

COMMONWEALTH OF KENTUCKY
46TH JUDICIAL DISTRICT, DIVISION II
BRECKINRIDGE CIRCUIT COURT
CRIMINAL ACTION NO. 18-CR-00012

COMMONWEALTH OF KENTUCKY PLAINTIFF

vs. JUDGMENT AND SENTENCE ON PLEA OF NOT GUILTY

FARAND O. SKINNER, III DEFENDANT

The Defendant at arraignment entered a plea of not guilty to the charge of Murder. This offense was committed on or about November 9, 2017, when the Defendant was more than eighteen (18) years of age. The Defendant's date of birth is June 2, 1967.

On the 12th, 13th, 14th and 15th days of August 2019, the Defendant having appeared in open court with his counsel, Hon. David Mour, a trial by jury was held. The jury found the Defendant guilty of Murder. The matter was set for sentencing for the 18th day of September 2019.

On the 18th day of September 2019, the Defendant appeared in open court with his counsel, Hon. David Mour, and the Court inquired of the Defendant and his counsel whether they had any legal cause to show why judgment should not be pronounced, and afforded the Defendant and his counsel the opportunity to make statements in the Defendant's behalf and to present any information in mitigation of punishment, and the Court having informed the Defendant and his counsel of the factual contents and conclusions contained in the written report of the pre-

KHJ

| |
|-----------------------------|
| ENTERED |
| CIRCUIT/DISTRICT COURT |
| SEP 25 2019 |
| CINDY M. RHODES, CLERK |
| BY: <i>[Signature]</i> D.C. |

APP. 1

sentence investigation prepared by the Division of Probation and Parole, the Defendant suggesting some changes to the factual contents of said report. Having given due consideration to the written report by the Division of Probation and Parole, and to the nature and circumstances of the crimes, and to the history, character and condition of the Defendant, the Court is of the opinion:

That imprisonment is necessary for the protection of the public because:

- (A) There is substantial risk that the Defendant will commit a crime during a period of probation or conditional discharge.
- (B) The Defendant is in need of correctional treatment that can be provided most effectively by the Defendant's commitment to a correctional institution.
- (C) Any other disposition will unduly depreciate the seriousness of the Defendant's crime.

No sufficient cause having been shown why judgment should not be pronounced, it is **ADJUDGED BY THE COURT** the Jury sentenced that the Defendant is guilty of Murder and is sentenced to twenty-three (23) years under the supervision of the Department of Corrections.

This sentence shall run consecutive to any other sentence imposed by this Court or any other Court prior to this date.

IT IS FURTHER ORDERED pursuant to KRS 23A.205 that:



The Defendant is a poor person as defined at KRS 453.190(2) and is therefore exempt from the imposition of court costs.

OR

The Defendant shall pay court costs for this action in the amount of \$165.00 to the Clerk of the Court within thirty (30) days of release from incarceration or shall appear before the Court on the _____ day of _____, at the hour of 9:00 a.m. CST to show cause why she should not be held in contempt for the failure to pay court costs as ordered.

IT IS FURTHER ORDERED pursuant to KRS 534.030 that:

 The Court finds the Defendant to be indigent pursuant to the terms of KRS Chapter 31 and therefore exempt from the imposition of a mandatory fine.

OR

 The Court has considered the Defendant's ability to pay a fine and has determined that no fine shall be imposed herein due to:

 The hardship likely to be imposed on the Defendant's dependents by the amount of the fine and the time and method of paying it; and/or

 The impact the amount of fine will have on the Defendant's ability to make reparation or restitution to the victim; and/or

 The amount of the Defendant's gain, if any, derived from the commission of the offense.



OR

____ The Court has considered the Defendant's ability to pay a fine and hereby imposes a fine in the amount of \$ _____ and orders the Defendant to pay the amount set forth above:

in full from the posted bond security;

OR

at the rate of _____ per month beginning the first day of the month immediately succeeding

entry of this order

OR

release from custody and on the first day of each month thereafter until paid in full.

| |
|------------------------|
| ENTERED |
| CIRCUIT/DISTRICT COURT |
| SEP 25 2019 |
| CINDY M. RHODES, CLERK |
| BY: <i>[Signature]</i> |
| D.C. |

Dated this 24 day of September 2019

[Handwritten signature]
HON. KENNETH HAROLD GOFF, II
JUDGE, BRECKINRIDGE CIRCUIT COURT
DIVISION II

Judgment entered and notice of entry served on the Defendant by mailing a true and correct copy to the Defendant's counsel, Hon. David Mour, postage prepaid, on this 25th day of Sept 2019.

[Handwritten signature]
CLERK
By: *(Signature)*

CORRECTED: MARCH 9, 2021
 RENDERED: FEBRUARY 18, 2021
 NOT TO BE PUBLISHED

Supreme Court of Kentucky

2019-SC-0589-MR

FARAND SKINNER

APPELLANT

ON APPEAL FROM BRECKINRIDGE CIRCUIT COURT
V. HONORABLE KENNETH HAROLD GOFF II, JUDGE
NO. 18-CR-00012

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

A circuit court jury convicted Farand Skinner of the murder of Paul Harrison. Following the jury's recommendation, the trial court sentenced Skinner to twenty-three years' imprisonment. He now appeals the resulting judgment as a matter of right.¹

Skinner claims several errors occurred during his trial: (1) that he should have received immunity from prosecution for acting in self-defense; (2) he was convicted on insufficient evidence; (3) prosecutorial misconduct deprived him of a fair trial; and (4) the trial court improperly admitted evidence. For reasons explained below, we find that no error occurred and affirm the judgment.

¹ Ky Const. § 110(2)(b) ("Appeals from a judgment of the Circuit Court imposing a sentence of . . . imprisonment for twenty years or more shall be taken directly to the Supreme Court.").

I. FACTS

Farand Skinner, the victim, Paul Harrison, and the sole eyewitness, Timothy Day, were roommates. They had been friends for years, and Skinner allowed the other two men to stay at his home. According to Day, Skinner and Harrison frequently argued, and Skinner made Harrison move out.

Harrison's moving out ignited an exchange of contentious text messages between Harrison and Skinner about when Harrison could retrieve his belongings from Skinner's house. Harrison texted that he was "going to take things to the extreme," "get physical," "knock his teeth down his throat" and that Skinner was going to have to "end up killing him," he was "ready to die," and "im bring a load of my shit out shoot me or do whatever but I'm going to get my shit."

Day accompanied Harrison to Skinner's house to help him move his belongings. How the events unfolded upon their arrival is disputed. Skinner's residence was equipped with a home-surveillance camera, and footage from that camera—despite low-quality video and no audio—shows Skinner emerging from the house as Harrison and Day arrive, Harrison exiting the vehicle and approaching Skinner, Skinner shooting Harrison once, and Harrison collapsing briefly before retreating to the vehicle. Once Harrison was inside the vehicle, Skinner shot at least twice into the vehicle, killing Harrison.

Skinner's defense at trial was self-defense. He claimed that Harrison got out of the car, threatened to kill him, approached him aggressively with a knife, and in a manner that made Skinner fear for his life.

Day did not testify that Harrison threatened to kill Skinner. He could only testify that Harrison was angry and the two argued immediately upon arrival. But in Day's initial interview with police, he indicated that Harrison may have threatened Skinner.

After the shooting, Skinner reentered the house and called 911. He identified himself, his address, and reported that he had shot Harrison. The grand jury indicted Skinner for Harrison's murder.

II. ANALYSIS

A. The trial court did not err in denying Skinner's motion to dismiss the indictment under Kentucky Revised Statute (KRS) 503.085.

Skinner argues the Commonwealth improperly prosecuted him because he killed Harrison in self-defense; therefore, he was entitled to immunity from prosecution under Kentucky Revised Statute (KRS) 503.085. Ordinarily, we do not "revisit whether there was probable cause" in cases in which "a jury has already convicted the defendant—and, thus, found [his actions were] unlawful beyond a reasonable doubt" unless there are flaws in the conviction.² But considering the seriousness of the alleged errors and fact-intensive issues raised by Skinner, we will review the trial court's denial of his immunity motion.³

² *Ragland v. Commonwealth*, 476 S.W.3d 236, 246 (Ky. 2015) ("In the present case, Truss 'has indeed shown his conviction to be flawed due to the . . . errors discussed above.' Therefore, we must 'address the merits of his immunity claim, which would preclude the prosecution from going forward on remand were this Court to find error in the trial court's denial of immunity.'").

³ *Id.*

A trial court must deny a motion to dismiss criminal charges based on the accused's claim of immunity if a substantial basis supports a finding of probable cause to conclude that the force used by the accused was unlawful.⁴ And we will uphold the trial court's decision to deny immunity so long as a substantial basis supported its finding that probable cause existed that the accused used unjustifiable force. A finding of probable cause requires that there be reasonable grounds to support a belief of unjustified force, supported by less than *prima facie* proof, but more than a mere suspicion.⁵

Our precedent, *Lemons v. Commonwealth*, is instructive.⁶ In *Lemons*, we upheld a trial court's decision to deny immunity because a substantial basis supported its conclusion of probable cause the defendant acted with unreasonable force.⁷

In *Lemons*, the trial court found probable cause to believe the defendant did not act in self-defense because there were inconsistent versions of events from eyewitness testimony and inaccuracies in the timeline of events.⁸ So we held that the totality of the circumstances justified a reasonable belief that the defendant injured the victim and supported the trial judge's finding that there

⁴ *Rodgers v. Commonwealth*, 285 S.W.3d 740, 754 (Ky. 2009).

⁵ *Id.* at 715.

⁶ 437 S.W.3d 708 (Ky. 2014).

⁷ *Id.* at 716.

⁸ *Id.* at 715-716.

was probable cause to believe that the defendant had acted with unjustifiable force.⁹

As in *Lemons*, we find the trial court in the present case did not err in finding probable cause that Skinner's use of deadly force was unjustified. The trial court's finding was supported by a substantial basis found in inconsistent evidence and testimony. For example, while Skinner argues that Harrison approached him aggressively with a knife, the sole eyewitness, Day, did not recall seeing a knife and did not describe Harrison's approach to the house as exhibiting behavior that justified the use of deadly force against him. Additionally, the video footage of the crime is inconclusive, at best, of the manner Harrison approached Skinner. These two facts comprise much of the evidence against Skinner.

Skinner argues that the trial court erred because there are no differing versions of events. Though Skinner's testimony is similar to Day's eyewitness testimony in many respects, it differs in the aspect most critical to Skinner's claim of immunity, which is whether Harrison approached with a deadly weapon and in a threatening manner making him fear for his life. This critical variance in the testimony is a small detail that has a great effect on whether Skinner acted justifiably. The trial court did not err in finding probable cause existed to believe Skinner did not have adequate reason to use deadly force.

⁹ *Id.* at 716.

Accordingly, the trial court properly denied Skinner's motion to dismiss the indictment based on immunity.

B. The trial court properly denied Skinner's motion for directed verdict of acquittal and his new trial motion because there was sufficient evidence to support the jury's verdict.

Skinner argues the trial court erred when it denied his motion for a directed verdict of self-defense. We review a trial court's denial of a directed verdict motion *de novo*, and we will uphold the trial court's decision unless it was clearly unreasonable for a jury to find guilt.¹⁰ In ruling on a directed verdict motion, a trial court draws all fair and reasonable inferences in favor of the Commonwealth, assumes all its evidence to be true, reserves weight and credibility determinations for the jury, and must deny the motion so long as there is sufficient evidence to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty.¹¹

A directed verdict motion for self-defense should only be granted in the rarest of circumstances and requires there to be no contradicting evidence, fact, or circumstance that the jury could reasonably conclude that some element of self-defense was lacking.¹² Clearly, the defendant has a high burden before a directed verdict for self-defense will be granted. We review this claim of error accordingly.

¹⁰ *Benham v. Commonwealth*, 816 S.W.2d 186, 187 (Ky. 1991).

¹¹ *Id.*

¹² *West v. Commonwealth*, 780 S.W.2d 600, 601 (Ky. 1989) (relying on *Townsend v. Commonwealth*, 474 S.W.2d 352 (Ky. 1971)).

We find sufficient evidence for a reasonable jury to conclude that Skinner was not acting in self-defense, and the trial court properly denied his motion.

At trial, the Commonwealth relied heavily on the surveillance video of the incident taken from Skinner's residence. Though blurry, the video showed the victim approaching Skinner, Skinner shooting a gun, the victim collapsing, the victim then retreating to his vehicle, and Skinner shooting twice more into the vehicle. The video, however, is not clear enough to prove that the victim was approaching Skinner in a manner that would lead him reasonably to believe he was acting in fear of imminent bodily danger.

Additionally, Skinner contends that the victim was approaching him not only aggressively, but with a knife. But the quality of the video footage is too poor to prove that claim. Overall, the lighting on the footage is dim, the images are fuzzy, and the video only shows each person's movements but not the details of bodily features. If, as Skinner contends, the victim had a knife and approached him in an aggressive manner, the video was not clear enough to show it. A reasonable juror could find that the victim was not holding a knife, was not approaching aggressively, and that Skinner was not acting in self-defense.

As previously mentioned, the testimony of the sole eyewitness, Day, does not completely support Skinner's defense. Day testified that the two men had been arguing, fought regularly, but he did not know Harrison customarily to carry a weapon. Importantly, he did not testify that Harrison approached Skinner with a knife or with any weapon. Day's testimony does support

Skinner's defense in some regards, but not enough to overcome the steep burden of a directed verdict for self-defense. The evidence presented was sufficient to allow a reasonable jury to consider whether Skinner's use of deadly force was unjustified. The trial court did not abuse its discretion in denying Skinner's motion for directed verdict.

C. Prosecutorial misconduct did not deprive Skinner of a fair trial.

Skinner argues misconduct by the Commonwealth resulted in a *Brady*¹³ violation that deprived Skinner of a fair trial. According to Skinner, the Commonwealth deprived him of exculpatory evidence, the police disposed of the exculpatory evidence, Detective Borders gave false testimony, and the Commonwealth elicited false testimony. This Court reviews claims of prosecutorial misconduct by focusing on the overall fairness of the trial and will only reverse the conviction if it finds the misconduct to be so improper, prejudicial, and egregious as to have undermined the overall fairness of trial.¹⁴ We find after reviewing all the circumstances that Skinner received a fair trial.

1. The Commonwealth did not fail to disclose material evidence to the defense.

Prosecutorial misconduct in the discovery process of a criminal trial can result in a violation of the defendant's due-process rights.¹⁵ A *Brady* violation occurs when the Commonwealth suppresses evidence that is material either to guilt or to punishment, irrespective of the good faith or bad faith of the

¹³ *Brady v. Maryland*, 373 U.S. 83 (1963).

¹⁴ *Brewer v. Commonwealth*, 206 S.W.3d 343 (Ky. 2006).

¹⁵ *Id.*

prosecution.¹⁶ A *Brady* violation also results when the government possesses integral information the defense does not and deprives the defendant of a fair trial.¹⁷ But, a *Brady* violation does not occur when the defense is aware of the allegedly suppressed information.¹⁸

Here, the Commonwealth did not improperly keep exculpatory evidence from Skinner. Most of the alleged misconduct by the Commonwealth relates to the existence of a utility knife found on Harrison's body. This knife was not found at the scene of the crime but was discovered later by the medical examiner during the autopsy. Four days after the incident occurred, Harrison's personal effects were returned to his family, including the knife. After the personal items were released, the Commonwealth turned over the remaining evidence of the knife's existence during discovery.

Although the knife itself was missing, which is an issue that will be discussed shortly, the defense had the autopsy report listing a utility knife as an item found on Harrison's body along with pictures of the knife's sheath that held it. The defense was aware the knife had been on Harrison's person when he died, what the knife's sheath looked like, and that it had been given back to the family. This information was properly disclosed to Skinner during the discovery process. Skinner was able to cross-examine Detective Borders about the knife and to raise doubt about the thoroughness of the Commonwealth's

¹⁶ *Commonwealth v. Parrish*, S.W.3d 694, 697 (Ky. 2015).

¹⁷ *Id.* at 698.

¹⁸ *Id.*

investigation. As previously mentioned, *Brady* concerns those instances in which the government possesses information that the defense does not have and then fails to disclose that information.¹⁹ Here, because there was no information withheld from the defense, no *Brady* violation occurred. Therefore, if prosecutorial misconduct occurred in Skinner's case, it was not a result of the Commonwealth's failure to disclose exculpatory evidence or information regarding it.

2. The trial court's finding that the Commonwealth did not act in bad faith by failing to preserve potentially exculpatory evidence was supported by substantial evidence.

Skinner argues his conviction must be reversed because the Commonwealth's failure to preserve evidence deprived him of a fair trial. We review a trial court's ruling on a failure to preserve evidence issue for clear error and we will uphold the finding so long as it is supported by substantial evidence.²⁰ To prove a failure to preserve evidence, the defendant must show the Commonwealth destroyed potentially useful evidence in bad faith.²¹ Deliberate conduct may result in a finding of bad faith, but mere negligence on

¹⁹ *Bowling v. Commonwealth*, 80 S.W.3d 405, 410 (Ky. 2002) ("Rather, *Brady* concerns those cases in which the government possesses information that the defense does not and the government's failure to disclose the information deprives the defendant of a fair trial.").

²⁰ *Garland*, 458 S.W.3d 781, 786 ("Substantial evidence is evidence, when taken alone or in light of all the evidence, which has sufficient probative value to induce conviction in the mind of a reasonable person.").

²¹ *Id.* at 786-87 ("Garland fails, however, to satisfy the first and most crucial prong of the *McPherson* test: bad faith on the part of the government.").

the part of the Commonwealth generally does not.²² If bad faith is shown, the potential prejudice can be cured with a missing-evidence instruction.²³

Four days after the shooting, Detective Borders returned the victim's inventoried belongings to his family. This included the utility knife that Skinner alleges the victim was holding as he approached and supports his claim that he was acting in self-defense. Skinner argues this was misconduct and constituted a violation of his due-process rights. The trial court found there was no misconduct by the Commonwealth because Detective Borders did not act in bad faith. The trial court gave a missing-evidence instruction nevertheless.

*Sanborn v. Commonwealth*²⁴ draws the clearest picture of bad-faith conduct in a failure to preserve evidence by the Commonwealth. In *Sanborn*, we held that a defendant's due-process and discovery rights were violated when the prosecutor deliberately erased witness-interview tapes to keep defense counsel from obtaining the statements contained in them.²⁵

By contrast, in *Garland v. Commonwealth*,²⁶ we upheld a trial court's finding that the Commonwealth had not acted in bad faith when two officers destroyed fingernail clippings in accordance with KSP procedure. The

²² *Collins v. Commonwealth*, 951 S.W.2d 569, 573 (Ky. 1997).

²³ *Gonclaves v. Commonwealth*, 404 S.W.3d 180, 197.

²⁴ 754 S.W.2d 534, 539-40 (Ky. 1988).

²⁵ *Id.* at 539.

²⁶ 458 S.W.3d 781 (Ky. 2015).

exculpatory nature of the evidence was not discovered before trial, but after.²⁷

That was substantial evidence that the officers were not acting in bad faith.²⁸

Similarly, in *McPherson v. Commonwealth*,²⁹ we upheld a trial court's decision to find the Commonwealth did not act in bad faith when a detective destroyed his preliminary notes once they had been incorporated into a draft of his report. As in *Garland*, we found this to be more a matter of routine housekeeping than the suppression of evidence.

We find the trial court in the present case did not err in finding there was no bad faith by the Commonwealth because there was a substantial basis for finding that Detective Borders returned the knife to victim's family out of negligence, and not deliberate misconduct. Skinner offered no evidence that Borders intentionally gave the knife to Harrison's family to deprive Skinner of its use in his defense but only speculates that the detective knew that the utility knife was a deadly weapon that would provide credibility to his defense.

Detective Borders testified that he did not check the victim's belongings before returning them to the family and that he personally did not think the knife to be a deadly weapon, but rather an ordinary pocketknife. Also, Borders's testimony regarding the crime scene indicated that the knife was not found immediately upon viewing the victim's body but was found later by the medical examiner, sheathed and in Harrison's pocket. Additionally, the

²⁷ *Id.* at 786.

²⁸ *Id.*

²⁹ 360 S.W.3d 207, 217 (Ky. 2012).

Commonwealth contends that Detective Borders did not consider the knife critical to Skinner's defense because within the four days between the crime and the release of the belongings, Skinner had not mentioned that the victim brandished a knife but only that he was acting in self-defense because of the way the victim approached him. This fact further supported the trial court's conclusion that Borders negligently disposed of the knife because he was unaware of its potential as exculpatory evidence.

Evidence of bad faith must go beyond mere speculation.³⁰ We are unwilling to say the trial court erred by concluding that the Commonwealth did not intentionally deprive Skinner of potentially exculpatory evidence.

Returning personal effects to the family is a common police procedure. And, as the trial court found it was negligent for Detective Borders to not check the victim's belongings before returning them. But we cannot say this approaches the intentional conduct we found in *Sanborn*. The knife lends some support to Skinner's claim of self-defense, but the trial court did not clearly err by finding that Detective Borders did not act in bad faith because substantial evidence supported the conclusion it was a result of negligence.

Importantly, the trial court gave the jury a missing-evidence instruction despite not finding bad faith. The missing-evidence instruction allowed the jury to infer the absent item would be favorable to the defendant's case.³¹ While it is impossible to gauge the effect of exhibiting the knife would have had

³⁰ *McPherson*, 360 S.W.3d at 217-18.

³¹ *Swan v. Commonwealth*, 384 S.W.3d 377, 391 (Ky. 2012).

on the success of Skinner's claim of self-defense, it cannot be said that he was denied a fair trial because of its absence.

3. Detective Borders did not give false testimony.

Skinner's third claim of prosecutorial misconduct arises from Detective Borders's testimony. Detective Borders testified at the preliminary hearing, before the grand jury, and at trial. At the preliminary hearing, he testified that the victim did not appear to be armed at the scene.³² Before the grand jury, he testified that Skinner made two statements to police: (1) that he did not know Harrison to carry a weapon and (2) that he did not believe the victim to be armed at the time. Additionally, before the grand jury, Detective Borders stated that the victim did not possess a weapon and Skinner would have never seen a gun. Borders testified to the same facts at trial that he relayed to the grand jury.

a. Borders's Grand Jury Testimony

Skinner argues that Detective Borders's grand jury testimony was false because the medical examiner found the knife on Harrison's body. Skinner's argument centers around the following statement made by Detective Borders to the grand jury:

Commonwealth: You didn't find any weapon in the car of the victim or on the person of the victim or anything like that?

Borders: He did not possess any weapon on him. In the vehicle, in the rear of the vehicle, there was an air rifle but that was not apparent. That had to be . . . we had to find that when we searched the vehicle.

³² The defense does not take issue with Det. Borders's preliminary hearing testimony.

In analyzing claims of false testimony, the Court must analyze three factors: (1) Was the testimony false? (2) If the testimony was false, was it material? and (3) Did the prosecution know it was false?³³ If the Court answers these three questions in the affirmative, the conviction must be reversed.³⁴ In *Commonwealth v. Baker*, the Court of Appeals stated, "Generally, a defendant must demonstrate a flagrant abuse of the grand jury process that resulted in both actual prejudice and deprived the grand jury of autonomous and unbiased judgment."³⁵

We find Detective Borders's grand jury testimony not falsified because his testimony relayed what he thought at that time to be true. Borders did not see a weapon on the victim at the crime scene. Additionally, in Skinner's initial statements to police he did not say that the victim approached him with a knife. Instead, Skinner said he had to defend himself because of the way that the victim approached him, the look in his eyes, and the way the victim raised his hands. Additionally, when asked if he thought Harrison had anything in his hands, he shook his head and said "I . . . I don't know."³⁶ Borders testified that the victim did not have a weapon on his person when they removed him from the car.³⁷ This is true testimony because Detective Borders himself did

³³ *Commonwealth v. Baker*, 11 S.W.3d 585, 590-91 (Ky. App. 2000).

³⁴ *Id.*

³⁵ *Id.* at 588.

³⁶ VR: 8/14/19 1:43:11; 2:19:54.

³⁷ Skinner does not contend that Harrison had an air rifle. The air rifle was found at the scene during the search of the vehicle, not when the body was removed.

not find a knife on the victim, even though a knife was later found during the autopsy.

While the testimony presented to the jury is arguably misleading, it cannot be said to be false, and the Commonwealth is under no duty to present exculpatory evidence to the grand jury. As we have held, if the Commonwealth's duty was to "present exculpatory as well as inculpatory evidence" it "would alter the grand jury's historical role, transforming it from an accusatory to an adjudicatory body."³⁸ Furthermore, a grand jury proceeding requires only a finding that the evidence supports an indictment for the crimes charged.³⁹ If the grand jury had been told that a knife was found later in the victim's belongings, it is hard to say this would have changed their decision to charge Skinner. The fact the grand jury did not hear that a knife was later found on the victim was likely immaterial.

b. Borders's trial testimony was not false.

As previously discussed, to establish prosecutorial misconduct the defendant must show (1) the statement was false; (2) the statement was

Borders's grand jury testimony relays this fact. At trial, when Borders was specifically asked if any weapons were found on Harrison when they removed him from the vehicle, he stated "Certainly no firearms and I don't believe there were any weapons of any type."; VR 8/13/19 11:23:20.

³⁸ *Baker*, 11 S.W.3d at 591 (quoting *United States v. Williams*, 504 U.S. 36, 51, 112 S.Ct. 1735, 1744, 118 L.Ed.2d 352 (1992)).

³⁹ *Rice v. Commonwealth*, 387 S.W.2d 4, 5 (Ky. 1965) ("The grand jury proceeding is not a trial. Such a body does nothing more than accuse a person of the offense he is alleged to have committed. The grand jury is merely required to find an indictment where they have received what they believe to be sufficient competent evidence to support it."); Kentucky Rules of Criminal Procedure 5.10.

material; and (3) the prosecution knew it was false.⁴⁰ If there is a reasonable likelihood that perjured testimony affected the judgment of the jury, then the defendant's due process rights have been violated and a new trial must be ordered.⁴¹

Detective Borders testified at trial that he did not find a knife on the victim's body. When asked if any weapons were found on Harrison's body at the scene of the crime, Borders stated: "There were certainly no firearms and I don't believe there were any weapons of any type."⁴² The prosecution then asked him to read the list of items returned to Harrison's family that revealed the knife listed as one of his personal effects found during the autopsy. This fact was also disclosed during the medical examiner's testimony as was a photograph of the sheath containing the knife.

The defense argues that Borders's testimony about not finding a knife was false because it was found during the autopsy. Additionally, the defense argues that the Commonwealth elicited false testimony. As discussed previously, Detective Borders's testimony was not false because he himself did not observe the knife at the scene. While the fact the knife was found during the autopsy was never revealed to the grand jury, at trial, immediately after

⁴⁰ *Commonwealth v. Spaulding*, 991 S.W.2d 651, 654 (Ky. 1999) (quoting *United States v. Lochmondy*, 890 F.2d 817, 822 (6th Cir. 1989)).

⁴¹ *Id.* at 655-66 ("When [such] perjured testimony could 'in any reasonable likelihood have affected the judgment of the jury,' the knowing use by the prosecutor of perjured testimony results in a denial of due process under the Fourteenth Amendment and a new trial is required." (quoting *Giglio v. United States*, 405 U.S. 150, 153, (1972)).

⁴² VR: 8/13/19 11:23:10.

Detective Borders answered that he did not find the knife, the Commonwealth drew Borders's attention to the list of items contained in the medical examiner's report, which disclosed that the victim did have the knife in his possession when he died. Additionally, the picture of the knife sheath was shown during the medical examiner's testimony. The defense was aware of the knife, used the presence of the knife to aid its defense of self-defense, and no false testimony was presented that compromised Skinner's right to a fair trial.

D. The surveillance video and 911 call recording were properly authenticated.

We review preserved trial errors for abuse of discretion and will uphold the trial court's ruling unless unreasonable, arbitrary, or unsupported by law.⁴³ Under KRE 901, evidence is properly authenticated when the proponent offers enough proof for a reasonable jury to conclude the item is what it is proposed to be.⁴⁴ The burden lies with the proponent and must provide *prima facie* evidence of authentication.

In *Litton v. Commonwealth*,⁴⁵ we found surveillance photographs to be properly authenticated when the store owner identified the photos as fair and accurate representation of the location, explained how the cameras operated, and testified that the store owner had removed the film, sent it to the installer, and received the pictures from it.⁴⁶

⁴³ *Johnson v. Commonwealth*, 134 S.W.3d 563, 566 (Ky. 2004).

⁴⁴ Kentucky Rule of Evidence 901.

⁴⁵ 597 S.W.2d 616, 618-620 (Ky. 1980).

⁴⁶ *Id.* at 619-20.

1. The surveillance video was properly authenticated.

As in *Litton*, we find the Commonwealth provided sufficient evidence to authenticate the video as a recording of the alleged offense. Skinner argues that the Commonwealth's authentication was insufficient because the mechanical workings of the camera were explained at trial. But Detective Borders testified that he saw the cameras as he patrolled the scene, found the control unit for the camera inside Skinner's house, and made a copy of the video from the control unit. This was sufficient to allow the jury to find the video was what it was purported to be. So the trial court did not err in finding the video properly authenticated.

Additionally, Skinner does not contest the accuracy of the video footage. In *Litton* the defendant also did not argue the photos were fake, and we stated, "In the absence of a showing of irregularity in the production of a proffered photograph, we need not set up 'unrealistic roadblocks' and 'deprive the trier of the facts of evidence not subject to the foibles of the imperfect memories and the passions and prejudices of human witnesses.'⁴⁷ Here, Skinner only contests that Detective Borders did not testify to facts like the camera's recording capabilities and technical workings. While these are facts relevant to authenticating the video, in this instance, these specific questions would have only provided additional evidence of authentication and the credibility and weight the jury should give to the video. Further, while Detective Borders's

⁴⁷ *Litton*, 597 S.W.2d at 620 (quoting *United States v. Hobbs*, 403 F.2d 977, 978-79 (6th Cir. 1968)).

testimony provided prima facie evidence of authentication, the jury also viewed Skinner's post-arrest interview in which he stated his surveillance camera had a 30-day recording span and that it was accessible with a computer mouse and remote. In sum, Detective Borders's testimony provided the jury with enough information reasonably to conclude the video was what it was purported to be.

2. The recording of the 911 call was properly authenticated.

Skinner argues the Commonwealth failed to provide prima facie evidence of the authenticity of his 911 call following the altercation. We review preserved trial court evidence rulings for abuse of discretion and will affirm the ruling unless it is arbitrary, unreasonable, or unsupported by law.⁴⁸ Like the surveillance video, we find the recording of Skinner's 911 call was properly authenticated under KRE 901.

The Commonwealth authenticated the call through the testimony of a 911 dispatcher. The dispatcher explained how 911 calls are maintained and how they are kept in their regular course of business. She testified how the calls were stored in the archives, how she retrieved the recording from the archives, and how she identified the call based on the name, address, or the computer-aided dispatch (CAD) report number. Further, she explained that she found the call and made a copy of it to a CD after listening to it and verified the CD was a copy of the call. This testimony authenticated the phone call, as

⁴⁸ *Johnson*, 134 S.W.3d at 566.

it provides prima facie evidence that this is the call Skinner made to 911 the night of the incident.

Additionally, while Skinner does not argue the recording is false, it should be noted that additional credibility and authentication were provided by the statements contained in the phone call itself.⁴⁹ The dispatcher asks the caller to identify himself, to give his phone number and address. The caller identifies himself as "Farand Owen Skinner III" and recites his phone number and address. The jury would have been able to compare the voice on the recording to Skinner's voice in his interview tape and his voice at trial. This provided additional assurance that the 911 recording offered at trial was the phone call Skinner made to police following the incident.

III. CONCLUSION

For the reasons explained above, we affirm the judgment.

All sitting. All concur.

⁴⁹ Kentucky Rule of Evidence 901(b)(5) ("Voice identification." Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.)

COUNSEL FOR APPELLANT:

David Bradley Mour
Law Office of David B. Mour

Gregory Dean Simms
Murphy & Associates

COUNSEL FOR APPELLEE:

Daniel J. Cameron
Attorney General of Kentucky

Jesse Leo Robbins
Assistant Attorney General

Supreme Court of Kentucky

2019-SC-0589-MR

FARAND SKINNER

APPELLANT

v.

ON APPEAL FROM BRECKINRIDGE CIRCUIT COURT
HONORABLE KENNETH H. GOFF, II, JUDGE
NO. 18-CR-00012

COMMONWEALTH OF KENTUCKY

APPELLEE

ORDER

Appellant Farand Skinner's motion for leave to file an untimely petition for rehearing and for modification of the Court's March 11, 2021 Opinion is DENIED.

Keller, Lambert, Nickell, and VanMeter, JJ., sitting. All concur.

ENTERED: September 16, 2021



John D. Hartman
CHIEF JUSTICE

APP. 27

COMMONWEALTH OF KENTUCKY
BRECKINRIDGE CIRCUIT COURT
HON. HAROLD GOFF
CASE NO.: 18-CR-00012

| |
|-----------------------------|
| FILED |
| CIRCUIT/DISTRICT COURT |
| AUG 23 2019 |
| CINDY M. RHODES, CLERK |
| BY: <i>[Signature]</i> D.C. |

COMMONWEALTH OF KENTUCKY

PLAINTIFF

v.

**DEFENDANT'S MOTION FOR NEW TRIAL PURSUANT TO
RCr 10.02 AND/OR FOR JUDGMENT OF ACQUITTAL
NOTWITHSTANDING THE VERDICT PURSUANT TO
RCr 10.24 AS PER RCr 10.06 AND 10.26**

FARAND SKINNER

DEFENDANT

NOTICE

Take notice that the undersigned attorneys will make the following Motion and tender the Order attached in the courtroom of the above court on September 18, 2019 at 9:00 a.m.

MOTION

Comes the Defendant, Farand O. Skinner ("Skinner"), by counsel, and moves the Court for a new trial as per RCr 10.02 and/or for judgment of acquittal notwithstanding the verdict as per RCr 10.24. This motion is also made under authority of RCr 10.06 and RCr 10.26, based on the fact palpable error was committed numerous times by the Trial Court. Pursuant to RCr 10.26, substantial and palpable error was committed during trial which affects Skinner's substantial rights, and a new trial is required in the interest of justice. In the alternative, if the verdict stands and a new trial is not ordered, the evidence presented was insufficient to support a finding of guilty

511

APP. 28

on the Count of the Indictment on which Skinner was convicted, and thus the verdict of guilty on said Count, Murder, should be set aside and judgment of acquittal entered. In support of his motion, Skinner states as follows:

I. FACTS

As the Court is aware, this matter was tried to a jury on August 12-15, 2019. Skinner was charged with and indicted for Murder, concerning the death of Paul Harrison.

The charges against Skinner set forth in the Indictment arose out of an altercation with Paul Harrison, at Skinner's home, on November 8-9, 2017. At trial, text message records were introduced, revealing a series of threats sent from Harrison to Skinner, the week prior to the altercation. Within those threats, Harrison indicated he would "knock [Skinner's] teeth down [his] throat"; things were going to "get physical"; Harrison wasn't "afraid of no gun" and that Harrison was going to "take it to the extreme." There were no threats of physical harm from Skinner to Harrison.

Teddy Day was called by the prosecution as a witness to the events. Day was a passenger in Harrison's vehicle when he drove to Skinner's home on the night of November 8, 2017, ostensibly, to carry out his threats of violence to Skinner. Day testified that on the night of Harrison's death, Harrison was "real aggravated and mad"; that Harrison was "hurt but hurt for no reason"; and was putting off some "intense vibes." When Harrison got out of the vehicle, he went "charging" toward Skinner and made a threat to "kill" Skinner.

Skinner told police that he killed Harrison in self-defense. According to Skinner in his police interview, he feared for his life and safety. After Skinner shot Harrison and Harrison dropped to the ground, Harrison then scrambled back to his vehicle. Skinner told police that he was concerned Harrison would use the vehicle to strike him, and so he fired the final shot, killing

52

APP. 29

Harrison. The vehicle in which Harrison died was found by police to be in "neutral" and not "reverse." The vehicle did, in fact, roll forward and toward the general direction of Skinner.

Two critical items of evidence were erroneously admitted by the Trial Court. First, a "911" call made by Skinner after Harrison's death was admitted into evidence. Second, a video of the altercation recorded by equipment owned by Skinner and installed on his residence was also admitted. Finally, there was also prosecutorial and police misconduct brought to light which should, in and of itself, have resulted in a dismissal per *Brady v. Maryland* and Kentucky caselaw.

All of these facts, notwithstanding, the Trial Court allowed the case to go to the Jury, which found Skinner Guilty of Murder.

The following sections will address Mr. Skinner's arguments, starting first with his motion for a new trial pursuant to CR 10.02 and continuing thereafter with the motion for judgment of acquittal notwithstanding the verdict of guilty on the Murder charge. As the Court will see, some of the issues are inextricably intertwined.

II. ARGUMENT

A. RCr 10.02—New Trial—Concerning the errors alleged herein, it is important to note that the Commonwealth conceded to the Court that the most "important" two pieces of evidence presented were (1) the "911" call (which was actually a call by Skinner to dispatch); and (2) the video of the actual shooting (as noted, filmed on Skinner's home security system).

i. Audio of the "911" call was Erroneously Admitted

During the Commonwealth's case in chief, Commonwealth called an employee of Breckinridge County 911 Dispatch. However, the Commonwealth did NOT produce the employee who actually took the call from the Defendant. The Commonwealth was only able to establish a

OP

APP. 30

limited amount of information: 1) That calls received by the 911 call center generate a "CAD report" and one was created in this case. 2) That the CAD report lists the time the call was made and the phone number that the call came from. 3) That the CAD report for this case had Skinner's address listed (although the employee could not testify whether that was automatically generated by the system or whether some employee wrote that information down).

Thus, although the employee called by the Commonwealth had some technical information to provide, that employee could *not* testify that the recording itself truly and accurately reflected the conversation that occurred in the early morning hours of November 9, 2017. The 911 call was admitted over Defense objection. Unquestionably, the Commonwealth failed to authenticate this all-important piece of evidence as required by KRE 901.

ii. **Video of the shooting was Erroneously Admitted**

The Commonwealth also introduced a video from Skinner's home security system which purported to be the actual footage of the shooting in this case. The witness through which the Commonwealth admitted this video was Det. Ken Borders (hereinafter, "Borders") of the Kentucky State Police ("KSP"). Borders was unfamiliar with the home video system. He testified that he did not have any technical information about the recording system, and when asked if he knew if the playback from the video was in real time, 1.1, 1.2, 1.5x, etc., Borders testified that he did not know.

There was literally no attempt to authenticate the video. In fact, the Commonwealth never even asked Borders, or any other witness whether the video truly and accurately reflected the events/shooting that occurred on the day of the incident? Further, Borders never volunteered any such statement. The Defendant challenged the authenticity of the video and objected to its

514

APP. 3)

admission. The Court admitted the video over Defense objection, notwithstanding, there was an utter failure to authenticate the same, as required by KRE 901.

In short, not only was the most important piece of evidence in this case offered without authentication, it was offered without the Commonwealth even *attempting* an authentication.

iii. *Brady* Violations

Defendant discovered and raised the serious *Brady* violations during the course of the trial. Specifically, the Commonwealth, through KSP, failed to preserve and make available for inspection a crucial piece of exculpatory evidence, the weapon (knife) found on the deceased. Four days after the death of Paul Harrison, Borders admitted he released the knife, along with some other personal belongings, to the family of Paul Harrison. Borders took this action without any Court Order authorizing the release destruction of evidence. The failure to disclose the existence of the knife and to maintain and make available this exculpatory evidence, was a significant discovery violation -- especially considering the Defendant in this case maintained the shooting was self-defense during his entire police interview, not to mention a violation of *Brady* meriting dismissal.

The fact that Borders released the knife, however, was only the second incidence of police misconduct.

To compound the misconduct, at the Grand Jury Proceeding, Borders also testified “[Harrison] -- he did not possess any weapon on him.” GJ at p. 10. It is important to note that at the time, Borders knew of the existence of, and had already disposed of, the knife. The disposal of the knife occurred in November 2017 – however, Borders did not testify in front of the Grand Jury until months later.

Although the Commonwealth knew or should have known Borders' testimony that Harrison "did not possess any weapon on him" was false, the Commonwealth made no effort whatsoever to correct same. As this Court full well knows, the Commonwealth was under an affirmative obligation to disclose to the Defendant that Borders made false statements to the Grand Jury, action it failed to take.

As if the above weren't bad enough, during his direct examination at trial, Borders repeated the untrue statement he provided to the Grand Jury, again testifying that Harrison had no weapon on him at the time of his death. The Commonwealth most certainly had the knowledge that Borders falsely stated Harrison had "no weapon" on him to the Grand Jury. And the Commonwealth knowingly put a witness, Borders, on the stand for the purpose of eliciting testimony the Commonwealth knew to be false! This instance of prosecutorial misconduct alone, again, merited a dismissal on *Brady* violation grounds.

To further compound the misconduct, at the Grand Jury Proceeding, Borders testified, "[Skinner] did make the statement to the detectives that interviewed him that he had -- he did not expect Mr. Harrison to be armed, did not know Mr. Harrison to carry a weapon, had never known Mr. Harrison to carry a weapon." GJ at 10. Those statement, as later admitted by Borders at trial, were false.

Upon cross-examination by Skinner's counsel, Borders admitted that Skinner was never even asked if he knew Harrison to carry weapons, or if he expected Harrison to be armed, and acknowledged the existence of the knife -- the details of which he could not recall.

The Commonwealth had a duty to disclose that Borders made these false statements to the Grand Jury. After all, the fact that Borders made false statements under oath in these proceedings, in itself, is exculpatory evidence regarding Borders' credibility. And the Commonwealth failed to

516

APP. 33

turn over that evidence. Even worse, Borders disposed of a piece of evidence critical to the Defense and failed to be candid regarding same. Under the circumstances, a new trial is warranted.

B. RCr 10.24- Entry of Judgment of Acquittal on Murder

As a prerequisite to this Motion, as required by RCr 10.24, Mr. Skinner, by counsel moved the Court for a directed verdict of acquittal at the close of the Commonwealth's proof and again at the close of all proof on the single count Indictment, thus, this Motion is proper. The reasons the Court should have granted Mr. Skinner's motion for directed verdict of acquittal and should now grant judgment notwithstanding the verdict are numerous:

i. Discovery Violations and Prosecutorial Misconduct

The above conduct of the Commonwealth and its Attorney, considered as individual acts or as a whole, constituted clear violations of RCr 7.24 and 7.26, *Brady v. Maryland*, 373 U.S. 83 (1963) as well Mr. Skinner's rights under Due Process and 6th Amendment rights incorporated therein, and in the Kentucky and U.S. Constitutions. In response to which, the Court inexplicably took no action. RCr 7.24(11) provides the Court with a number of remedies when discovery violations are brought to its attention, those remedies including exclusion of evidence, extending even to dismissal of charges. Despite numerous timely motions to dismiss made by Skinner's counsel— and acknowledgment that there were in fact discovery violations— the Court afforded Skinner not a single remedy; rather, the Court simply opted to press on with trial.

Accordingly, for the grounds above stated, the Court should dismiss the charges against Skinner and/or enter judgment of acquittal to the charge of Murder. In the alternative, a new trial should be ordered on the charge of Murder, as set forth above.

517

APP. 34

ii. **Sufficient Evidence Was Not Presented By the Commonwealth to Allow the Case to Go to the Jury and the numerous Motions for Directed Verdict of Acquittal Should Have Been Granted**

As noted by Mr. Skinner's counsel numerous times, a Judgment of Acquittal should have been granted Mr. Skinner. In addition to that as above discussed, the Commonwealth's case against Mr. Skinner failed for a number of other critical reasons:

- a. Not a single witness identified Mr. Skinner in the courtroom. This is a fatal flaw in the Commonwealth's case and, alone, merits a judgement of dismissal/acquittal notwithstanding the verdict.
- b. Similar to the fatal flaw in the Commonwealth's failure to identify Mr. Skinner in the court room, there was also a jurisdictional failure in the form of a failure on the part of the Commonwealth to prove venue. This is also a fatal flaw in the Commonwealth's case; *i.e.*, as a matter of law, the Commonwealth failed to prove a second element of the Indictment, *i.e.*, the offence occurred in Breckinridge County, Kentucky. The Court should grant a judgment of dismissal/acquittal notwithstanding the verdict and dismiss the case against Mr. Skinner with prejudice.
- c. The Commonwealth conceded the motive for killing was "fear" for Skinner's life and safety. When asked if, in the course of his investigation, at any time, did he receive any evidence of another motive (for example, anger, jealousy, or financial gain), Borders conceded, "No."

The Jury Instructions in this case correctly indicated the Commonwealth had the burden to prove 1) Skinner intentionally killed Paul Harrison; AND 2) that in so doing, he was not privileged to act in self-defense. Through Detective Borders, the Commonwealth conceded the motive for

518

APP. 35

killing Harrison was fear for Skinner's life and safety, i.e., Self-Defense. Further, the Commonwealth offered no other evidence of any motive, *other than* self-defense.

Kentucky self-defense law is measured in a subjective standard, from the standpoint of the person using defensive force.

When determining whether to issue a directed verdict of acquittal, the Court must take the facts in the light most favorable to the non-moving party. Nevertheless, the Commonwealth, in order to survive a motion for directed verdict, must put forth at least some evidence on each element. In this case, no evidence was put forth by the Commonwealth that Skinner did not believe that his life was in danger and in fact, zero evidence was introduced regarding any motive other than self-defense.

Accordingly, the case should have been dismissed with prejudice based on the arguments set forth in this section and made at trial by Counsel for Mr. Skinner. Accordingly, there simply was not sufficient evidence to support the jury's verdict of guilty, and that verdict and judgment should be vacated and set aside and a judgment of acquittal entered as per RCr 10.24.

Respectfully submitted,

GREGORY D. SIMMS, Esq.
Murphy & Associates, PLC
513 S. Second St.
Louisville, KY 40202
(502) 618-4949

DAVID B. MOUR, Esq.
513 S. Second St.
Louisville, KY 40202
(502) 693.1968
ATTORNEYS FOR DEFENDANT,
Farand Skinner

519

APP. 36

CERTIFICATE OF SERVICE

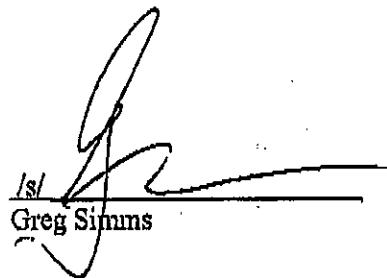
This is to certify that a true copy of the foregoing Motion, Notice and tendered Order was forwarded via U. S. Mail, postage prepaid and/or facsimile and/or via electronic mail on the 22nd day of August, 2019 to the following persons:

Hon. Judge Harold Goff
500 Carroll Gibson Blvd.
Leitchfield, KY 42754

Hon. Robert Schaefer
125 East White Oak Street
Leitchfield, KY 42754

and the original to:

Clerk, Breckinridge Circuit Court
111 W. 2nd St.
P.O. Box 111
Hardinsburg, KY 40143


/s/
Greg Simms

520

APP. 37

COMMONWEALTH OF KENTUCKY
46TH JUDICIAL DISTRICT, DIVISION II
BRECKINRIDGE CIRCUIT COURT
CRIMINAL FILE NO. 18-CR-00012

COMMONWEALTH OF KENTUCKY

PLAINTIFF

VS.

ORDER

FARAND O. SKINNER, III

DEFENDANT

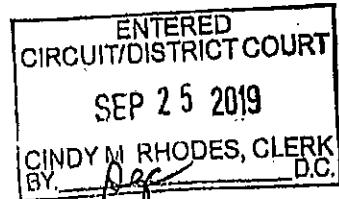
This matter having come before the Court upon Defendant's motion for a new trial and/or for Judgment for acquittal notwithstanding the verdict and the Court having reviewed the Defendant's motion and the Commonwealth's objection finds that the trier of fact found the Defendant, Farand O. Skinner, III guilty of Murder. THEREFORE

IT IS HEREBY ORDERED as follows:

1. That Defendant's motion for a new trial and/or for judgment of acquittal notwithstanding the verdict shall be and is hereby overruled.
2. That there being no delay in its entry, this is a Final and Appealable Order.

Dated this 24 day of September 2019.

KENNETH HAROLD GOFF, II
BRECKINRIDGE CIRCUIT COURT
DIVISION II



APP. 38