Case No. 12-CR-00238

(5)

(6)

A. Defendant is sentenced to:

1. Courts Costs, Restitution, Fees and Fines

Defendant is ORDERED to pay:

[ ] Court Costs of $100 (plus $25.00 Court Facilities Fee, if applicable).

[ ] Restitution in the amount of $ _____.

[ ] Fees in the amount of $ _____.

[ ] Fine(s) in the amount of $ _____.

2. Method of Payment

[X] Court Costs are **WAIVED** due to Defendant having been found to be a "poor person" under KRS 453.190(2).

[ ] **At time of SENTENCING**, all Court Costs, Restitution, Fees and Fines shall be paid in full.

[ ] **Payment is DEFERRED.** All amounts shall be PAID IN FULL by _____, 2____.

[ ] An **INSTALLMENT SCHEDULE IS ESTABLISHED.** Beginning _____, 2____, Defendant is **ORDERED** to pay $_____ [ ] weekly [ ] every other week [ ] monthly [ ] other _____ until paid in full.

3. Directions for Payment of Restitution

As specified in KRS 532.032 and 532.033, Defendant shall pay restitution pursuant to these conditions:

Restitution shall be paid through the

[ ] Circuit Court Clerk with a 5% service fee;

[ ] County Attorney; **OR**

[ ] Commonwealth's Attorney

for the benefit of (*name of specific person or organization*) _____

_____

4. Imprisonment

In addition to any monetary amount specified above, Defendant is sentenced to:

[X] imprisonment for a maximum term of 27.5 years [ ] probated OR [ ] probated with an alternative sentence as stated in the attached Order of Probation. (No fine imposed on KRS Chapter 31 indigent defendant).

[ ] imprisonment for a maximum term of _____ conditionally discharged as stated in the attached Order of Conditional Discharge. (No fine imposed on KRS Chapter 31 indigent defendant).

[X] imprisonment for a maximum term of 27.5 years in _____ (institution) to run [X] concurrently [ ] ~~consecutively with a sentence previously imposed on~~ _____

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Case No. 12-CR-00238

On 11/5-, 2012, the case was tried before a jury which returned the following verdict:

	Charge	Sentence
(1)	Complicity to Murder	20-5 years Concurre
(2)	Complicity to Murder	20-5 years Concurre
(3)	Robbery 1st Degree	15 years Concurre
(4)	Burglary 1st Degree	15 years Concurre
(5)		
(6)		

For the purpose of **sentencing**, Defendant appeared in open court on 1-2, 2013,
[ ] without counsel [X] with counsel, Honorable Paul Cox.
The Court inquired of Defendant (and counsel, if any) whether there was any legal cause why judgment should not be pronounced, and afforded Defendant (and counsel, if any) the opportunity to make statements in Defendant's behalf and to present any information in mitigation of punishment. The Court informed Defendant (and counsel, if any) of the factual contents and conclusions contained in the written Presentence Investigation Report (PSI) prepared by the Division of Probation and Parole and provided Defendant's attorney (if any) with a copy of the PSI although not the sources of confidential information. Defendant [X] agreed with the factual contents of the PSI **OR** [ ] was granted a hearing to controvert factual contents of the PSI. Having given due consideration to the PSI prepared by the Division of Probation and Parole, and to the nature and circumstances of the crime, as well as the history, character and condition of Defendant, and any matters presented to the Court by the Defendant (or counsel, if any) **the Court finds:**

[X] the Victim suffered death or serious physical injury;
[X] imprisonment is necessary for protection of the public because:
- [X] there is a likelihood that during a period of probation with an alternative sentencing plan or conditional discharge Defendant will commit a Class D or Class C felony or a substantial risk that Defendant will commit a Class B or Class A felony;
- [X] Defendant is in need of correctional treatment that can be provided most effectively by the defendant's commitment to a correctional institution;
- [X] probation, probation with an alternative sentencing plan, or conditional discharge would unduly depreciate the seriousness of the Defendant's crime;
- [X] Defendant is ineligible for probation, probation with an alternative sentencing plan, or conditional discharge because of the applicability of KRS 532.080, KRS 439.3401, or KRS 533.060;

[ ] Defendant is eligible for probation, probation with an alternative sentencing plan, or conditional discharge as hereinafter ordered on AOC-455.

Insufficient cause having been shown why judgment should not be pronounced, it is ADJUDGED BY THE COURT that Defendant is **GUILTY** of the following charge(s):

(1) Complicity to Murder
(2) Complicity to Murder
(3) Robbery 1st Degree
(4) Burglary 1st Degree

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B. It is ORDERED that Defendant's bond:

[ ] be released. If bond was posted by Defendant, bond [ ] shall be [ ] shall not be applied to payment of remaining fines and costs; [ ] other _____.

[ ] is not released until [ ] further order of the court; [ ] payment of all fines and costs; [ ] other _____.

C. It is further ORDERED that:

[ ] upon release from incarceration or parole, Defendant, being found guilty of a felony under KRS Chapter 510, 530.020, 530.064, or 531.310, is sentenced to a three-year period of **conditional discharge.**

[ ] pursuant to KRS 17.510(2) Defendant has been convicted of a sex crime or a crime against a minor, or has been committed as a sexually violent predator, and has been informed of the **duty to register** with the appropriate local Probation and Parole Office. (See JC-4).

[ ] Defendant shall not be released from probation supervision until **restitution** has been paid in full and all other aspects of probation have been successfully completed.

[ ] by a preponderance of evidence, the Court finds **hate was a primary factor** in the commission of the crime by the Defendant. KRS 532.031(2).

[ ] being sentenced to a term of incarceration for a nonstatus juvenile offense, moving traffic violation, criminal violation, misdemeanor, or Class D felony, Defendant is ordered to pay **costs of incarceration** in the amount of $ _____ as allowed by KRS 532.352. Said costs shall be reimbursed to (*specify state or local government*) _____.

[X] Defendant shall be delivered to the custody of the Department of Corrections at such location within this Commonwealth as Corrections shall designate.

[ ] pursuant to KRS 17.170, Defendant having been convicted of a felony offense under KRS Chapter 510 (Sexual Offense) or KRS 530.020 (Incest), shall have a **sample of blood** taken by the Department of Corrections for DNA law enforcement identification purposes and inclusion in law enforcement identification databases.

[X] Defendant is hereby **credited with time spent in custody prior to sentencing**, namely 605 days as certified by the jailer of Hancock County towards service of the maximum term of imprisonment (or toward payment of a fine at the rate of $5.00 per day). RCr 4.58.

Date: 1-2, 2013 _____ **Judge**

Copies to: Defendant / Attorney Sheriff (2 Certified copies if Defendant sentenced to death or confinement)
Principal, _____ School (If Defendant is youthful offender)

SHERIFF'S RETURN

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[ ] Served on Defendant named herein this _____ day of _____, 2____.

[ ] Not served because: _____

_____ Officer

Fairchild v. Commonwealth, 2015 Ky. Unpub. LEXIS 55

Supreme Court of Kentucky August 20, 2015, Rendered 2013-SC-000024-MR

Reporter 2015 Ky. Unpub. LEXIS 55 *
RONALD CHRISTOPHER FAIRCHILD, APPELLANT v. COMMONWEALTH OF KENTUCKY, APPELLEE
Notice: THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE.
Subsequent History: Post-conviction relief denied at Fairchild v. Commonwealth, 2020 Ky. App. Unpub. LEXIS 527 (Ky. Ct. App., Aug. 14, 2020)
Prior History: [*1] ON APPEAL FROM ROWAN CIRCUIT COURT. HONORABLE WILLIAM B. MAINS, SPECIAL JUDGE. NO. 12-CR-00238.

Opinion

MEMORANDUM OPINION OF THE COURT
AFFIRMING

A circuit court jury convicted Ronald Christopher Fairchild of two counts of complicity to commit murder and one count each of first-degree robbery and first-degree burglary. Following the jury's recommendation, the trial court ordered Fairchild's sentences to be served concurrently for a total of twenty- seven-and-a-half years' imprisonment. Fairchild appeals the resulting judgment as a matter of right.1

Fairchild's appeal presents numerous allegations of error. He claims the trial court erred by: (1) denying his motion to suppress his confession and permitting the Commonwealth to play for the jury the original version of the videotape of that confession; (2) failing to grant his motion for a continuance; (3) failing to excuse for cause five prospective jurors; (4) permitting a witness's wife to testify that he had previously told her the same version [*2] of events he testified to at trial; (5) allowing testimony of an incriminating statement made by Fairchild despite evidence that the declarant conceded she may have imagined it in a dream; and (6) failing to provide a facilitation-to-murder instruction as a lesser-included offense of complicity to commit murder. We affirm Fairchild's convictions because none of his arguments merit reversal.

I. FACTUAL AND PROCEDURAL HISTORY.

Donald Walker and his girlfriend, Marlene Mauk, were killed by multiple gunshots fired into their bodies at close range during a robbery of Walker's trailer in rural Fleming County, Kentucky.2 Six years after the bodies were discovered, investigators charged Jason Jackson and Rodney Dodson and arrested them in Ohio. These two suspects quickly gave statements implicating Fairchild, who was soon arrested and charged.

Eventually, both Jackson and Dodson pleaded guilty in exchange for their testimony. Jackson agreed to life without possibility of parole for two counts of complicity to murder, [*3] one count of first-degree robbery, one count of first-degree burglary, and tampering with physical evidence. Similarly, Dodson agreed to twenty-one years' imprisonment for two counts of complicity to commit murder and one count of first-degree robbery.

Before the murders, Dodson and Fairchild had been longtime friends and, at the time of the murders, shared an apartment in Ohio. Jackson—married to Dodson's sister, Alena—was involved with Walker in selling marijuana. When Walker's local marijuana source dried up, Jackson, with Dodson's help, found another source in Ohio. Jackson then began shuttling Walker to and from Ohio so Walker could purchase large quantities of marijuana. Walker paid Jackson roughly $100 per pound of marijuana purchased. On each of these trips to Ohio, Walker and Jackson stopped at Dodson's apartment to pick him up before continuing to the drug transaction.3 At least once, Fairchild was present at the apartment when Walker and Jackson stopped by.

Testimony revealed that a series of events caused people, especially the Jacksons, to be angry with Walker. First, after helping with several drug transactions, Jackson [*4] learned that Walker had been an informant for the Kentucky State Police, prompting Jackson to worry that he might be prosecuted for his own involvement. Second, on one occasion, Jackson sent Alena over to Walker's place to purchase marijuana on credit. During the transaction, Walker grabbed Alena's breasts and vagina and attempted to force himself on her. And, finally, Walker offered Alena thousands of dollars to buy the Jacksons' baby from them.4

Jackson testified he informed Fairchild and Dodson of these incidents, and Fairchild was upset about the attempted baby buying and sexual assault. But Dodson dismissed these incidents as a motive for murder. In fact, Dodson testified he was not aware of these incidents until after the murder. Dodson alleged the murders were simply motivated by money.

A few days before the murders, Dodson and Fairchild traveled from Ohio and spent several days with the Jacksons in Kentucky. During these idle days together, the three men discussed robbing Walker and they and Alena shot targets with Jackson's 9mm pistol.

Dodson and Jackson visited Walker several times during [*5] their stay in Kentucky.5 They attempted to persuade Walker to accompany them back to Ohio, ostensibly to purchase more marijuana because the two were low on cash. But Walker repeatedly declined their offers.

On their last visit to the Walker trailer, Dodson and Jackson entered while Fairchild waited in the car outside. After roughly fifteen to twenty minutes, Fairchild entered the trailer. The group gathered in the living room and talked for a while, Jackson and Dodson still attempting to coax Walker to return with them to Ohio. During the conversation, Fairchild stood with his back to the group, warming his hands over the wood stove.

It is at this point that the co-defendants' respective stories begin to diverge. According to Jackson and Dodson, Fairchild turned around and began shooting Walker, then Mauk as she attempted to flee the room.6 They all immediately fled the trailer, but Jackson realized he forgot the car keys inside. Jackson [*6] alleged that upon returning to the trailer, Fairchild stood over Walker and Mauk and shot them again. Then, according to Jackson, Fairchild grabbed an envelope full of cash Walker was known to carry and handed Jackson $1,000. Fairchild also handed Jackson the 9mm pistol and told him to get rid of it.7 Jackson shut and padlocked the trailer door, and the trio made a quick getaway.

They returned to the Jacksons' home, and Fairchild distributed some of the stolen money to the others. Dodson, Fairchild, and Alena then departed for Dodson's and Fairchild's apartment in Ohio. A few days later, Jackson joined them at the Ohio apartment and received an additional payment from Fairchild. Dodson twice received money from Fairchild and was able to fix his truck's transmission with the proceeds.

According to Fairchild, Jackson was the shooter. By his account, Fairchild waited outside for Jackson and Dodson to finish their business; and he heard gunfire after Dodson came outside. Upon entering

the trailer, Fairchild saw Walker lying face down and smelled gunpowder. Jackson then distributed about $1,500-1,800 to Fairchild as hush money. But, through further questioning, Fairchild admitted that he was inside the trailer during the shooting, and he was warming his hands over the stove as Jackson began firing.

Additional facts will be provided below as necessary.

II. ANALYSIS.

A. Fairchild's Statement to Police was Properly Admitted, and it [*8] was not Palpable Error for the Trial Court to Allow the Commonwealth to Introduce the Original Video of the Statement.

For Fairchild's first claim of error, we address jointly two issues raised separately in the briefing because they deal exclusively with a single piece of evidence—Fairchild's statement to police. He first claims the trial court erred by denying his motion to suppress his statement because it was involuntary. Second, Fairchild alleges the trial court erred by permitting the Commonwealth to play portions of his videotaped statement relating to his prior bad acts. We find neither of these alleged errors to be reversible.

1. Fairchild's Statement to Police was not Involuntarily Made.

Fairchild claims his statement to police was inadmissible because it was made involuntarily. In support of this claim, he points to the administration of the polygraph, the deviation from accepted techniques in its administration, and alleged threats made by the interrogator. We find these arguments unpersuasive.

Due process requires exclusion of confessions or statements procured when the defendant's "will has been overborne and his capacity for self-determination critically impaired . . . ." [*9] 8 The United States Supreme Court has announced—and this Court has endorsed—a rather simple question as the "ultimate test" of voluntariness: "Is the confession the product of an essentially free and unconstrained choice by its maker?"9 To apply this test of voluntariness, we assess the totality of the circumstances surrounding the challenged statement, including "the characteristics of the accused and the details of the interrogation."10 In sum, the voluntariness inquiry can be pared down to: "(1) whether the police activity was 'objectively coercive'; (2) whether the coercion overbore the will of the defendant; and (3) whether the defendant showed that the coercive police activity was the 'crucial motivating factor' behind the defendant's confession."11

The voluntariness of a confession is a mixed question of fact and law.12 But where "a trial judge's decision on a motion to suppress is supported by substantial evidence, and is correct as a matter of law, such findings are conclusive."13

Fairchild was briefly interviewed the evening before he submitted to the polygraph examination. During that interview, he was informed that he was a suspect and [*10] was asked to submit to a polygraph examination the next day so he could be cleared as a suspect. Fairchild agreed. When he arrived at the sheriff's department the following day for the polygraph test, he was taken to a small room purportedly located underneath the jail. Although the door was closed, Deputy Ron Van Nuys, who conducted the interview and polygraph examination, assured Fairchild that the door would remain unlocked and he was free to stop the questioning and leave at anytime. Fairchild concedes he was properly informed of and waived his *Miranda*14 rights before the start of the interrogation.

Of the entirety of the circumstances that surround the procedure that followed, Fairchild focuses much of his argument on the administration of the polygraph examination. So, too, does our analysis of Fairchild's claim of involuntariness.

First, Fairchild claims the detectives coerced him into taking a "fake" polygraph examination. Nothing in the record indicates any overt coercion associated with the detectives' request. But the implication was that if Fairchild declined to submit to a polygraph examination, he would remain a suspect in the investigation. This implication could not have [*11] risen to the level of coercion. That Fairchild would have remained a suspect in the investigation was factually accurate and presented no threat of future action. The only coercion that may be found in that circumstance is perhaps a heightened fear of detection. Following the detectives' direction, Fairchild spent the evening before the polygraph test at home—insulated from any coercive effects—and returned voluntarily to the sheriff's department the following morning.

Fairchild also claims his statement was involuntary because an interrogation preceded the administration of the polygraph examination. This position is misguided. The designated purpose for Fairchild's arrival at the sheriff's department notwithstanding, he acknowledged and waived his *Miranda* rights at the outset of the interview. Van Nuys repeatedly made clear that Fairchild could stop the questioning or polygraph at any time he wished. And Fairchild showed his complete understanding of his ability to halt the interrogation at his behest by invoking that ability, at which point Van Nuys terminated the interview.

Likewise, we are unpersuaded by Fairchild's attempt to paint the ominous specter of the impending polygraph [*12] as improperly coercive. We have previously rejected the so-called "psychological coercion" allegedly attendant to the administration of a polygraph examination.15 And Kentucky courts have routinely found interrogations that followed polygraph examinations to be voluntary.16 We find no reason to depart from this precedent in the instant case.

Fairchild also argues that because the technique used by Van Nuys to administer the polygraph examination—the "Arthur" technique—is unreliable and does not conform to the later-published American Polygraph Association's standards,17 his statement was rendered involuntary. Again, like his reliance on the existence of the polygraph examination, Fairchild's argument is misplaced.

A deviation from established procedure or regulations in the administration of a polygraph test does not render a statement inadmissible.18 In fact, this Court has gone so far as to question what relevance such a deviation may have in a voluntariness inquiry.19 This is because deviation from established standards in administering a polygraph [*13] examination serves to undermine only the validity of the test's *results*, but polygraph results are per se inadmissible because of their inherent unreliability.20 So the "Arthur" technique's interrogative style of administering a polygraph examination could not have overborne Fairchild's will because of its deviation from accepted polygraph-examination practice. But those techniques may have rendered Fairchild's statement involuntary if they were independently coercive, *i.e.*, objectively coercive. This brings us to Fairchild's next allegation.

Aside from any coercion related to the polygraph, Van Nuys's conduct, alone, was coercive according to Fairchild. At some point, according to Fairchild, the interrogation became confrontational and threatening. But Fairchild's argument is meritless on this point because it lacks any mention of specific instances of coercive behavior and omits any citation to the transcript of the interview. Without evidence of, or citation to, specific instances of hostility or threats made by Van Nuys, we cannot find Fairchild's bare allegations credible. To the contrary, the Commonwealth competently undercuts any specific instances of confrontation or [*14] threats.

The Commonwealth concedes that the last hour of the interview took on a more confrontational tone. Van Nuys testified that he periodically interrupted and spoke over Fairchild as an interrogation technique. The Commonwealth also acknowledged that in the final hour of the interview Van Nuys began to question the version of events described by Fairchild. At most, these instances could perhaps be considered annoying but certainly not objectively coercive.

Similarly unsupported by the record, Fairchild's allegation that Van Nuys threatened him must fail. The nearest "threat" that has been cited to us in the record is a plea for Fairchild to tell the truth in order to help himself so he could be present for his young daughter. Taking this statement at its worst—an implication that Fairchild could be put to death because of the seriousness of the crimes in which he was implicated—it still does not amount to coercion. "[T]ruthful, non-coercive advisement of potential penalties," and comments relating thereto, do not render a statement or confession involuntary.21

It evades reference in Fairchild's brief, but the best evidence indicating the voluntary nature of Fairchild's statement is exemplified [*15] by his unilateral termination of the interview by halting questioning and invoking his right to an attorney. Such an affirmative and authoritative invocation of constitutional rights is not the act of an individual whose will was overborne by police coercion.

After contemplating the totality of the circumstances surrounding Fairchild's statement to police, we conclude Fairchild fails to show he was subjected to objectively coercive police activity that overbore his freewill. The trial court's conclusion that Fairchild's statement was voluntary was supported by substantial evidence and was consistent with the law. It is, therefore, conclusive.22 The trial court did not err in denying Fairchild's motion to suppress.

2. The Trial Court Erred in Permitting Admission of Prior-Bad-Acts Evidence Contained in Fairchild's Statement to Police, but that Error was not Palpable.

Now that we have concluded that Fairchild's statement to police was not involuntarily made, we must address the manner in which the evidence was presented to the jury. Fairchild claims the trial court erred when it permitted the original version of the video-recorded statement to be played for the jury. Specifically, he [*16] takes issue with the admission of portions of the statement pertaining to his prior bad acts in violation of Kentucky Rules of Evidence (KRE) 404(b).

Well before trial, the Commonwealth acknowledged the inadmissibility of polygraph results along with *any* reference to a polygraph examination.23 In an effort to comply with our case law, the Commonwealth prepared a redacted audio recording from the original video recording of Fairchild's statement to police. The video was converted to audio so the jury could not view images of Fairchild while he was connected to the polygraph machine. All references to the polygraph examination or procedure were likewise redacted from this audio version. Fairchild then tendered to the court a list of additional audio segments he sought to have excised under KRE 404(b)'s general prohibition of prior-bad-acts evidence. In response, the Commonwealth redacted those segments.

All this preparation and sanitizing was for naught because Fairchild's counsel went into detail in opening statement describing how, in his estimation, Fairchild was coerced into submitting to a polygraph to "bulldoze" him into confessing. Simply put, Fairchild's counsel interjected the polygraph and its administration into the trial. [*17] So the Commonwealth sought permission from the trial court to play the full video version of Fairchild's statement as opposed to the redacted audio version created in anticipation of trial. The trial court took the Commonwealth's motion under careful consideration ultimately concluding the Commonwealth could play the original video, excluding the actual administration of the polygraph examination (which consisted of only the final six pages of the 172 pages of the transcribed statement). Fairchild later requested the polygraph examination also be played, a request the trial court granted.

When the Commonwealth moved the court to play the original video of his statement to police, Fairchild remained silent regarding the admissibility of the prior-bad-acts evidence he now claims was admitted in error. He nonetheless claims his pre-trial motion in limine outlining audio segments he sought to have redacted as violative of KRE 404(b) preserved this issue for appeal. Admittedly, our case law and rules of evidence hold motions in limine resolved by an order of record sufficient to

preserve evidentiary errors for appellate review.[24] But to avail themselves of the benefit of this rule, parties must specifically [*18] detail the alleged inadmissible evidence in their motion in limine to ensure their position is "fairly brought to the attention of the court."[25] Here, we are hard-pressed to conclude that Fairchild's position regarding the prior-bad-acts evidence with which he now takes issue was ever fairly brought to the attention of the trial court.

When Fairchild first filed his motion in limine, all parties—and the trial court—were preparing for trial under the impression the Commonwealth would be playing a redacted audio version of Fairchild's statement in order to insulate the jury from any references to the polygraph examination. This plan was firmly in place and well understood by all involved. But by the time the Commonwealth moved the court to admit the original video in response to Fairchild's surprise attack on the polygraph examination, these circumstances had shifted drastically. While the court heard arguments and contemplated its ruling on the Commonwealth's motion, Fairchild remained silent regarding any wish to prevent any prior-bad-acts evidence from reaching the jury. In fact, when the court ultimately ruled the original version (excepting the actual examination) [*19] to be admissible, Fairchild's response was to request the examination be played as well. Not once during the trial court's consideration of the Commonwealth's motion did Fairchild present the court with the prior-bad-acts argument he raises on appeal.

Under the circumstances before the trial court at the time the Commonwealth sought admission of the entire video recording, it cannot be said that Fairchild's position regarding the exclusion of prior-bad-acts evidence was fairly brought to the attention of the trial court. Unquestionably, Fairchild previously filed a motion in limine; but he effectively abandoned that motion by his contrary trial conduct— in reality, he requested the *admission* of the evidence at trial. Furthermore, Fairchild was silent as the Commonwealth requested the admission of the original video—an additional indicator of abandoning his motion in limine.

To allow a litigant to remain mute in the face of a motion to admit evidence without voicing an objection to apprise the trial court of his opposition to the admission of all or a portion of that evidence and still reap the benefits of preservation because of a pre-trial motion, effectively sets a trap in the record [*20] and is inconsistent with the purpose of KRE 103(d), as well as motions in limine in general. We deactivate one such snare today by treating this error as unpreserved.

Fairchild requests, in the alternative, palpable-error review of this issue.[26] "An error is palpable only if it is 'shocking or jurisprudentially intolerable'"[27] and a "probability of a different result or [an] error so fundamental as to threaten [his] entitlement to due process of law"[28] can be shown. We find no such error.

There cannot be much argument that the evidence Fairchild complains of was erroneously admitted. KRE 404(b), irrelevant exceptions aside, states that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." The evidence that Fairchild claims runs afoul of this rule includes explanation of his criminal background, convictions, and probation status; his drug use and involvement in drug trafficking; his failure to pay child support and resulting instances of incarceration; and his abuse of cats as a child. This evidence clearly relates to prior crimes and bad acts committed by Fairchild and serves only as character evidence.

As clear as [*21] this error is, though, it does not rise to the level of palpable error. Putting aside the prior-bad-acts evidence, Fairchild's statement puts him in the trailer alongside Jackson and Dodson with knowledge of the impending criminal acts when Walker and Mauk were murdered. He also received cash proceeds from the crime. Fairchild was heavily implicated by the trial testimony of Jackson and Dodson, even though with conflicting levels of his involvement. On review of the evidence

and convictions, it becomes clear the jury found the version of events most favorable to Fairchild (with the exception of his testimony that he was in Ohio during the commission of the murders) to be the truth. Based on its verdict, the jury appears to have found Fairchild's statement to police very credible—a statement confessing to complicity to murder in substance if not in form.

So Fairchild cannot show the likelihood of a different result absent the prior-bad-acts evidence necessary to find palpable error. The jury's verdict was not swayed by the evidence of Fairchild's poor character. Instead, the jury returned a reasonable verdict recommending a term of years to be served concurrently that could not have [*22] been reached had the jury been influenced by evidence that Fairchild was of despicable character.

The trial court's admission of the challenged prior-bad-acts evidence was error, but that error was not palpable mandating reveral.

B. Fairchild's Challenge to the Trial Court's Refusal to Strike Five Prospective Jurors for Cause is Unpreserved for Judicial Review.

During voir dire, Fairchild moved the trial court to strike five members of the venire for cause. According to Fairchild, these prospective jurors either showed a proclivity toward the higher end of the sentencing range for a murder conviction or appeared disinclined to consider a term of years as a sentence for a murder conviction. The trial court declined to strike any of the five for cause, forcing Fairchild to use his peremptory challenges to remove them from the venire. Fairchild now argues the trial court abused its discretion when it declined to strike the challenged jurors. In doing so, Fairchild argues the trial court deprived him of a substantial right—the free use of his peremptory challenges—by requiring him to use his challenges to neutralize the trial court's errors in denying for-cause strikes.29

If the alleged error [*23] is properly preserved, we presume prejudice when a trial court's erroneous failure to strike a juror for cause requires a defendant to expend a peremptory challenge that he otherwise would have used to expel a member of the petit jury. In *Gabbard v. Commonwealth*,30 we explained that "the defendant must identify on his strike sheet any additional jurors he would have struck"31 to preserve an error alleging deprivation of a peremptory challenge through the trial court's erroneous failure to strike a juror for cause. Importantly, this delineation of jurors the defendant would have struck but for the trial court's alleged error must be presented to the trial court *before* the jury is empanelled.32

Requiring defendants to follow the procedure outlined in *Gabbard* serves two purposes. First, it aids in determining whether the error is prejudicial. If the jurors the defendant would have struck via peremptory challenges absent the trial court's error did not sit on the petit jury, the defendant was not deprived of his ability to use his peremptory challenges to receive "the jury [he] was entitled to select."33 The second purpose is to prevent litigants from "arbitrarily object[ing] to the newly-seated jurors" [*24] to manufacture prejudice and "undermine our *Gabbard* rule."34

Fairchild argues that he satisfied the *Gabbard* standard by tendering to the trial court a list of seven jurors—all of whom were members of the petit jury—he would have struck if he had additional peremptory challenges available. This handwritten paper erroneously purporting to represent Fairchild's preservation through compliance with *Baze v. Commonwealth*35 does appear in the record, but the video record belies Fairchild's preservation argument. A review of the video record makes clear that Fairchild did not tender his list of potential strikes until *after* the jury was empanelled, thus, failing to satisfy the standard set forth in *Gabbard*.

We have held compliance with *Gabbard* to be strictly required.36 Following this precedent, we hold this error is unpreserved for appellate review. And Fairchild [*25] failed to request palpable error review37

even in light of the Commonwealth's strong challenge to his claim of preservation. So we decline to engage in palpable-error review of this assignment of error on our own initiative.38 Therefore, we do not reach the merits of Fairchild's claim.

C. The Trial Court did not Abuse its Discretion by Permitting Alena Jackson to Testify to Prior Consistent Statements Made by Jason Jackson.

A portion of Alena Jackson's trial testimony included a recitation of statements made by Jackson describing how Walker and Mauk were murdered. Alena testified Jackson made those statements the first time they discussed his involvement in the deaths of Walker and Mauk and before his arrest. This version of events was consistent with the testimony Jackson produced at trial.

Fairchild objected to this portion of Alena's testimony at trial and argued it was inadmissible hearsay and impermissible bolstering of Jackson's testimony. The trial [*26] court rejected Fairchild's arguments because it found that in his opening statement Fairchild charged Jackson, Dodson, and Alena with fabricating a story to implicate Fairchild as the shooter. The trial court reasoned that because Jackson's statements to Alena were made before his arrest and were consistent with his trial testimony, his statements were admissible to rebut Fairchild's allegation of fabrication. Fairchild challenges this conclusion and reiterates the arguments he presented to the trial court—that Alena's testimony was inadmissible hearsay and bolstering.

Trial courts are gatekeepers entrusted with broad discretion in handling evidentiary matters.39 And we review assignments of evidentiary error for an abuse of discretion.40 "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles."41

Hearsay is an out-of-court statement "offered in evidence to prove the truth of the matter asserted."42 Absent an enumerated exception, hearsay is generally inadmissible.43 The hearsay exception the trial court ostensibly applied was that pertaining to prior consistent statements. Found in KRE 801A(a)(2), this exception reads:

(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:

. . . .

(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.

In his authoritative treatise, Professor Lawson explains that four elements must be met to trigger the application of the prior-consistent-statement exception: (1) the original declarant must testify at trial and be examined concerning the statement,44 (2) an express or implied charge of recent fabrication or improper influence [*28] or motive to falsify must be made, (3) the prior statement must be sufficiently consistent with the declarant's in-court testimony, and (4) the prior consistent statement must predate the alleged fabrication or motivation to falsify.45 As with any hearsay exception, the party offering the statement into evidence bears the burden of proving it falls within an exception to the hearsay rule.46 We now apply this standard to the facts at hand.

It cannot be disputed that Jackson's statements to Alena constitute hearsay. They were made outside of court and are offered by the Commonwealth as evidence to prove Fairchild was the shooter. It is likewise beyond cavil that the Commonwealth presented sufficient evidence regarding elements (1)

and (3). Jackson, the [*29] original declarant of the hearsay statements proffered through Alena's testimony, testified extensively at trial and was available for recall at Fairchild's discretion because he was in custody throughout the trial. And Jackson's hearsay statements were consistent with his in-court testimony. In fact, Jackson's hearsay statements were so consistent with his trial testimony that Fairchild alleges their admission amounted to improper bolstering. The real dispute[47] here comes where it so often does in relation to this hearsay exception: whether there was a charge of fabrication or motive to falsify and if the prior statement predated that motive.[48]

Jackson was assailed by both express and implied [*30] allegations of fabrication or motive to falsify by Fairchild. The express allegation—Jackson, Dodson, and Alena conspired to fabricate a story labeling Fairchild as the shooter—was the crux of Fairchild's openin& statement and a recurring theme throughout Fairchild's theory of the case. Further, Fairchild spent time cross-examining Jackson regarding his plea agreement and its terms, including a discussion of each and every benefit he received by pleading guilty. This scrutiny of Jackson's plea agreement was an implicit charge of his motive to falsify his testimony.[49] Consistent with this implied motive to falsify his trial testimony, Fairchild's counsel engaged in a nearly sentence-by-sentence hunt for inconsistencies between Jackson's trial testimony and statements he made to police *before* entering plea negotiations. We find the charge-of-fabrication element to be satisfied twice over.

Implicit in the trial court's admission of Jackson's statements was the conclusion that they predated Fairchild's allegations of fabrication or motive to [*31] falsify. Otherwise, Jackson's prior statements would have no probative value to rebut Fairchild's allegations. This conclusion is supported by the record. Alena testified that Jackson's statements were relayed to her *the first time* they discussed his involvement in the murders, thus precluding and predating any collusion between her and Jackson. Fairchild presents no argument that calls this conclusion into question. Jackson's statements also clearly preceded his plea negotiations, which Fairchild implied gave reason to falsify his trial testimony. When Jackson made his statements to Alena, he could have had no expectation of leniency or beneficial treatment in any future prosecution.[50] Certainly, Alena had no authority to grant leniency and Jackson had not yet been arrested or charged.

Concluding that Jackson's statements meet all four elements necessary for application of the prior-consistent-statement exception, we hold that the trial court did not abuse its discretion [*32] by permitting Alena to testify regarding Jackson's prior consistent statements.

As to Fairchild's bolstering claim, it is axiomatic that "[a]s a general rule, a witness cannot be corroborated by proof that on previous occasions he has made the same statements as those made in his testimony."[51] Without more, such testimony would amount to impermissible bolstering as Fairchild alleges. But the application of the prior-consistent-statement exception removes the challenged testimony from classification as impermissible character evidence—*i.e.*, bolstering—and reclassifies it as admissible substantive evidence. The prerequisites to admissibility listed in KRE 801A(a)(2) ensure statements admitted under that rule contain "probative force . . . beyond merely sowing repetition."[52] Because we have already concluded KRE 801A(a)(2) was applicable to Alena's testimony of Jackson's statements, we likewise conclude she did not improperly bolster Jackson's testimony.

D. The Trial Court did not Abuse its Discretion by Permitting Testimony Regarding Incriminating Statements that Alena Jackson Attributed [*33] to Fairchild.

Fairchild's next allegation of error also implicates Alena's testimony, albeit tangentially. At trial, the Commonwealth proffered testimony through Alena that while she napped one afternoon, Fairchild, Jackson, and Dodson entered the room and Fairchild made a statement to this effect: killing Walker and Mauk was easy for him because his military training and experience hardened his heart. Alena

conceded she was unsure whether Fairchild made the statement in reality or if she dreamed that Fairchild made the statement. In light of this revelation, the trial court prohibited Alena from testifying about Fairchild's alleged statement, presumably because she had an insufficient basis of knowledge to testify accurately about the statement.[53]

The following day, the Commonwealth asked the trial court to reconsider its ruling. At a hearing held outside the presence of the jury, the Commonwealth presented the trial court with transcripts of statements Alena made to the police and examined her concerning those statements. The trial court pointed out that Alena never referenced the possibility of Fairchild's statement being part of a dream in her earlier statements. Because of the [*34] certainty Alena showed in her statement to police and the testimony she provided at the hearing, the trial court revised its previous ruling to permit the detective who took her statement to provide testimony about Alena's recitation of Fairchild's incriminating statement.

Fairchild now alleges the trial court erred by permitting the Commonwealth to elicit testimony from Alena about her statements to police regarding Fairchild's alleged incriminating statement. This is a challenge to Alena's perception of Fairchild's statement. No violation of the hearsay prohibition is raised.[54] As with any alleged evidentiary error, we review for an abuse of discretion.[55]

Procedurally speaking, a trial court's rulings are interlocutory and may be revised until final judgment is entered.[56] A court has the inherent authority, if not a duty, to change or correct any rulings it deems erroneous before finality is reached.[57] Therefore, the practice by which the trial court altered its evidentiary ruling was not erroneous.

We also conclude the trial court's decision to permit evidence of Fairchild's incriminating statement was not an abuse of discretion. With all the facts and testimony before it, the trial court concluded the Commonwealth met its burden of showing its proffered evidence was admissible. Alena's concession [*36] that she may have imagined Fairchild's statement in a dream was given due weight and consideration, but the trial court ultimately favored the Commonwealth's position that she had previously explained the statement to police without the slightest reservation about its veracity. Although we may have come to a different conclusion based on these facts, we cannot conclude that the trial court's decision was "unreasonable . . . or unsupported by sound legal principles" as to render it an abuse of discretion.[58]

In passing, Fairchild also challenges the relevancy of this evidence.[59] His main allegation hinges upon the unreliability of Alena's knowledge of whether Fairchild made the statement or not. Evidence that is relevant tends to make the existence of a fact of consequence more or less probable than it was without the evidence.[60] It is plain to see that Fairchild's incriminating statement makes a fact of consequence—he being the gunman in the murders of Walker and Mauk—more probable than it is without that evidence. Fairchild's challenge to the unreliability of Alena's knowledge goes to the *weight* of the evidence, not its *relevancy*.[61]

Even if the admission of Fairchild's incriminating statement was erroneous, either because Alena lacked personal knowledge of the statement or because the method of its introduction was improper, such error could only have been harmless. Fairchild's statement was introduced to buttress the Commonwealth's theory that he was the shooter because it tends to show his military training hardened his heart, leaving him capable of committing murder. That the jury was not swayed by this testimony or the Commonwealth's theory implicating Fairchild as the gunman is clear because he was found to have been only complicit to the murders, not the shooter. So we can conclude with certainty that the "judgment was not substantially swayed" by the testimony relating to Fairchild's incriminating statement.[62]

E. Fairchild was not Entitled to a Facilitation-to-Murder Instruction.

For his next allegation of error, Fairchild claims he was entitled to a facilitation instruction as a lesser-included offense to complicity to commit murder, of which he was ultimately convicted. As a basis for his entitlement, he argues the jury may have reasonably concluded he was "wholly indifferent" to the murders perpetrated by Jackson and Dodson and, therefore, could have found him guilty of facilitation to murder rather than complicity to murder.

It is the trial court's duty to "instruct the jury on every theory of the case supported by the evidence."63 This duty includes presenting the jury with instructions encompassing lesser-included offenses that are supported by evidence of record.64 We have noted the distinction between the complicity statute, KRS 502.020(1), and the facilitation statute, KRS 506.080(1), as follows:

Under either statute, the defendant acts with knowledge that the principal actor is committing or intends to commit a crime. Under the complicity statute, the defendant must intend [*39] that the crime be committed; under the facilitation statute, the defendant acts without such intent. Facilitation only requires provision of the means or opportunity to commit a crime, while complicity requires solicitation, conspiracy, or some form of assistance. Facilitation reflects the mental state of one who is wholly indifferent to the actual completion of the crime.65

Therefore, to prove his entitlement to a facilitation instruction, Fairchild must show there is sufficient evidence of record to allow the jury to conclude he knew of Jackson's and Dodson's intent to murder Walker and Mauk, provided them with the "means or opportunity" to commit the murders, but was "wholly indifferent" to whether the murders were ever completed. Fairchild has not met this burden, particularly concerning the "means or opportunity" element.

Fairchild's argument that the trial court was required to provide a facilitation instruction focuses on the required mental state—indifference to the and commission of the crime. Fairchild argues there was sufficient evidence of record pointing to Jackson as the shooter and Dodson as his co-conspirator. Because [*40] of this evidence, Fairchild claims the jury may have found he did not take part in planning the murder but was aware of the conspiracy between Jackson and Dodson and remained "wholly indifferent" when it came to fruition, thus, entitling him to a facilitation instruction.

Although this argument has some merit as to the mental-state element of facilitation, Fairchild neglects to present any colorable argument regarding the "means or opportunity" element. It was undisputed at trial that the gun used to kill Walker and Mauk belonged to Jackson. And no evidence touched upon a scenario in which Fairchild could have presented Jackson or Dodson the opportunity to commit the murders. Fairchild has not shown evidence of record that would permit the jury to find he provided Jackson or Dodson with the "means or opportunity" to commit murder.

The Commonwealth is correct in its assessment that the evidence of record supports one of four conclusions regarding Fairchild's involvement in the murders: he was the shooter, he conspired with Jackson and Dodson to commit the murders or aided in their commission, he was merely a bystander with no intent the murders be committed and provided no aid, or he [*41] was in Ohio during the murders and was unaware of them until later. Fairchild's argument that that the jury reasonably could have found him "wholly indifferent" to the murders, without any evidence he provided the "means or opportunity" for their commission, falls within the third scenario outlined by the Commonwealth: that Fairchild was a bystander that neither intended the crime's commission nor provided any assistance or opportunity for its commission. Such a verdict was an option available to the jury as instructed by the trial court. Had the jury found Fairchild's mental state was "wholly indifferent" and he did not actively aid in the commission of the murders, the jury would have returned a not-guilty verdict. This, of course, was not the case.

Fairchild has not shown that a facilitation instruction was supported by the evidence of record. And we do not require trial courts to provide a facilitation instruction as a companion to a complicity instruction when it is unsupported by the record.66 The trial court did not err by declining to provide the jury a facilitation-to-murder instruction.

F. The Trial Court did not Abuse its Discretion by Denying Fairchild's Request for a Continuance.

Finally, Fairchild challenges the trial court's denial of his motion seeking a continuance of the trial less than a month before trial was set to begin. Fairchild's trial was set to begin on November 5, 2012; but, on September 14 and 19, 2012, Fairchild was notified that Dodson and Jackson, respectively, had entered guilty pleas and agreed to testify against him. Until that point, Fairchild had operated under the impression that he would go to trial last out of the three co-defendants. So, on October 8, 2012, Fairchild filed a motion to continue his trial. Fairchild asserts he was entitled to a continuance because the interjection of two new eyewitnesses created a substantial change in trial strategy for his defense team.

Our criminal rules allow a trial to be postponed upon a showing of "sufficient cause."67 The decision whether to postpone trial rests wholly within the trial court's discretion;68 so much so that we will not [*43] overturn a trial court's decision "unless that discretion has been plainly abused and manifest injustice has resulted."69 Over time, we have developed a group of factors for the trial court to consider when exercising its discretion: (1) length of delay; (2) previous continuances; (3) inconvenience to litigants, witnesses, counsel, and the court; (4) whether the delay is purposeful or is caused by the accused; (5) availability of other competent counsel; (6) complexity of the case; and (7) whether denying the continuance will lead to identifiable prejudice.70

Here, the trial court analyzed each factor. While perhaps factor (4) weighs clearly in Fairchild's favor, the remaining factors weigh either in favor of the Commonwealth or are, at worst, even. So this issue is somewhat of a close call. As we have previously stated, "[i]n a close case, we hold that the trial court did not err in denying this continuance."71 There is sufficient evidence that granting [*44] the continuance would have caused significant inconvenience for both the trial court and the Commonwealth.

Most importantly, "there is absolutely no evidence of identifiable prejudice to [Fairchild] arising from the denial of the continuance."72 In *Bartley*, we stressed that "[i]dentifiable prejudice is especially important. Conclusory or speculative contentions that additional time might prove helpful are insufficient. The movant, rather, must be able to state with particularity how his . . . case will suffer if the motion to postpone is denied."73 Herein lies one of the primary—if not fatal—flaws with Fairchild's request for a continuance. Fairchild, even now, is unable to present anything "specific that would have been presented, or even an avenue that could have been pursued, that would have constituted mitigating evidence admissible at trial."74 Notably, Fairchild's brief omits prejudice entirely. So we are left to resort to speculation and conjecture.

Turning to the other factors, the length of delay if Fairchild's continuance was granted brought into play concerns with the Commonwealth's representation because a new Commonwealth's Attorney was set to take over on January 1, 2013, within the [*45] sixty-day minimum continuance Fairchild requested. At most, Fairchild's trial would not have begun until April 2013 meaning the case would have pended for nearly two years.

This was not the first continuance requested in Fairchild's case. Trial was originally scheduled for May 2012; but, in April 2012, all three defendants requested a continuance. At the time, the trial court noted that Fairchild's trial was not scheduled because a competency hearing was pending. That said, the

trial court granted the continuance for all three defendants. The next hearing was scheduled for August 2012. As a result, Fairchild's case pended for over a year even before requesting the continuance in issue.

Finally, we are unconvinced this case's complexity warranted a continuance. Putting aside the various moving parts associated with testimonial inconsistencies, this case boils down to a very simple premise: three men were involved in a murder and each disputes his level of culpability. Definitely, the case largely turns on a witness's ability to present a believable narrative to the jury. There are no complex issues or difficult-to-understand items of evidence that would require a continuance for more [*46] in-depth review. Moreover, Fairchild's theory of defense did not change because of Jackson's and Dodson's plea agreements.

Fairchild's abuse-of-discretion argument primarily centers on *Eldred v. Commonwealth*,[75] a case somewhat similar factually. In *Eldred*, late at night a mere three days before trial was slated to begin,[76] the defendant's ex-wife accepted a plea bargain and, as a condition of the plea, agreed to testify against Eldred. This plea agreement, however, was not made known to Eldred until the morning of trial. Eldred's counsel requested a continuance and argued, among other things, insufficient time to perform an adequate investigation because of the "vast difference between the statement [the ex-wife] must have made during the plea agreement and her previous statements."[77] The trial court gave Eldred a week to investigate but denied his primary request that trial be postponed sixty days. On appeal, we found the trial court abused its discretion, and the sixty-day continuance was appropriate.

Eldred is facially similar: a witness associated in criminal activity with the defendant accepts a plea agreement temporally [*47] close to trial and agrees to testify against the defendant. But the similarities end there. The plea agreement in *Eldred* was a surprise *on the day of trial*. Here, the plea agreement was months before trial was set to begin. And the witness's statements were inconsistent in *Eldred*, thereby requiring more investigation; here, on the other hand, the statements Jackson and Dodson gave to police initially and then again during their plea agreements did not materially change. Finally, *Eldred* does not stand for the proposition that a sixty-day continuance is essentially automatically appropriate when a co-defendant or other significantly involved witness accepts a plea agreement near the scheduled trial, date. To the contrary, *Eldred* did exactly that which we do here: engage in a review of the totality of the circumstances and weigh the various factors appropriate for reaching a sound decision. But unlike in *Eldred*, the instant circumstances do not weigh in favor of granting Fairchild's continuance request.

Fairchild's case is further distinguished from *Eldred* because Fairchild does not "point to any significant avenues of investigation which were foreclosed by the trial court's denial of [*48] a continuance."[78] Of course, Fairchild argues he was foreclosed from investigating Jackson's and Dodson's backgrounds and any prior bad acts or character evidence that may have challenged their credibility. But the problem with suggesting this investigation as grounds for a continuance is that Fairchild was always aware of Jackson and Dodson and the possibility they may testify—they were, after all, co-defendants whose statements directly implicated Fairchild. We are puzzled why Fairchild would delay adequate investigation of their backgrounds because his defense hinged significantly on Jackson's and Dodson's credibility.

The trial court did not abuse its discretion in denying a continuance.

III. CONCLUSION.

For the foregoing reasons, we affirm the judgment of the trial court.

All sitting. All concur.

Footnotes

1 Ky.Const. § 110(2)(b).

2 The original indictment (Case No. 11-CR-00047) was handed down in Fleming County where the murders occurred, but venue was later transferred to Rowan County (Case No. 12-CR-00238).

3 Dodson testified he only assisted on one transaction.

4 The exact amount varies depending on who testified, but it ranged from $5,000 to $50,000.

5 Jackson testified Fairchild accompanied him and Dodson on a couple occasions, but Dodson testified that Fairchild only joined them on the last trip. This is of little importance because all three agree that Fairchild was there on the 'night of the murders.

6 Jackson and Dodson's versions agree Fairchild was the shooter. There are minor distinctions regarding how many shots were fired, which victim was shot first, how Walker fell when he was shot initially, and Dodson's whereabouts when Walker was shot a second time.

7 Further investigation revealed that Jackson had thrown the magazine into a pond and crushed the gun with a hammer and buried it. The pond was drained and the magazine recovered. The pieces of the gun were discovered, but it was in no condition to allow anysort of ballistics analysis. Cleverly, though, police were able to compare shell casings from the murder scene with those recovered from the location where Jackson, Dodson, Fairchild, and Alena had target practice—the casings matched. That is, the specific barrel marks made by the pistol were the same, [*7] indicating that the same gun was used for target practice and the murders. So evidence established that Jackson's gun was the murder weapon.

8 *Schneckloth v. Bustamonte*, 412 U.S. 218, 225, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973).

9 *Bailey v. Commonwealth*, 194 S.W.3d 296, 300 (Ky. 2006) (quoting *Schneckloth*, 412 U.S. at 225).

10 *Schneckloth*, 412 U.S. at 226; *see also Bailey*, 194 S.W.3d at 300.

11 *Bailey*, 194 S.W.3d at 301 (quoting *Henson v. Commonwealth*, 20 S.W.3d 466, 469, 46 11 Ky. L. Summary 28 (Ky. 1999)).

12 *Henson*, 20 S.W.3d at 469.

13 *Benjamin v. Commonwealth*, 266 S.W.3d 775, 787 (Ky. 2008) (citing *Commonwealth v. Neal*, 84 S.W.3d 920, 923 (Ky.App. 2002); Kentucky Rules of Criminal Procedure (RCr) 9.78).

14 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

15 *Rogers v. Commonwealth*, 86 S.W.3d 29, 36 (Ky. 2002).

16 *See id.*; *Silverburg v. Commonwealth*, 587 S.W.2d 241, 244 (Ky. 1979); *Morgan v. Commonwealth*, 809 S.W.2d 704, 707 (Ky. 1991); *Powell v. Commonwealth*, 944 S.W.2d 1, 994 S.W.2d 1, 994 S.W:2d 4, 44 13 Ky. L. Summary 12 (Ky.App. 1998).

17 Fairchild's polygraph examination was administered in 2011; the American Polygraph Association's standards were published in 2012.

18 *Rogers*, 86 S.W.3d at 37.

19 *Id.*

20 *Id.* at 38; *Ice v. Commonwealth*, 667 S.W.2d 671, 675 (Ky. 1984).

21 *Benjamin*, 266 S.W.3d at 787.

22 *Id.* at 787.

23 *Rogers*, 86 S.W.3d at 38 n.22, 23.

24 *E.g.*, *Lanham v. Commonwealth*, 171 S.W.3d 14, 19-23 (Ky. 2005); KRE 103(d).

25 *Lanham*, 171 S.W.3d at 21 (quoting *Davis v Commonwealth*, 147 S.W.3d 709, 722 (Ky. 2004)).

26 RCr. 10.26.

27 *Allen v. Commonwealth*, 286 S.W.3d 221, 226 (Ky. 2009) (quoting *Martin v. Commonwealth*, 207 S.W.3d 1, 4 (Ky. 2006)).

28 *Martin*, 207 S.W.3d at 3.

29 *Shane v. Commonwealth*, 243 S.W.3d 336 (Ky. 2007).

30 297 S.W.3d 844 (Ky. 2009).

31 *Id.* at 854.

32 *Hurt v. Commonwealth*, 409 S.W.3d 327, 329 (Ky. 2013).

33 *Shane*, 243 S.W.3d at 340; *Gabbard*, 297 S.W.3d at 854.

34 *Hurt*, 409 S.W.3d at 329-30.

35 965 S.W.2d 817, 44 4 Ky. L. Summary 10 (Ky. 1997). *Baze* is inapplicable to the present situation. That case stands for the proposition that the Commonwealth and the defendant must exercise their peremptory challenges simultaneously. *Id.* at 825. The right to any peremptory challenge that is not exercised simultaneously with the opposing party is extinguished absent compelling circumstances. *Id.*

36 *Hurt*, 409 S.W.3d at 330 (citing *Grubb v. Norton Hosps., Inc.*, 401 S.W.3d 486, 488 (Ky. 2013); *McDaniel v. Commonwealth*, 341 S.W.3d 89, 92 (Ky. 2011); *Paulley v. Commonwealth*, 323 S.W.3d 715, 720 (Ky. 2010)).

37 *See* RCr 10.26.

38 *Id.*; *Shepherd v. Commonwealth*, 251 S.W.3d 309, 316 (Ky. 2008) ("Absent extreme circumstances amounting to a substantial miscarriage of justice, an appellate court will not engage in palpable error review pursuant to RCr. 10.26 unless such a request is made and briefed by the appellant.").

39 *See, e.g.*, *Chestnut v. Commonwealth*, 250 S.W.3d 288, 298 (Ky. 2008) ("Assuredly, the trial court is granted broad discretion in its determination on the admissibility of evidence . . . ."); *Clark v. Commonwealth*, 223 S.W.3d 90, 95 (Ky. 2007) ("Since the trial court's unique role as a gatekeeper of evidence requires on-the-spot rulings on the admissibility of evidence, we may [only] reverse a trial court's decision [*27] to admit evidence only if that decision represents an abuse of discretion.")

40 *Commonwealth v. English*, 993 S.W.2d 941, 945, 46 8 Ky. L. Summary 28 (Ky. 1999).

41 *Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000) (citing *English*, 993 S.W.2d at 945).

42 KRE 801(c).

43 KRE 802.

44 This requirement has universally been read to require merely *opportunity* for meaningful examination of the declarant regarding the statement at issue. *See, e.g.*, *Shepherd v. Commonwealth*, 251 S.W.3d 309, 322 (Ky. 2008) (stating the leading language of KRE 801A mandates the declarant be "examined concerning the statement" requires only an opportunity to examine the witness about the statement) ; *see also* ROBERT G. LAWSON, THE KENTUCKY EVIDENCE LAW HANDBOOK § 8.10(2)(b) n.27 (5th ed. 2013).

45 LAWSON, *supra at n.16* (citing *United States v. Bao*, 189 F.3d 860, 864 (9th Cir. 1999)).

46 *Noel v. Commonwealth*, 76 S.W.3d 923, 926 (Ky. 2002).

47 We use the word *dispute* very loosely here. Fairchild provides nothing more than a conclusory argument that Jackson's statements were inadmissible hearsay and bolstering. KRE 801A is not cited by Fairchild even though his brief appears to recognize it as the grounds for the trial court's decision to admit the challenged testimony.

48 *See* LAWSON, *supra* ("[Elements two and four] are closely related to each other [and] are clearly the ones most likely to come into play in disputes over the use of the exception . . . .").

49 *See United States v. Feldman*, 711 F.2d 758 (6th Cir. 1983) (finding an implicit charge of motive to falsify when defense counsel cross-examined the declarant regarding his plea deal with the government).

50 *Id.* (concluding that statements made to police before engaging in plea negotiations predated any motive to falsify because there could have been no expectation of lenient treatment in implicating another at that time).

51 *Eubank v. Commonwealth*, 210 Ky. 150, 275 S.W. 630, 633 (Ky. 1925).

52 *United States v. Pierre*, 781 F.2d 329, 333 (2d 1986); *see also* LAWSON, *supra* at § 8.10(2)(c) n.16 (noting that KRE 801A(a)(2) acts as a roadblock to admissibility of prior statements that serve no purpose beyond bolstering).

53 *See* KRE 602.

54 Hearsay concerns—double hearsay, even—are lurking throughout this issue. *See* KRE 802; 805. The Commonwealth concedes both sides argued whether Alena's statement to police fit within the prior-inconsistent-statement hearsay exception at the hearing, but it asserts no challenge is made on appeal to the *method* of introducing evidence of Fairchild's incriminating statement. This appears correct from the briefs, and Fairchild does not challenge the Commonwealth's assertion in its reply brief. So we will not engage in any such analysis on our own [*35] volition.

55 *Clark*, 223 S.W.3d at 95.

56 *JPMorgan Chase Bank, N.A. v. Bluegrass Powerboats*, 424 S.W.3d 902, 909 (Ky. 2014) ("Until a final judgment is entered, all rulings by a court are interlocutory, and subject to revision."); *see also* CR 54.02(1) ("[A]ny order or other form of decision, however designated, which adjudicates less than all the claims or the rights and liabilities of less than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is interlocutory and subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.").

57 *Bluegrass Powerboats*, 424 S.W.3d at 909.

58 *Goodyear Tire & Rubber Co.*, 11 S.W.3d at 581 (Ky. 2000).

59 KRE 402.

60 KRE 401.

61 Fairchild also claims evidence of his incriminating statement [*37] ran afoul of KRE 403, stating conclusively that "the prejudicial impact of the statement far outweighed any arguably probative value." Because this statement is presented without even an explanation of the prejudice emanating from the statement's admission, we will not address this bald allegation.

62 *Crossland v. Commonwealth*, 291 S.W.3d 223, 233 (Ky. 2009) ("A preserved, non-constitutional error is harmless 'if one cannot say, with fair assurance, after pondering all [*38] that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error.'") (quoting *Kotteakos v. United States*, 328 U.S. 750, 765, 66 S. Ct. 1239, 90 L. Ed. 1557 (1946)).

63 *Swain v. Commonwealth*, 887 S.W.2d 346, 348 (Ky. 1994).

64 *Id.*; *Houston v. Commonwealth*, 975 S.W.2d 925, 929 (Ky. 1998).

65 *Thompkins v. Commonwealth*, 54 S.W.3d 147, 150 (Ky. 2001) (citations and internal quotation marks omitted).

66 *White v. Commonwealth*, 178 S.W.3d 470, 490 (Ky. 2005) ("Such an approach would require that a facilitation instruction be given in *every* case where [*42] the defendant is charged with complicity. But such an approach is improper and a lesser-included offense instruction is available only when supported by the evidence.").

67 RCr 9.04.

68 *E.g.*, *Snodgrass v. Commonwealth*, 814 S.W.2d 579, 581 (Ky. 1991), *overruled on other grounds by Lawson v. Commonwealth*, 53 S.W.3d 534 (Ky. 2001). We review whether this discretion was abused, *i.e.*, the trial court's decision was "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *English*, 993 S.W.2d at 945.

69 *Bartley v. Commonwealth*, 400 S.W.3d 714, 733 (Ky. 2013) (quoting *Hudson v. Commonwealth*, 202 S.W.3d 17, 22 (Ky. 2006)) (internal quotation marks omitted).

70 *Snodgrass*, 814 S.W.2d at 581.

71 *Foley v. Commonwealth*, 953 S.W.2d 924, 937, 44 5 Ky. L. Summary 13 (Ky. 1997).

72 *Id.*

73 *Bartley*, 400 S.W.3d at 733.

74 *Foley*, 953 S.W.2d at 937.

75 906 S.W.2d 694, 41 11 Ky. L. Summary 20 (Ky. 1994).

76 The plea bargain occurred on Friday and trial was scheduled for Monday.

77 *Eldred*, 906 S.W.2d at 698.

78 *Iseral v. Commonwealth*, No. 2001-SC-0602-MR, 2003 Ky. Unpub. LEXIS 85, 2003 WL 22227193 at *2 (Ky. Sept. 18, 2003).

COMMONWEALTH OF KENTUCKY

ROWAN CIRCUIT COURT

CASE NO. 12-CR-00238

RONALD C. FAIRCHILD MOVANT

VS. ORDER

COMMONWEALTH OF KENTUCKY RESPONDENT

****

This matter having come before the Court upon Movant's Motion pursuant to RCr 11.42 To set aside Movant's conviction of two counts of complicity to commit murder, one count of first degree robbery and one count of first degree burglary resulting in a sentence of twenty-seven and -a-half years imprisonment. The Court will not recite the factual history of this case as it is adequately set forth by the filings pertaining to this Motion.

This Motion is guided by the two-prong standard of Strickland v. Washington, 466 U.S. 668 (1984). The first prong requires that counsel's performance was so poor to not meet the protections provided by the Sixth Amendment and second prong being that such deficient representation in fact prejudiced the defense. It is presumed that counsel's representation falls with the range of adequate representation.

The Movant raises 5 alleged deficiencies of counsel.

1. Failure to raise evidence of alleged coercive action. The Movant alleges that law enforcement engaged in coercion to force his statement. He does not allege any specific circumstances other that at some point the interrogation became more hostile. The Kentucky Supreme Court noted this, however movant notes his appellant counsel should have done more with something that

was not of record or otherwise more memorialized. There is nothing to support this allegation to the extent that this produced a coerced statement. This issue does not require a hearing.

2. Admission of the Polygraph. Trial counsel first attempted to use a redacted version and then at a point reverted to using the polygraph process unredacted to attempt to show coercion. This is completely responsive to what Movant wanted done in the first claim and is thus a sound enough strategy to fall with the deferential range of counsel's reasonable professional judgement. This also does not require a hearing.
3. Failure to strike five jurors. The Supreme Court did not find any palpable error in their own review of the matter. There are also no possible facts that the failure to strike the five jurors would have made a difference even based od movant's argument. This does not require a hearing.
4. Failure to object to Testimony of Alena Jackson. This portion of testimony was to have cast Movant as a militarily trained, cold calloused and hard-hearted killer. Movant was not convicted as the killer, but as complicit and thus the outcome cannot be shown to be potentially different. No hearing is required here as well.
5. Failure to produce evidence for facilitation. Movant alludes to circumstances where the trial could have argued better for facilitation over complicity. Movant argues no putative facts that would have been of any possible help other that counsel's bare argument, which not be evidence. The Supreme Court covered this issue in their opinion. This does not require a hearing.

This Court does not find any cumulative errors or effect that would require a hearing in this case and the Motion is denied.

This is a final and appealable order with no cause for delay.

January 22, 2018

1

Judge Rowan Circuit Court

I hereby certify that a true and accurate copy of the foregoing was served by first class mail upon the following this 13th day of February, 2018.

Hon. Jeffrey Prather

Assistant Attorney General

Mr. Ronald Fairchild

By: Ramona Dawn-pc

Rowan Circuit Clerk

Fairchild v. Commonwealth, 2020 Ky. App. Unpub. LEXIS 527

Court of Appeals of Kentucky

August 14, 2020, Rendered

NO. 2018-CA-000932-MR

Reporter

2020 Ky. App. Unpub. LEXIS 527 *

RONALD C. FAIRCHILD, APPELLANT v. COMMONWEALTH OF KENTUCKY, APPELLEE

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

Prior History: **[*1]** APPEAL FROM ROWAN CIRCUIT COURT. HONORABLE WILLIAM E. LANE, JUDGE. ACTION NO. 12-CR-00238.

Fairchild v. Commonwealth, 2015 Ky. Unpub. LEXIS 55 (Ky., Aug. 20, 2015)

Core Terms

trial counsel, ineffective, appellate counsel, evidentiary hearing, direct appeal, polygraph, jurors, ineffective assistance, trial court, argues, movant, murder

Counsel: BRIEF FOR APPELLANT: Ronald C. Fairfield, Pro se, LaGrange, Kentucky.

BRIEF FOR APPELLEE: Andy Beshear, Attorney General of Kentucky; James Havey, Assistant Attorney General, Frankfort, Kentucky.

Judges: BEFORE: CLAYTON, CHIEF JUDGE; ACREE AND TAYLOR, JUDGES. ALL CONCUR.

Opinion by: ACREE

Opinion

AFFIRMING

ACREE, JUDGE: Ronald Fairchild appeals the Rowan Circuit Court's February 13, 2018 order denying his RCr [1] 11.42 motion for post-conviction relief alleging ineffective assistance of trial and appellate counsel. Finding no error, we affirm.

BACKGROUND

Donald Walker and his girlfriend, Marlene Mauk, were killed during a robbery at Walker's trailer in Fleming County, Kentucky. Six years after the bodies were discovered, investigators charged and arrested two individuals in Ohio. Those two suspects, Jason Jackson and Rodney Dodson, quickly gave statements implicating Fairchild, who was then arrested and charged.

During the investigation, police discovered Walker was not liked by these three individuals. Jackson, Dodson, and Fairchild discovered Walker was working as a Kentucky State Police informant and had allegations of sexual assault and attempted **[*2]** baby buying - all of which did not sit well with Fairchild. Jackson, Dodson, and Fairchild discussed robbing Walker. Ultimately, all three men went to Walker's home, wanting him to accompany them to Ohio to purchase more marijuana because they were low on cash. Walker declined. At this point, Fairchild allegedly shot Walker and Mauk, then stole an envelope full of cash. [2]

After hearing the evidence, the jury found Fairchild guilty of two counts of complicity to commit murder, one count of robbery, and one count of burglary. He was sentenced to twenty-seven and one-half years for each murder, fifteen years for robbery, and fifteen years for burglary - all to run concurrently. The Kentucky Supreme Court affirmed his conviction. *See Fairchild v. Commonwealth*, No. 2013-SC-000024-MR, 2015 Ky. Unpub. LEXIS 55, 2015 WL 4967150 (Ky. Aug. 20, 2015).

After the Kentucky Supreme Court rendered its decision, Fairchild, *pro se*, filed an RCr 11.42 motion to vacate for ineffective assistance of counsel. The trial court denied the motion and his request for a hearing. This appeal followed.

STANDARD OF REVIEW

Every defendant is entitled to reasonably effective, but not necessarily errorless, counsel. *Fegley v. Commonwealth*, 337 S.W.3d 657, 659 (Ky. App. 2011). In evaluating a claim of ineffective assistance of counsel, we apply the familiar "deficient-performance plus prejudice" standard **[*3]** first articulated in *Strickland v. Washington*, 466 U.S. 668, 689, 104 S. Ct. 2052, 2065, 80 L. Ed. 2d 674 (1984).

Under this standard, the movant must first prove his counsel's performance was deficient. *Id.* at 687, 104 S. Ct. at 2064. To establish deficient performance, the movant must show that counsel's representation "fell below an objective standard of reasonableness" such that "counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment[.]" *Commonwealth v. Tamme*, 83 S.W.3d 465, 469 (Ky. 2002); *Commonwealth v. Elza*, 284 S.W.3d 118, 120-21 (Ky. 2009).

Second, the movant must prove that counsel's "deficient performance prejudiced the defense." *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064. To establish prejudice, the movant must demonstrate "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 104 S. Ct. at 2068.

As a general matter, we recognize "that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 690, 104 S. Ct. at 2066. For that reason, "[j]udicial scrutiny of counsel's performance [is] highly deferential." *Id.* at 689, 104 S. Ct. at 2065. We must make every effort "to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.*

ANALYSIS

Fairchild suggests multiple instances of ineffective assistance of **[*4]** counsel in both the trial and appellate courts. He also argues the trial court erred when it denied his motion without first conducting an evidentiary hearing.

Not every claim of ineffective assistance merits an evidentiary hearing. Nor is an RCr 11.42 movant automatically entitled to one. *See Stanford v. Commonwealth*, 854 S.W.2d 742, 743 (Ky. 1993). The trial court need only conduct an evidentiary hearing "if there is a material issue of fact that cannot be conclusively resolved, *i.e.*, conclusively proved or disproved, by an examination of the record." *Fraser v. Commonwealth*, 59 S.W.3d 448, 452 (Ky. 2001) (citations omitted); RCr 11.42(5). An evidentiary hearing is unnecessary when the record refutes the claims of error or when the allegations, even if true, would not be sufficient to invalidate the conviction. *Harper v. Commonwealth*, 978 S.W.2d 311, 314, 45 10 Ky. L. Summary 15 (Ky. 1998). If an evidentiary hearing is mandated, then the trial court shall appoint counsel to represent an indigent defendant. RCr 11.42(5).

In this case, as explained below, the claims raised by Fairchild are either refuted by the record or are insufficient to justify relief under *Strickland*. An evidentiary hearing was not warranted.

Trial Counsel Ineffectiveness

First, Fairchild contends trial counsel was ineffective for referencing his polygraph in counsel's opening statement, which led to the introduction of his "negative" **[*5]** (failing) results. During opening statements, Fairchild's counsel chose to refer to the polygraph examination as a sham to bulldoze Fairchild into admitting a role in the murders. This defense is permissible. *Rogers v.*

Commonwealth, 96 S.W.3d 29, 38 (Ky. 2002).

Because trial counsel used the polygraph in opening statements, the trial judge allowed the recording of the polygraph to be heard, in its entirety, during the hearing. This opened the door for trial counsel to attack the examination as a sham used to coerce a confession. Trial counsel elicited testimony from three different experts about the risks of obtaining a false confession, the proper conduct of a polygraph examination, and the unreliableness of recognized methods. This was a trial strategy, and Fairchild fails to offer a sounder strategy to combat his own statements to police.

Nonetheless, the polygraph, in and of itself, did not harm Fairchild. He continuously made contradicting statements to police. Eventually, his statements put him in the trailer, alongside Jackson and Dodson, with knowledge of impending criminal acts. He also received cash from the crime. Given the evidence - including his own statements - the jury's verdict of complicity to murder was the best possible **[*6]** outcome for him. He fails to satisfy the *Strickland* elements. He did not demonstrate how his counsel was "deficient" or how he was "prejudiced" by this deficiency.

Second, Fairchild argues that trial counsel's failure to preserve a juror selection issue is ineffective assistance of counsel. Fairchild wished to strike five jurors for cause and counsel used peremptory strikes to remove them. However, counsel tendered to the court additional jurors Fairchild wanted to strike, but only *after* jury selection. He claims his trial counsel did not preserve the issue appropriately under *Gabbard v. Commonwealth*, 297 S.W.3d 844 (Ky. 2009). *Gabbard* requires that "the defendant must identify on his strike sheet any additional jurors he would have struck" to preserve an error alleging deprivation of a peremptory challenge through the trial court's erroneous failure to strike a juror for cause. *Id.* at 854. This is true; yet, it does not apply to the post-conviction relief Fairchild seeks. Fairchild must identify how he was prejudiced by this erroneous preservation. Specifically, he must show how the presence of the jurors he wished to dismiss impaired the fairness of his proceedings. Without this specificity, we cannot conclude Fairchild's trial counsel was **[*7]** ineffective.

Third, Fairchild argues his trial counsel failed to object to introductions of statements that had a prejudicial/inflammatory effect. On his direct appeal to the Kentucky Supreme Court, the Court found all statements relevant, in that "[i]t is plain to see that Fairchild's incriminating statement makes a fact of consequence - he being the gunman in the murders of Walker and Mauk - more probable than it is without that evidence." ***Fairchild*, 2015 Ky. Unpub. LEXIS 55, 2015 WL 4967150, at *12.** It held that the trial court did not abuse its discretion in finding the statements reliable, and even if they were inadmissible, the error was harmless because the jury only found he was complicit. *Id.*

Additionally, although this testimony was objectionable, trial counsel may well have refrained from objecting as a matter of trial strategy, to avoid bringing additional attention to the statement. Furthermore, even if counsel simply erred in not objecting to this testimony, we cannot say that this one deficiency negated what was otherwise competent representation, or that there would be any likelihood that the outcome of the trial would have been any different had he objected. "The critical issue is not whether counsel made errors but whether counsel **[*8]** was so thoroughly ineffective that defeat was snatched from the hands of probable victory." *Haight v. Commonwealth*, 41 S.W.3d 436, 441 (Ky. 2001), *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky 2009). Every defendant is entitled to reasonably effective, but not necessarily errorless, counsel. *Fegley*, 337 S.W.3d at 659.

Fairchild also blames trial counsel for not putting on sufficient evidence to warrant a jury instruction on facilitation. A person is guilty of criminal facilitation when, by "acting with knowledge that another person is committing or intends to commit a crime, he engages in conduct which knowingly provides such person with means or opportunity for the commission of the crime and which in fact aids such person to commit the crime." KRS 506.080. According to the Kentucky Supreme Court's opinion on Fairchild's direct appeal, he failed to provide evidence he provided the "means and opportunity" to commit the crime. ***Fairchild*, 2015 Ky. Unpub. LEXIS 55, 2015 WL 4967150, at *13** ("Fairchild has not met this burden, particularly concerning the 'means or opportunity' element.").

On this appeal, Fairchild still does not provide evidence to satisfy this element of criminal facilitation. Fairchild offers no evidence his trial counsel was ineffective as that standard is set out in *Strickland*.

Appellate Counsel Ineffectiveness

Next, Fairchild argues he **[*9]** received ineffective assistance of appellate counsel because counsel, on direct appeal, failed to raise a claim that his conviction was based on his coerced statement to police. *See id.* at *3 -*5. In *Hollon v. Commonwealth*, 334 S.W.3d 431, 436 (Ky. 2010), our Supreme Court recognized that criminal defendants are entitled to effective assistance of appellate counsel. Should appellate counsel wholly fail in this endeavor in the appellate court, criminal defendants may pursue a claim of ineffective assistance of appellate counsel.

We evaluate the effectiveness of appellate counsel's representation under *Strickland*'s performance and prejudice standard. *Id.* Appellate counsel's failure to raise a particular issue on direct appeal may constitute deficient performance, but petitioners who allege their appellate counsel's deficiency must overcome the "strong presumption that [their counsel's] choice of issues to present [on appeal] was a reasonable exercise of appellate strategy." *Id.* To overcome this strong presumption, Fairchild must show that the omitted issue was a "clearly stronger" issue than those presented. *Id.* Prejudice must derive from counsel's omission, and so we ask whether "absent counsel's [omission,] there is a reasonable probability that **[*10]** the appeal would have succeeded." *Id.* at 437. Fairchild is unable to overcome these hurdles.

Fairchild's counsel did not fail to raise this issue. The Supreme Court fully addressed it in the opinion it rendered in his direct appeal. ***Fairchild*, 2015 Ky. Unpub. LEXIS 55, 2015 WL 4967150, at *3-*5**. Rather, Fairchild argues his appellate counsel was ineffective in the manner in which he argued the case on appeal because he failed to reference specific claims of coercion during his police interrogation. This argument fails first because the Supreme Court made it clear that "IAAC claims will not be premised on inartful arguments or missed case citations; rather counsel must have omitted completely an issue that should have been presented on direct appeal." *Hollon*, 334 at 437 Furthermore, the argument fails because, as the Supreme Court said in his direct appeal, the record contains nothing of this alleged coercion except "Fairchild's bare allegations . . . ." ***Fairchild*, 2015 Ky. Unpub. LEXIS 55, 2015 WL 4967150, at *5**. Both are reasons for denying his RCr 11.42 motion.

CONCLUSION

We affirm the Rowan Circuit Court's February 13, 2018 order denying Fairchild's RCr 11.42 motion for post-conviction relief alleging ineffective assistance of trial and appellate counsel.

ALL CONCUR.

Footnotes

[1] Kentucky Rules of Criminal Procedure.

[2] The various defendants told differing stories as to who was the actual gunman.

Supreme Court of Kentucky

2020-SC-0442-D
(2018-CA-0932)

RONALD C. FAIRCHILD — MOVANT

V.

ROWAN CIRCUIT COURT
12-CR-00238

COMMONWEALTH OF KENTUCKY — RESPONDENT

ORDER DENYING DISCRETIONARY REVIEW

The motion for review of the decision of the Court of Appeals is denied.

ENTERED: February 9TH, 2021.

John D. Minton, Jr.
Chief Justice

APP. 32

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000932-MR

RONALD C. FAIRCHILD — APPELLANT

v. APPEAL FROM ROWAN CIRCUIT COURT
ACTION NO. 12-CR-00238

COMMONWEALTH OF KENTUCKY — APPELLEE

ORDER

* * * * * *

This Court has considered what is being treated as appellant's motion to reconsider the Court's October 11, 2018 Order granting the Department of Public Advocacy's motion to withdraw as counsel. No response to the motion has been filed.

Having considered the motion, the Court ORDERS the motion be, and it is hereby, DENIED.

ENTERED: NOV 09 2018

Denise G. Clayton

CHIEF JUDGE, COURT OF APPEALS

APP. 33

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000932-MR

RONALD C. FAIRCHILD — APPELLANT

v. APPEAL FROM ROWAN CIRCUIT COURT
ACTION NO. 12-CR-00238

COMMONWEALTH OF KENTUCKY — APPELLEE

ORDER

* * * * * *

The Department of Public Advocacy has moved to withdraw as counsel for appellant and to allow appellant to file a *pro se* brief. The Court notes that a copy of the motion was mailed to appellant and his address is contained in the certificate of service. No response to the motion has been filed.

Having considered the motion, the Court ORDERS the motion be, and it is hereby, GRANTED. Appellant shall file a *pro se* brief on or before 60 days from the date of entry of this order. CR 76.12 provides adequate and detailed instructions for the format of an appellate brief. Failure to file a brief within that time may result in dismissal of the appeal.

ENTERED: 10-11-2018

Denise G. Clayton

CHIEF JUDGE, COURT OF APPEALS

App. 34