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RENDERED: JUNE 25, 2009
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2007-SC-000081-MR

PHILLIP LEROY WINES — APPELLANT

V.

ON APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE WILLIAM DOUGLAS KEMPER, JUDGE
NOS. 05-CR-001921 AND 06-CR-001838

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Phillip Wines appeals as a matter of right from a December 22, 2006 Judgment of the Jefferson Circuit Court convicting him of murder, second-degree assault, and tampering with physical evidence. Wines was sentenced as a second-degree persistent felony offender to enhanced, consecutive terms of imprisonment totaling forty-five years. At Wines's trial in late October and early November 2006, the Commonwealth alleged and the jury found that in April 2005 Wines assaulted Micah Brashear by hitting him in the head with a pair of nunchuka karate sticks and that in June 2005 Wines murdered James Hamilton by stabbing him to death with a pocket knife. The jury also found that Wines tampered with evidence of the murder when, after the stabbing, he washed off the knife. On appeal, Wines contends that the trial court erred (1)

by refusing to sever the assault and the murder charges; (2) by inadequately instructing the jury with respect to the defense of extreme emotional disturbance; (3) by refusing to apply to Wines's trial recent amendments to KRS Chapter 503 regarding self defense; (4) by admitting evidence of a witness's prior consistent statement; and (5) by admitting expert testimony regarding blood spatter and cast off. Finding no reversible error, we affirm.

RELEVANT FACTS

Micah Brashear testified that he and Wines had grown up in the same Louisville neighborhood and had been friends for more than thirty years. During the months leading up to the alleged assault, they had frequently socialized over the weekends. According to Brashear, their socializing often included smoking marijuana together, and Brashear claimed that Wines sometimes sold small quantities of marijuana to him and to others. During the afternoon of April 14, 2005, Brashear phoned Wines and asked if he and one Brian Langan could come to the house Wines rented on Cannons Lane in Louisville to visit and to purchase a couple of marijuana cigarettes. According to Brashear, Wines became irate, accused Brian Langan of being a "narc," and told Brashear to stay away. Later that evening Brashear and Langan were visiting Brashear's sister, who lived only a few doors from Wines, and another friend, who lived across the street from her. As they were leaving the friend's house to return to the sister's, Brashear, who admitted that he had consumed several beers in the course of the evening, heard Wines call to him from the

front porch of Wines's house. Brashear testified that Wines was calling him names and daring him to fight. He walked down the street to Wines's house, and exchanged insults. Wines came to the end of his driveway, Brashear testified, and dared Brashear to step on Wines's property. Brashear claimed that he remained standing in the street, but that finally, when their insults became heated, Wines stepped forward and struck him on the side of the head with what later proved to be a pair of nunchuka sticks. The blow stunned him, Brashear testified, and caused a cut that was later treated at University Hospital. Police were summoned, Wines was arrested and charged with assault, and he was held for several days in jail. He posted bond on April 26, 2005. The matter was referred to the May Jefferson County Grand Jury, which declined to indict. There the matter stood until June 2005.

During Wines's stay in jail, he wrote a letter to James Hamilton, the man he was later accused of killing. Hamilton was a neighbor who lived in an apartment just around the corner from Cannons Lane on Ephraim McDowell. In the letter Wines advised Hamilton of two friends whom he had "handled" for years and implied that they might need "handling" during his incarceration. To one friend he attached the numbers, "50, 100," and to the other, "60, 100." The letter also sought Hamilton's aid caring for a pet and raising bond money. Hamilton, several witnesses testified, was a drug dealer who for a few years had lived with a young woman named Angela Nelson. Nelson became the Commonwealth's principal witness concerning Hamilton's murder.

Nelson testified that Hamilton had supported the two of them by selling drugs and that at some point in early 2005 he had arranged with Wines to keep his "supplies" at Wines's house. Wines gave Hamilton a key to his house and received drugs in exchange. Wines, too, according to Nelson, dealt drugs, primarily marijuana and prescription pills, but on a smaller scale than Hamilton. Nelson testified that her relationship with Hamilton had always been somewhat stormy, and that it became strained in late April 2005 when she learned that he had infected her with HIV. She began to spend increasing amounts of time with Wines, who before had been merely an acquaintance, and in early May commenced a sexual relationship with him. According to Nelson, however, she never intended to end her relationship with Hamilton, and from mid-May through early June divided her time between the two men. Jealousies arose from that situation. Twice during the later part of May, Hamilton entered Wines's house unannounced and choked Nelson. On another occasion he pushed in the screen on Wines's bedroom window. Finally, at about 2:00 a.m. on June 12, 2005, Hamilton stopped his car outside Wines's house, honked his horn repeatedly, and yelled for Nelson to come out and talk with him. Wines summoned the police, but before they arrived Hamilton had left. When the police had gone, according to Nelson, Wines confronted her with an ultimatum: one man or the other. When Nelson said that she would never leave Hamilton, Wines allegedly grew furious and declared that he would kill his former friend.

At about 4:00 that same morning, Hamilton again honked in front of

Wines's house and yelled for Nelson to join him. Nelson testified that she tried to go out to him, but that Wines prevented her from leaving the house. Hamilton came up on Wines's porch, and seeing that Wines had armed himself with a knife, Nelson screamed at Hamilton to run. He ran down the street toward a friend's apartment, but when Wines, instead of chasing him, took the keys from Hamilton's car, Hamilton returned, and the two men confronted each other in the street. Nelson described Wines stabbing Hamilton several times. The autopsy examiner testified that there were eight principal wounds caused by seven separate stabs, one of which caused two wounds by both entering and exiting. Two of the stabs reached Hamilton's heart. After the assault, Wines washed the blood from the knife and called the police. Nelson frantically sought aid for Hamilton, who had collapsed in a yard nearby. Emergency personnel soon came and transported Hamilton to the hospital, but he was pronounced dead upon arrival.

Wines was taken into custody, and during its June 2005 term, the grand jury indicted him for Hamilton's murder, for tampering with evidence, and also for the April assault upon Micah Brashear. Later Wines was separately indicted for being a persistent felony offender in the second degree. Prior to trial, Wines moved to have the assault charge severed from the murder charge, and his first claim on appeal is that the trial court abused its discretion by denying that motion.

ANALYSIS

I. Wines Was Not Unduly Prejudiced By The Joinder Of The Assault And Murder Charges.

As the parties correctly note, RCr 6.18 allows for the joinder of offenses in separate counts of an indictment provided that "the offenses are of the same or similar character or are based on the same acts or transactions connected together or constituting parts of a common scheme or plan." A liberal rule of joinder furthers the important interest courts, parties, and witnesses all have in the economy of a single trial. Under RCr 9.16, however, "[i]f it appears that a defendant or the Commonwealth is or will be prejudiced by a joinder of offenses . . . in an indictment, . . . the court shall order separate trials of counts . . . or provide whatever other relief justice requires." Thus, even if joinder is permissible under RCr 6.18, if the defendant makes a timely motion for severance under RCr 9.16 and shows prejudice, the court should grant separate trials or provide otherwise appropriate relief. "Prejudice," in this context, means more, of course, than mere hurt or disadvantage. Romans v. Commonwealth, 547 S.W.2d 128 (Ky. 1977). Separate trials are required only if the joinder would result in an unreasonable disadvantage for the defendant. *Id.* We review the denial of a motion to sever for abuse of discretion. Ratliff v. Commonwealth, 194 S.W.3d 258 (Ky. 2006).

As we have often observed, a significant factor in identifying the prejudice that calls for separate trials "is the extent to which evidence of one offense would be admissible in a trial of the other offense." *Id.* at 264.

Generally, if evidence of joined offenses would be mutually admissible even were the charges severed, then joinder of the offenses will not be prejudicial. Otherwise, of course, evidence of unrelated crimes is likely to be significantly prejudicial, a concern embodied in KRE 404(b). Under that rule, evidence of crimes other than the one charged is not admissible merely as evidence of the defendant's character or disposition, but only for some substantial, legitimate purpose such as showing "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." KRE 404(b) (1). Evidence of other crimes may also be admitted if inextricably intertwined with evidence of the crime charged. KRE 404(b)(2). The trial court ruled that severance was not required here because under KRE 404(b) evidence of both the assault and the murder would be admissible at separate trials of the other offense. We agree.

Wines claimed self-defense in both cases, each of which ended with an unarmed "friend" of Wines either injured or dying within feet of Wines's residence. In the assault case he asserted that during his verbal altercation with Brashear, Brashear kept one hand in his pocket where Wines believed he carried a knife. When the argument reached its climax, he claimed, Brashear lunged toward him onto his property, and Wines struck out with the nunchuka sticks to protect himself from what he feared was a potentially deadly threat. In the murder case, contrary to Nelson's testimony, Wines asserted that Hamilton not only came up on his porch, but forced his way through the front

screen door and began to beat Wines. It was Wines's testimony that seven thrusts of his knife were required to deter Hamilton's assault.

In both cases, however, there was evidence tending to show that Wines planned to use self-defense as a pretext for a premeditated attack. Brashear testified that Wines, angry at Brashear for having allegedly brought a "narc" to Wines's home earlier that day, taunted him and tried to induce him to come onto Wines's property, where a self-defense claim might appear more credible. In the days leading up to Hamilton's death, furthermore, and also following the first honking incident just two or three hours prior to the killing, Wines called the police to report Hamilton's disturbances. Nelson testified that Wines told her he was lodging the police complaints to make Hamilton look like the aggressor, so that when he finally did kill Hamilton he would get off. Both crimes, therefore, reflected a common scheme and each provided evidence that the other crime had been similarly planned to appear as an act of justified self-defense. Thus evidence of each alleged act of self-defense would have been admissible under KRE 404(b) in a separate trial of the other. Given this mutual admissibility, the trial court did not abuse its discretion by denying Wines's motion to sever.

II. The Trial Court's Failure To Give A Presumption-Of-Innocence Admonition That Incorporated Wines's EED Claim Did Not Amount To Palpable Error.

In addition to asserting self-defense, Wines claimed that his attack against Hamilton was carried out under the influence of an extreme emotional

disturbance. The trial court agreed that there was evidence in support of EED mitigation, and so instructed the jury, in pertinent part, that it was to find Wines guilty of intentional murder if and only if it believed beyond a reasonable doubt that "he caused the death of James Hamilton intentionally, and not while acting under the influence of extreme emotional disturbance." The court did not, however, include in its generic presumption of innocence/reasonable doubt instruction the admonition that if the jury would otherwise find Wines guilty of intentional murder but had a reasonable doubt as to whether at the time of the killing he was acting under the influence of extreme emotional disturbance, then it should find him guilty only of first-degree manslaughter. As Wines correctly points out, if properly requested and supported by the evidence, such an admonition is required. Sherroan v. Commonwealth, 142 S.W.3d 7 (Ky. 2004) (citing Commonwealth v. Hager, 41 S.W.3d 828 (Ky. 2001)). The question here is whether Wines preserved this issue by properly requesting that admonition.

As we explained in Pollini v. Commonwealth, 172 S.W.3d 418 (Ky. 2005),

> [f]or adequate preservation of exceptions to jury instructions, the Kentucky Rules of Criminal Procedure [RCr 9.54] require evidence on the record of either (1) a specific objection or (2) the tendering of an instruction in . . . a manner which presents the party's position "fairly and adequately" to the trial judge . . . . "In many cases, . . . counsel submit a raft of tendered instructions, any one of which may be overlooked by the trial court. The failure to instruct upon a matter which would have been surely instructed upon if the oversight had been called to the attention of the court by counsel is not error."

Id. at 428 (quoting from RCr 9.54(2) and from Grooms v. Commonwealth, 756 S.W.2d 131 (Ky. 1988)). To preserve a claim of error, it is counsel's duty "to object with specificity so that the trial judge will be advised on how to instruct." Gibbs v. Commonwealth, 208 S.W.3d 848, 854 (Ky. 2006).

In this case, Wines tendered some sixteen pages of proposed instructions with respect to the murder and tampering charges. While it is true that his proposed "presumption of innocence" instruction included the EED admonition our case law has required, it also included a provision concerning reasonable doubt with respect to the degree of the offense, which we have held is not required. Butts v. Commonwealth, 953 S.W.2d 943 (Ky. 1997) (citing Carwile v. Commonwealth, 656 S.W.2d 722 (Ky. 1983)). When the trial court presented counsel with the instructions it had prepared, Wines's only comment was a blanket objection to every deviation from his tendered instructions. He did not call the trial court's attention to the EED admonition in particular or even to the "presumption of innocence" instruction. Although a tendered instruction that "fairly and adequately" presents the party's position to the trial judge may be sufficient to preserve the issue for appeal, Sand Hill Energy, Inc. v. Smith, 142 S.W.3d 153 (Ky. 2004), the blanket, partially incorrect instructions tendered here and counsel's blanket objection to any and all deviations therefrom amounts precisely to the circumstances Pollini held do not give the trial court adequate notice of the party's position. The alleged error, therefore, was not properly preserved. We have held, furthermore, that where, as here,

the murder instruction correctly includes EED as a negative element, "the failure to include the additional [EED] admonition in the presumption of innocence/reasonable doubt instruction d[oes] not adversely affect Appellant's substantial rights," and thus does not provide grounds for relief as palpable error under RCr 10.26. Sherroan, 142 S.W.3d at 23.

III. The Trial Court Correctly Determined That Wines Was Not Immune From Prosecution And That Substantive Changes To KRS Chapter 503 Did Not Apply Retroactively To Wines's Case.

Effective July 12, 2006, after Wines's alleged 2005 crime but before his October/November 2006 trial, the Kentucky General Assembly extensively amended the self-defense provisions of KRS Chapter 503. The new legislation—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 also 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). And it 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).

Wines moved for application of the new legislation to his case. In particular he sought dismissal of the murder and assault charges on the basis of the new immunity provision, and he sought jury instructions incorporating the new statutory presumptions and the new provisions declaring that there is no duty to retreat. The trial court ruled that Wines was not entitled to immunity because the self-defense evidence in both cases was conflicting, and it ruled that the other provisions of the new law did not apply retroactively to Wines's case and so ought not to be reflected in the jury instructions. Wines challenges both of those rulings.

In Rogers v. Commonwealth, 2007-SC-000040-MR, released this same day, we addressed virtually identical claims based on the new self-defense provisions. We concluded in Rogers that, aside from the immunity statute, all of the 2006 amendments to KRS Chapter 503, including the "no duty to retreat" provisions, are substantive in nature and thus do not apply retroactively to crimes committed before the new law's effective date. Nor, we held, was a "no duty to retreat" instruction required by pre-existing law or by the constitutional right to present a defense. The trial court did not err in this case, therefore, when it rejected Wines's tendered self-defense instructions.

The new immunity provision, we held in Rogers, is procedural, and so does apply retroactively to cases pending as of or arising after June 12, 2006. We held, however, that KRS 503.085

> contemplates that the prosecutor and the courts may . . . be called upon to determine whether a particular defendant is entitled to . . . 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.

Although the trial court in this case did not apply this precise standard, we are convinced that the Commonwealth's proffered proof satisfied it. Brashear's and Nelson's statements to the police alone suggested evidence that would support a finding of probable cause. We are also convinced that the "conflicting evidence" standard the court did apply was at least as favorable to Wines as the probable cause standard announced in Rogers and thus any discrepancy did not affect Wines's substantial rights. RCr 10.26. Wines, therefore, is not entitled to relief based on the 2006 amendments to KRS Chapter 503.

IV. The Trial Court Did Not Err By Admitting Nelson's Initial Statement To Investigators As An Excited Utterance.

Wines next contends that the trial court erred when it permitted the Commonwealth to play for the jury the portion of the tape-recorded statement Nelson gave to one of the investigating officers in which she described the events of June 12 leading up to the fatal encounter. That statement was hearsay, of course, but the trial court ruled that the statement was admissible

as an excited utterance. We review that determination for clear error. Young v. Commonwealth, 50 S.W.3d 148 (Ky. 2001). Because there is substantial evidence supporting it, we uphold the trial court's ruling.

Kentucky Rule of Evidence 803(2) provides that the hearsay rules do not exclude "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." We have identified eight factors to be considered in determining whether a statement was an excited utterance:

> (i) lapse of time between the main act and the declaration, (ii) the opportunity or likelihood of fabrication, (iii) the inducement to fabrication, (iv) the actual excitement of the declarant, (v) the place of the declaration, (vi) the presence there of visible results of the act or occurrence to which the utterance relates, (vii) whether the utterance was made in response to a question, and (viii) whether the declaration was against interest or self-serving.

Souder v. Commonwealth, 719 S.W.2d 730, 733 (Ky. 1986) (quoting from Lawson, *Kentucky Evidence Law Handbook,* 8.60(B) (2d ed. 1984)). In Thomas v. Commonwealth, 170 S.W.3d 343 (Ky. 2005), we explained that

> [t]emporal proximity to the "startling event" is only one factor to consider in determining whether a statement was "made while the declarant was *under the stress* of excitement caused by the event. . . ." KRE 803(2) (emphasis added). "For an out-of-court statement to qualify for admission under KRE 803(2), it must appear that the declarant's *condition at the time* was such that the statement was spontaneous, excited, or impulsive rather than the product of reflection and deliberation." . . . "Spontaneity, as opposed to mere proximity in time, is a most important consideration."

Id. at 350 (citations and internal quotation marks omitted).

Here, Louisville Metro Police Detective Michael Sherrard testified that he interviewed Nelson in the back of his police vehicle at the scene of the stabbing at approximately 6:30 am, or about two hours after Nelson had witnessed the assault and had applied her own shirt to Hamilton's wounds in an attempt to stop his profuse bleeding. According to Detective Sherrard, she was crying and hysterical. That testimony was borne out by the recording, on which Nelson is audibly very upset. Her description of the entire incident was induced by nothing more than the detective's request that she tell him "what happened." Contrary to Wines's argument, moreover, there is no suggestion that Nelson's statement was self-serving. Wines maintains that Nelson had a motive to minimize her own involvement in the tragedy and to curry favor with the police due to an outstanding drug-possession charge. We fail to see, however, how her statement can be construed as doing either. Nelson made no attempt to deny or hide her relationships with both men and admitted during her testimony that jealously undoubtedly contributed to the animosity between them. At the time of her statement, moreover, she had no reason to think that the police were interested in any version of events but the true one, and thus could not have thought that she would "curry favor" by lying. The evidence was substantial, in sum, that only about two hours after an extremely traumatic event Nelson remained distraught, and that her description of the event was a spontaneous outpouring under the influence of her distress. The

trial court did not clearly err, therefore, by admitting her hearsay statement into evidence pursuant to the excited utterance hearsay exception.

V. The Trial Court Did Not Err By Admitting The Medical Examiner's Testimony Concerning Cast Off Blood.

A. The Blood-Cast-Off Testimony Was Within The Examiner's Expertise.

Finally, Wines contends that the trial court erred by permitting the medical examiner to testify regarding cast off blood. The medical examiner described Hamilton's wounds, explained how they had caused Hamilton's death, and noted how they were consistent with the particular features of the knife which Wines himself surrendered to the police and admitted using. Over Wines's objection, the medical examiner was also permitted to testify that in cases of multiple blood-letting injuries, such as this one, blood tends to accumulate on the weapon and to be cast off onto the surrounding environment. Wines contends that this later testimony exceeded both the medical examiner's expertise and the scope of her testimony as disclosed prior to trial. We disagree.

Kentucky Rule of Evidence 702 permits a qualified expert to testify in the form of an opinion or otherwise with respect to scientific, technical, or other specialized knowledge, provided that the testimony is scientifically reliable and will assist the trier of fact to understand the evidence or to determine a fact in issue. Faced with the proffer of scientific testimony, the trial judge must make a preliminary determination that the testimony will satisfy these reliability and relevancy requirements. A finding that the testimony is scientifically reliable is

reviewed for clear error. Ragland v. Commonwealth, 191 S.W.3d 569 (Ky. 2006). A finding that the evidence will assist the trier of fact is reviewed for abuse of discretion. *Id.* Wines contends that the Commonwealth failed to establish an adequate foundation for the medical examiner's alleged expertise in blood cast-off, and thus that the trial court clearly erred by deeming the blood-cast-off testimony reliable.

Generally, of course, the reliability of expert testimony has been assessed in terms of the factors identified in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993) and Mitchell v. Commonwealth, 908 S.W.2d 100 (Ky. 1995), such factors as whether the theory can be and has been tested, whether it has been subjected to peer review, whether there is a potential or known error rate for such tests, and whether it enjoys acceptance within the relevant scientific community. The Commonwealth did not ask the medical examiner to relate her blood-cast-off testimony to any of these factors. She testified only that in addition to her medical training and experience as an autopsy examiner, she had attended a week-long course concerning blood-spatter phenomena: the different ways in which blood can be expelled or released from the body and the different patterns such blood typically leaves in the environment. Her training had included, she testified, instruction in the fact that in the course of repeated blood-letting injuries, blood typically accumulates on the weapon and is cast off onto surrounding surfaces.

In Ratliff v. Commonwealth, 194 S.W.3d 258 (Ky. 2006), we noted that

> [t]he inquiry into reliability and relevance is a flexible one. The factors enumerated in *Daubert and Mitchell* . . . are neither exhaustive nor exclusive. A trial court may apply any or all of these factors when determining the admissibility of any expert testimony. . . . The United States Supreme Court has clarified the import of the *Daubert* factors, stating: The factors identified in *Daubert* may or may not be pertinent in assessing reliability, depending on the nature of the issue, the expert's particular expertise, and the subject of his testimony. . . . *Kumho Tire Co. v. Carmichael,* 526 U.S. 137, 150 . . . (1999).

Id. at 270 (citations and internal quotation marks omitted).

Given this flexibility, the trial court did not clearly err by deeming the medical examiner's blood-cast-off testimony sufficiently reliable. The subject of her testimony—the very general observation that weapons repeatedly brought into contact with blood will tend to accumulate blood and transfer it to surrounding surfaces—was not far removed from common sense and common experience, and was surely within the competence of someone as familiar with blood in general and as specifically trained in blood-spatter phenomena as the medical examiner. This general testimony, therefore, did not require a more extensive foundation than the one provided, as might have been the case, for example, had the medical examiner opined that a particular blood pattern was the result of cast-off.

B. The Blood-Cast-Off Testimony Did Not Constitute A Discovery Violation.

For similar reasons, we are not persuaded that the medical examiner's blood-cast-off testimony amounted to a discovery violation. Wines complains

that the autopsy report with which he was provided made no mention of blood cast-off and that otherwise the Commonwealth provided no notice that the examiner would be questioned on that topic. He correctly notes that RCr 7.24 requires the Commonwealth, upon request, to disclose "results or reports of physical or mental examinations, and of scientific tests or results or reports of physical or mental examinations, and of scientific tests or experiments made in connection with the particular case," and argues that under this rule notice of the examiner's blood-cast-off testimony was required.

We have held, however, that where an expert's disclosed report includes all the underlying facts upon which her testimony is based and where that testimony addresses only matters naturally and clearly suggested by the report, RCr 7.24 does not require that the expert's report specify her testimony in detail. Milburn v. Commonwealth, 788 S.W.2d 253 (Ky. 1989). In Milburn, a ballistics expert reported prior to trial that his testing had found traces of lead on the murder victim's hair. At trial he testified that the lead residue on the hair indicated a gunshot within close proximity to the victim's head. Although the expert's report had not mentioned his conclusion about the gunshot, we held that that testimony was so clearly suggested by the report as not to violate RCr 7.24. Similarly here, the autopsy report detailing eight stab wounds, two of which reached Hamilton's heart, plainly suggested that Hamilton's bleeding was a most important fact and clearly foreshadowed questions concerning how the blood may have been spread. Because the

medical examiner's blood-cast-off testimony cannot, therefore, be deemed to have unfairly surprised Wines, the trial court did not abuse its discretion by admitting that testimony over Wines's discovery objection.

CONCLUSION

In sum, Wines is not entitled to relief. The trial court did not abuse its discretion by trying the murder and assault charges together. It did not run afoul of the new immunity statute by concluding that Wines's self-defense claims were sufficiently controverted to render him subject to prosecution, and it correctly instructed the jury based on the substantive law of self-defense that existed at the time of Wines's offenses. In the absence of a more specific objection on the issue, the trial court adequately instructed on the defense of extreme emotional disturbance. Finally, the court did not err by admitting into evidence Nelson's initial excited utterance to Detective Sherrard or the medical examiner's testimony concerning cast off blood. Accordingly, we affirm the December 22, 2006 Judgment of the Jefferson Circuit Court.

Minton, C.J.; Abramson, Cunningham, and Venters, JJ., concur. Noble, J., concurs in part, concurs in result in part, and dissents in part by separate opinion. Schroder, J., concurs in result only. Scott, J., concurs in result only 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, 936 (1936). This Court, in Hilbert v. Commonwealth, 162 S.W.2d 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 RESULT:

I concur in result with the majority opinion herein, because unlike Rodgers v. Commonwealth, --- S.W.3d ---, 2007-SC-000040-MR (Ky. 2009), the "no duty to retreat" instruction was not applicable. Here, Wines was not defending himself, he waited for Brashear at Brashear's car and then waylaid him. That's not self-defense. Thus, I concur in result.

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