth Dept. of Agriculture v. Vinson,* 30 S.W.3d 162, 168 (Ky.2000); *Peabody Coal Co. v. Gossett,* 819 S.W.2d 33 (Ky.1991); and *University of Louisville v. O'Bannon,* 770 S.W.2d 215, 217 (Ky.1989), applied the "substantive versus procedural" analysis applicable under KRS 446.080(3), rather than the "remedial" and "mitigating" analysis applicable under KRS 446.110, when the statutory amendment *mitigates "any penalty, forfeiture or punishment.*"

***762** Contrary to the majority's suggestion, *Lawson acknowledges* the applicability of KRS 446.110 to any "new law which is 'certainly' or 'definitely' mitigating," to wit:

> This Court and its predecessor have consistently interpreted KRS 446.110 to require courts to sentence a defendant in accordance with the law which existed at the time of the commission of the offense unless the defendant specifically consents to the application of a new law which is "certainly" or "definitely" mitigating. [However, as Appellant] did not raise any issue in the trial court concerning the new provisions of KRS Chapter

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> 532, he certainly did not consent to the application of the modified provisions.

Lawson, 53 S.W.3d at 550–51 (internal citations omitted). For reasons that the defendant in *Lawson* had not consented to the application of the newly added seventy (70) year cap on sentencing in KRS 532.110(1)(a), the court did not go on to determine whether or nor the cap was " 'certainly' or 'definitely mitigating.' " *Id.* at 550. However, the Court answered this question in the affirmative in *Cummings v. Commonwealth,* 226 S.W.3d 62, 67, 68 (Ky.2007), as the defendant therein *had* requested its retroactive application.

Vinson dealt *only* with retroactive application under KRS 446.080(3), as there was no question of mitigation of any penalty, forfeiture, or punishment per KRS 446.110. *Vinson,* 30 S.W.3d at 168 ("Kentucky law prohibits the amended version of a statute from being applied retroactively to events which occurred prior to the effective date of the amendment unless the amendment expressly provides for retroactive application. KRS 446.080(3)."). It dealt with an amendment to the Kentucky Whistleblowers Act, KRS 61.103, which enlarged the substantive rights of employees, as well as the burden of proof of employers. "The amendment changed the causation and weight of evidence components as to what an employee is required to prove successfully to support a claim under the Act. The amendment also required a new burden of proof from the employer in order to successfully defend a claim under the law." *Vinson,* 30 S.W.3d at 169. Thus, as there was no question of mitigation of any "penalty, forfeiture, or punishment" under KRS 446.110, the "substantive versus procedural" analysis under KRS 446.080(3) was appropriate. *Vinson,* 30 S.W.3d at 169.

Gossett, also dealt with KRS 446.080(3), although the Court then strangely found the statute to be "remedial" and thus allowed the requested retroactive application of the amendment enlarging the grounds for a claimant's reopening under KRS 342.125, and thus *lessening* his burden by lowering the standard for disability. *Gossett,* 819 S.W.2d at 35–36. Thus, it was mitigating and, therefore, remedial. *Id.* at 36; *see also Miracle v. Riggs,* 918 S.W.2d 745, 747 (Ky.App.1996) ("When a statute is purely *remedial* or procedural and does not violate a vested right, but operates to *further a remedy or confirm a right,* it does not come within the legal concept of retrospective law nor the general rule [in KRS 446.080(3)] against the retrospective operation of statutes." (emphasis added)). Admittedly, these latter opinions dealt only with KRS 446.080(3), yet they are instructive as to what this Court has considered as remedial.

O'Bannon, upheld the denial of retroactive application of a later enacted hospital immunity statute to an existing malpractice action. Again, however, the Court's, analysis was limited to the "substantive versus procedural" analysis applicable under the general statute, KRS 446.080(3). *O'Bannon,* 770 S.W.2d at 217

***763** KRS 446.080(3) provides that "[n]o statute shall be construed to be retroactive, unless expressly so declared." However, under KRS 446.080(3), if a statutory change is deemed to be a procedural change, it may be allowed retroactive application. *Vinson,* 30 S.W.3d at 169.

Under our earlier common law, "the repeal of a statute repealed also the power and authority of a court to enforce a penalty incurred under the statute, and no penalty could be imposed or enforced for a violation of a statute which occurred before its repeal." *Commonwealth v. Louisville & N.R. Co.,* 186 Ky. 1, 215 S.W. 938, 939 (1919). "This rule [, however, was] modified by section 465, Kentucky Statutes," now KRS 446.110 as mentioned above. *Louisville & N.R. Co.,* 186 Ky. 1, 215 S.W. at 939

KRS 446.110 provides:

> No new law shall be construed to repeal a former law as to any *offense* committed against a former law, nor as to any act done, *or penalty, forfeiture or punishment* incurred, or any right accrued or claim arising under the former law, or in any way whatever to affect any such offense or act so committed or done, or any penalty, forfeiture or punishment so incurred, or any right accrued or claim arising before the new law takes effect, except that the proceedings thereafter had shall conform, so far as practicable, to the laws in force at the time of such proceedings. *If any penalty, forfeiture or punishment is mitigated by any provision of the new law, such provision may, by the consent of the party affected, be applied to any*

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> *judgment pronounced after the new law takes effect.*

(emphasis added).

Notably, KRS 446.110 and KRS 446.080(3), overlap in application when any new law mitigates any penalty, forfeiture or punishment, and the party affected consents to, or requests, the benefit of the new law. Yet, when they do, KRS 446.110 prevails over KRS 446.080(3). *Commonwealth v. Phon,* 17 S.W.3d 106, 108 (Ky.2000) ("KRS 446.110 is more specific and should prevail over KRS 446.080(3)."). KRS 446.110 thus, "applies to states of cases in which the penalty, forfeiture or punishment is *definitely mitigated* by the provisions of the new law, and that, when it is so mitigated, the defendant can only avail himself of its provisions by consenting that judgment may be pronounced under the new law." *Coleman v. Commonwealth,* 160 Ky. 87, 169 S.W. 595, 597 (1914) (emphasis added). Plainly, the terminology "penalty, forfeiture or punishment" is rather broad and would undoubtedly include the forfeiture of one's liberty. *Cf. Phon,* 17 S.W.3d at 107.

In *Phon,* the defendant requested the right to be sentenced under the " 'new crime bill,' which added life without parole to the capital sentencing scheme." *Id.* In contrast, the Commonwealth argued "that Phon had committed the crimes in 1996 more than two years before the July 15, 1998 effective date of HB 455." *Id.* Finding that life without parole "indeed mitigates the death penalty," this court found the change to be retroactive. *Id.*

In *Bolen v. Commonwealth,* 31 S.W.3d 907 (Ky.2000), the defendant sought to take advantage of an amended version of KRS 532.080(8), which barred any violations of KRS 218A.500 from being used as convictions for determination of persistent felony offender status. We found the amendment therein definitely mitigating in that it "eliminates an eligible person's sentence from being enhanced as a persistent felony offender." *Bolen,* 31 S.W.3d at 909. And, in *Cummings,* 226 S.W.3d at 67, we noted:

> [p]ursuant to KRS 446.110, the amendment including the seventy year cap ***764** may govern his sentence even on those offenses Appellant committed prior to the effective date of that statutory provision.

Id. at 67 n. 3. We then found the seventy year cap applicable. *Id.* at 68.

Plainly, "[t]he policy of our law, as respects retroactive application of new laws relating to penalties, forfeitures, punishments, rights or claims, is set forth in KRS 446.110." *Kentucky State Bar Ass'n v. Taylor,* 516 S.W.2d 871, 872 (Ky.1974) (emphasis added). Moreover, it is doubtful that one would argue that the sentencing provisions considered in *Cummings* and *Phon,* or the limitation on predicates for a finding of persistent felony offender status, as considered in *Bolen,* are not examples of substantive law.

For a large part of our history, the law in Kentucky was that a person could stand his ground against an aggressor; quite simply, he was not obliged to retreat, nor consider whether he could safely do so. *Gibson v. Commonwealth,* 237 Ky. 33, 34 S.W.2d 936 (1931). *Gibson,* in fact quoted from an opinion of the noted Kentucky jurist and United States Supreme Court Justice, John M. Harlan, in *Beard v. United States,* 158 U.S. 550, 564, 15 S.Ct. 962, 39 L.Ed. 1086 (1895), to wit:

> The defendant was where he had the right to be, when the deceased advanced upon him in a threatening manner, and with a deadly weapon; and if the accused did not provoke the assault, and had at the time reasonable grounds to believe, and in good faith believed, that the deceased intended to take his life, or do him great bodily harm, he was not obliged to retreat, nor to consider whether he could safely retreat, but was entitled to stand his ground, and meet any attack made upon him with a deadly weapon, in such way and with such force as, under all the circumstances, he, at the moment, honestly believed, and had reasonable grounds to believe, were necessary to save his own life, or to protect himself from great bodily injury.
>
> Thus:
>
> [this] doctrine of the law permeates the opinions of this court, and an instruction [to the contrary] has been condemned in several cases; the more recent one being *Caudill v. Commonwealth,* 234 Ky. 142, 27 S.W.2d 705[ ].

Gibson, 237 Ky. 33, 34 S.W.2d at 936. Accordingly, in Kentucky, at that time, a defendant was not required to choose a safe avenue of retreat before using deadly force to protect

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himself. Moreover, the enactment of the 1974 Kentucky Penal Code did not abrogate this view. *Hilbert v. Commonwealth,* 162 S.W.3d 921, 926 (Ky.2005).

In *Hilbert, citing* to Robert G. Lawson & William H. Fortune, *Kentucky Criminal Law* § 4–2(d)(2) (1998), we noted "[a] proposal by the drafters of the Kentucky Penal Code to change this rule was rejected by the General Assembly and the right of a defender to stand his ground against aggression was left intact." Hilbert, 162 S.W.3d at 926. Notably, "it is [a] tradition that a Kentuckian never runs. He does not have to." *Id. (citing Gibson,* 237 Ky. 33, 34 S.W.2d at 936).

However, "[d]espite the defiant attitude towards retreat exhibited by the *Gibson* opinion, Kentucky decisions [over the intervening years] have generally not adhered to such an absolute interpretation of the 'no duty to retreat rule,' nor did our [more recent] predecessor court[s] require jury instructions describing the same." *Hilbert,* 162 S.W.3d at 926; *see also* James M. Roberson, *New Kentucky Criminal Law and Procedure* § 313 (2d ed.1927) (stating that "the rule now is that whether the assailant should stand his ground or give back is the question for the jury, and ***765** that he may properly follow that course which is apparently necessary to save himself from death or great bodily harm."). Thus, Kentucky, in more recent years, has followed "the principle 'that when the trial court adequately instructs on self-defense, it need not also give a no duty to retreat instruction.' " *Hilbert,* 162 S.W.3d at 926 (internal citations omitted).

However, as previously noted, effective July 12, 2006, and following the occurrence of the crimes charged herein—*but before their trial*—the Legislature amended Kentucky's criminal statutes in multiple places to re-insert this longstanding component of self-defense. SB 38, 2006 Kentucky Laws Ch. 192. KRS 503.055(1) as amended, established a presumption, with some exceptions, that a person *has* "a reasonable fear of imminent peril of death or great bodily harm" to himself or others when using defensive force against someone unlawfully entering or present in a dwelling, residence or vehicle, or the other person is removing or trying to remove someone therefore against their will. The legislation also codified the pre-existing "no duty to retreat":

> A person who is not engaged in an unlawful activity and who is attacked in any other place where he or she has a right to be has *no duty to retreat* and has the right to stand his or her ground and meet force with force, including deadly force, if he or she reasonably believes it is necessary to do so to prevent death or great bodily harm to himself or herself or another or to prevent the commission of a felony involving the use of force.

KRS 503.055(3) (emphasis added). KRS 503.050 was also amended to state "[a] person does not have a duty to retreat prior to the use of deadly physical force." KRS 503.050(4). Likewise, KRS 503.070 was amended to address the justification of protecting another and now recognizes that a person "does not have a duty to retreat if the person is in a place where he or she has a right to be." KRS 503.070(3).

Here, the 2006 amendments on the "no duty to retreat" doctrine did not create any new duty or obligation on behalf of the defendant, nor impair any vested right, but only operated in confirmation of his preexisting right. *See Hilbert,* 162 S.W.3d at 926; *see also Riggs,* 918 S.W.2d at 747 ("When a statute is purely remedial ... and does not violate a vested right, but operates to further a remedy *or confirm a right,* it does not come within ... the general rule against the retrospective operation of statutes." (emphasis added).). Thus, its application was retroactive if there was sufficient evidence to support the instruction.

"A defendant is entitled 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). This "entitlement ... is dependant upon the introduction of some evidence justifying a reasonable inference of the existence of [the] defense." *Id.*

Looking at the evidence in a light most favorable to Appellant, the introduction of parts of his confession established that he was standing in the yard and was attacked by McAfee who had a gun. As they were wrestling, Appellant told McAfee, "man, get off of me, man; just get off of me, man. I don't won't no problems. I'm trying to leave, man, get off of me." He then "heard one shot, and [said] I didn't know where it came to[.] I was protecting myself. I didn't know if I was hit." "We was wrestling, and [he] had me. Somehow I managed to grab the gun out of his hand, and, I just remember, I yanked it back, like that." "And I shot at his leg."

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Since Appellant asked for the instruction under the amendments discussed, and the ***766** evidence in this case necessarily included an issue of self-defense and thus, an issue as to a "duty to retreat," it was error not to instruct the jury fully on the relevant law regarding the duty.

As I could not find the error to be harmless under the facts of this case, I would vacate the conviction and remand for a new trial with appropriate instructions including the "no duty to retreat."

All Citations

285 S.W.3d 740

Footnotes

1 The trial judge did not issue the limiting instruction referred to in *Richardson* informing the jury to consider the statement only against Eddings and not against Rodgers. We have held, however, that such an instruction is required only upon request. *Caudill v. Commonwealth,* 120 S.W.3d 635 (Ky.2003). Because Rodgers does not claim to have made such a request, no error occurred.

2 Notably, Justice Scalia authored both *Crawford* and *Richardson.*

3 In addition to self-defense, the 2006 amendments relate to defense of others, defense of property and other justified uses of force. For ease of reference, these various types of justified force will be referred to as "self-defense."

4 The savings statute appears to have been first enacted in about 1851, borrowed from the Virginia Revision, and included at chapter 21, section 23 in our Revised Statutes of 1852.

5 Other exceptions exist to the prohibition against pretrial dismissals, of course, such as where the statute allegedly violated is unconstitutional, *Commonwealth v. Bishop,* 245 S.W.3d 733 (Ky.2008), or where prosecution is barred by the Double Jeopardy Clause. *Commonwealth v. Stephenson,* 82 S.W.3d 876 (Ky.2002).

6 *Hilbert,* of course, is not applicable to conduct occurring after the July 12, 2006 effective date of Senate Bill 38 but remains applicable to Rodgers and other defendants prosecuted for conduct occurring before that date.

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718 F.2d 161
United States Court of Appeals,
Sixth Circuit.

In re Mayer MORGANROTH, Petitioner-Appellant.
Raymond J. DONOVAN, Secretary
of Labor, Plaintiff-Appellee,
v.
Frank FITZSIMMONS, et al., Defendants.

No. 81–1574.
|
Argued Jan. 19, 1983.
|
Decided Sept. 30, 1983.

Synopsis

Witness appealed from order of the United States District Court for the Eastern District of Michigan, Horace W. Gilmore, J., which directed him to answer deposition questions. The Court of Appeals, Cornelia G. Kennedy, Circuit Judge, held that: (1) fact that witness had answered identical questions in earlier proceeding did not necessarily waive his Fifth Amendment privilege, nor did the fact that he had been granted immunity in the prior proceeding preclude him from asserting the privilege, as he now faced, in addition to whatever prosecution he risked when giving the earlier answers, the possibility of a perjured prosecution should he be given inconsistent answers, but (2) witness' conclusory statement that his answers might intend to incriminate him was insufficient to establish a foundation for the privilege.

Remanded.

Nathaniel R. Jones, Circuit Judge, filed a dissenting opinion.

Procedural Posture(s): On Appeal.

West Headnotes (10)

[1] **Self-Incrimination** Incriminating nature in general

Self-Incrimination Indirect incrimination; responses linking or leading to evidence of criminal activity

Privilege against self-incrimination extends not only to answers which would, in and of themselves, support a criminal conviction, but also, to answers which would furnish a link in the chain of evidence needed to prosecute.

20 Cases that cite this headnote

[2] **Self-Incrimination** Proceedings to Which Privilege Applies; Government Compulsion

Self-Incrimination Right Not to Testify

Fifth Amendment privilege against self-incrimination not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution but also privileges him not to answer questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings. U.S.C.A. Const.Amend. 5.

43 Cases that cite this headnote

[3] **Criminal Law** Effect of grant of immunity

Where witness has once testified under oath, risk of prosecution which the witness faced in the earlier proceeding is not identical to that which he would face as result of answers given under oath in a subsequent proceeding as, having testified once, he now risks the possibility of perjury charges in addition to any risk he may face for prosecution for nonperjury charges so that the fact that he was granted immunity or voluntarily testified in the initial proceeding does not preclude him from asserting his Fifth Amendment privilege when the same questions are asked in a subsequent proceeding. U.S.C.A. Const.Amend. 5.

15 Cases that cite this headnote

[4] **Self-Incrimination** Prosecution in different jurisdiction

One jurisdiction in the federal system may not, absent an immunity provision, compel a witness

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to give testimony which might incriminate him under the laws of another jurisdiction.

[5] **Self-Incrimination** Particular cases

It was insufficient for witness to answer each question propounded to him with the statement that the answer might tend to incriminate him; witness had to supply such additional statements under oath and other evidence which would enable the court to reasonably identify the nature of the criminal charge for which the witness feared prosecution.

12 Cases that cite this headnote

[6] **Self-Incrimination** Determination of Right to Assert Privilege

It is for court to decide whether witness' silence is justified and to require him to answer if it clearly appears to the court that the witness' assertion of the Fifth Amendment privilege is mistaken as to its validity. U.S.C.A. Const.Amend. 5.

17 Cases that cite this headnote

[7] **Self-Incrimination** Possibility or Danger of Prosecution

Valid assertion of the Fifth Amendment privilege exists where a witness has reasonable cause to apprehend a real danger of incrimination; it is not sufficient to show an imaginary, remote, or speculative possibility of prosecution. U.S.C.A. Const.Amend. 5.

80 Cases that cite this headnote

[8] **Self-Incrimination** Invocation as to specific questions; blanket invocation

Blanket assertion of Fifth Amendment privilege by a witness is not sufficient to meet the reasonable cause requirement; privilege cannot be claimed in advance of the questions and must be asserted with respect to each particular question. U.S.C.A. Const.Amend. 5.

51 Cases that cite this headnote

[9] **Self-Incrimination** Presumptions, inferences, and burden of proof

Where there is nothing suggestive of incrimination about the setting in which a seemingly innocent question is asked, burden of establishing a foundation for assertion of the Fifth Amendment privilege should lie with the witness making it; witness does not have the burden of proof on the issue and he presents sufficient evidence to establish a foundation for the assertion of the privilege if it is not perfectly clear to the court that the witness is mistaken and that the answer cannot possibly have a tendency to incriminate. U.S.C.A. Const.Amend. 5.

27 Cases that cite this headnote

[10] **Self-Incrimination** Presumptions, inferences, and burden of proof

Sufficient evidence is presented by a witness to establish a Fifth Amendment privilege if the court can, by use of reasonable inference or judicial imagination, conceive a sound basis for a reasonable fear of prosecution. U.S.C.A. Const.Amend. 5.

15 Cases that cite this headnote

Attorneys and Law Firms

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Dennerline, Fillenwarth & Fillenwarth, Indianapolis, Ind., for appellees.

Before KENNEDY, JONES and CONTIE, Circuit Judges.

Opinion

CORNELIA G. KENNEDY, Circuit Judge.

Petitioner Morganroth seeks review of an order directing him to answer deposition questions to which he asserted his fifth amendment right to remain silent on the ground that his answers might tend to subject him to criminal liability.

In 1975 the Central States, Southeast & Southwest Areas Pension Fund made a loan to Indico Corporation of $7,000,000. Morganroth was president of Indico Corporation at that time. Subsequently, Indico defaulted on the loan and as a result the Pension Fund suffered significant losses on its investment. Morganroth has since been involved in a number of lawsuits. He was indicted by a federal grand jury on conspiracy and mail and wire fraud charges arising out of this loan transaction with the Pension Fund. On October 20, 1979, subsequent to his indictment, Morganroth was deposed in a civil action, *Trustees of Central States, Southeast & Southwest Areas Pension Fund v. Indico Corp.,* then pending in Florida state court. This civil case was a foreclosure proceeding in connection with the same loan. At that deposition Morganroth appeared voluntarily and answered all questions put to him. Morganroth is himself an attorney. In March 1980, Morganroth was acquitted of the federal criminal charges. It appears that after his acquittal, Morganroth was subpoenaed to appear before a New York federal grand jury and was asked the same set of questions which he voluntarily answered in the Florida state foreclosure proceeding. Morganroth asserted his fifth amendment privilege to these same questions. Immunity was conferred upon Morganroth, his testimony given, and thereafter he was advised by one of the prosecutors that his testimony was in serious conflict with that of others appearing before the grand jury.

Subsequent to his acquittal and the immunized testimony before the New York federal grand jury, the Secretary of Labor subpoenaed Morganroth to appear for a deposition as a non-party witness in this civil action pending in the United States ***164** District Court for the Eastern District of Illinois. In this action, the Secretary of Labor has alleged that defendants, who are former trustees and officials of the Central States, Southeast & Southwest Areas Pension Fund, imprudently made, administered and monitored certain investments on behalf of the Fund in violation of their fiduciary obligations under the Employee Retirement Income Security Act, 29 U.S.C. §§ 1001 *et seq.* Morganroth's deposition was scheduled for June 29, 1981 in Detroit, Michigan pursuant to Fed.R.Civ.P. 45(d)(2). At the deposition, Morganroth was represented by counsel. He answered questions under oath. After providing information as to his name, address and occupation, Morganroth individually refused to answer each question propounded to him by counsel for the Secretary of Labor on the ground that each answer might tend to incriminate him, without elaborating further. The questions he refused to answer at this latter deposition covered the same aspects of the Indico loan transaction with the Central States, Southeast & Southwest Areas Pension Fund about which he had previously given deposition answers voluntarily in the Florida state foreclosure proceeding on October 20, 1979 and pursuant to the grant of immunity in the New York federal grand jury proceeding. As a result, the Secretary of Labor moved the United States District Court for the Eastern District of Michigan that same day for an order pursuant to Fed.R.Civ.P. 37(a) compelling Morganroth to answer these questions on the grounds that he had waived any fifth amendment right he had with respect to these questions by answering virtually identical questions in the Florida state foreclosure proceeding and that he had no legitimate fifth amendment right to assert because there was no reasonable likelihood of criminal prosecution, given his acquittal in March 1980, that would flow from the answers requested. The District Court ordered Morganroth to testify at the deposition on the ground that he had waived his fifth amendment rights by testifying in the earlier, separate Florida foreclosure proceeding and that he would suffer no additional legal detriment from testifying. The District Court did, however, confine the Secretary of Labor to asking only the identical questions asked at the prior deposition.

Morganroth then filed for certification under 28 U.S.C. § 1292(b) asserting that no Supreme Court or Sixth Circuit authority existed on this issue and that the District Court had adopted a rule followed in only one circuit, rejecting the rule followed by a majority of circuits, and applied it erroneously. The District Court granted the motion and certified the question as follows:

> When a deponent has testified on October 20, 1979, in a deposition pursuant to a civil proceeding in which

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> he is not a party without invoking his Fifth Amendment privilege against self-incrimination, and later on June 29, 1981, in a separate and unrelated proceeding to which he is also not a party, he refused to answer the same question asked in the earlier deposition on the basis that his answer would further incriminate him, may he do so, or does his earlier testimony constitute a waiver of the privilege, notwithstanding any possible intervening circumstances.

[1] **[2]** In granting Morganroth's petition for leave to appeal, this Court stated that it may consider other issues raised in the order of the District Court even though they were not included in the certified question formulated by the District Court.

The fifth amendment states that "No person shall be ... compelled in any criminal case to be a witness against himself ...." U.S. Const. amend. V. The privilege extends not only to answers which would in and of themselves support a criminal conviction, but also to answers which would furnish a link in the chain of evidence needed to prosecute. *Hoffman v. United States,* 341 U.S. 479, 486, 71 S.Ct. 814, 818, 95 L.Ed. 1118 (1951). *See also Maness v. Meyers,* 419 U.S. 449, 462, 95 S.Ct. 584, 593, 42 L.Ed.2d 574 (1975); *Kastigar v. United States,* 406 U.S. 441, 444–45, 92 S.Ct. 1653, 1656, 32 L.Ed.2d 212 (1972); *Arndstein v. McCarthy,* 254 U.S. 71, 72–73, 41 S.Ct. 26, 26–27, 65 L.Ed. 128 (1920). The fifth amendment privilege not only protects the individual against being involuntarily ***165** called as a witness against himself in a criminal prosecution but also privileges him not to answer questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings. *Lefkowitz v. Turley,* 414 U.S. 70, 94 S.Ct. 316, 38 L.Ed.2d 274 (1973). *See also Lefkowitz v. Cunningham,* 431 U.S. 801, 805, 97 S.Ct. 2132, 2135, 53 L.Ed.2d 1 (1977); *Arndstein, supra.*

In this appeal, Morganroth urges that this Court reject the "minority" rule adopted by the District Court, or its application of that rule, and adopt the "majority" rule that waiver of the privilege and voluntary testimony in response to specific questions or a particular subject matter in one proceeding does not constitute a waiver of the fifth amendment privilege with respect to identical questions or a particular subject matter in a second proceeding if the witness remains at risk for the same offense. *United States v. Licavoli,* 604 F.2d 613 (9th Cir.1979), *cert. denied,* 446 U.S. 935, 100 S.Ct. 2151, 64 L.Ed.2d 787 (1980); *United States v. Cain,* 544 F.2d 1113 (1st Cir.1976); *United States v. Lawrenson,* 315 F.2d 612 (4th Cir.1963); *United States v. Miranti,* 253 F.2d 135 (2d Cir.1958). The policy behind the majority rule that the privilege is "proceeding specific" and not waived in a subsequent proceeding by waiver in an earlier one, rests on the thought that during the period between the successive proceedings conditions might have changed creating new grounds for apprehension, *e.g.,* the passage of new criminal law, or that the witness might be subject to different interrogation for different purposes at a subsequent proceeding, or that repetition of testimony in an independent proceeding might itself be incriminating, even if it merely repeated or acknowledged the witness' earlier testimony, because it could constitute an independent source of evidence against him or her. *Miranti, supra,* 140; *In re Corrugated Container Antitrust Litigation, Conboy,* 661 F.2d 1145, 1155 (7th Cir.1981), *aff'd, Pillsbury Co. v. Conboy,* 459 U.S. 248, 103 S.Ct. 608, 74 L.Ed.2d 430 (1983) (hereinafter *Conboy*).

The Secretary of Labor urges that the District Court correctly adopted and applied the minority rule set forth in *Ellis v. United States,* 416 F.2d 791 (D.C.Cir.1969). In *Ellis,* the court held that a waiver of the assertion of a valid privilege in one proceeding, where a witness places himself or herself at risk of prosecution for a particular offense, constitutes a waiver of the privilege in all subsequent proceedings in response to the identical questions or the same general subject matter where the risk of prosecution for the identical offense remains the same. An exception to the minority view exists where new material or new conditions may give rise to further incrimination. *Id.* 802. The rationale behind the minority view of *Ellis* is that, absent intervening circumstances, a witness' repetition of the same information in a subsequent proceeding for which he originally placed himself at risk of prosecution in an earlier proceeding would not expose him to any real danger of legal harm to which he had not already exposed himself by virtue of his prior voluntary testimony. *Id.* The rationale of the minority view of *Ellis* applies only where the witness faces the identical risk of prosecution in both proceedings in which he is called upon to testify. The *Ellis* court's exception recognizes this limitation.

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[3] We need not reach the issue of whether this Circuit should adopt the majority or minority view on waiver as framed in the question certified by the District Court because we find neither applicable to a factual situation where a fifth amendment privilege is asserted solely because the witness alleges he is apprehensive of providing incriminating evidence in regard to a possible perjury charge stemming from responses in an earlier proceeding under oath. [1] The District Court's adoption and ***166** application of the minority view is inappropriate in this case because the minority view presumes that the witness is facing identical risks in both proceedings. In contrast, as in this case, once a witness has testified under oath initially, the risk of prosecution which the witness faced in the earlier proceeding is not identical even though the questions may be the same in a subsequent proceeding or the same subject matter covered. Once a witness has testified under oath, he risks the possibility of perjury charges in addition to any risk he may face for prosecution for non-perjury offenses suggested by his testimony. Perjury is a separate crime. The possibility of a perjury prosecution exists whenever an individual takes an oath, in a civil or criminal matter, where the law of the United States authorizes an oath to be administered, and willfully gives testimony material to the inquiry being pursued which, to the individual's knowledge, is false. 18 U.S.C. § 1621. Similar elements are contained in state perjury laws. Within the applicable statute of limitations for a perjury prosecution, an individual's potential exposure to a perjury prosecution growing out of criminal proceedings against him remains viable even though he faces no risk of prosecution for substantive crimes due to double jeopardy or the running of the statute of limitations for the substantive offenses. The federal and state perjury statutes apply with equal force to testimony given under oath in civil matters and criminal matters in which the individual is merely a witness. *Id.* Even immunized testimony is subject to prosecution on the ground of perjury. 18 U.S.C. § 6002. When a witness is asked a question in a subsequent proceeding, the answer to which could show that he has already committed the crime of perjury in a prior proceeding, his refusal to answer is permissible almost by the definition of self-incrimination. The witness is still criminally accountable for his earlier perjury. He may not be convicted out of his own mouth.

[4] The risk of prosecution for which Morganroth has articulated a fear of prosecution in this case is that for perjury in his prior testimony. This possibility of prosecution exists independently of and is unaffected by his acquittal of federal conspiracy and mail and wire fraud charges. It is unclear whether he fears perjury charges stemming from his deposition testimony in the Florida state foreclosure proceeding or his New York federal grand jury testimony. Either could provide a basis for a valid assertion of the privilege. [2] Morganroth remains at risk for state and federal perjury prosecutions until the risk is removed by a running of the applicable statute of limitations for perjury or a guilty plea or conviction. Therefore, because Morganroth alleges he is presently at risk for a different crime than those for which he initially faced a reasonable risk of prosecution, the question of whether the minority view should control the waiver issue is not properly raised by the facts.

We do, however, consider another issue raised by the order of the District Court even though not included in the certified question. At issue is what sort of showing must be made by a witness to justify the invocation of the fifth amendment privilege when the only possible risk of prosecution which might flow from testimony in a subsequent proceeding is for perjury.

[5] We conclude that it is not enough that Morganroth answer each deposition question propounded by the Secretary of ***167** Labor with the conclusory statement: "I refuse to answer on the ground that the answer might tend to incriminate me." Morganroth must supply such additional statements under oath and other evidence to the District Court in response to each question propounded so as to enable the District Court to reasonably identify the nature of the criminal charge for which Morganroth fears prosecution, *i.e.,* perjury and to discern a sound basis for the witness' reasonable fear of prosecution.

[6] **[7]** **[8]** Before a witness, such as Morganroth, is entitled to remain silent, there must be a valid assertion of the fifth amendment privilege. *See Conboy, supra,* 459 U.S. ——, ——, 103 S.Ct. 608, 614 n. 13, 74 L.Ed.2d 430. It is for the court to decide whether a witness' silence is justified and to require him to answer if it clearly appears to the court that the witness asserting the privilege is mistaken as to its validity. *Hoffman, supra.* A valid assertion of the fifth amendment privilege exists where a witness has reasonable cause to apprehend a real danger of incrimination. *Id.* A witness must, however, show a "real danger," and not a mere imaginary, remote or speculative possibility of prosecution. *United States v. Apfelbaum,* 445 U.S. 115, 128, 100 S.Ct. 948, 955–956, 63 L.Ed.2d 250 (1980). *Zicarelli v. New Jersey State Commission of Investigation,* 406 U.S. 472, 478, 92 S.Ct. 1670, 1675, 32 L.Ed.2d 234 (1972); *Rogers v. United States,* 340 U.S.

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367, 374–75, 71 S.Ct. 438, 442–443, 95 L.Ed. 344 (1951); *cf., Marchetti v. United States,* 390 U.S. 39, 88 S.Ct. 697, 19 L.Ed.2d 889 (1968). While the privilege is to be accorded liberal application, the court may order a witness to answer if it clearly appears that he is mistaken as to the justification for the privilege in advancing his claim as a subterfuge. *Hoffman, supra,* 341 U.S. 486, 71 S.Ct. 818; *In re Brogna,* 589 F.2d 24, 27 (1st Cir.1979); *Ryan v. Commissioner,* 568 F.2d 531, 539 (7th Cir.1977), *cert. denied,* 439 U.S. 820, 99 S.Ct. 84, 58 L.Ed.2d 111 (1978). A blanket assertion of the privilege by a witness is not sufficient to meet the reasonable cause requirement and the privilege cannot be claimed in advance of the questions. The privilege must be asserted by a witness with respect to particular questions, and in each instance, the court must determine the propriety of the refusal to testify. *See Hoffman, supra,* 341 U.S. 486–88, 71 S.Ct. 818–819.

A witness risks a real danger of prosecution if an answer to a question, on its face, calls for the admission of a crime or requires that the witness supply evidence of a necessary element of a crime or furnishes a link in the chain of evidence needed to prosecute. In *Hoffman,* the Supreme Court held that a real danger of prosecution also exists where questions, which appear on their face to call only for innocent answers, are dangerous in light of other facts already developed. In such a situation a witness bears no further burden of establishing a reasonable cause to fear prosecution beyond asserting the privilege and identifying the nature of the criminal charge or supplying sufficient facts so that a particular criminal charge can reasonably be identified by the court. The witness has met his burden and the court does not need to inquire further as to the validity of the assertion of the privilege, if it is evident from the implications of a question, in the setting in which it is asked, that a responsive answer might be dangerous to the witness because an injurious disclosure could result. *Id.* 486–87, 71 S.Ct. 818–819. In appraising the claim, the court "must be governed as much by his personal perception of the peculiarities of the case as by the facts actually in evidence." *Id.* 487, 71 S.Ct. 818; *Malloy v. Hogan,* 378 U.S. 1, 34, 84 S.Ct. 1489, 1507, 12 L.Ed.2d 653 (1964) (White, J., dissenting); *United States v. Moreno,* 536 F.2d 1042, 1047 (5th Cir.1976); *Klein v. Smith,* 559 F.2d 189, 200 (2d Cir.1977), *cert. denied,* 434 U.S. 987, 98 S.Ct. 617, 54 L.Ed.2d 482 (1977).

The facts of this case make the *Hoffman* approach to a witness' burden of establishing a foundation for the reasonable cause determination, or rather lack of it, inapplicable. Morganroth is allegedly raising the specter of a perjury prosecution; *i.e.,* his proposed truthful testimony might provide ***168** evidence that he had perjured himself in earlier proceedings under oath. Like *Hoffman,* the questions propounded to Morganroth appear on their face to be innocent. Unlike *Hoffman,* the present setting, in which the questions were propounded and representations made, sheds no light whatsoever on whether Morganroth's proposed truthful answers would constitute injurious disclosures in light of his previous testimony on the same subject matter in earlier proceedings.

The *Hoffman* guidelines for determining whether an assertion of the privilege against self-incrimination should be respected works well in cases in which an individual is at risk of prosecution on substantive charges or in which an individual expresses a concern of perjury prosecution stemming from statements made in earlier proceedings in which the trial judge has a personal familiarity. The *Hoffman* guidelines, however, are of little help in a case such as the one on appeal where the District Court making the privilege determination has no personal knowledge of the scope of content of prior proceedings and where the only possible prosecution for which the witness is at risk is perjury. This is due to the nature of the perjury offense in relation to the assertion of the privilege and the inability of the trial court, in this case and others like it, to draw upon its own knowledge of the case. In *Hoffman,* the Supreme Court stressed facts within the knowledge of the trial court. There the trial court was instructed that the privilege be "evident from the implications of the question *in the setting in which it was asked,*" that the determination be governed "as much by his [trial judge's] personal perception of the particularities of the case as by the facts actually in evidence," and that it consider the "circumstances" of the case. *Hoffman, supra* 341 U.S. 486–87, 71 S.Ct. 818–819 (emphasis added). *Hoffman* is typical of subsequent cases applying the *Hoffman* guidelines. As in *Hoffman,* those cases, in contrast to the one on appeal, reveal a superior knowledge by the trial court of the "setting in which it [the questions to which the privilege is sought] is asked." In *Hoffman,* the petitioner was asked if he knew or was acquainted with the whereabouts of a missing man who was being sought for his connection with violations of a large number of federal statutes. Petitioner had already admitted he knew the missing man but invoked the privilege when asked of his whereabouts. The Supreme Court noted that if he answered the question from which he sought protection under the fifth amendment, his answer would have a strong possibility of implicating him in some of the crimes under investigation or in harboring a fugitive and upheld the trial court's approval of the invocation of his privilege. In *Hoffman,*

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however, the trial court had some concrete information to work with. First, the petitioner's invocation of the privilege was to protect against the prosecution for substantive crimes. Therefore, the elements of the underlying violation and the necessary facts to support them could be inferred by the trial court. In addition, the Court noted that the trial court had impaneled the grand jury before whom Hoffman refused to testify, was intimately familiar with the purposes of the grand jury investigation and knew that petitioner had a long police record and was widely recognized as a key member of an organized crime underworld. These circumstances, in relation to the nature of the potential prosecution, gave the trial court the ability to make a reasoned inference that Hoffman's answer would tend to incriminate him.

Similarly, in *United States v. Wilcox,* 450 F.2d 1131 (5th Cir.1971), *cert. denied,* 405 U.S. 917, 92 S.Ct. 941, 30 L.Ed.2d 787 (1972), where the perjury/incrimination issue was raised, the trial court making the privilege determination was intimately familiar with the facts. In *Wilcox,* damaging testimony against Wilcox had been given by a witness in two prior trials, each of which resulted in convictions followed by reversals and new trials following appeals. The third time around, the witness refused to testify on the ground that subsequent testimony might provide evidence that he had perjured himself in the earlier proceedings. ***169** The District Court respected his assertion and the witness did not testify in person. Instead, his testimony from the first trial was read into evidence. The trial judge who made the privilege determination was the same judge who had presided at the first two trials, knew of the nature of the testimony and of the grounds for the witness' subsequent assertion. As in *Hoffman,* he was intimately aware of the "circumstances" and "setting" in which the privilege was asserted. He was clearly notified that the testimony offered by the witness, if forced to testify, would differ between the proceedings. *Wilcox, supra,* 1140, nn. 10–11.

This case is in sharp contrast to *Hoffman* and *Wilcox.* The trial court did not have any background familiarity with the setting in which the assertion was raised. The District Court had not participated in either the grand jury matter in New York or the Florida foreclosure proceeding. With respect to the New York grand jury statements, he did not even know the substance of those statements, the nature of the conflicting testimony by other witnesses or contradictory documentary evidence which might tend to show that Morganroth had perjured himself in that proceeding. Nor did Morganroth apprise the District Court that his testimony or deposition answers would differ from statements given in the earlier proceedings. The District Court in this case was merely informed by Morganroth's attorney that there was a possibility that material inconsistencies would exist between his proposed testimony, based on his current memory of the loan transactions, and prior testimony. This possibility, however, exists in every case in which a witness has given prior testimony. Thus, perjury prosecutions which are prospective and possible in nature present special problems in determining appropriate invocation of the fifth amendment right.

[9] **[10]** Whether a witness risks a "real danger" of prosecution from questions which appear on their face to call for only innocent answers and where the incriminating nature of the answer is not evident from the implications of the question in the setting in which it is asked, is a difficult question left unanswered by *Hoffman.* On one hand, while it is clear that a witness, upon interposing his claim of privilege, is not required to prove the hazard in the sense in which a claim is usually required to be established in court, *Hoffman, supra,* 341 U.S. 486, 71 S.Ct. 818, it is equally clear that a witness' "say so" does not by itself establish the hazard of incrimination. *Id.* Where there is nothing suggestive of incrimination about the setting in which a seemingly innocent question is asked, the burden of establishing a foundation for the assertion of the privilege should lie with the witness making it. *See Moreno, supra,* 536 F.2d 1049; *United States v. Rosen,* 174 F.2d 187, 188 (2d Cir.1949), *cert. denied,* 338 U.S. 851, 70 S.Ct. 87, 94 L.Ed. 521 (1949). We do not hold, however, that a witness has the burden of proof on this issue. A witness presents sufficient evidence to establish a foundation for the assertion of the privilege and shows a real danger of prosecution if it is not perfectly clear to the court "from a careful consideration of all of the circumstances in the case, that a witness is mistaken, and that the answer[s] cannot possibly have such a tendency to incriminate." *Hoffman, supra,* 341 U.S. 488, 71 S.Ct. 819. Stated differently, sufficient evidence is presented by a witness if a court can, by the use of reasonable inference or judicial imagination, conceive a sound basis for a reasonable fear of prosecution. Short of uttering statements or supplying evidence that would be incriminating, a witness must supply personal statements under oath or provide evidence with respect to each question propounded to him to indicate the nature of the criminal charge which provides the basis for his fear of prosecution[3] and, if ***170** necessary to complement non-testimonial evidence, personal statements under oath to meet the standard for establishing reasonable

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cause to fear prosecution under this charge.[4] Statements under oath, in person or by affidavit, are necessary because the present penalty of perjury may be the sole assurance against a spurious assertion of the privilege. Argument may be supplied by counsel but not the facts necessary for the court's determination.

Public policy also requires that a witness bear the burden of establishing the foundation of the privilege beyond his mere "say so." Unless something more is required in situations such as the one on appeal where seemingly innocent questions exist in a setting presently devoid of incriminating overtones, witnesses such as Morganroth will be the final arbiters of the validity of their asserted privileges. A litigant's right to information must be balanced against a witness' constitutional right to invoke the privilege. Only where there is some real danger can the loss of information to a litigant or to the judicial system be justified. *See Emspak, supra,* 349 U.S. 205–06, 75 S.Ct. 705–706 (Harlan, J., dissenting). In addition, unless some additional showing beyond the mere assertion of the privilege is required, no witness would ever have to testify twice regarding the same subject matter because the possibility of perjury would always exist in theory.

From the record on appeal, it appears that Morganroth has not met this burden of establishing a foundation necessary for the valid assertion of the privilege based on his alleged fear of a perjury prosecution. Accordingly, we remand this case to the District Court for further proceedings consistent with this opinion.

NATHANIEL R. JONES, Circuit Judge, dissenting.

The majority reasons that the considerations that were before the Supreme Court in *Pillsbury Co. v. Conboy,* 459 U.S. 248, 103 S.Ct. 608, 74 L.Ed.2d 430 (1983), are not implicated in the instant case because of the particular offense for which appellant-Morganroth fears prosecution. The clear holding in *Conboy* is that a district court cannot compel a witness to answer deposition questions over a valid assertion of his Fifth Amendment right, absent a duly authorized grant of immunity at the time the testimony is sought. Thus, when a witness or deponent is accorded a grant of immunity for testimony that is given during one proceeding, a subsequent interrogation pertaining to the same subject matter must be accompanied by a new grant of immunity. The majority concludes that this rule is not applicable to the facts *sub judice* because the witness' attempt to invoke his Fifth Amendment privilege was based upon his fear of prosecution for perjury. The majority further reasons that

> because Morganroth alleges he is presently at risk for a different crime than those for which he initially faced a reasonable risk of prosecution, the question [pertaining to] the waiver issue is not properly raised by the facts.

***171** *See* Majority Opinion at 166–167. It is upon this basis that I enter my dissent.

My review of the proceedings below indicates that the appellant's response to the numerous questions that were propounded to him was "I refuse to answer on the ground it may incriminate me." During these proceedings, Morganroth's attorney advised the court that if the appellant testified, he ran the risk of possible prosecution for tax evasion.

The majority apparently assumed that since the prosecutor informed the appellant that his answers during the grand jury proceeding contradicted the testimony of other witnesses, the appellant was invoking his right to remain silent in order that he would not perjure himself. However, the appellant declares that he invoked his Fifth Amendment privilege because of the possible threat of *perjury and criminal tax evasion.*[1] Nevertheless, the majority, characterized the issue as follows: "At issue is what sort of showing must be made by a witness to justify the invocation of the Fifth Amendment privilege *when the only possible risk of prosecution* which might flow from testimony in a subsequent proceeding *is for perjury.*" This construction of the issue completely ignores appellant's claim of possible prosecution for tax evasion. Therefore, it is upon this basis that I construe the majority's analysis to be in error.

Upon my review of the record, I conclude that this case is appropriate for application of the holding of *Conboy* because the appellant was faced with the possible prosecution for tax evasion; therefore, a second grant of immunity should have been extended to him. Accordingly, I view the facts herein as warranting a reversal of the district court's order compelling the appellant to testify absent a subsequent assurance of immunity for that particular testimony.

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Footnotes

1 We also note that the Supreme Court's recent decision in *Pillsbury Co. v. Conboy,* 459 U.S. 248, 103 S.Ct. 608, 74 L.Ed.2d 430 (1983), raises doubt as to the continued validity of the *Ellis* Court's view. In *Conboy,* The Supreme Court emphasized that: “Questions do not incriminate; answers do.” *Id.* 608, 103 S.Ct. 613. The Court reasoned that “answers to such questions ‘are derived from the deponent's *current,* independent memory of events' and thus ‘necessarily create a *new* source of evidence’ that could incriminate a witness and could be used in a subsequent criminal prosecution against him.” *Id.*

2 It is immaterial whether the basis of Morganroth's alleged fear is from the Florida state foreclosure proceeding or the New York grand jury proceeding. One jurisdiction in our federal system may not, absent an immunity provision, compel a witness to give testimony which might incriminate him under the laws of another jurisdiction. *Murphy v. Waterfront Comm'n of New York Harbor,* 378 U.S. 52, 84 S.Ct. 1594, 12 L.Ed.2d 678 (1964).

3 With respect to each question for which the privilege is asserted, it is important to the court's reasonable cause determination that Morganroth swear under oath or provide other evidence that the criminal charge for which he has reasonable cause to fear prosecution is perjury. Here he stated only that the issue would tend to incriminate him. This fear may have been based on the mistaken belief he could still be prosecuted for some statute of limitations barred offense. While no ritualistic formula or talismanic phrase is necessary to invoke the privilege, *Emspak v. United States,* 349 U.S. 190, 194, 75 S.Ct. 687, 690, 99 L.Ed. 997 (1955), a court cannot be asked to scan all of the law for a possible connection between a question and a criminal offense. To impose such a duty on courts in response to a mere assertion of the privilege, without elaboration, in response to seemingly innocent questions devoid of a setting suggestive of producing injurious disclosures would result in a guessing game in which the witness is the final judge of the claim of privilege. *See Tennesco, Inc. v. Berger,* 144 Ga.App. 45, 240 S.E.2d 586 (1977).

4 Where a witness, such as Morganroth, no longer faces a reasonable risk of prosecution for the underlying substantive crimes, due to a running of the statute of limitations, acquittal, double jeopardy, etc., the court must be apprised of the fear of perjury or at least be aware that a witness has testified before on the same subject matter and that his proposed truthful testimony might provide evidence that his former testimony was false. This is because the court must be able to eliminate the underlying substantive crimes and still find a factual basis from which a reasonable cause to fear criminal prosecution may be found.

1 *See* Appellant's brief page 5, n. 1, which reads: Mr. Morganroth asserted his Fifth Amendment privilege to the same set of questions [in the earlier proceeding] to which he asserts his privilege in the instant action. Immunity was then conferred upon Mr. Morganroth, his testimony given, and thereafter he was advised that his testimony was in serious conflict with that of others appearing before the grand jury. This apparent conflict and two possible legal ramifications flowing from it—threatened perjury and criminal tax evasion exposure—constitute in large part the basis for his imposition of his Fifth Amendment privilege in this action.

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