APPENDIX

A

NOT TO BE PUBLISHED

Supreme Court of Kentucky

2021-SC-0492-MR

JAMES ANTHONY GRAY — APPELLANT

V.

ON APPEAL FROM SCOTT CIRCUIT COURT
HONORABLE THOMAS CLARK, SPECIAL JUDGE
NO. 07-CR-00211

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION AND ORDER

James Anthony Gray was convicted by the Scott Circuit Court after a jury trial of two counts of murder for intentionally killing his parents, James Gray and Vivian Gray (collectively Gray's parents), and one count of tampering with physical evidence. This Court reversed and remanded, and on retrial the jury again found Gray guilty of the same crimes.[1] Gray received consecutive sentences for a total of fifty-five years' as follows: Count 1, Murder: twenty years'; Count 2, Murder: thirty-years'; and Count 3, Tampering: five years'. Gray again appeals as a matter of right, alleging multiple trial errors. Gray's

[1] The final judgment before us is the result of Gray's third trial. The first trial ended in a hung jury. Our Court reversed the result of Gray's second trial on the basis that Gray's confession, procured after a lengthy police interrogation which included the use of a fabricated DNA report tying him to the murders should have been suppressed and constituted a reversible error. *Gray v. Commonwealth*, 480 S.W.3d 253, 259-65 (Ky. 2016). Our Court also ruled that Gray's alternative perpetrator evidence regarding Peter Hafer should have been admitted. *Id.* at 266-68.

Appendix A

murder convictions are affirmed because the Court was equally split in its voting and the tampering conviction is reversed by a majority of the Court.

I. THE MURDER CONVICTIONS

As to the two murder convictions, the vote of the six members of this Court participating in the determination of this appeal is equally divided. Therefore, pursuant to Supreme Court Rule (SCR) 1.020(1)(a), the judgment of the Scott Circuit Court on these convictions stands affirmed.

Bisig, Keller, and Lambert, JJ., would affirm the judgment of the Scott Circuit Court; Conley, Nickell, and Thompson, JJ., would reverse the judgment of the Scott Circuit Court. VanMeter, C.J., not sitting.

II. THE TAMPERING CONVICTION

As to the tampering conviction, the vote of the six members of this Court participating, Bisig, Conley, Keller, Lambert, Nickell, and Thompson, JJ., is to reverse and remand for the trial court to vacate that conviction.

Gray argues that the mere fact that the gun used to commit the murders was never recovered was insufficient to allow the jury to infer that Gray intended to impair the availability of the evidence while believing an official proceeding may be instituted. Relying on *Mullins v. Commonwealth*, 350 S.W.3d 434, 443-44 (Ky. 2011), Gray argues that the fact that the perpetrator leaves the scene with evidence is not enough to establish a tampering charge when insufficient steps were taken to locate that evidence and no proof is provided that the defendant acted to prevent the evidence from being available at trial.

Gray argues that no evidence was presented at trial regarding what steps the police took to recover the gun.

The Commonwealth argues that in construing the evidence in the light most favorable to the Commonwealth, it was not clearly unreasonable for the jury to find Gray guilty of tampering after the jury found beyond a reasonable doubt that Gray had murdered his parents. There was evidence Gray had a .45 caliber pistol, and the jury heard evidence that the police engaged in an extensive search for the murder weapon. The Commonwealth cites various portions of testimony from Detective Rodger Persley and states that the search for the murder weapon included Gray's parents' home and surrounding areas, Gray's home, cars, and work van. Having reviewed such testimony, Detective Persley did not testify that Gray's home was searched for the murder weapon. Instead, he testified that police sought a search warrant to seize Gray's work clothes to test them for gunshot residue, but this warrant was denied.

KRS 524.100(1) states in relevant part:

> A person is guilty of tampering with physical evidence when, believing that an official proceeding is pending or may be instituted, he:
>
> > (a) Destroys, mutilates, conceals, removes or alters physical evidence which he believes is about to be produced or used in the official proceeding with intent to impair its verity or availability in the official proceeding[.]

In *Mullins*, 350 S.W.3d at 442, our Court established that evidence that the defendant must have left the scene with the firearm "is not enough to support a tampering charge without evidence of some additional act demonstrating an intent to conceal." The Court explained:

> When a crime takes place, it will almost always be the case that the perpetrator leaves the scene with evidence. If this amounted to a charge of tampering, the result would be an impermissible "piling on."
>
> Instead, intent to impair availability of evidence, believing that an official proceeding may be instituted, is the standard required under KRS 524.100. . . . [W]here the person charged is the defendant, it is reasonable to infer that the primary intent when a defendant leaves the scene of a crime is to get *himself* away from the scene and that carrying away evidence that is on his person is not necessarily an additional step, or an active attempt to impair the availability of evidence.

Id. at 443. When there are "conventional" locations where a firearm could have been found after being carried away, but there is no evidence that the police searched those places, rather than just searching the murder scene, this is insufficient to establish a tampering charge. *Id.* at 444.

> The Commonwealth cannot bootstrap a tampering charge onto another charge simply because a woefully inadequate effort to locate the evidence was made by the police. It is often the case that evidence will not be found. However, it is insufficient to bring a charge of tampering based solely on the fact evidence was not found when there were insufficient steps to locate that evidence, and there is no proof that the defendant acted with the intent to prevent evidence from being available at trial.

Id.

This same reasoning was applied in *McAtee v. Commonwealth*, 413 S.W.3d 608, 616-17 (Ky. 2013), to require a directed verdict on the tampering charge where the firearm was never located and a search was never made of the defendant's residence or that of his girlfriend's where he may have gone after committing the crime.

Our Court went even further in *Kingdon v. Commonwealth*, 2014-SC-000406-MR, 2016 WL 3387066, at *4 (Ky. June 16, 2016) (unpublished),[2] where the police did look in the defendant's apartment and automobile but failed to locate the firearm. The Court explained the Commonwealth's inference that because the firearm was not located the defendant must have destroyed, concealed, or disposed of it so it could not be used as evidence, was insufficient to establish the crime of tampering, explaining:

> The Commonwealth's theory leads to the paradoxical situation in which the complete lack of evidence concerning the gun becomes sufficient "evidence" to prove that Kingdon destroyed it, concealed it, or otherwise disposed of it. The theory is fundamentally flawed because it unconstitutionally shifts the burden to the defendant to prove his innocence.
>
> "The Commonwealth has the burden of proving every element of the case beyond a reasonable doubt[.]" KRS 500.070. "Due process commands that no man shall lose his liberty unless the Government has borne the burden of producing the evidence and convincing the factfinder of his guilt." *Speiser v. Randall*, 357 U.S. 513, 526 (1958) (citation omitted). If the Commonwealth's inability to explain what happened to the weapon sufficiently established a *prima facie* case of tampering with physical evidence, then the defendant could be found guilty unless he provided evidence to prove he had *not* "destroyed, concealed, or disposed of" it. Our system works on the opposite premise: the state must present evidence of guilt; the defendant is not required to produce evidence of his innocence.

---

[2] Pursuant to the Kentucky Rules of Appellate Procedure (RAP) 41(A), which replaces Kentucky Rules of Civil Procedure (CR) 76.28(4)(c), it is appropriate to consider this unpublished opinion and it satisfies the needed standards for consideration. Although *Mullins* and *McAtee* are certainly authoritative "there is no published opinion of the Supreme Court or the Court of Appeals that would adequately address the point of law" as to why tampering cannot be established in such a situation. RAP 41(A)(3).

Id. at *5. We agree with the cogent reasoning expressed in *Kingdon*, which is particularly applicable here.

Based on this precedent, there was insufficient evidence produced at trial to establish that Gray committed the crime of tampering with physical evidence. Accordingly, the Scott Circuit Court erred as a matter of law in failing to grant Gray a directed verdict on the tampering with physical evidence charge. We affirm the judgment and sentence of the trial court as to Gray's murder convictions, vacate the judgment and sentence of the trial court as to Gray's tampering conviction, and remand to the trial court for entry of a new judgment consistent with this Opinion.

ENTERED: June 13, 2024

Debra Hembree Lambert
DEPUTY CHIEF JUSTICE

APPENDIX B

*****ELECTRONICALLY FILED*****

COMMONWEALTH OF KENTUCKY
KENTUCKY SUPREME COURT
CASE NUMBER: 2021-SC-0492

JAMES ANTHONY GRAY — APPELLANT

v.

APPEAL FROM SCOTT CIRCUIT COURT
HON. PAUL F. ISAACS, JUDGE
CASE NO: 2007-CR-00211

COMMONWEALTH OF KENTUCKY — APPELLEE

BRIEF FOR APPELLANT

Submitted by:
ERIN HOFFMAN YANG, KBA #91588
J. TRAVIS BEWLEY, KBA #95515
ASSISTANT PUBLIC ADVOCATES
DEPT. OF PUBLIC ADVOCACY
5 MILL CREEK PARK, SECTION 100
FRANKFORT, KENTUCKY 40601
(502) 564-8006
erin.yang@ky.gov
jared.bewley@ky.gov
COUNSELS FOR APPELLANT

CERTIFICATE OF SERVICE

We hereby certify that on August 31, 2022, the foregoing Brief for Appellant was served by first class mail upon the following: Hon. Thomas Clark, Special Judge, Scott County Justice Center, 119 N. Hamilton Street, Georgetown, Kentucky 40324; Hon. Lou Anna Red Corn, Commonwealth Attorney, 116 North Upper Street, Suite 300, Lexington, Kentucky 40507; Hon. Keith Eardley, Assistant Commonwealth Attorney, 116 North Upper Street, Suite 300, Lexington, Kentucky 40507; by electronic mail to: Hon. Rodney D. Barnes, Assistant Public Advocate, 221 St. Clair Street, Frankfort, Kentucky 40601; and by state messenger mail to; Hon. Daniel J. Cameron, Attorney General, 1024 Capital Center Drive, Frankfort, Kentucky 40601. We also certify the record on appeal has been returned to the Clerk of this Court.

Erin Hoffman Yang

J. Travis Bewley

Appendix B

INTRODUCTION

James "Anthony" Gray was found guilty of two counts of murder and one count of tampering with physical evidence after his third jury trial. He was sentenced to fifty-five years' imprisonment.

STATEMENT CONCERNING ORAL ARGUMENT

Mr. Gray requests oral argument to clarify any questions which remain upon completion of briefing, specifically with regard to the structural error caused by the trial court's erroneous rulings based on a misinterpretation of this Court's prior Opinion in this case.

STATEMENT CONCERNING CITES TO THE RECORD

Cites to the trial record shall be TR page no. Cites to the videotaped hearings shall be VR, date stamp, time stamp.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

James "Anthony" Gray was convicted of two counts of murder and one count of tampering with physical evidence after a third trial upon reversal and remand by this Court. The relevant unchanged facts from that appeal are set forth as a preliminary matter, and additional facts will be adduced thereafter.

> James and Vivian Gray were shot to death in their home. The Grays were generally considered affluent, having owned and operated a successful downtown business for decades. They had a tumultuous relationship with their son, James Anthony Gray. This family rift and allegedly missing wills that purportedly disinherited Gray made him an immediate person-of-interest, and ultimately the prime suspect in the official investigation.
>
> About six months elapsed before the sheriff's investigators called Gray to the sheriff's office to answer questions ostensibly related to the missing wills. He received *Miranda* warnings and opted to speak with investigators. After a brief break in the questioning, the investigators shifted gears, deciding to question Gray about his parents' murder. Five-and-a-half hours of unrecorded interrogation followed. Investigators used a number of different ruses and forms of trickery, including a forged lab report of DNA evidence linking Gray to the murders and an alleged phone call from a judge threatening the certain imposition of the death penalty if Gray did not confess to them. Shortly after the interrogation ended, the cameras came back on and Gray confessed to murdering his parents. He was promptly arrested.
>
> Gray moved before trial to suppress this confession. The trial court denied his motion because, in light of the totality of the circumstances, the trial court could not

> conclude that the confession was involuntarily given. The trial court was admittedly troubled by the investigators' method of obtaining the confession but determined he could not conclude the confession was coerced.
>
> Gray's first trial resulted in mistrial when the jury failed to agree on a verdict. In the second trial, the jury convicted Gray of the murders and tampering with physical evidence and recommended a sentence of forty-five years' imprisonment. The trial court entered judgment accordingly, and Gray appeals that judgment to this Court.

Gray v. Commonwealth, 480 S.W.3d 253, 258 - 59 (Ky. 2016).

Anthony's relationship with his parents had long been troubled. James and Vivian were well-known members of the community but were controlling in their role as parents.[1] They wanted to control Anthony's money, how he raised his children, and who he dated.[2] Although Anthony fought with his parents frequently, their relationship improved in the following years.[3] In 2004, he moved into a shack made out of Toyota crates behind James and Vivian's house to help out at the property.[4] It was during this time Anthony started dating Rosa Rowland; and they were still dating at the time his parents were killed.[5] James and Vivian did not like Rosa; and Anthony was told by his father that he would be cut out of the will if he did not end the relationship.[6] No will

---

[1] VR 8/16/2021, 10:06:00.
[2] *Id.*; VR 8/12/2021, 9:14:00.
[3] VR 8/10/2021, 10:08:00.
[4] VR 8/10/2021, 9:16:00.
[5] VR 8/16/2021, 9:16:00.
[6] VR 8/18/2021, 10:59:00.

was ever found.[7] Anthony and Rosa did not remain long on the Gray property, and in 2007, they were living in Carlisle, KY, an hour drive from James and Vivian's home in Georgetown.[8] James and Vivian helped them move.[9] Anthony and Rosa would still visit occasionally.[10]

On one occasion a few weeks before James and Vivian were killed, Rosa and Vivian were sitting in the kitchen when Vivian showed Rosa a photograph of a woman and asked if Rosa knew who it was.[11] When Rosa said she did not, Vivian said her name was Jodi Lucas.[12] "If anything ever happens to me," Vivian said, "[Jodi] had something to do with it."[13]

Anthony's parents were creatures of habit. Every day at noon, Vivian took the dogs outside.[14] Every night, just before dinner, she would bring them back inside and put them in their crates.[15] If James was not home by 6:30, she would feed his plate to the dogs before putting them up.[16] In the springtime, Jodi would garden with Vivian and James.[17] In the fall, Jodi and Vivian would can vegetables.[18] James always carried a gun in his pocket, which he called his "little buddy."[19] He wore the same

---

[7] VR 8/10/2021, 3:35:00.
[8] VR 8/16/2021, 9:16:00.
[9] VR 8/18/2021, 10:12:00.
[10] VR 8/16/2021, 9:20:00.
[11] *Id.* at 9:21:00.
[12] *Id.*
[13] *Id.*
[14] VR 8/19/2021, 9:33:00.
[15] *Id.*
[16] *Id.* at 9:47:00.
[17] VR 8/10/2021, 1:19:00.
[18] VR 8/19/2021, 10:08:00.
[19] VR 8/13/2021, 3:14:00.

shirt all day long, no matter how dirty he got.[20] At night, he would take off his clothes and put them in the laundry.[21]

When Jodi Lucas first found James and Vivian dead in their home, she did not suspect Anthony was the killer.[22] In the weeks following, Jodi started calling Anthony to talk about his parents, trying to elicit a confession at the behest of Detective Rodger Persley of the Scott County Sheriff's Office, to whom she sent recordings of these calls.[23] Jodi told Anthony what she had learned about the scene, and after she went to inspect the bodies, she told him about their wounds.[24] Detective Persley reasoned that Anthony was responsible for the deaths of James and Vivian when he did not exhibit any emotion or ask any questions the day they were found.[25] His suspicion grew when Anthony knew the specific wounds that caused his parents' deaths.[26] Detective Persley thought that Anthony was the only person who would benefit from James and Vivian's deaths.[27] He also discovered that Anthony did not have an alibi for the night of Tuesday the 24th, and he had the means to drive from Carlisle to Corinth.[28]

---

[20] VR 8/19/2021, 9:42:00.
[21] *Id.*
[22] *Id.* at 9:40:00.
[23] *Id.* at 9:38:00.
[24] *Id.* at 9:34:00.
[25] VR 8/16/2021, 10:36:00.
[26] *Id.* at 2:07:00.
[27] *Id.* at 1:38:00.
[28] *Id.* At 1:48:00.

On Tuesday the 24th of April, 2007, two days before their bodies were found, James and Vivian were gardening with Jodi Lucas.[29] They gardened all day from 8:00 am until 5:00 pm, when Jodi had to prepare for work.[30] Jodi and James chatted about a potential deal with a man named Peter Hafer,[31] who was coming to the house the following day to sell some guns.[32] James wanted to know if Jodi would want to go in on the transaction with him, but Jodi declined, saying she didn't have time to go to the bank.[33]

Also on Tuesday the 24th, Anthony and Rosa drove to Napier Pallets to work on a forklift after normal work hours.[34] They left Napier at 8:00 pm.[35] When they got home, they got into a big argument.[36] Then Rosa and her daughter also got into an argument and Anthony tried to calm them down.[37] He left the house sometime after 8:30 pm.[38] Rosa did not see Anthony until the next morning when Anthony left for work.[39] During that time period, Rosa was using Klonopin and Xanax.[40]

---

[29] VR 8/19/2021, 9:06:00.
[30] *Id.*
[31] Peter Hafer was sentenced federally for stealing guns from Dryden's Pawn shop. The guns he sold to James Gray in the months before James was killed were traced back to the Dryden's burglary. VR 8/17/2021, 9:27:00.
[32] VR 8/19/2021, 9:46:00.
[33] *Id.*
[34] VR 8/16/2021, 9:31:00.
[35] *Id.*; VR 8/18/2021, 10:45:00.
[36] VR 8/16/2021, 9:33:00.
[37] VR 8/12/2021, 10:59:00.
[38] *Id.* VR 8/12/2021, 10:48:00.
[39] VR 8/16/2021, 9:37:00. At 6:41 am, Anthony placed a phone call. It would have been impossible for his phone to have been near the crime scene based on the triangulation from the call phone data records. VR 8/23/2021, 9:20:00.
[40] VR 8/16/21, 9:44:00.

On Wednesdays, Stonewall Baptist Church, across the street from the Gray residence, held prayer meetings at 7:00 pm.[41] Pastor Mike Campbell was the pastor at the church, and he had a special arrangement with his employer so that he could take Wednesdays off to work at the church.[42] On April 25th, he arrived at the church in his Lincoln Town Car a little before 4:00 pm.[43] Surveillance footage from nearby neighbor Tony Hayden's security setup showed Campbell's Town Car driving past at 3:41.[44] Other cars were also captured by Tony's security camera.[45] Police asked Pastor Campbell to identify any cars that he recognized in the footage.[46] Pastor Campbell identified his own car as well as one belonging to Joy Jump.[47] Joy was a member of the church.[48]

Joy Jump saw James on Wednesday, April 25th.[49] She also saw Vivian.[50] Joy was an antiques dealer who normally drove her Scion to Georgetown to stock her booth at Peddler's Mall on Wednesdays, Thursdays, and Fridays.[51] On that Wednesday, a little before 3:00 pm, Joy was driving up US 25/Cincinnati Pike towards home in her Scion on her way back from Georgetown.[52]

---

[41] VR 8/19/2021, 1:12:00.
[42] *Id.* at 1:13:00.
[43] *Id.* at 1:14:00.
[44] *Id.* at 1:15:00; 1:24:00.
[45] *Id.*
[46] *Id.* at 1:23:00; 1:24:00.
[47] *Id.* at 1:24:00.
[48] *Id.*
[49] *Id.* at 11:08:00.
[50] *Id.* at 11:06:00.
[51] *Id.* at 11:30:00.
[52] *Id.* At 11:00:00.

Her car was captured in Tony's surveillance footage.[53] Vivian was standing by Gray on Main as Joy rounded the curve.[54] She recalled a blue van hastily departing the driveway of the Gray's home.[55] Some dogs ran across the road, and Joy stopped to let them pass.[56] As she watched, the blue van reversed, and James jumped out of the driver's seat.[57] Joy thought about getting out of her car to ask James about a patio table she saw out on the sidewalk at Gray on Main.[58] Then she decided she'd come back.[59]

Theresa Parrish worked at a grocery store in Sadieville.[60] James would come into the store almost every day, often twice a day.[61] The week James and Vivian's bodies were found, James and Blane Coulson came into the store for lunch and then again around 4:00 pm.[62] As Theresa drove home from work that day, she saw James standing by a garden near the garage of his home with a stranger.[63] She recalled Pastor Campbell was mowing the lawn.[64]

---

[53] *Id.* at 11:02:00.
[54] *Id.* at 11:06:00. Joy stated in her testimony that she wished she had added more to the statement she submitted to the Sheriff's Office on the Monday after the bodies were found. Vivian had on a coat and was standing next to a white-colored rocking chair. *Id.* at 11:17:00; 11:39:00; 11:40:00.
[55] *Id.* at 11:08:00.
[56] *Id.* at 11:10:00; 11:11:00.
[57] *Id.*
[58] *Id.* at 11:11:00.
[59] *Id.*
[60] *Id.* at 1:48:00.
[61] *Id.* at 1:58:00.
[62] *Id.* at 1:57:00.
[63] *Id.*
[64] *Id.* at 1:58:00.

Pastor Campbell was indeed mowing the lawn on Wednesday.[65] A little after 4:30 pm, he was filling up the mower with gas with the church door open, when he heard three shots from what he described as a powerful gun.[66] Two shots, one right after the other, then a single shot.[67] At the time, he dismissed the sound of the powerful gun as target practice on the back of the Gray property.[68] Anthony's whereabouts on Wednesday the 25th from 6:41 a.m. until 4:52 p.m. are corroborated by the call data records, which place his phone either at home or at work, 42 miles from Corinth.[69]

Anthony's first trial resulted in a mistrial on March 1, 2012, after the jury failed to reach a verdict.[70] The verdict reached in the second trial was vacated by this Court in 2016.[71] In the opinion, this Court stressed that the Fourteenth Amendment to the United States Constitution, "includes the right to introduce evidence that an alternative perpetrator committed the offense" the purpose of which is to guarantee the defendant in a criminal trial the right to present a full defense.[72] In his third trial[73], Anthony was convicted of two counts of murder and one

---

[65] *Id.* at 1:16:00.
[66] *Id.* at 1:17:00.
[67] *Id.* at 1:19:00.
[68] *Id.*
[69] VR 8/23/2021, 9:20:00; 9:24:00.
[70] VR 1/1/2012, 4:21:00.
[71] *Gray v. Commonwealth*, 480 S.W.3d 253 (Ky. 2016).
[72] *Id.* at 266.
[73] Many allegations of wrongdoing were lodged during this case. Defense attorneys and investigators were accused of tampering with Jason Linville. VR 12/17/18, 9:58:00; 10:00:00. However, at a hearing on the matter, Detective Persley admitted that there was no indication the defense had tried to dissuade Jason Linville from attending the hearings for which he was subpoenaed. *Id.* at 10:12:00. In an email to

count of tampering with physical evidence.[74] He was sentenced to twenty years and thirty years on the two murder charges, and an additional five years for tampering, run consecutively for a total of 55 years.[75]

Anthony now appeals his conviction as a matter of right. [76]

DPA General Counsel regarding the matter, prosecutor Keith Eardley wrote "I speak for the entire prosecution team when I say no one on our side believes [cut off] engaged in misconduct of any kind whatsoever." TR 3011.

The Commonwealth also accused defense counsel of directing investigators to make misleading statements to Peter Hafer at the Fayette County Detention Center. *See* TR 1987; VR 7/14/21, 3:47:00. The trial court found "no credible evidence" that the defense team encouraged investigators to mislead Hafer. *Id.* at 3:47:20. The trial court found insufficient basis to remove counsel and held that any proposed sanctions be abated until trial commenced. TR 1987. There is no indication in the record the trial court or the Commonwealth pursued sanctions following trial.

[74] TR 3262 – 3265.

[75] *Id.*

[76] Ky. Const. §110(2)(b).

ARGUMENTS

I. The trial court's rulings allowing the Commonwealth to preview aaltperp evidence and subpoena witnesses prior to trial denied Anthony his right to present a defense.

Preservation

This issue is preserved by Anthony's written and oral objections[77], as well as a Writ of Prohibition filed to prevent further disclosure of proposed witness statements.[78]

Standard of Review

"Structural" errors are errors "which are, per se, reversible because they undermine the fundamental legitimacy of the judicial process." *Moorman v. Commonwealth*, 325 S.W.3d 325, 329 (Ky. 2010). The trial court's rulings caused a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Neder v. United States*, 527 U.S. 1, 8 (1999) (internal citations omitted).

Law and Analysis

"The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973). Under both the Kentucky and the United States Constitutions, the defendant

---

[77] TR 1077-1091, 2005-2010, 2093-98 VR 10/13/16 at 10:09:30-10:11:40, VR 12/8/16 at 9:39:30, 9:42:30; 10:07:00; 10:07:30.
[78] TR 2277

has the right to present a complete and meaningful defense. *Brown v. Commonwealth*, 313 S.W.3d 577, 624–25 (Ky. 2010), *Holmes v. South Carolina*, 547 U.S. 319 (2006), *see also Montgomery v. Commonwealth*, 320 S.W.3d 28, 41 (Ky. 2010) (right to present a defense based in the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Section 11 of the Kentucky Constitution). This right includes the right to present evidence reasonably suggesting that someone else committed the charged crimes. *Id.* (*citing Holmes, supra*). Unfortunately, Anthony's right to present a defense was fundamentally abridged, which affected the framework of the trial itself.

Opinion Reversing

In *Gray I*, this Court held that Anthony was entitled to present his aaltperp theory of defense:

> [It is undisputed that evidence tends to show that Hafer had motive to commit the crime and that this motive was established at trial. No doubt, a stated intention to rob the Grays and kill them in their home is sufficient evidence of motive to satisfy the first prong of the Beaty aaltperp test. But the trial court was not satisfied with Gray's proffer of evidence to support a finding of Hafer's opportunity to commit the murders. Hafer's alleged opportunity was considered too speculative to be presented to the jury. But we hold that this conclusion was misplaced.
>
> At its heart, the critical question for aaltperp evidence is one of relevance: whether the defendant's proffered evidence has any tendency to make the existence of any consequential fact more or less probable. And the best tool for assessing the admissibility of aaltperp evidence is the Kentucky Rules of Evidence. Naturally, under

the powerfully inclusionary thrust of relevance under these rules, it would appear almost any aaltperp theory would be admissible at trial. But KRE 403 provides the qualification of this evidence we considered necessary in *Beaty*. That rule prompts the trial court to weigh the probative value of the evidence against the risk of prejudice at trial, including confusing the issues or misleading the jury. Essentially, the balancing test found in KRE 403 is the true threshold for admitting aaltperp evidence; Beaty and its progeny are simply this Court's way of guiding the trial court in assessing the probative value of prospective aaltperp theories.

Motive and opportunity are not required to admit an aaltperp theory at trial, but it is but one of many ways a defendant may successfully assert this defense. To be sure, we reaffirm *Beaty*'s assertion that a defendant's proof of motive and opportunity is certainly probative enough for admission under KRE 403. But we do not require a defendant to recount a precise theory of how the aaltperp did the deed. Rather, all KRE 403 requires is evidence of some logical, qualifying information to enhance the proffered evidence beyond speculative, farfetched theories that may potentially confuse the issues or mislead the jury. **And we think Gray has more than enough probative information under this standard to warrant admission of his aaltperp evidence.**

Essentially, the decision to admit an aaltperp theory at trial is committed to the sound discretion of the trial judge. But we caution trial courts that aaltperp-evidence theories must be supported by more than speculation or exculpatory name-dropping when assessing the probativeness of evidence under KRE 403. The proponent of the theory must establish something more than simple relevance or the threat of confusion or deception can indeed substantially outweigh the evidentiary value of the theory. Motive and opportunity is one way to achieve that goal, but as we stated above, it is not the only acceptable method. There must simply be some

> legal or factual basis to the theory beyond raising an inference to mitigate the risk of harm that can be quite substantial.
>
> In the case at hand, it is unclear from the evidence precisely when the Grays were murdered. The Commonwealth urges us to conclude they were killed on the afternoon or evening of Tuesday, April 24, 2007 (when Gray had no alibi). But Gray suggests they died the following day, pointing to several witnesses who may have seen them Wednesday morning. Either way, there is a span of time when the crime could have occurred. We do not know Hafer's account of his movements during that two-day span because he invoked his right against self-incrimination. Without any information from Hafer, we cannot know whether he had an alibi during that 36–48 hour period. Nevertheless, we are faced with nearly two days of time when the crime could have been committed and an aaltperp with a motive to have played a role in the Grays' deaths. Gray's right to present a complete defense at trial was impaired by the trial court's exclusion of his aaltperp evidence.

Gray, 480 S.W.3d 253, 266–68 (Ky. 2016) (emphasis added).

Procedural History

Despite *Gray I*'s unequivocal holding that Anthony was entitled to present aaltperp testimony proffered by avowal in his second trial, the Commonwealth moved to hold hearings in which they could question defense aaltperp witnesses as to "1) when exactly were the hearsay statements made?; 2) where exactly were the hearsay statement made?; 3) what specifically were the hearsay statements?; and 4) who was present when the hearsay statements were made?[79]"

[79] TR 1041.

Anthony objected to any pretrial hearings being conducted to examine witnesses in advance of trial.[80] "The Commonwealth should not be permitted to conduct discovery hearings of witnesses about matters that the Commonwealth could have previously posed at avowal hearings or pursued through investigation."[81] Defense counsel noted that this Court held that the avowal testimony in question met the threshold of probativeness under KRE 403; seeking limits on its admissibility violated the law of the case.[82] Accordingly, the law of the case should apply to the issues raised by the Commonwealth and the issues raised are settled by this Court's decision in this matter.[83]

At the subsequent hearing, Defense counsel again vigorously objected:

> I mean, we don't, I mean, listen, most everything that Mr. Eardley is addressing as it relates to, as it relates to issues of credibility of the witnesses, and, you know, has been told to Defense many, many times before, that is appropriate cross examination and that goes to the weight of the evidence, and not whether it should be admitted or not, or not to the competency of the witness. And as far - so, you know, I would - we would object to essentially allowing the Commonwealth to depose witnesses that have provided avowal testimony and whose testimony is anticipated simply to, you know, I

[80] TR 1077. The defense noted that it "responds but explicitly objects as to preserve the issue of waiver of this issue."
[81] *Id.*
[82] *Id.* at 1078.
[83] *Id.* at 1078-79, *see also Williamson v. Commonwealth*, 767 S.W.2d 323, 325 (Ky. 1989) ("it is fundamental that when an issue is finally determined by an appellate court, the trial court must comply with such determination.")

mean, frankly, I don't think it would be -- I don't think it's appropriate.

I think the question, I think all the questions that he is asking about their reliability or as far as their credibility is appropriate for cross examination. I have never in my life had any luck getting a judge allowing me to have a hearing on a confidential informant, to actually put them on the stand on a confidential informant, on a jail informant, or on anybody else whose credibility was certainly at issue prior to trial, so I don't think that that's the case. I think there's enough information for the Court to make a basic ruling on that. I certainly don't believe any of these people are incompetent to testify.

The question is going to be whether what they have to say is admissible under the law, and I think we've outlined that. I think Mr. Eardley has gone through and actually agreed that some of it would be, and then -- and then I suppose as the Court raised today the question is, is whether that would be if it's admissible, I mean, I think we were, the, the motion that Ms. Gonzalez filed, the notice, was, in effect, a notice anticipating that Mr. Hafer would be unavailable for trial, and I think the Commonwealth's response, reply, and their response is taking the same assumption, so we're -- we've gotten that far.

I think the only question is whether Mr. Hafer is gonna plead the 5th or not, and then the issues, as it relates to the admissibility of the evidence is, is the question that we have to address. I don't believe that we, that Mr. Eardley is entitled to a hearing as to the credibility of witnesses. You know, these and, you know, note that he's had an opportunity to actually cross-examine these people during avowal testimony as well. So no, we don't agree with that.[84]

The trial court subsequently held a hearing, prior to which it allowed the Commonwealth to subpoena prospective defense witnesses.[85]

---

[84] VR 10/13/16 at 10:09:30-10:11:40.

[85] VR 12/8/16 at 9:39:30.

Defense counsel again objected to any attempt to elicit evidence prior to trial and to providing the prosecution with "extraordinary discovery not required by the criminal rules."[86] Counsel reiterated that this Court had determined the proposed testimony was probative and admissible.[87] The Commonwealth was therefore not entitled to preemptively bring in witnesses under oath to ask investigatory questions.[88] All the questions the Commonwealth sought to ask were fact questions they were capable of investigating without the trial court's involvement.[89] After asking for leave to file a writ, defense counsel agreed to a limited hearing while noting their continuing objections.[90]

At the hearing, Peter Hafer invoked the Fifth Amendment on the advice of counsel.[91] Golden Hall attempted to assert his Fifth Amendment rights and did not wish to testify, citing safety concerns.[92] The trial court informed him he did not have a right to remain silent and could be subject to contempt. The trial court decided to appoint outside counsel to advise Hall on the matter before he would be compelled to testify, and he was released from the subpoena.[93] Finally, Ray Yarnell was called.[94] Despite assurances by the Commonwealth that the

---

[86] *Id.* at 9:42:30.
[87] *Id.* at 9:50:00.
[88] *Id.* at 9:54:00.
[89] *Id.* at 10:06:00, 10:07:00; 10:07:30.
[90] *Id.* at 9:59:00.
[91] *Id.* at 9:45:00.
[92] *Id.* at 10:12:41.
[93] *Id.* at 10:13:00; 10:14:30. Golden Hall did not testify at the subsequent trial.
[94] *Id.* at 10:27:00.

questions would be limited to basic time and place questions, Yarnell was asked whether he was confused as to whether Hafer or another individual, Adam French, made certain statements.[95]

In 2017, defense counsel divulged evidence of Hafer's recorded phone calls and a recorded interview between Hafer and defense investigators.[96] Inexplicably, the Commonwealth then moved for exclusion of all alternative perpetrator testimony, arguing that the only adequate remedy for the late disclosure of this "alternative perpetrator" material was the exclusion of any and all "alternative perpetrator" evidence.[97] The trial court took the extraordinary step of continuing the trial *sua sponte*.[98] Defense counsel again noted that he was not required to turn over work product to the Commonwealth, and the Commonwealth and its agents had equal access to jail phone calls.[99] Anthony was not given a chance to object or an option to continue to trial without the additional proposed evidence.[100] Defense counsel noted that they were not required to turn over the statement and witnesses they proposed to use at trial, but did so in order to "maximize efficiency" of

---

[95] *Id.* at 10:33:00.

[96] TR 1146-1147.

[97] TR 1156. The Commonwealth also accused investigators of impropriety, which they were unable to substantiate.

[98] VR 1/12/17 at 3:33:00. Hon. Paul Isaacs also presided over Anthony's first two trials in 2012 and 2013.

[99] *Id.* at 3:32:00.

[100] *Id.* at 3:33:00 Further delays were arguably related to the issue at hand; VR 5/22/17 at 2:42:00 (*see*, Motion to Recuse TR 1649-70) (request for continuance based on defense motion to for judicial recusal). The motion to recuse was denied. TR 1903. *See also* TR 1934-1935 (Linville hearing continued). In 2018, the case was removed from the docket after the prior trial judge, Hon. Paul Isaacs, retired. TR 1969-1972. Thereafter, the Commonwealth filed a motion to recuse defense counsel, TR 1978, which was denied. TR 1985-1988. It was followed by the defense's filing of the writ in 2019.

proceeding to trial for Anthony, who had been incarcerated for over nine years at that point.[101] Ultimately, Anthony filed a motion to recuse, arguing that the continuance was based on an *ex parte* communication with the Commonwealth.[102]

Discovery issues continued throughout the pendency of the case. Defense counsel objected to further aaltperp witness hearings.[103] The trial court entered an order sustaining the Commonwealth's motion and ordered both parties "to provide opposing counsel all alt-perp statements the court finding this may assist the court in making necessary determinations regarding the accuracy, reliability and admissibility of alt-perp evidence at trial."[104] The defense sought a writ of prohibition of the enforcement of this order against the defense "as it requires the defense to disclose witnesses and any statements made by those witnesses to the defense while preparing Mr. Gray's case for trial."[105] "This falls far outside the scope of discovery allowed against a criminally charged defendant in Kentucky."[106]

Required disclosure of statements violated the work-product doctrine.[107] The Court of Appeals granted the writ "insofar that the circuit court is prohibited from compelling the petitioner to turn over

---

[101] TR 1668-1669.
[102] TR 1668-70.
[103] TR 2005-2010.
[104] See, Order 2266-2268.
[105] TR 2277
[106] *Id.*
[107] *Id.* citing *United States v. Nobles*, 422 U.S. 225, 238 (1975).

transcripts or audio recordings of witness interviews conducted by the defense in preparation for trial."[108] Despite this guidance, the trial court entered an order requiring the defense to divulge proposed aaltperp evidence if it wished to avail itself of the KRE 403 balancing delineated in *Gray I, supra*, rather than the regular rules of hearsay.[109] Defense counsel vigorously objected, but ultimately agreed to turn over additional aaltperp evidence for *in camera* review "to avoid legal wrangling" and keep an upcoming trial date.[110]

There is no authority for requiring a defendant to furnish a list of witnesses to the Commonwealth. *King v. Venters*, 596 S.W.2d 721, 721 (Ky. 1980) ("we are not entirely convinced that it would be free of constitutional difficulty."). Moreover, the Commonwealth is not permitted to preview defense testimony ahead of trial. The only authorized purpose of depositions in criminal cases is "to preserve evidence, not to afford discovery." *United States v. Drogoul*, 1 F.3d 1546, 1551 (11th Cir. 1993) *citing Simon v. United States*, 644 F.2d 490, 498 n.12 (5th Cir.1981); *See also Barnes v. Goodman Christian*, 626 S.W.3d 631, 637 (Ky. 2021) (deposing witnesses improper under restrictive criminal rules.).

A trial court lacks authority to compel a witness to be interviewed at a pretrial conference. *See Commonwealth v. Peters*, 353 S.W.3d 592,

---

[108] 19-CA-1312, Order granting in part, granting in part and denying in part, entered November 13, 2019 (See attached Appendix Tab 2)
[109] TR 2427-28.
[110] VR 11/27/19 at 10:35:00; 10:37:30; 10:39:00; 10:42:30-10:44:00; 10:46:00 The April trial date was delayed due to the Corona-virus epidemic.

596–98 (Ky. 2011). Each party's right to interview witnesses is tempered by the fact that "a witness also has the right to refuse to be interviewed by either the defense or the prosecution." *Id.* at 598; *see also United States v. Scott*, 518 F.2d 261, 268 (6th Cir. 1975) (recognizing that any witness has the right to refuse to be interviewed if he so desires and is not under or subject to legal process). A trial court order compelling a witness to be interviewed at a pretrial hearing clearly compels attendance for discovery. *Peters*, 353 S.W.3d at 598. A party in a criminal proceeding cannot sidestep the rules of criminal discovery to obtain evidence to which they would otherwise not be entitled. *Lehmann v. Gibson*, 482 S.W.3d 375, 383 (Ky. 2016).

The defense's attempt to mitigate this harm led to Anthony's writ of prohibition to prevent enforcement of the subsequent 2019 Order mandating disclosure of witness statements. The Court of Appeals agreed, finding irreparable harm and granting Anthony's writ of prohibition. The Court of Appeals recognized that "[o]nce the information is furnished it cannot be recalled.'" Order, Writ of Prohibition, *citing Peters* at 592, *quoting Bende v. Eaton*, 343 S.W.2d 799, 802 (Ky. 1961). "While the Commonwealth argues Gray is not being forced to disclose anything, the court speaks through its order which clearly states that [t]he court after considering he arguments sustained the Commonwealth's motion and ordered both parties to provide opposing counsel all alt-perp statements." Order, Writ of Prohibition. Anthony's

due process rights could not be "trampled upon" by an overreaching discovery order." Order, *citing Commonwealth v. Nichols*, 280 S.W.3d 39, 44 (Ky. 2009).

The government violates a defendant's Sixth Amendment right to effective assistance of counsel when it interferes with the ability of defense counsel to make independent decisions about how to conduct the defense. *Perry v. Leeke*, 488 U.S. 272, 280 (1989). Allowing the Commonwealth to force witnesses to testify, under oath, prior to trial, interfered with their right to present a defense and their ability to make tactical decisions as the case progressed.

Counsel must work for the advancement of justice while faithfully protecting the rightful interests of his clients. *Hickman v. Taylor*, 329 U.S. 495, 510 (1947). "In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel." *Id.* at 511. "Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference." *Id.*

For example, an attorney's right to make tactical decisions throughout trial was abridged by a statute requiring the defendant to be the first witness or waive testifying. *Brooks v. Tennessee*, 406 U.S. 605, 612 (1972). The statute denied a defendant "'the guiding hand of counsel'

in the timing of this critical element of his defense.'" *Id.* at 613. The statute took away counsel's autonomy to make decisions as the case unfolded. Even after trial commences, defense counsel is often doing "intensive work, with tactical decisions to be made and strategies to be reviewed." *Geders v. United States*, 425 U.S. 80, 88 (1976). Defense counsel's ability to make tactical decisions and prep witnesses is foreclosed when the trial court allows the Commonwealth to compel witnesses into court before trial commences.

The chilling effect of the pretrial hearings, and the trial court allowing the Commonwealth to subpoena defense witnesses, cannot be quantified. There is now no way to speculate what result a trial in 2017 might have produced. Instead, Anthony languished in jail while the Commonwealth relitigated evidence already deemed admissible by this Court's 2016 opinion. By the time the writ was granted, it was too late to undo the harm Anthony suffered. The trial court recognized that most of the witness testimony had already been litigated.[11] While Anthony was ultimately able to present aaltperp evidence, he suffered undue harm when he was forced to divulge his defense prior to trial. Harmless error analysis does not apply where a substantial right is involved. *Shane v. Commonwealth*, 243 S.W.3d 336, 341 (Ky. 2008). Because of excessive interference by the Commonwealth and the trial court, Anthony "did not get the trial he was entitled to get." *Id.* These errors deprived Anthony of

[11] VR 11/27/19 at 10:51:45.

the basic protections of due process without which "a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence ... and no criminal punishment may be regarded as fundamentally fair." *Neder*, 527 U.S. at 9.

II. The trial court erred by allowing improper KRE 404(b) evidence.

Facts & Preservation

This issue is preserved by defense counsel's written and oral objections to the evidence. TR 12, 1558-1559. In *Gray I*, this court held that evidence that Anthony threatened Rosa Rowland was admissible:

> On first glance, this testimony seems irrelevant to the issue of whether Gray murdered his parents. Proof of threats against Rowland does not make it any more or less probable that Gray killed anyone. And it proves nothing with regard to his motivation to murder his parents or to show any type of plan or preparation to commit those crimes.
>
> The Commonwealth correctly points out that use of prior bad acts to prove consciousness of guilt, which includes threats to kill witnesses, is an acceptable practice.[44] The theory follows that Gray, concerned by Rowland's erratic behavior and fearing she may testify against him, made the threats to prevent Rowland from disclosing any incriminatory information. We agree that if viewed as a threat against a witness, the statements become relevant. But, to us, that status is unclear. Gray articulately contends that at the time the statements were made, Gray was not charged with the Gray murders—they occurred months before he confessed at the sheriff's office. On the other hand, the statements were made after the Gray murders occurred. To us, this is enough to make Rowland a witness; and,

> therefore, the trial court did not abuse its discretion by allowing this testimony at trial.

Gray v. Commonwealth, 480 S.W.3d 253, 270–71 (Ky. 2016).

On remand, the Commonwealth gave 404(c) notice of intent to offer additional details of alleged violence between Anthony and Rosa-alleging that Anthony threw Rosa against the wall, threatened to "cut her throat in half a second," and warned he'd be "gone before she bled out."[112] The Commonwealth argued that the threats were relevant because Rosa contradicted his statement that he was in Butler the Tuesday before the Grays were discovered.[113] According to the Commonwealth, because Anthony admitted making a statement that he might kill Rosa to Betty White, the allegation Anthony later assaulted Rosa was also relevant.[114]

The trial court initially asked, "isn't this just doubling down on what you already have and is this not getting into territory where its probative value may be less than it is prejudicial?"[115] The Commonwealth countered that evidence Anthony threw Rosa against the wall and threatened to slit her throat was "pretty extreme."[116]

Defense counsel noted that the statement "describes a plot to murder that shares neither mode nor manner of death to the Grays."[117] The late addition of evidence of domestic violence was more prejudicial

---

[112] VR 3/16/17, 10:28:30;10:29:00; TR vol. 18 pg. 2195.
[113] VR 3/16/17, 10:30:00.
[114] *Id.* at 10:31:00.
[115] *Id.* at 10:32:20.
[116] *Id.* at 10:33:00.
[117] TR vol. 12 pgs. 1558 1559.

than probative.[118] Defense counsel argued, though limited testimony of threats to Rosa was permissible, this additional evidence should not be allowed, as it amounted to impermissible "piling on."[119] "This is something to try and go beyond and paint Mr. Gray in—in a way that paints him as a vicious murderer and is only offered for prejudicial value."[120] Moreover, there was only speculation that the violence was connected to her failure to provide an alibi.[121] Defense counsel argued that the volume of evidence regarding Anthony's alleged violence towards Rosa was unduly prejudicial.[122] The trial court overruled the objection, stating that while it "had concerns" about prejudice, this was a "natural extension of what happened before."[123]

At trial, Betty White repeated her claim that Anthony had expressed a desire to kill Rosa.[124] Eric Frazier also alleged that Anthony threatened to kill Rosa in *Gray I*. [125] However, in the case at bar, Frazier added a new allegation that Anthony said he would slit Rosa's throat.[126]

Testimony of threats or violence towards Rosa also came in through two additional witnesses. Rosa Rowland testified about domestic

---

[118] *Id.*
[119] VR 3/16/17, 10:36:00.
[120] *Id.* at 10:37:00.
[121] *Id.* at 10:40:00.
[122] *Id.* at 10:42:00.
[123] *Id.*
[124] 8/12/21 at 10:05:30.
[125] *Gray*, 480 S.W.3d at 270.
[126] VR 8/17/21, 11:23:00.

violence between herself and Anthony. And the Commonwealth read from a petition for a restraining order:

> Commonwealth: Anthony grabbed me by the arm and slung me up against the wall. *Anthony told me at the time that he could cut my throat in half a sec and be gone before I started bleeding out.*" Is that what he said to you?
>
> Rowland: Yes, Sir
>
> Commonwealth: And you asked the Nicholas County Family Court to grant a protective order against him, or no contact?
>
> Rowland: Well, that's the day he almost killed me also
>
> Commonwealth: So, you went to court, and asked for a no contact order
>
> Rowland: Yes, I did.[127]

Marvin Gilbert, a former coworker of Anthony's, testified for the Commonwealth.[128] Defense counsel objected to his testimony. [129]Gilbert said he warned Anthony that Rosa would "get him in trouble."[130] Gilbert testified Anthony told him he and Rosa were having "relationship issues."[131] Gilbert claimed Anthony admitted to putting a gun in Rosa's face during a particularly bad argument.[132] After being questioned about

---

[127] VR 8/16/21 at 9:49:00-9:50:00.
[128] VR 8/13/21 at 9:37:00.
[129] *Id.* at 9:32:00.
[130] VR 8/13/21, 9:47:00.
[131] *Id.* at 9:43:00.
[132] *Id.*

his initial statement on cross, Gilbert added that Anthony had also admitted to putting his hands on Rosa's throat during a previous fight.[133]

Standard of Review

The standard of review for evidentiary issues is abuse of discretion. *Minch v. Commonwealth*, 630 S.W.3d 660, 666 (Ky. 2021).

Law and Analysis

This Court has held that 404(b) evidence that may be admissible for a limited purpose can also become too broad. *St. Clair v. Commonwealth*, 455 S.W.3d 869, 889 (Ky. 2015). "[T]he Commonwealth's prerogative in dictating the specific evidence used to prove its case is not without limit, and Rule 403 is perhaps the most important check on the Commonwealth in this respect." *Hall v. Commonwealth*, 468 S.W.3d 814, 825 (Ky. 2015). In other words, evidence may be probative up to a point, after which it becomes unduly prejudicial. *Id.* at 826.

Even where evidence of another crime has some relevancy, the court must exercise discretion in deciding whether, and to what extent, evidence of the offense may be utilized without prejudice. *Funk v. Commonwealth*, 842 S.W.2d 476, 481 (Ky. 1992). The probative value of the evidence must outweigh its inflammatory nature. *Id.* In *Funk*, the defendant's admission and guilty plea for sexually abusing a toddler were relevant to provide for context to the defendant's statements as well as

[133] *Id.* at 9:50:00.

identity issues presented at trial. *Id.* The admissions and plea, standing alone, were sufficient to show what was necessary for context and identity. *Id.* But the Commonwealth went beyond what was necessary, calling the prior victim's mother and treating physician to discuss details of the crime. *Id.* This Court held "[t]he extensive use of overkill was unduly prejudicial and trial error." *Id.*

Likewise, the *St. Clair* case demonstrates how 404(b) evidence admissible for a limited purpose can become unnecessarily cumulative and prejudicial. In *St. Clair*, evidence of kidnapping a separate victim, Tim Keeling, was admissible in St. Clair's trial for kidnapping Frank Brady because "the proof touched on St. Clair's *modus operandi* for kidnapping: using a gun and handcuffs to steal a specific type of truck and abduct the truck's driver to prevent him from reporting the theft to police." 455 S.W.3d at 889. The evidence demonstrated St. Clair's *modus operandi* for kidnapping and not just criminal propensity. *Id.* at 888. The fact that the same handcuffs and gun were used in both crimes was also relevant to the issue of identity. *Id.* at 889.

However, the proof became too broad when it went beyond the kidnapping into evidence of Keeling's murder. *Id.* Evidence of Brady's murder was admissible because it provided context for one of the elements of the charged offense (kidnapping with the victim not released alive). *Id.* Although the evidence of Brady's killing was not all direct evidence of the element at issue, providing instead mere context, it was

only one step removed from that element. *Id.* The proof thus had probative force, despite not being direct evidence of the time of death. *Id.*

Brady's murder, though connected to the other proof of the kidnapping, was not an essential element of the kidnapping offense; only Brady's death was. *Id.* The Commonwealth improperly offered evidence of Keeling's kidnapping and murder to show St. Clair's murder *modus operandi*, and thus to indirectly show his identity as Frank Brady's killer. *Id.* The Commonwealth sought to prove the men died in a similar fashion. *Id.* "This, in turn, would tend to support the inference that Brady died in the course of the kidnapping." *Id.*

Several elements of this proof were irrelevant and clearly inadmissible. *Id.* St. Clair's statement that killing people was easy and that he saw the killing as a joking matter and excited him had nothing to do with his alleged *modus operandi*. *Id.* "This proof showed only that St. Clair was a cold-blooded, experienced killer." *Id.* at 890. "That proof is improper character evidence and is forbidden by KRE 404." *Id.* Similarly, St. Clair's cold commentary about the victims was irrelevant and inadmissible, since it was evidence only of despicable character, having nothing to do with St. Clair's alleged *modus operandi*. *Id.*

While some aspects of Keeling's murder were technically relevant, because they showed a "murder *modus operandi*," "the chain of inferences needed to get from St. Clair's murder of Timothy Keeling to the fact that Frank Brady died in the course of a kidnapping that occurred

much later and over a thousand miles away necessarily eroded the probative value of that evidence." *Id.* "The probative value of this proof was substantially outweighed by the danger of undue prejudice, confusion of the issues, and misleading the jury." *Id.* Allowing the jury to hear it was reversible error. *Id.*

The same error occurred here. This Court determined in *Gray I* that Anthony's alleged threats to kill Rosa were relevant because he may have believed she would incriminate him. Under the law of the case, Frazier and White could repeat their allegations that Anthony wanted to kill Rosa to the jury. However, like in *Funk* and *St. Clair*, the trial court allowed the? Commonwealth to elicit testimony beyond what was probative or necessary. Similar to *St. Clair*, Anthony's alleged statement that he would "slit [Rosa's] throat in half a second" and be gone before she bled out simply made him look like a cold-blooded killer.[134]

Likewise, Frazier's testimony that Anthony wanted to slit Rosa's throat was irrelevant. The Grays were shot, not stabbed - there was nothing in the statement to show identity or *modus operandi* - it simply painted Anthony as a man with a propensity for violence, the type of evidence that 404(b) prohibits. Moreover, Gilbert's testimony that Anthony had put a gun in Rosa's face and choked her were more prejudicial than probative. There was no nexus connecting these alleged admissions to the case being tried. Gilbert did not claim Anthony said he

[134] *St. Clair*, 455 S.W.3d at 890.

and Rosa had argued about her testimony, or a fear she would implicate him. Rather, Gilbert testified that Anthony and Rosa had a rocky relationship, riddled with arguments and occasional violence.

Evidence of other acts cannot be used to show a propensity or predisposition to again commit the same or a similar act. *Southworth v. Commonwealth*, 435 S.W.3d 32, 48 (Ky. 2014) (*citing* KRE 404(b)). Evidence of criminal conduct other than that being tried is admissible only if probative of an issue independent of character or criminal predisposition, and only if its probative value on that issue outweighs the unfair prejudice with respect to character, since it carries a significant risk of prejudice to a defendant, even when offered for a proper purpose. *Id.* KRE 404(b) is "strictly construed" and "has always been interpreted as exclusionary in nature." *Id.* (*citing Bell v. Commonwealth*, 875 S.W.2d 882, 889 (Ky. 1994)).

Irrelevant and prejudicial evidence of an uncharged crime denied Anthony a fair trial. Due process is violated when an improper admission of evidence is "so egregious that it results in a denial of fundamental fairness." *Ege v. Yukins*, 485 F.3d 364, 375 (6th Cir. 2007); U.S. Const. Amends. V, XIV.

III. The trial court should have directed a verdict on the tampering charge.

Preservation

This issue is preserved by defense motion for directed verdict at the close of the Commonwealth's proof.[135] The motion was renewed at the close of the defense case and at the conclusion of the Commonwealth's rebuttal.[136] The motions were overruled.[137]

Standard of Review

"On appellate review, the test of directed verdict is, if under the evidence as whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal." *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991). "There must be evidence of substance, and the trial court is expressly authorized to direct a verdict for the defendant if the prosecution produces no more than a mere scintilla of evidence." *Id.* at 187–88.

Law & Analysis

Law enforcement recovered .45 caliber casings at the scene of the murders.[138] This led Detective Persley to conclude that a .45 was used to

---

[135] VR 8/18/21, 11:43:00.
[136] VR 8/23/21, 11:42:00; 1:58:00.
[137] VR 8/18/21, 11:44:00; VR 8/23/21, 11:43:00; 1:58:00.
[138] VR 8/15/21, 12:39:00.

kill James and Vivian.[139] The murder weapon was never recovered.[140] The Commonwealth's theory was that a "reasonable inference" was that the murderer took the gun with him and "disposed of it."[141]

The Commonwealth is required to prove every element of a charge beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 361 (1970). There was no evidence of any act of disposal, concealment, or even removal by Anthony. Only that the gun was never recovered.[142] Wrongdoing must be conscious to be criminal. *Elonis v. U.S.*, 575 U.S. 723, 734 (2015).

What the Commonwealth must show is that a particular defendant intended to impair the availability of the evidence while believing an official proceeding may be instituted. KRS 524.100. "When a crime takes place, it will almost always be the case that the perpetrator leaves the scene with evidence." *Mullins v. Commonwealth*, 350 S.W.3d 434, 443 (Ky. 2011). If this amounted to a charge of tampering, the result would be an impermissible piling on. *Id.* (internal quotations omitted).

In *Mullins*, the defendant was seen by eyewitnesses shooting a gun, getting into a car, and fleeing the scene. *Id.* at 442. The police recovered three bullets – but no casings – leading to the supposition that the weapon used was a revolver. *Id.* The defendant had also been seen with a

---

[139] VR 8/16/21, 1:25:00.
[140] *Id.* at 3:05:00.
[141] VR 8/18/21, 11:44:00.
[142] *Id.*

revolver days before the murder. *Id.* Finally, the police search failed to uncover the murder weapon. *Id.* It was the Commonwealth's position that Mullins was guilty of tampering because he removed the murder weapon from the crime scene. *Id.* Rejecting this argument, this Court held that "it is insufficient to bring a charge of tampering based solely on the fact that evidence was not found when there were insufficient steps to locate that evidence, and there is no proof that the defendant acted with the intent to prevent evidence from being available at trial." *Id.* at 444. As a result, this Court vacated Mullins' conviction for tampering. *Id.*

Similarly, in this case, police found .45 shell casings at the scene which made them suspect a .45 caliber weapon had been used.[143] After prompting by his attorney, Peter Hafer told the ATF that he had sold Anthony a .45 caliber model 1911 pistol.[144] Jodi Lucas also recalled that Anthony possessed a .45 handgun at some time prior to the murders.[145] There was no evidence about what steps the police took to recover the gun. No officer testified about where they looked for it or executed search warrants to find it. There was no testimony that they searched any of the places Anthony had resided for a gun during the investigation.

"The Commonwealth cannot bootstrap a tampering charge onto another charge simply because a woefully inadequate effort to locate the evidence was made by the police." *Mullins*, 350 S.W.3d at 444. This

---

[143] VR 8/15/21, 12:39:00; VR 8/16/21, 1:25:00.
[144] VR 8/17/21, 9:36:00; 10:31:00.
[145] VR 8/19/21, 10:16:00.

stands to reason, as any other holding could lead to *purposefully* inadequate police investigation. The fact, standing alone, that the gun was not recovered does not mean it was placed in an unconventional location. *Id.* There must be some active attempt by the defendant that demonstrates intent to impair the availability of the evidence. *Id.*

Because no evidence of any act of concealment was adduced and the police investigation was inadequate, the tampering charge must be vacated.

IV. Anthony was denied his right to Confrontation when the Commonwealth was allowed to elicit improper hearsay evidence.

Preservation

The Commonwealth offered 404(c) notice of intent to introduce Peter Hafer's statement that he sold Anthony a .45 caliber weapon.[146] Anthony's objection is preserved by defense counsel's written and oral objections.[147]

Standard of Review

The standard of review of an evidentiary ruling is abuse of discretion. *Ward v. Commonwealth*, 587 S.W.3d 312, 332 (Ky. 2019). "The test for abuse of discretion is whether the trial judge's decision was

[146] TR 2193-2914.
[147] TR 2106 08, VR 7/17/19 at 10:44:00-10:46:00; 10:48:00-10:50:00.

arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Id.*

Law and Analysis

The Commonwealth was allowed to introduce Peter's Hafer's statements implicating Anthony in illegal gun transactions before the defense had presented its case. Doug Robinson testified that Hafer alleged Anthony purchased a .45 caliber pistol from him.[148]

Under *Crawford v. Washington*, testimonial, out-of-court statements cannot be introduced unless the defendant has, or had, an opportunity to cross-examine the declarant. 541 U.S. 36, 59 (2004); *see also Rodgers v. Commonwealth*, 285 S.W.3d 740, 745 (Ky.2009). Without an opportunity to cross-examine the declarant, a defendant's right to confrontation under the Sixth Amendment is violated. In this case, Hafer's statements to Robinson were testimonial in nature. Unlike the spontaneous statements against interest the defense sought to introduce, Hafer's hearsay statement was in response to prodding from law enforcement. As defense counsel noted in its objection, "Mr. Hafer is told that Mr. Shaw is there as a result of a double homicide investigation and Ms. Hawkins stresses the need for Hafer to put a .45 caliber gun in Anthony Gray's hand while offering potential leniency for his cooperation on federal charges."[149]

---

[148] *Id.* at 9:36.
[149] TR 2107.

Thus, Hafer's statements were "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Crawford*, 541 U.S. at 52. Moreover, Anthony has a right to confrontation in this matter; Hafer did not. *Cabinet for Health and Family Services v. A.G.G.*, 190 S.W.3d 338, 344–45 (Ky. 2006) ("The principal evil at which the Confrontation Clause was directed is use of *ex parte* examinations as evidence against the accused."); *Crawford*, 541 U.S. at 50.

Admitting Hafer's statement was reversible error. "Before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Whittle v. Commonwealth*, 352 S.W.3d 898, 905–06 (Ky. 2011) citing *Chapman v. California*, 386 U.S. 18, 22, 24 (1967). The Commonwealth's case was circumstantial. There was scant evidence connecting Anthony to the crime scene or suggesting he possessed the murder weapon.[150]

V. The trial court erred by allowing Alford Switzer's testimony regarding the hearsay statements of James Gray.

Preservation

This issue is preserved by oral objection.[151] The objection was overruled.[152]

---

[150] VR 8/17/21, 9:36:00; Jody Marsanopoli, the toolmark examiner with the ATF, testified that a Charles Daly 1911 .45 was recovered and excluded based on class characteristics. VR 8/18/21, 9:37:00. *Id.* at 10:31:00

[151] VR 8/12/21, 2:43:00.

[152] *Id.* at 2:44:00.

Standard of Review

Determinations of admissibility of evidence are generally within the sound discretion of the trial court. *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). As such, they are reviewed for abuse of discretion. *Id.*

Law and Analysis

During trial, the Commonwealth called Alford Switzer to testify.[153] Switzer knew James Gray and had performed work for him as an auto mechanic.[154] He contacted the police in 2016 – after the case had been reversed on appeal.[155] He recalled a conversation he'd had with James about a week prior to the murder.[156] James produced a revolver from his pocket and said "it's a damn shame I have to pack this out of fear of my own son."[157] Switzer described James as "scared to death."[158]

The Commonwealth's claimed mechanism for introducing James' statements through Switzer was as a present sense impression.[159] The trial court allowed Switzer's testimony under this theory.[160]

Hearsay is a statement, other than one made by the declarant while testifying at trial, offered in evidence to prove the truth of the

---

[153] *Id.* at 2:46:00.
[154] *Id.* at 2:47:00.
[155] *Id.* at 2:44:00.
[156] *Id.* at 2:50:00.
[157] *Id.* at 2:51:00.
[158] *Id.* at 2:52:00.
[159] *Id.* at 2:43:00; TR 3170 – 3173.
[160] VR 8/12/21, 2:44:00.

matter asserted. KRE 801(c). It is not admissible except as provided by rule. KRE 802. There is a carveout for statements which describe or explain an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter. KRE 803(1).

Attempting to characterize James' statement as an exception to the bar to hearsay, the Commonwealth cited to the case of *Sturgeon v. Commonwealth*, 521 S.W.3d 189 (Ky. 2017).[161] In *Sturgeon*, this Court found no error in the admission of text messages between the defendant and a murder victim under KRE 803(3). *Id.* at 197 – 99. This is a different hearsay exception than the one relied upon by the Commonwealth in its written motion and at argument at the bench.[162] The trial court allowed Switzer's testimony about James' statement under KRE 803(1) as a present sense impression.[163]

Further conflating the issue, in its written motion, the Commonwealth also cited to the case of *Dillon v. Commonwealth*, 475 S.W.3d 1 (Ky. 2015).[164] The *Dillon* case also discusses KRE 803(3), not KRE 803(1). This Court held that admission of the victim's statement to her niece about getting rid of a gun because she did not want it used against her was harmless error. *Id.* at 22 – 23.

---

[161] TR 3172.
[162] *Id.* at 2:43:00; TR 3170 – 3173.
[163] VR 8/12/21, 2:44:00.
[164] TR 3171.

Neither of the cases cited is applicable to Anthony's case. In *Dillon*, the defendant claimed, alternatively, accident or self-defense. 475 S.W.3d at 4. In *Sturgeon*, the defendant claimed extreme emotional disturbance leading to an accident. 521 S.W.3d at 192. Anthony's defense has always been one of factual innocence by presentation of an alternative perpetrator, Peter Hafer. *Gray v. Commonwealth*, 480 S.W.3d 253, 266 (Ky. 2016).

Whether under KRE 803(1) or 803(3), statements that reflect the basis for a victim's fear of a defendant are not admissible where the victim's state of mind is not at issue. *Harris v. Commonwealth*, 384 S.W.3d 117, 128 (Ky. 2012); *Bray v. Commonwealth*, 68 S.W.3d 375, 382 (Ky. 2002) (internal quotation omitted). Except where self-defense, accident, or suicide is claimed by a defendant, statements regarding the victim's fear "usually have little relevancy." *Harris*, 384 S.W.3d at 129; *Bray*, 68 S.W.3d at 381 – 82.

Additionally, there is a likelihood that admission of such statements raise the danger that a jury will consider the victim's statement of fear as a "true indication of the defendant's intentions, actions, or culpability." *Harris*, 384 S.W.3d at 129 (internal citation omitted). These statements are "highly improper" because they create a strong likelihood that improper inferences will be drawn by the jury, making the danger of injurious prejudice particularly evident. *Id.*

Precedent dictates that statements of a victim's fear are irrelevant and highly prejudicial. KRE 401, 402, 403. As such, it was error for the trial court to permit Switzer to testify about James Gray's fear of Anthony. Reversal is required.

VI. Palpable error occurred when Carolyn Caraway testified that a will for James and Vivian Gray was never found, Anthony's sons from his marriage were disinherited by adoption, and that Anthony had fathered two children out of wedlock.

Preservation

This issue is unpreserved. Anthony requests palpable error review pursuant to RCr 10.26.

Standard of Review

Palpable error occurs when there is a "probability of a different result or [an] error so fundamental as to threaten a defendant's entitlement to due process of law." *Alford v. Commonwealth*, 338 S.W.3d 240, 246 (Ky. 2011).

Law and Analysis

The Commonwealth called Carolyn Caraway, an attorney specializing in estate law, to testify about James and Vivian's assets. Caraway testified that she was retained to administer the Grays' estate.[165] Caraway contacted local attorneys and several attorneys who

[165] VR 8/10/21 at 3:26:00.

had been retained by the Grays.[166] She did not find evidence that any attorney had drafted a will for the Grays. [167] Caraway estimated the Grays' estate was valued at $642,800.[168] She had not closed the estate, because it had not been determined who the heirs would be.[169]

Caraway told the jury a child deemed responsible for their parents' death could not inherit the estate.[170] She stated because Anthony gave his sons Charles and Darwin up for adoption, under Kentucky law, they "lose all right to inherit" under intestacy laws.[171]

Caraway testified that in 2014, an attorney representing Devin and Michael Vallejo contacted her asserting that the brothers were Anthony's children.[172] DNA testing confirmed that they were Anthony's biological children.[173] The Vallejo brothers would therefore inherit from the Grays' estate.[174] The Commonwealth repeated that Anthony's children with his late wife Amy "could not inherit."[175]

Relevant evidence is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. KRE 401. Evidence which is not relevant is not admissible. KRE 402.

---

[166] *Id.* at 3:35:00.
[167] *Id.*
[168] VR 8/10/21 at 3:33:00.
[169] *Id.* at 3:27:30
[170] *Id.* at 3:38:00
[171] *Id.* at 3:39:00.
[172] *Id.* at 3:39:00.
[173] *Id.* at 3:40:00.
[174] *Id.* at 3:41:00.
[175] *Id.*

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence. KRE 403. Thus, even if an item of evidence meets the threshold for relevance, the court must perform a balancing test to determine whether the probative value of the item outweighs the danger of undue prejudice. KRE 403; *Southworth v. Commonwealth*, 435 S.W.3d 32, 50-51 (Ky. 2014).

Evidence of illegitimate children has been deemed "irrelevant and highly prejudicial." *See Hutsell v. Commonwealth*, 243 S.W.2d 898, 899–900 (Ky. 1951). Other jurisdictions have agreed evidence of children born out of wedlock is inflammatory. *See State v. Spencer*, 472 S.W.2d 404, 405 (Mo. 1971). In *Spencer*, the prosecution admitted to asking a defense witness about two children born outside of marriage in order to impugn her credibility. *Id.* Similarly, the Texas Court of Appeals held that evidence a defendant divorced his wife and fathered a child outside of marriage was highly inflammatory. *Hodges v. State*, 651 S.W.2d 386, 389 (Tex. App. 1983). The Texas Court of Appeals held, despite the state's assertions, the evidence was not related to motive and should have been excluded. *Id. See also, Gutierrez v. City of New York*, 205 A.D.2d 425, 426 (1994) ("absolutely no rationale whatsoever exists, and no door was opened, for defense counsel's repeated questions concerning the legitimacy of plaintiff's children.").

The stigma of being an "illegitimate" child or the parent of an "illegitimate child" has diminished over time. *J.A.S. v. Bushelman*, 342 S.W.3d 850, 852 (Ky. 2011). However, "some may lament the change as indicative of a decline in the moral fiber of American society." *Id.* Regardless, in this instance, evidence of children born out of wedlock was irrelevant and unduly prejudicial. The jury was left to speculate about the circumstances of their birth, whether Anthony was aware of them, and whether he was absent from their lives by chance or by choice. Moreover, society typically disapproves of men who do not support their children financially. *See*, David Ray Papke *Family Law for the Underclass: Underscoring Law's Ideological Function*, 42 Ind. L. Rev. 583, 597 (2009) (Sporting an alliterative lilt, the phrase "deadbeat dad" suggested indolent, shiftless, and duplicitous men who probably should not have fathered children in the first place.).

Evidence that Charles and Darwin would be unable to inherit the Gray's estate because Anthony had put them up for adoption was irrelevant and prejudicial. The Commonwealth presented evidence the Grays were unhappy Anthony allowed someone outside the family to adopt the boys.[176] Anthony's desire to keep the boys from his parents had some relevance in explaining the animosity between Anthony and his parents. However, there was no evidence that Anthony voluntarily terminated his parental rights in order to disinherit his children. There is

[176] VR 8/12/21 at 9:56:00.

no evidence Anthony was aware of intestacy law. Eliciting evidence that Charles and Darwin were ineligible to inherit from the Grays' sizable estate would only be relevant to evoke sympathy for them or animosity towards Anthony.

"Evidence that 'appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish, or otherwise may cause a jury to base its decision on something other than the established propositions in the case' is unfairly prejudicial." *Hammond v. Commonwealth*, 577 S.W.3d 93, 101 (Ky. App. 2019), *Thorpe v. Commonwealth*, 295 S.W.3d 458, 462 (Ky. App. 2009) (*quoting* Robert G. Lawson, The Kentucky Evidence Law Handbook, § 2.10(4) (4th ed. 2003)).

Evidence of children conceived out of wedlock with whom Anthony apparently did not have a relationship, and that terminating his parental rights to Charles and Darwin disinherited them served no other purpose other than painting Anthony as a deadbeat. In a case based on circumstantial evidence, it cannot be assured "that the judgment was not substantially swayed by the error" thus "it is impossible to conclude that substantial rights were not affected." *Kotteakos v. United States*, 328 U.S. 750, 765 (1946). "The inquiry cannot be merely whether there was enough [evidence] to support the result," but "whether the error itself had substantial influence." *Id.* "If so, or if one is left in grave doubt, the conviction cannot stand." *Id.*

All criminal defendants have the right to a fair trial. *Payne v. Tennessee*, 501 U.S. 808, 825 (1991) (When a state court admits evidence that is "so unduly prejudicial that it renders the trial fundamentally unfair, the due process clause provides a mechanism for relief"); *Alexander v. Louisiana*, 406 U.S. 625 (1972) (Due process clause incorporates the U.S. Const. Amend V right to a fair trial to the states.); *California v. Trombetta*, 467 U.S. 479, 485 (1984). Multiple instances of irrelevant evidence offered to bolster a circumstantial case rendered Anthony's trial unfair. Reversal is warranted.

VII. Cumulative Error

It is long established authority in this Commonwealth that an accumulation of concurrent errors may authorize a reversal where no one error taken alone would justify a reversal. *Funk v. Commonwealth*, 842 S.W.2d 476, 483 (Ky. 1993); *Peters v. Commonwealth*, 477 S.W.2d 154 (Ky. 1972); *Faulkner v. Commonwealth*, 423 S.W.2d 245 (Ky. 1965).

Anthony believes that each of the errors alleged *supra* individually warrant reversal. However, assuming *arguendo* that this Court declines to hold any individual, previously assigned error sufficient to require reversal, the cumulative effect of the preceding errors requires that his convictions be set aside. *See Sanborn v. Commonwealth*, 754 S.W.2d at 534, 542-49(1988), *overruled on other grounds by Hudson v. Commonwealth*, 202 S.W.3d 17 (Ky. 2006).

Anthony was denied the right to a fair trial, with a level playing field throughout the pendency of his case. Cumulative error denied his rights to due process and a fair trial under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Sections 7 and 11 of the Kentucky Constitution. This Court should reverse his convictions and remand this cause for a new trial.

CONCLUSION

Based on the foregoing arguments, Anthony asks that his convictions be vacated and remanded, and welcomes any and all other relief this Court determines is appropriate.

Respectfully Submitted,

ERIN HOFFMAN YANG (KBA 91588)
ASSISTANT PUBLIC ADVOCATE
DEPARTMENT OF PUBLIC ADVOCACY
5 MILL CREEK PARK, SECTION 100
FRANKFORT, KY. 40601
(502) 564-8006
erin.yang@ky.gov

J. TRAVIS BEWLEY (KBA 95515)
ASSISTANT PUBLIC ADVOCATE
DEPARTMENT OF PUBLIC ADVOCACY
5 MILL CREEK PARK, SECTION 100
FRANKFORT, KY. 40601
(502) 564-8006
jared.bewley@ky.gov

APPENDIX

C

Supreme Court of Kentucky

2021-SC-0492-MR

JAMES ANTHONY GRAY — APPELLANT

V.

ON APPEAL FROM SCOTT CIRCUIT COURT
HONORABLE PAUL F. ISAACS, JUDGE
NO. 07-CR-00211

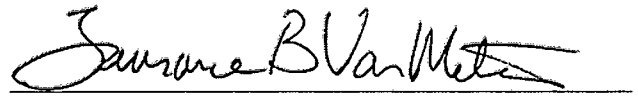
COMMONWEALTH OF KENTUCKY — APPELLEE

ORDER DENYING PETITION FOR REHEARING

The Petition for Rehearing, filed by the Appellant, of the Opinion of the Court, rendered June 13, 2024, is DENIED.

Bisig, Conley, Keller, Lambert, Nickell, and Thompson, JJ., sitting. All concur. VanMeter, C.J., not sitting.

ENTERED: August 22, 2024.



CHIEF JUSTICE

Appendix C

APPENDIX D

COMMONWEALTH OF KENTUCKY
SUPREME COURT
CASE NUMBER: 2021-SC-0492

JAMES ANTHONY GRAY — APPELLANT

v.

APPEAL FROM SCOTT CIRCUIT COURT
HON. PAUL F. ISAACS, JUDGE
CASE NO: 2007-CR-00211

COMMONWEALTH OF KENTUCKY — APPELLEE

PETITION FOR REHEARING FOR APPELLANT

Submitted by:
ERIN HOFFMAN YANG, KBA #91588
J. TRAVIS BEWLEY, KBA #95515
ASSISTANT PUBLIC ADVOCATES
DEPT. OF PUBLIC ADVOCACY
5 MILL CREEK PARK, SECTION 100
FRANKFORT, KENTUCKY 40601
(502) 564-8006
erin.yang@ky.gov
jared.bewley@ky.gov
COUNSELS FOR APPELLANT

CERTIFICATE OF SERVICE

We hereby certify on June 28, 2024, the foregoing Petition for Rehearing for Appellant was served by first class mail upon the following: to the Hon. Thomas Clark, Special Judge, Scott Co. Justice Ctr., 119 N. Hamilton St., Georgetown, KY 40324; the Hon. Lou Anna Red Corn, Commonwealth Attorney, and Hon. Keith Eardley, Assistant Commonwealth Attorney, 116 N. Upper Str., Ste. 300, Lexington, KY 40507; the Hon. Rodney D. Barnes, Assistant Public Advocate, 221 St. Clair Str., Frankfort, KY 40601; and by state messenger mail to the Hon. Harrison Gray Kilgore, Assistant Attorney General, 1024 Capital Center Dr., Frankfort, KY 40601. We also certify the record was not checked out for the preparation of this Petition for Rehearing.

Erin Hoffman Yang

Erin Hoffman Yang

Jared Travis Bewley

Appendix D

INTRODUCTION

James Anthony Gray respectfully requests that this Court grant this Petition for Rehearing pursuant to Kentucky Rule of Appellate Procedure 43 (B)(1)(a) &(c).

Ky. Const. 110 (2)(b) guarantees Anthony Gray a matter of right appeal and decision on the merits.

This Petition for Rehearing should be granted in accordance with RAP 43(B)(1)(a) & (c) as this Court did not address several issues when it rendered its decision in *Gray v. Commonwealth*, 2021-SC-0492-MR, (Ky. Jun 13, 2024) (not to be published), attached at Appendix 1.

In its Opinion Affirming in Part and Reversing in Part, this Court addressed only the argument that Gray was entitled to a directed verdict on the tampering charge.[1] All the other assignments of error were grouped into a heading called "The Murder Convictions" with a brief explanation that the votes of the six sitting Justices were evenly divided which resulted in an affirmance of the murder convictions.[2] Gray is left unable to say if this Court has overlooked a material fact or controlling law or statute pursuant to RAP 43 (1)(a) because the review of the merits remains a mystery.

"A system of appeal as of right is established precisely to assure that only those who are validly convicted have their freedom drastically curtailed." *Evitts v. Lucey*, 469 U.S. 387, 399–400 (1985). Every state has recognized the importance of appellate review to a correct adjudication of guilt or innocence and provided a method for appellate review. *Griffin v. Illinois*, 351 U.S. 12, 18 (1956). On a first appeal as a matter of right, due process requires states to "offer each defendant a fair opportunity to obtain an adjudication on the merits of his appeal." *Hollon v. Commonwealth*, 334 S.W.3d 431, 435 (Ky. 2011) *citing Smith v. Robbins*, 528 U.S. 259, 277 (2000). Section 110(2)(b) of the Kentucky Constitution vests *exclusive* jurisdiction of appeals in which a sentence of 20

[1] Opinion Affirming at 2 – 6.
[2] *Id.* at 2.

years or more has been imposed in the Supreme Court of Kentucky. *Shepherd v. Commonwealth*, 739 S.W.2d 540, 540 (Ky. 1987)

In briefing, Gray argued that the trial court deprived him of his right to present a defense and right to counsel by permitting the Commonwealth to preview defense witnesses prior to trial[3], erred by permitting improper KRE 404(b) evidence[4], denied his right to confront witnesses by allowing improper hearsay evidence[5], erred by permitting Alford Switzer's hearsay statements[6], erred by permitting Carolyn Caraway to testify[7], all of which resulted in reversible cumulative error.[8] None of these issues were addressed in this Court's Opinion and Order. This is contrary to RAP 40(A)(2), which requires that "[o]pinions and orders finally deciding a case on the merits shall include an explanation of the legal reasoning underlying the decision."

Anthony is aware that this Court has on several prior occasions issued similar orders of dismissal in cases where the Court was evenly divided. *See Maguire v. Crook*, 606 S.W.3d 343 (Ky. 2020); *CSX Transportation, Inc. v. Boggs*, 605 S.W.3d 343 (Ky. 2020); *Cabinet for Health and Family Svcs. v. M.Q.M.*, 2022-SC-0383-DG (Ky. Sept 14, 2023)[9]; *EQT Production Company v. Potter*, 2017-SC-000161-DG (Ky. Aug. 16, 2018). However, in all of those cases, this Court was hearing the matter on discretionary review, so the party had already received a reasoned opinion in their one appeal as of right and

---

[3] Appellant's Brief at 10 – 23.
[4] *Id.* at 23 – 31.
[5] *Id.* at 35 – 37.
[6] *Id.* at 37 – 41.
[7] *Id.* at 41 – 45 (Appellant concedes this issue was unpreserved).
[8] *Id.* at 46 – 47.
[9] Pursuant to RAP 41, this opinion is unpublished and is not cited for precedential value, but only as an example of an equal spilt of a 6 Justice Court.

were not Constitutionally entitled to a merits opinion from this Court. In this case, Gray is clearly entitled to one appeal as of right to another court. Ky.Const. Section 115. A matter of right appeal is superior to discretionary review. *See Evitts v. Lucey*, 469 U.S. 387, 396 fn. 7 (1985).

The absence of a reasoned opinion may prejudice Anthony in future proceedings. For example, a federal court reviewing a state prisoner's request for habeas corpus relief is required to "train its attention on the particular reasons—both legal and factual—why state courts rejected a state prisoner's federal claims . . . and to give appropriate deference to that decision." *Wilson v. Sellers*, 584 U.S. 122, 125 (2018) (quotations omitted). Where there is a reasoned opinion, the "federal habeas court simply reviews the specific reasons given by the state court and defers to those reasons if they are reasonable." *Id.* However, where there is no reasoned opinion to defer to,[10] the federal court "must determine what arguments or theories could have supported the state court's" determination", and then "assess whether 'fairminded jurists could disagree' on the correctness of the state court's decision if based on one of those arguments or theories." *Shinn v. Kayer*, 592 U.S. 111, 120 (2020) (quotations and punctuation omitted). Under these circumstances, there is a clear benefit to ensuring that the state issues a reasoned opinion explaining its decision – something Kentucky law has required since the adoption of Section 115 of the Kentucky Constitution. Compare RAP 40(A)(2) (requiring a reasoned opinion) with CR 76.28(1)(b) (same rule).

---

[10] *Wilson* permits the federal court to "look through" a summary decision to the "last reasoned decision" of the state court. *Id.* However, where, as here, the summary decision is the only appeal of the case, there is often not a reasoned decision at all. For example, most objections on evidence are not resolved with an opinion, simply a statement that the objection is sustained or overruled.

There are two ways this Court can address this issue. Gray suggests that the fairest way is to ask for the Governor to appoint a special justice to sit on this case, thereby ensuring that the final outcome is not a tie. Gray is aware of *Hodge v. Commonwealth*, 17 S.W.3d 824 (Ky. 1999), wherein this Court rejected a defendant's request asked for appointment of a seventh justice to hear his post-conviction appeal. However, this case is distinguishable from *Hodge*, as in that case this Court was not evenly divided and an opinion on the merits was issued. To the contrary, shortly after rendering an opinion denying Hodge's request for an additional justice, the six sitting justices unanimously affirmed his convictions and analyzed numerous issues on the merits. Unlike *Hodge*, Anthony is left with a 50-year sentence and no analysis of the merits. While the language of Section 110(3) does not require the Chief Justice to certify the need for an appointment to the Governor, the language pointedly does not prohibit it either, a fact acknowledged in *Hodge*. *Id.* (declining to overrule this Court's finding in *Kentucky Utils. Co. v. South East Coal Co.*, 836 S.W.2d 407 (Ky. 1992) that Section 110(3) permitted the Chief Justice to request appointment of a special justice when a single justice recused).

Alternatively, if this Court does not wish to seek a special justice, Anthony asks this Court to render an opinion on the merits, treating the three justices voting to affirm as the majority for purposes of an opinion.

For the foregoing reasons, Anthony respectfully requests Rehearing.

CONCLUSION

Anthony respectfully requests that this Court grant his Petition for Rehearing and appoint a special justice to break the tie so that Anthony may have a decision on the merits in his matter of right appeal. In the alternative, Anthony requests that this Court issue a fully reasoned opinion for all claims for which this Court has denied relief, as required by RAP 40(A)(2) and Section 115 of the Kentucky Constitution.

Respectfully submitted,

Erin Hoffman Yang
KBA # 91588
erin.yang@ky.gov
Counsel for Appellant

Jared Travis Bewley
KBA #95515
jared.bewley@ky.gov
Counsel for Appellant

APPENDIX

Tab Number	Item Description	Record Location
1	*Gray v. Commonwealth*, 2021-SC-0492-MR, (Ky. Jun 13, 2024)	
2	Final Judgment & Sentence Of Imprisonment	TR 3262-3265

APPENDIX

E

Gray v. Commonwealth, 480 S.W.3d 253

Supreme Court of Kentucky

February 18, 2016, Rendered

2013-SC-000374-MR

Reporter

480 S.W.3d 253 * | 2016 Ky. LEXIS 1 **

JAMES ANTHONY GRAY, APPELLANT v. COMMONWEALTH OF KENTUCKY, APPELLEE

Subsequent History: Corrected: April 12, 2016.Released for Publication April 12, 2016.
Related proceeding at Gray v. Hampton, 2017 U.S. Dist. LEXIS 186422, 2017 WL 5194582 (E.D. Ky., Nov. 9, 2017)
Decision reached on appeal by, Remanded by Gray v. Commonwealth, 2024 Ky. Unpub. LEXIS 45 (Ky., June 13, 2024)

Prior History: [**1] ON APPEAL FROM SCOTT CIRCUIT COURT. HONORABLE PAUL F. ISAACS, JUDGE. NO. 07-CR-00211.

Core Terms

confession, trial court, interrogation, aaltperp, murder, overwhelmed, documents, admit, kill, law enforcement, mistrial, tactics, motive, sheriff's office, coercive, suppress, trickery, false evidence, questioning, deception, jurors, free will, investigators, convictions, principles, declare, totality of the circumstances, criminal defendant, second trial, first trial

Case Summary

Appendix E

Overview

HOLDINGS: [1]-The trial court erred in failing to suppress defendant's confession to officers, as the use of false statements and a phony DNA lab report as the sole basis for hours of unrecorded interrogation offended the Fourteenth Amendment right to due process, and the weight of false evidence against defendant and the pressures exerted by interrogating officers overwhelmed defendant's conscience; [2]-The trial court improperly excluded defendant's alternate perpetrator evidence, as the evidence tended to show that the other individual had motive to commit the crime and the exclusion of evidence prevented defendant from showing that he also had opportunity; [3]-The trial court did not err, under Ky. R. Evid. 702, in refusing to allow a retired police officer to testify to a variety of missteps during the investigation, as he had no published works or professional credentials beyond his years of experience.

Outcome

Reversed and remanded.

LexisNexis® Headnotes

Criminal Law & Procedure > ... > Standards of Review > De Novo Review > Conclusions of Law
View more legal topics

HN1 **De Novo Review, Conclusions of Law**

The Supreme Court of Kentucky reviews a trial court's findings of fact for clear error, but legal determinations it examines de novo. More like this Headnote

Shepardize® - Narrow by this Headnote (1)

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection
Criminal Law & Procedure > Commencement of Criminal Proceedings > Interrogation > Voluntariness

HN2 **Procedural Due Process, Scope of Protection**

The Due Process Clause of the Fourteenth Amendment precludes the use of involuntary confessions against a criminal defendant at trial. An involuntary confession is defined as one that is not the product of a rational intellect and a free will. And coercive police activity is a necessary predicate to the finding that a confession is not "voluntary" within the meaning of the Due Process Clause of the Fourteenth Amendment. Under Kentucky law, courts evaluate the voluntariness of a confession using a three-part test. In determining whether a confession was coerced,

a court considers: (1) whether police activity was objectively coercive; (2) whether the coercion overwhelmed the will of the defendant; and (3) whether the defendant has shown that the coercive activity was the "crucial motivating factor" behind his confession. More like this Headnote

Shepardize® - Narrow by this Headnote (2) 2

Criminal Law & Procedure > Commencement of Criminal Proceedings > Interrogation > Voluntariness

HN3 Interrogation, Voluntariness

In reaching a decision on the voluntariness of a defendant's confession, a court must view the facts and evidence under the "totality of the circumstances." Aiding the court's inquiry, it is given many factors to consider in light of the circumstances behind an individual confession. One set of criteria is defendant-specific, such as the defendant's age, intelligence, education, criminal experience, and criminal and mental condition at the time of the interrogation. Another set of criteria requires us to consider methods employed in the interrogation itself, including whether there was any physical or mental coercion, threats, promises, delay, and the extent of trickery and deception used in questioning. More like this Headnote

Shepardize® - Narrow by this Headnote (1) 1

Criminal Law & Procedure > Commencement of Criminal Proceedings > Interrogation > Voluntariness

HN4 Interrogation, Voluntariness

See Ky. Rev. Stat. Ann. § 422.110. More like this Headnote

Shepardize® - Narrow by this Headnote (0)

Criminal Law & Procedure > Commencement of Criminal Proceedings > Interrogation > Voluntariness

HN5 Interrogation, Voluntariness

A reviewing court should consider the use of false documents as merely one factor in the totality of the circumstances test in determining the voluntariness of a defendant's confession. More like this Headnote

Shepardize® - Narrow by this Headnote (0)

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Criminal Law & Procedure > Commencement of Criminal Proceedings > Interrogation > Voluntariness

HN6 Procedural Due Process, Scope of Protection

When a criminal defendant can establish that the police use falsified documents to

induce a confession, a reviewing court will presume this tactic is unconstitutional until the Commonwealth can firmly establish that the document(s) did not overwhelm the defendant's will and was not a critical factor in the defendant's decision to confess. More like this Headnote

Shepardize® - Narrow by this Headnote (0)

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection
Criminal Law & Procedure > Commencement of Criminal Proceedings > Interrogation > Voluntariness

HN7 Procedural Due Process, Scope of Protection

In determining whether false evidence overwhelmed a defendant's free will, the controlling factors are the volume of false evidence used and the heft that inheres in DNA evidence. The Supreme Court of Kentucky views this aspect of its analysis as an objective one in which it asks whether the tactics employed by police would overwhelm the will of an ordinary defendant. More like this Headnote

Shepardize® - Narrow by this Headnote (0)

Criminal Law & Procedure > ... > Standards of Review > Harmless & Invited Error > Constitutional Rights
Evidence > Inferences & Presumptions > Presumptions > Particular Presumptions

HN8 Harmless & Invited Error, Constitutional Rights

For constitutional errors that contribute to a criminal conviction, those errors are presumed prejudicial unless a reviewing court can conclude they were harmless beyond a reasonable doubt. Under this standard, if the evidence against a defendant is so overwhelming that he would be convicted in spite of the constitutional violation, the violation is harmless. Essentially, if the reviewing court is certain the outcome would remain unchanged even if an erroneously admitted piece of evidence was excluded, the reviewing court may preserve a defendant's conviction. More like this Headnote

Shepardize® - Narrow by this Headnote (0)

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection
Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > Evidence
View more legal topics

HN9 Procedural Due Process, Scope of Protection

The Due Process Clause of the Fourteenth Amendment guarantees a criminal defendant the opportunity to present a full defense, and that guarantee includes the right to introduce evidence that an alternate perpetrator committed the offense. A

reviewing court shows great deference to a trial court's evidentiary rulings and reverses only upon a finding of an abuse of discretion. A trial court's ruling on this issue will be affirmed absent a showing that the trial court's ruling was arbitrary, unreasonable, unfair, or unsupported by legal principles. More like this Headnote

Shepardize® - Narrow by this Headnote (7) 1

Criminal Law & Procedure > Defenses

HN10 **Criminal Law & Procedure, Defenses**

One way to advance an alternate perpetrator theory of defense is to establish that an alternate perpetrator had both the motive and opportunity to commit the crime before introducing evidence at trial in support of that theory. More like this Headnote

Shepardize® - Narrow by this Headnote (7) 2

Criminal Law & Procedure > Defenses
View more legal topics

HN11 **Criminal Law & Procedure, Defenses**

A trial court may only infringe upon a defendant's right to a complete defense when the defense theory is unsupported, speculative, and far-fetched and could thereby confuse or mislead the jury. More like this Headnote

Shepardize® - Narrow by this Headnote (0)

Criminal Law & Procedure > Defenses
Evidence > Relevance > Relevant Evidence

HN12 **Criminal Law & Procedure, Defenses**

The critical question for alternate perpetrator evidence is one of relevance: whether the defendant's proffered evidence has any tendency to make the existence of any consequential fact more or less probable. Ky. R. Evid. 401. More like this Headnote

Shepardize® - Narrow by this Headnote (5)

Criminal Law & Procedure > Defenses
Evidence > Relevance > Exclusion of Relevant Evidence >
Confusion, Prejudice & Waste of Time

HN13 **Criminal Law & Procedure, Defenses**

Ky. R. Evid. 403 prompts the trial court to weigh the probative value of the evidence against the risk of prejudice at trial, including confusing the issues or misleading the jury. Essentially, the balancing test found in Rule 403 test is the true threshold for admitting alternate perpetrator evidence. More like this Headnote

Shepardize® - Narrow by this Headnote (7) 2

Criminal Law & Procedure > Defenses
Evidence > Relevance > Exclusion of Relevant Evidence >
Confusion, Prejudice & Waste of Time

HN14 **Criminal Law & Procedure, Defenses**

The Supreme Court of Kentucky does not require a defendant to recount a precise theory of how an alternate perpetrator did the deed. Rather, all Ky. R. Evid. 403 requires is evidence of some logical, qualifying information to enhance the proffered evidence beyond speculative, farfetched theories that may potentially confuse the issues or mislead the jury. More like this Headnote

Shepardize® - Narrow by this Headnote (7) 3

Criminal Law & Procedure > Defenses
Evidence > Relevance > Exclusion of Relevant Evidence >
Confusion, Prejudice & Waste of Time

HN15 **Criminal Law & Procedure, Defenses**

The decision to admit an alternate perpetrator theory at trial is committed to the sound discretion of the trial judge. Alternate perpetrator evidence theories must be supported by more than speculation or exculpatory name-dropping when assessing the probativeness of evidence under Ky. R. Evid. 403. The proponent of the theory must establish something more than simple relevance or the threat of confusion or deception can indeed substantially outweigh the evidentiary value of the theory. Motive and opportunity is one way to achieve that goal, but as we stated above, it is not the only acceptable method. There must simply be some legal or factual basis to the theory beyond raising an inference to mitigate the risk of harm that can be quite substantial. More like this Headnote

Shepardize® - Narrow by this Headnote (8) 3

Evidence > Admissibility > Expert Witnesses > Helpfulness
View more legal topics

HN16 **Expert Witnesses, Helpfulness**

The Kentucky Rules of Evidence permit opinion evidence from experts providing scientific, technical, or other specialized knowledge if it will assist the trier of fact in understanding the evidence or determining a fact in issue. Ky. R. Evid. 702. A qualified expert may provide an opinion so long as: (1) the testimony is based on scientific facts or data; (2) the testimony is the product of reliable principles and methods; and (3) the witness has applied the principles and methods reliably to the facts of the case. More like this Headnote

Shepardize® - Narrow by this Headnote (2)

Evidence > ... > Procedural Matters > Preliminary Questions > Admissibility of Evidence
View more legal topics

HN17 **Preliminary Questions, Admissibility of Evidence**
Investigative hearsay is typically inadmissible. More like this Headnote

Shepardize® - Narrow by this Headnote (0)

Evidence > Admissibility > Character Evidence

HN18 **Admissibility, Character Evidence**
Proof of a person's character or particular character trait is generally inadmissible to show conformity with that character on a particular occasion. Ky. R. Evid. 404(a)(1). More like this Headnote

Shepardize® - Narrow by this Headnote (0)

Evidence > Admissibility > Conduct Evidence > Prior Acts, Crimes & Wrongs

HN19 **Conduct Evidence, Prior Acts, Crimes & Wrongs**
Ky. R. Evid. 404(b) states that evidence of other crimes, wrongs, or acts are prohibited to prove conformity to character, with exceptions in criminal cases for proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. It is also true that it is only proper to admit relevant evidence. More like this Headnote

Shepardize® - Narrow by this Headnote (1)

Evidence > Relevance > Relevant Evidence

HN20 **Relevance, Relevant Evidence**
Evidence becomes relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Ky. R. Evid. 401. More like this Headnote

Shepardize® - Narrow by this Headnote (0)

Evidence > Relevance > Exclusion of Relevant Evidence > Confusion, Prejudice & Waste of Time

HN21 **Exclusion of Relevant Evidence, Confusion, Prejudice & Waste of Time**
Even upon a finding that evidence is relevant, a court may still nonetheless exclude testimony if its probative value is "substantially outweighed" by risk of unfair prejudice to the defendant. Ky. R. Evid. 403. More like this Headnote

Shepardize® - Narrow by this Headnote (2)

Evidence > Relevance > Relevant Evidence

HN22 **Relevance, Relevant Evidence**

See Ky. R. Evid. 402. More like this Headnote

Shepardize® - Narrow by this Headnote (0)

Evidence > Admissibility > Conduct Evidence > Prior Acts, Crimes & Wrongs

HN23 **Conduct Evidence, Prior Acts, Crimes & Wrongs**

Use of prior bad acts to prove consciousness of guilt, which includes threats to kill witnesses, is an acceptable practice. More like this Headnote

Shepardize® - Narrow by this Headnote (1)

Evidence > ... > Procedural Matters > Preliminary Questions > Admissibility of Evidence

HN24 **Preliminary Questions, Admissibility of Evidence**

Temporal remoteness generally is a consideration made by the trial court in weighing the admissibility of particular evidence. More like this Headnote

Shepardize® - Narrow by this Headnote (0)

Criminal Law & Procedure > ... > Standards of Review > Plain Error > Definition of Plain Error

HN25 **Plain Error, Definition of Plain Error**

When an issue is unpreserved by an objection at trial, a reviewing court will review the issue for palpable error. Under Ky. R. Crim. P. 10.26, palpable error is one that affects the substantial rights of the party and a "manifest injustice" would result from the error. More like this Headnote

Shepardize® - Narrow by this Headnote (0)

Criminal Law & Procedure > ... > Jury Instructions > Particular Instructions > Allen Charges

HN26 **Particular Instructions, Allen Charges**

There is no error in a jury instruction intending to prevent a hung jury. But the practice of delivering jury instructions designed solely to pressure the jury into reaching a verdict is prohibited by the Ky. R. Crim. P. 9.57. More like this Headnote

Shepardize® - Narrow by this Headnote (0)

Criminal Law & Procedure > ... > Jury Instructions > Particular Instructions > Allen Charges

HN27 **Particular Instructions, Allen Charges**

The lapse in time between the trial court's allegedly coercive comment and the jury's deliberation may be a relevant consideration in a totality-of-the-circumstances review. A reviewing court must ultimately determine whether the trial court's statement actually forces an agreement, or whether it merely fosters thorough jury deliberation that results in an agreement. More like this Headnote

Shepardize® - Narrow by this Headnote (1)

Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > Mistrial

View more legal topics

HN28 **Abuse of Discretion, Mistrial**

The decision to declare a mistrial is properly within the sound discretion of the trial court. A mistrial is an extreme remedy and should be resorted to only when there appears in the record a manifest necessity for such an action or an urgent or real necessity. A "manifest necessity" can be understood as to be an urgent need for a new trial in consideration of the totality of the circumstances. As such, a ruling declaring a mistrial will not be disturbed absent an abuse of discretion by the trial court. More like this Headnote

Shepardize® - Narrow by this Headnote (5)

Criminal Law & Procedure > ... > Double Jeopardy > Double Jeopardy Protection > Convictions

View more legal topics

HN29 **Double Jeopardy Protection, Convictions**

Once jeopardy attaches, a second jury trial is prohibited absent the "manifest necessity" prerequisite to the declaration of a mistrial. More like this Headnote

Shepardize® - Narrow by this Headnote (0)

Counsel: FOR APPELLANT: Erin Hoffman Yang, Assistant Public Advocate.

FOR APPELLEE: Andy Beshear, Attorney General of Kentucky; Jeffrey Allan Cross, Assistant Attorney General.

Judges: OPINION OF THE COURT BY CHIEF JUSTICE MINTON. All sitting. All concur.

Opinion by: MINTON

Opinion

[*258] OPINION OF THE COURT BY CHIEF JUSTICE MINTON

REVERSING

A circuit court jury convicted James Anthony Gray of two counts of murder for intentionally killing his parents, James and Vivian Gray, and one count of tampering with physical evidence. He was sentenced to twenty years' imprisonment for each murder and five years' imprisonment for tampering with physical evidence, running consecutively for a total of forty-five years' imprisonment. He appeals the resulting judgment to this Court as a matter of right. 1

Gray presents several claims of error on appeal, and we will address each of them. Most notably, he argues that the trial court erred when it failed to suppress his confession made during protracted interrogation by sheriffs detectives. He asserts the confession was involuntarily extracted through trickery that included the interrogators' use of false claims and [**2] phony documents. Because we agree that this confession was not voluntarily given, we reverse Gray's convictions and remand this case to the trial court for further proceedings.

I. FACTUAL AND PROCEDURAL BACKGROUND.

James and Vivian Gray were shot to death in their home. The Grays were generally considered affluent, having owned and operated a successful downtown business for decades. They had a tumultuous relationship with their son, James Anthony Gray. This family rift and allegedly missing wills that purportedly disinherited Gray made him an immediate person-of-interest, and ultimately the prime suspect in the official investigation.

About six months elapsed before the sheriff's investigators called Gray to the sheriff's office to answer questions ostensibly related to the missing wills. He received *Miranda* warnings and opted to speak with investigators. After a brief break in the questioning, the investigators shifted gears, deciding to question Gray about his parents' murder. Five-and-a-half hours of unrecorded interrogation followed. Investigators used a number of different ruses and forms of trickery, including **[*259]** a forged lab report of DNA evidence linking Gray to the murders and [**3] an alleged phone call from a judge threatening the certain imposition of the death penalty if Gray did not confess to them. Shortly after the interrogation ended, the cameras came back on and Gray confessed to murdering his parents. He was promptly arrested.

Gray moved before trial to suppress this confession. The trial court denied his motion because, in light of the totality of the circumstances, the trial court could not conclude that the confession was involuntarily given. The trial court was admittedly troubled by the investigators' method of obtaining the confession but determined he could not conclude the confession was coerced.

Gray's first trial resulted in mistrial when the jury failed to agree on a verdict. In the second trial, the jury convicted Gray of the murders and tampering with physical evidence

and recommended a sentence of forty-five years' imprisonment. The trial court entered judgment accordingly, and Gray appeals that judgment to this Court.

Gray asserts a number of trial errors. Specifically, he raises seven issues for our review: (1) whether the trial court erroneously admitted the confession Gray gave to law enforcement; (2) whether the trial court improperly [**4] refused to allow Gray to present alternate perpetrator evidence (aaltperp); (3) whether the trial court failed to allow Gray to present a full defense; (4) whether inadmissible prior-bad-acts evidence was admitted against him; (5) whether the trial court erred in giving an *Allen* charge; (6) whether the Double Jeopardy Clause barred his second trial; and (7) whether a variety of minor errors cumulatively rendered his trial fundamentally unfair.

II. ANALYSIS.

A. The Trial Court Should Have Suppressed Gray's Confession.

The most troubling claim of error Gray presents to us on appeal is whether the trial court erroneously failed to suppress the confession Gray gave to law enforcement. The Commonwealth does not dispute that interviewers used false statements and fabricated documents as a technique to coax Gray into admitting he murdered his parents.

Police trickery is not new to our criminal procedure jurisprudence, but today's actions exceed any reasonable leeway our case law has previously afforded law enforcement. This issue presents mixed questions of law and fact. ***HN1*** We review the trial court's findings of fact for clear error, but legal determinations we examine de novo. **2**

HN2 The Due Process Clause of the Fourteenth Amendment precludes the use of involuntary [**5] confessions against a criminal defendant at trial. **3** The United States Supreme Court defines an *involuntary confession* as one that is "not the product of a rational intellect and a free will." **4** And "coercive police activity is a necessary predicate to the finding that a confession is not Voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment." **5** Under Kentucky law, we **[*260]** evaluate the voluntariness of a confession using a three-part test. In determining whether a confession was coerced, a court considers: (1) whether police activity was objectively coercive; (2) whether the coercion overwhelmed the will of the defendant; and (3) whether the defendant has shown that the coercive activity was the "crucial motivating factor" behind his confession. **6**

HN3 In reaching our decision on the voluntariness of Gray's confession, we must view the facts and evidence under the "totality of [the] circumstances." **7** Aiding our inquiry, we are given many factors to consider in light of the circumstances behind an individual confession. One set of criteria is defendant-specific, such as the defendant's age, intelligence, education, criminal experience, and criminal and mental condition at the [**6] time of the interrogation. Another set of criteria requires us to consider methods employed in the interrogation itself, including whether there was any physical or mental coercion, threats, promises, delay, and the extent of trickery and deception used in questioning.

A confession obtained by police through trickery is not a new issue for us.[8] In *Springer v. Commonwealth*, we refused to suppress a confession because "the mere employment of a ruse, or 'strategic deception,' does not render a confession involuntary so long as the ploy does not rise to the level of compulsion or coercion."[9] In essence, we have refused to hold that intentional police misinformation by itself makes a confession involuntary. But both parties rightly remind us that the particular issue presented today—falsified documents purporting to represent the official results of a state-police lab's DNA examination—is one we have yet to confront. To understand this issue under the totality of the circumstances, it is important to frame precisely what activities law enforcement used in Gray's interrogation.

Gray was summoned to the sheriffs office ostensibly to address a matter related to his parents' will. After a break, he returned to the interview room and signed a *Miranda* waiver. Upon his return, the room was arrayed with photos of the crime scene and murder victims. A piece of pecan pie and a Pepsi were placed on the table to recreate the crime-scene environment. The police turned off the camera and five-and-a-half hours of unrecorded interrogation proceeded from that point. Gray alleges he was coerced into confessing to the crimes within this period

According to Gray, interrogators showed him pictures of his parents' corpses, told him that their blood was found on his clothes and in his vehicle, told him that gunshot residue was found on his clothing, and told him that an eyewitness and a videotape recording placed him at the scene of the crime. Law enforcement admitted that they made these representations to Gray and that all of them were false. Interrogators presented Gray a fake document purporting to originate from the Kentucky State Police linking his parents' DNA to his vehicle. Finally, Gray alleges that while he was being interrogated, **[*261]** an officer claimed to have received [**8] a phone call from the judge, who threatened use of the death penalty against Gray if he did not confess. Gray confessed but the text of his admission is filled with statements that suggest he did not truly believe he committed the crime.

Admittedly troubled by the investigative techniques, the trial court denied Gray's suppression motion nonetheless. The trial court made a factual finding that the phone call from the judge did not take place, and he removed this factor from his analysis. He then reviewed the remaining evidence of false information in light of the voluntariness test and Kentucky's Anti-Sweating Statute.[10] Considering the totality of the circumstances—including the recorded confession Gray made in the sheriff's office that day combined with the specific exculpatory language used in the confession—the trial court was led to conclude that Gray's will was not overwhelmed by the ruse the sheriff's investigators employed to induce his confession.

Considering all of the events leading up to Gray's confession, we must disagree with the trial court's ruling. Although no single factor prompts our decision, the hours of manipulation and fabricated evidence can be nothing other than coercion that overbore Gray's free will.

We make clear at the outset that we will not consider the alleged threatening phone call from a judge as part of our totality-of-the-circumstances analysis. On appeal, Gray presents this as a factual issue for our review. But the trial court found as a matter of fact

that this threat did not occur. And we will only reverse the trial court's factual finding upon discovery of independent evidence outside of Gray's version of the narrative that corroborates his story. So, locating no such evidence in the record, we must defer to the trial court in stating that as a matter of fact, the alleged phone-call threat from the judge did not occur, and it will bear no weight in the remainder of our review in determining whether his confession was voluntarily [**10] made.

1. Police Tactics Used were Problematic but not Objectively Coercive.

Beginning our analysis of whether Gray voluntarily confessed, we first ask whether the police activity was objectively coercive. The false statements and fabricated documents are critical to our inquiry. Statements deceptively overstating the evidence against a criminal defendant during interrogation fall within the trickery we have traditionally tolerated. 11 But we have never faced a situation where deceptive interrogation tactics included fake reports made to link DNA evidence to the defendant.

Briefing reveals an underlying debate in state courts that have confronted this issue. The debate centralizes on two competing approaches: the bright-line approach as seen in the Florida rule from *State v. Cayward* 12 and the more balanced rule as seen in the Maryland rule in *Lincoln* ***[*262]*** *v. State*. 13 In establishing this Court's position on the place in our constitutional jurisprudence and criminal justice system for this form of trickery, we must thoroughly examine the principles conveyed in those two conflicting approaches.

The trickery in *Cayward* was factually very similar to the case at hand. There, the defendant was accused of sexually assaulting his five-year-old niece. 14 He voluntarily came to the police station for an interview, was given his *Miranda* warnings and signed a waiver of those rights. 15 He was then interrogated for two hours, during which police produced manufactured reports of evidence against him. 16 Ultimately, Cayward confessed to the crime.

The Florida District Court of Appeals responded under the state's notions of due process of law by establishing a bright-line rule prohibiting use of falsified documents. 17 The court went so far as to declare a difference between deceptive oral statements and physical documentation of false evidence. A major factor is the presumed legitimacy and persuasive weight that documented evidence originating from police and state investigative agencies carries in court. Additionally, practical concerns like the risk of counterfeit reports making their way into court or accidentally being offered as substantive evidence further supported the appellate court's conclusion [**12] that this type of evidence had no place in Florida's criminal justice system. 18 So if we were to adopt the *Cayward* rule, our analysis need not continue because we would declare police activity in this case objectively coercive, making a voluntary confession under these circumstances impossible.

Alternatively, in *Lincoln*, the Maryland appellate court expressly rejected the *Cayward* bright-line approach. 19 Like the present case, *Lincoln* involved a murder investigation. 20 Instead of endorsing the Florida approach, *Lincoln* declared that ***HN5***

a reviewing court should consider the use of false documents as merely one factor in the totality of the circumstances test—a similar approach to the traditional method of confronting police trickery in general.[21]

We cannot say that use of falsified documents is an objectively coercive police tactic, although it comes dangerously close. So we will not adopt the *Cayward* bright-line approach. But, at the same time, we do not view fabricated scientific evidence in the same vein as any other factor in the totality-of-the-circumstances [**13] analysis. We agree with *Cayward* that this tactic disturbs traditional notions of due process of law and may lead potentially to more harmful results. And we also do not want to encourage this type of behavior from law enforcement in the future. So while we cannot declare all uses of fabricated **[*263]** documents inherently coercive, we are highly suspicious of this practice, especially when the document misrepresents scientific or DNA evidence against a criminal defendant.

Although we must decline to adopt for Kentucky a bright-line rule that the use of falsified documents is objectively coercive in all situations, we think the risk of constitutional infirmity is so severe that a petitioning defendant is entitled to a presumption in his favor. As is the case with other constitutional liberties, here we must place the burden on the Commonwealth to prove it did not abuse its power. ***HN6*** When a criminal defendant, like Gray, can establish that the police use falsified documents to induce a confession, we will presume this tactic is unconstitutional until the Commonwealth can firmly establish that the document(s) did not overwhelm the defendant's will and was not a critical factor in the defendant's [**14] decision to confess. We will now evaluate Gray's interrogation under that standard.

2. The False Evidence Overwhelmed Gray's Wilt

The next step in evaluating the voluntariness of Gray's confession is a review of ***HN7*** whether the false evidence overwhelmed his free will. The controlling factors in this analysis are the volume of false evidence used and the heft that inheres in DNA evidence. We view this aspect of our analysis as an objective one in which we ask whether the tactics employed by police would overwhelm the will of an ordinary defendant. Because of how actively the interrogators used this evidence to deceive Gray during the several hours' interrogation and the power of documented DNA evidence in the mind of an average person, we conclude that this overwhelmed Gray's will.

DNA evidence carries enormous probative weight in criminal adjudications.[22] Because of its powerful probative effect, we have gone to great lengths to ensure that this information is accurately and fairly introduced at trial.[23] In his brief, Gray points to the Rational Choice Model, an academic theory postulating that many criminal defendants choose to confess when faced with an abundance of evidence against them [**15] as the more economical solution.[24] Given the evidentiary power DNA and forensic evidence enjoys in the minds of jurors, it is reasonable to conclude that documents containing incriminating scientific evidence would similarly cause the ordinary criminal defendant to consider maintaining his innocence a futile endeavor.

In addition to invoking highly probative scientific evidence, the abundance of false evidence and the frequency with which it was invoked weigh heavily in overwhelming Gray's free will. Not only did the interrogators use a fabricated document purporting to confirm the existence of DNA evidence incriminating Gray, they also claimed to have video footage placing him [**16] at the crime scene, blood spatters on **[*264]** his clothing, and more DNA evidence beyond what was shown in the fake report. This was repeated multiple times over the course of a seven-and-a-half hour interrogation, most of which was not recorded. When faced with seemingly insurmountable evidence, it becomes reasonable for one to perceive the futility of maintaining innocence. Indeed, facing overwhelming documentary and verbal forensic evidence, we think an average defendant in Gray's situation would feel pressured to confess to the point that it usurps free will.

3. These Tactics were the Crucial Motivating Factor Behind Gray's Confession.

In contrast to the previous factor, this analysis is a subjective inquiry into whether the police interrogation tactics were the crucial reasons why Gray confessed at the sheriffs office. Essentially, we seek to determine whether Gray confessed because of the interrogation pressures he faced in the five-and-a-half hours of unrecorded interrogation at the sheriffs office that day. We think the answer is revealed in the transcript of Gray's recorded confession:

> Gray: I don't know who was there, or with me, whatever. I don't have a clue. I don't know who if [**17] I told anybody. I don't remember. I don't—after that is—it's all gone. I mean, I just kind of—it was—*and until, you know, you guys made me realize what I had done, I didn't even know or believe I had done it.*
>
> Persley: But you are telling us today what you did. You are admitting it.
>
> Gray: Yes, with your evidence, it helped me to.
>
> Persley: Go ahead; I'm sorry.
>
> Gray: *With the emdence that you showed me, it helped me to see what I done, I still don't believe I done it but you know, with the evidence I must have.*

Reviewing the text of his statement, it seems clear that the false evidence weighed heavily in Gray's decision to admit to the murders. Combined with the volume of evidence that overwhelmed his free will as discussed above, we think this is enough to conclude that the interrogators' deceptions were the crucial motivating factor leading to his confession.

The Commonwealth downplays the impact this evidence played on Gray's decision to confess because of the amateurish quality of the counterfeit lab report. Specific details about the nature of the document like the term DNA not being capitalized and the off-centered text are the Commonwealth's main grounds supporting the implausibility [**18] of Gray's assertion that he believed the fake document to be authentic and that this belief

moved him to confess. To us, the Commonwealth's position is a shortsighted take on the abundance of misrepresentations made to Gray that day.

Gray is a mechanic with limited education; it assumes too much to think he would be able to distinguish at a glance a counterfeit KSP lab report from an authentic one. Our operative assumption should not be an expectation that citizens should distrust everything law enforcement tells them or shows them. The contrary should be true. Ordinarily, when a police officer presents a lab report purporting to represent DNA evidence of criminality, one likely does not carefully examine the contents for detailed accuracy. To us, it seems in this case that the overwhelming weight of false evidence brought forth against Gray directly prompted his confession that day at the sheriffs office. After review of all three factors guiding our determination on the voluntariness behind Gray's confession and **[*265]** in consideration of the totality of the circumstances, we conclude that the confession at the sheriff's office was not the voluntary product of Gray's free will.

Gray's constitutional [**19] right to due process of law was violated in obtaining the confession. The trial court erred by failing to suppress the confession, and it was thus erroneously admitted as evidence at trial.

4. The Error Admitting Gray's Confession was not Harmless Beyond a Reasonable Doubt.

We must now assess the propriety of Gray's convictions because of this error at trial. ***HN8*** For constitutional errors that contribute to a criminal conviction, those errors are presumed prejudicial unless a reviewing court can conclude they were "harmless beyond a reasonable doubt."[25] Under this standard, if the evidence against a defendant is so overwhelming that he would be convicted in spite of the constitutional violation, the violation is harmless.[26] Essentially, if we are certain the outcome would remain unchanged even if this piece of evidence was excluded, we may preserve Gray's conviction. There are a number of competing considerations in reaching this decision; but, ultimately, we cannot hold that erroneously admitting this confession at trial was harmless beyond a reasonable doubt.

The Commonwealth is correct in asserting that there is considerable evidence pointing to Gray's guilt. Most notably, [**20] the fact that Gray made an independent confession to Eric Frazier while in jail for an unrelated charge weighs heavily in the Commonwealth's favor. During that brief stint in jail, Gray gave Frazier a detailed account of the shootings, bragged about his impending financial windfall, and boasted that the police would never prove he did it. Not only does this independent confession tend to prove Gray's guilt, but it also mirrors exactly the evidence contained in the erroneously admitted confession given at the sheriffs office.

Also, the constitutional issues involved in obtaining the police confession were disclosed to the jurors. The trial court recognized the problematic nature of the tactics the police used to provoke Gray's confession. So despite denying Gray's motion to suppress, the trial court allowed Gray to present evidence of the manner in which the confession was obtained and permitted Gray to ask jurors to disbelieve the confession.[27] Gray was

free to inform jurors on the constitutional problems involved in obtaining his confession, and he was free to tell them simply to ignore its existence.

Ultimately, despite the fact that the Commonwealth was able to use similar evidence and Gray was able to attack the methods used in eliciting his confession, we cannot say that admitting the sheriff's-office confession was harmless beyond a reasonable doubt. Gray's case had already mistried once with a deadlocked jury; and, in the second trial, the jury deliberated for a long time before returning a guilty verdict. And introduction of involuntary confessions at trial has almost always resulted in a new trial.[28] Because **[*266]** of the credibility officers of the law enjoy in our community and the persuasive force that associated with a confession made to the police, we simply cannot uphold Gray's verdict in light of the circumstances in this case.

The police here admit to all of the allegations Gray asserts except the alleged phone-call threat from the judge. Essentially, law enforcement does not attempt to refute Gray's account of the interrogation,[**22] but instead, urges us to endorse their deceptive tactics for obtaining his confession. But we find the tactics employed by law enforcement in this case constitutionally unjustifiable, and our steadfast fidelity to the federal and state Constitutions directs us to condemn them. Harmless misdirection and simple ruses may be constitutionally permissible in some situations, but use of false statements and phony lab reports as the sole basis for hours of unrecorded interrogation offends the guarantee of due process of law. Because we conclude that the weight of false evidence against Gray and the pressures exerted by interrogating officers overwhelmed his conscience, the trial court's decision to deny suppression was error. The confession should have been excluded from trial. We reverse the judgment and remand the case to the trial court for further proceedings consistent with this opinion. We review the remaining allegations of error for mistakes capable of repetition in the event of a retrial.

B. The Trial Court Improperly Excluded Gray's Aaltperp Evidence.

Gray's next claim of error is that the trial court erroneously refused to admit his alternate perpetrator (aaltperp) evidence at trial.[**23] Gray maintained his own theory of who murdered his parents. He suggests the true perpetrator was Peter Hafer. In the time leading up to the Grays' murders, Hafer had recently stolen a large number of guns from a local gun dealer. After the theft, Hafer had sold some of the stolen guns to James Gray, the father. Jodi Lucas, a family friend and the first person to discover the Grays' dead bodies, informed police she had found a large number of guns the elder Gray had left in her basement. Gray's aaltperp theory focused on Hafer's knowledge of the Gray family's wealth and statements Hafer had made that he intended to rob and kill the Grays. Further, Hafer drove a van, and witnesses reported seeing a van near the Grays' property around the time of their murders.

At Gray's first trial, Hafer appeared as a witness, but his testimony was never offered because he immediately invoked his Fifth Amendment right against self-incrimination on the advice of counsel. Gray attempted to offer several potentially inculpatory statements Hafer had made to federal agents, but they were excluded. And the trial court excluded other statements from several other witnesses relating to Hafer's involvement with the

Grays. Gray [**24] argued at trial that this testimony was essential to his aaltperp theory.

HN9 The Due Process Clause of the Fourteenth Amendment guarantees a criminal defendant the opportunity to present a full defense, and that guarantee includes the right to introduce evidence that an alternate perpetrator committed the offense. **29** We show great deference to **[*267]** a trial court's evidentiary rulings and reverse only upon a finding of an abuse of discretion. So the trial court's ruling on this issue will be affirmed absent a showing that the trial court's ruling was "arbitrary, unreasonable, unfair, or unsupported by legal principles." **30** Applying this standard, the trial court abused its discretion in refusing to admit evidence in support of Gray's aaltperp theory because Gray adequately asserted the minimum probativeness required to introduce an aaltperp theory.

In *Beaty v. Commonwealth*, we held that ***HN10*** one way to advance an aaltperp theory of defense is to establish that an alternate perpetrator had both the motive *and* opportunity to commit the crime before introducing evidence at trial in support of that theory. **31** But somewhere between *Beaty* and today, this method seems to have calcified into a categorical rule for introducing aaltperp evidence. It is [**25] true we require qualification as a matter of necessity to prevent unsupported or widely speculative theories that may mislead or confuse the jury. **32** But the motive-and-opportunity approach articulated in *Beaty* is not the only path to advance an aaltperp theory and it is certainly not an absolute prerequisite for admission into evidence.

It is undisputed that evidence tends to show that Hafer had motive to commit the crime and that this motive was established at trial. No doubt, a stated intention to rob the Grays and kill them in their home is sufficient evidence of motive to satisfy the first prong of the *Beaty* aaltperp test. But the trial court was not satisfied with Gray's proffer of evidence to support a finding of Hafer's opportunity to commit the murders. Hafer's alleged opportunity was considered too speculative to be presented to the jury. But we hold that this conclusion was misplaced.

At its heart, ***HN12*** the critical question for aaltperp evidence is one of relevance: whether the [**26] defendant's proffered evidence has any tendency to make the existence of any consequential fact more or less probable. **33** And the best tool for assessing the admissibility of aaltperp evidence is the Kentucky Rules of Evidence. Naturally, under the powerfully inclusionary thrust of relevance under these rules, it would appear almost any aaltperp theory would be admissible at trial. But KRE 403 provides the qualification of this evidence we considered necessary in *Beaty*. That rule ***HN13*** prompts the trial court to weigh the probative value of the evidence against the risk of prejudice at trial, including confusing the issues or misleading the jury. **34** Essentially, the balancing test found in KRE 403 is the true threshold for admitting aaltperp evidence; *Beaty* and its progeny are simply this Court's way of guiding the trial court in assessing the probative value of prospective aaltperp theories.

Motive and opportunity are not required to admit an aaltperp theory at trial, but it is but one of many ways a defendant may successfully assert this defense. To be sure, we reaffirm *Beaty*'s assertion that a defendant's proof of motive and opportunity is certainly probative enough for admission under KRE 403. **[*268]** But ***HN14*** we do [**27] not require a defendant to recount a precise theory of how the aaltperp did the deed. Rather,

all KRE 403 requires is evidence of some logical, qualifying information to enhance the proffered evidence beyond speculative, farfetched theories that may potentially confuse the issues or mislead the jury. And we think Gray has more than enough probative information under this standard to warrant admission of his aaltperp evidence.

Essentially, ***HN15*** the decision to admit an aaltperp theory at trial is committed to the sound discretion of the trial judge. But we caution trial courts that aaltperp-evidence theories must be supported by more than speculation or exculpatory name-dropping when assessing the probativeness of evidence under KRE 403. The proponent of the theory must establish something more than simple relevance or the threat of confusion or deception can indeed substantially outweigh the evidentiary value of the theory. Motive and opportunity is one way to achieve that goal, but as we stated above, it is not the only acceptable method. There must simply be some legal or factual basis to the theory beyond raising an inference to mitigate the risk of harm that can be quite substantial.

In the case at [**28] hand, it is unclear from the evidence precisely when the Grays were murdered. The Commonwealth urges us to conclude they were killed on the afternoon or evening of Tuesday, April 24, 2007 (when Gray had no alibi). But Gray suggests they died the following day, pointing to several witnesses who may have seen them Wednesday morning. Either way, there is a span of time when the crime could have occurred. We do not know Hafer's account of his movements during that two-day span because he invoked his right against self-incrimination. Without any information from Hafer, we cannot know whether he had an alibi during that 36-48 hour period. Nevertheless, we are faced with nearly two days of time when the crime could have been committed and an aaltperp with a motive to have played a role in the Grays' deaths. Gray's right to present a complete defense at trial was impaired by the trial court's exclusion of his aaltperp evidence.

C. Gray was not Denied the Right to Present a Complete Defense by Being Limited in his Critique of the Police Investigation.

Gray believes he was denied due process of law because the trial court refused to allow him to question law enforcement on particular aspects of [**29] the investigation of this crime: This issue relates to three aspects of Gray's case. First, he was not permitted to call as a witness Mike Mathis, a retired police officer, to point out glaring flaws in the investigative process, critiquing the sheriff's department's overall performance in this case. Second, the trial court limited Gray' cross-examination of Detective Persley, one of the interrogating officers at the sheriff's office. Finally, the trial court limited Gray's examination of law enforcement by not allowing him to ask the officer about the legality of their interrogative techniques. Because these are evidentiary rulings, we review each of the trial court's decisions for an abuse of discretion.

1. Mike Mathis as a Defense Expert.

Mathis was set to testify as a defense expert to a variety of missteps occurring during the course of the official investigation of the Grays' murders. Particularly, he would supposedly testify to the correlation between the law enforcement's lack of control of the crime scene

and Gray's knowledge of how the crime occurred. Mathis is a retired police officer **[*269]** now employed as a private investigator in Tennessee. He has no published works or peer-reviewed [**30] articles or any other professional credentials beyond his years of law enforcement experience and his subjective view of the investigation. The trial court, concerned about future uses of this type of testimony, refused to allow Mathis to testify as an expert witness, so Mathis was left to testify to his observations of the crime scene. The trial court did not abuse its discretion in making this ruling.

HN16 The Kentucky Rules of Evidence (KRE) permit opinion evidence from experts providing "scientific, technical, or other specialized knowledge" if it will "assist the trier of fact" in understanding the evidence or determining a fact in issue.[35] A qualified expert may provide an opinion so long as: (1) the testimony is based on scientific facts or data; (2) the testimony is the product of reliable principles and methods; and (3) the witness has applied the principles and methods reliably to the facts of the case.[36] With these rules firmly in mind, we hold that the trial court did not abuse its discretion in refusing to allow Mathis to testify as an expert.

As an initial matter, Mathis likely had the requisite qualifications to be considered an expert. Thirty years of experience conducting [**31] criminal investigations likely adequately qualifies Mathis under Kentucky's relatively liberal standard.[37] But Gray offered no objective methods or principles for the basis of Mathis's opinions other than his own subjective experiences with crime scenes across the span of his career as a police officer. Mathis would provide no specialized knowledge necessary to aid the jury in fact-finding. So the trial court properly excluded him from testifying as an expert.

2. Cross-Examination of Detective Persley.

The trial court limited Gray in his cross-examination of Detective Persley. This aspect of Gray's argument on this issue is closely related to the denial of aaltperp evidence we addressed above. Citing hearsay grounds, the trial court limited the cross-examination of out-of-court statements Detective Persley had heard about Hafer. Essentially, Gray intended to use statements about Hafer to assert that the sheriff's department did not [**32] conduct an adequate investigation into other leads.

We recognize that ***HN17*** investigative hearsay is typically inadmissible.[38] So we will not rule that the trial court abused its discretion in excluding this line of questioning. With this in mind, we also recognize that we have already held that Gray should have been allowed to introduce his aaltperp evidence at trial. If this questioning comes up on retrial, the trial court must review the testimony under this standard and may not base any of its decision on the aaltperp test for admissibility.

3. Limited Questioning Regarding the Legality of False DNA Reports.

The trial court refused to allow Gray to question two sheriff's detectives about the legality of using a false DNA report when interrogating a suspect. **[*270]** Gray wanted to use this opportunity to highlight "their willingness to commit forgery and possibly run afoul of

the law." The trial court prohibited this line of questioning and threatened sanctions if Gray's counsel did not comply. We agree that this line of questioning was inappropriate and, accordingly, conclude that the trial court did not abuse its discretion in refusing to allow it.

D. No Improper Character Evidence was Admitted [33] at Trial.**

Gray next alleges that the trial court improperly admitted evidence against him at trial contrary to the principles set forth in the Kentucky Rules of Evidence. He contends that the trial court erroneously allowed evidence of prior bad acts against him at trial. Among this testimony are alleged threats to kill his girlfriend, Rosa Rowland, and other statements Gray allegedly made expressing his desire to kill his parents. Again, as an evidentiary ruling, we review the trial court's decision for an abuse of discretion. Finding no error in admitting the statements, the trial court did not abuse its discretion.

Under our rules of evidence, ***HN18*** proof of a person's character or particular character trait is generally inadmissible to show conformity with that character on a particular occasion.[39] ***HN19*** KRE 404(b) states that evidence of other crimes, wrongs, or acts are prohibited to prove conformity to character, with exceptions in criminal cases for proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. It is also true that it is only proper to admit relevant evidence.[40] ***HN20*** Evidence becomes relevant if it has "any tendency to make the existence of [**34] any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[41] Finally, ***HN21*** even upon a finding that evidence is relevant, we may still nonetheless exclude testimony if its probative value is "substantially outweighed" by risk of unfair prejudice to the defendant.[42]

1. Gray's Statements About Rosa Rowland.

Rowland was Gray's girlfriend at the time of the Grays' murder. She is a drug addict and highly unpredictable. The two had a very unstable relationship, frequently fighting over Rowland's drug use. Gray made two statements expressing his desire to kill her. The first occurred when Gray was briefly jailed in mid-2007.[43] At that time, he told his fellow inmate, Eric Frazier, that he was thinking of killing Rowland. The second statement was made to Betty White at an old truck stop. According to White, Gray commented that he "should have killed her a long time ago" and "I think I'll kill the bitch."

On first glance, this testimony seems irrelevant to the issue of whether Gray murdered his parents. Proof [**35] of threats against Rowland does not make it any more or less probable that Gray killed anyone. And it proves nothing with regard to his motivation to murder his parents or to show any type of plan or preparation to commit those crimes.

The Commonwealth correctly points out that ***HN23*** use of prior bad acts to prove consciousness of guilt, which includes threats **[*271]** to kill witnesses, is an acceptable practice.[44] The theory follows that Gray, concerned by Rowland's erratic behavior and

fearing she may testify against him, made the threats to prevent Rowland from disclosing any incriminatory information. 45 We agree that if viewed as a threat against a witness, the statements become relevant. But, to us, that status is unclear. Gray articulately contends that at the time the statements were made, Gray was not charged with the Gray murders—they occurred months before he confessed at the sheriff's office. On the other hand, the statements were made after the Gray murders occurred. To us, this is enough to make Rowland a witness; and, therefore, the trial court did not abuse its discretion by allowing this testimony at trial.

2. Gray's Statements About his Parents.

At trial, the Commonwealth also made use of various statements Gray had made expressing a desire for his parents to die. Tammy Kidd testified that in 2001, Gray said he wanted to kill his parents by driving to his parents' home and shooting them; although, she admitted she did not take this talk seriously. In addition to Kidd's testimony, Cynthia Neal testified that Gray had moved to a home near her because his parents were sick and they would be dying soon. After suggesting to Gray that they seemed to be in good health, he responded by saying "I might have to help them a little." Both of these statements were used against Gray at trial.

Gray contests the trial court's admission of Kidd's testimony under KRE 403, suggesting that because of the time elapsed between when the statement was made and when the crime occurred, the risk of unfair prejudice substantially outweighs the probative value of the evidence. He is correct in stating that ***HN24*** temporal remoteness generally is a consideration made by the trial court in weighing the [**37] admissibility of particular evidence. 46 And we afford trial courts great deference in making those decisions. A prior statement expressing intent to commit the crime is certainly relevant to Gray's murder trial and highly probative. We simply will not displace the trial court's judgment with our own in making this determination under KRE 403. There is no indication that the trial court's decision here was arbitrary, unreasonable, unfair, or unsupported by legal principles, giving rise to an abuse of discretion.

As for Cynthia Neal's testimony, we are less concerned about temporal remoteness. Gray allegedly made those statements to Neal two years before the murders, and we are unwilling to hold that two years is so remote as to disconnect this statement to a motive or intent to commit murder. Given the highly probative nature of this evidence, we agree with the trial court's decision to include this testimony at trial.

E. There was no Improper *Allen* Charge..

Before jury selection began at trial, the trial court made general introductory statements to the assembled venire about the nature of the trial process that was set to begin. These statements include **[*272]** information of the emotional and financial [**38] burden in retrying a case, that the attorneys would present the best and most persuasive evidence possible, and the importance in the end for the jury to reach a verdict. Gray posits that these statements tainted the venire.

This issue was ***HN25*** unpreserved by an objection at trial, so we will review these statements for palpable error. Under Kentucky Rules of Criminal Procedure (RCr) 10.26, palpable error is one that affects the substantial rights of the party and a "manifest injustice" would result from the error.[47] With that lofty standard in place, we do not find palpable error in the trial court's statements.

In *Allen v. United States*, the United States Supreme Court held that ***HN26*** there is no error in a jury instruction intending to prevent a hung jury.[48] But the practice of delivering jury instructions designed solely to pressure the jury into reaching a verdict is prohibited by the Kentucky Rules of Criminal Procedure.[49]

We are unwilling to find error in the trial court's preliminary statements.[50] ***HN27*** The lapse in time between the trial court's [**39] allegedly coercive comment and the jury's deliberation may be a relevant consideration in a totality-of-the-circumstances review.[51] We must ultimately determine whether the trial court's statement actually forces an agreement, or whether it merely fosters thorough jury deliberation that results in an agreement.[52]

We cannot conclude the trial court committed a palpable error by emphasizing to the prospective jurors the importance of their duty. The trial court made the statements in controversy before the parties began voir dire, before eleven days of trial, and before hours of juror deliberation. Gray's first trial had ended in mistrial because the jury was unable to reach a verdict. Here, the trial court simply wanted to impress upon the prospective jurors the importance of the duty they were about to undertake and the stakes involved in their deliberations. Given the enormous gap in time between the statement and the verdict, along with the broad and inconsequential nature of his statements, we do not find these instructions to be problematic, much less palpable error.

F. Gray's Second Trial was not Barred by Double Jeopardy.

For his final claim of error below, Gray argues [**40] that the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution bars his second trial. Gray specifically argues that in the first trial, the trial court too readily declared a mistrial two hours after giving the jury an appropriate *Allen* charge. He also contends he was not given an opportunity to object to the court's declaration of a mistrial. As a final subpart of his claim, Gray suggests the trial court erred in addressing only the jury foreperson rather than polling each juror individually before making the decision to declare a mistrial. **[*273]** This inquiry was also made by the trial court on its own initiative while the jury was on a smoke break.

HN28 The decision to declare a mistrial is properly within the sound discretion of the trial court.[53] A mistrial is "an extreme remedy and should be resorted to only when there appears in the record a manifest necessity for such an action or an urgent or real necessity."[54] A "manifest necessity" can be understood as to be an urgent need for a new trial in consideration of the totality of the circumstances. As such, a ruling declaring a mistrial will not be disturbed absent an abuse of discretion by the trial court.[55]

In *Cardine*, we held that ***HN29*** once jeopardy attaches, a second jury trial is [**41] prohibited absent the "manifest necessity" prerequisite to the declaration of a mistrial. **56** The Commonwealth correctly notes that a hung jury is a classic example of this standard. The facts are clear that the jury in Gray's first trial had been deadlocked for over ten hours (two of which occurred after the trial court delivered a proper *Allen* charge). At that point, the trial court apparently determined that the jury would be unable to reach a verdict, and it was necessary to declare a mistrial. We afford considerable deference to trial courts in deciding to grant mistrials, and we see no evidence here jarring enough to displace the trial court's determination. We simply cannot say that the trial court abused its discretion in concluding the jury in Gray's first trial was indefinitely deadlocked. So we hold that Gray's second trial was proper; and, as such, there can be no violation of the Double Jeopardy Clause.

G. Cumulative Error.

Having already reversed Gray's convictions on other grounds, and weighing in on matters that may re-appear once this case is tried again, there is no need to conduct a cumulative-error review.

III. CONCLUSION.

Because we find the interrogation techniques employed by the sheriff's [**42] detectives to induce Gray's confession to the murder of his parents to be an unconstitutional violation of due process, we reverse his convictions and remand the case to the trial court for proceedings consistent with this opinion.

All sitting. All concur.

Footnotes

1 Ky.Const. § 110(2)(b).

2 *See* *Dye v. Commonwealth*, 411 S.W.3d 227, 230-31 (Ky. 2013).

3 *See* *Jackson v. Denno*, 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964).

4 *Mincey v. Arizona*, 437 U.S. 385, 398, 98 S. Ct. 2408, 57 L. Ed. 2d 290 (1978) (internal quotation marks omitted).

5 *Colorado v. Connelly*, 479 U.S. 157, 167, 107 S. Ct. 515, 93 L. Ed. 2d 473 (1986).

6 *Benjamin v. Commonwealth*, 266 S.W.3d 775, 786 (Ky. 2008).

7 *Haynes v. State of Washington*, 373 U.S. 503, 83 S. Ct. 1336, 10 L. Ed. 2d 513 (1963). *See also Dye*, 411 S.W.3d at 232.

8 *See Matthews v. Commonwealth*, 168 S.W.3d 14, 21 (Ky. 2005) (holding that ruses and evidence ploys are an acceptable law enforcement practice). *See also Springer v. Commonwealth*, 998 S.W.2d 439, 46 6 Ky. L. Summary 38 (Ky. 1999).

9 *Springer*, 998 S.W.2d at 447 (referring [**7] to *Illinois v. Perkins*, 496 U.S. 292, 297, 110 S. Ct. 2394, 110 L. Ed. 2d 243 (1990).

10 KRS 422.110 (***HN4*** "no peace officer or other person having lawful custody of any person charged with crime, shall attempt to obtain information from the accused concerning his connection with or knowledge of crime by plying him with questions, or extort [**9] information to be used against him on his trial by threats or other wrongful means, nor shall the person having custody of the accused permit any other person to do so.").

11 *Matthews*, 168 S.W.3d 14 (Ky. 2005).

12 552 So.2d 971 (Fla.Dist.Ct.App. 1989), *dismissing review*, 562 So. 2d 347 (Fla. 1990) (drawing a bright line declaring confessions resulting from use of fabricated lab evidence [**11] per se involuntary).

13 164 Md.App. 170, 882 A.2d 944 (Md.Ct.Spec.App. 2005), *cert. denied*390 Md. 285, 888 A.2d 342 (Md. 2005) (strongly distinguishing Cay *ward's* bright-line rule).

14 *Cayward*, 552 So.2d at 972.

15 *Id.*

16 *Id.*

17 *Id.* at 974.

18 *Id.* at 974-75.

19 Maryland is not alone in rejecting the categorical rule formed in Cayward. Other states rejecting this method include Virginia (*Arthur v. Commonwealth*, 24 Va. App. 102, 480 S.E.2d 749 (Va.App. 1997)), and Nevada (*Sheriff, Washoe County v. Bessey*, 112 Nev. 322, 914 P.2d 618 (Nev. 1996)).

20 *Lincoln*, 164 Md.App. at 175.

21 *Id.* at 191-92.

22 *See Brown v. Commonwealth*, 313 S.W.3d 577, 617 (Ky. 2010) (". . . DNA evidence is powerful evidence and for that reason material misrepresentations of its significance are apt to be prejudicial."). Although Brown involved the methods of proving this type of evidence at trial (and not the existence of the material at all), it nonetheless confirms the powerful role this type of evidence has in the minds of jurors.

23 *See id. See also Duncan v. Commonwealth*, 322 S.W.3d 81, 93 (Ky. 2010).

24 Miriam S. Gohara, *A Lie for a Lie: False Confessions and the Case for Reconsidering the Legality of Deceptive Interrogation Techniques*, 33 Fordham Urb. L.J. 791,817-19(2006).

25 *See Chapman v. California*, 386 U.S. 18, 23-24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). *See also Whittle v. Commonwealth*, 352 S.W.3d 898, 905-06 (Ky.

2011).

26 *Id.*

27 The trial court in this instance appears to have invoked correctly a defendant's rights [**21] to attack the credibility of a confession under *Crane v. Kentucky*, 476 U.S. 683, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986).

28 *Chapman v. California*, 386 U.S. 18, 42-43, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967) (Stewart, J., concurring) (referring to *Lynumn v. State of Illinois*, 372 U.S. 528, 83 S. Ct. 917, 9 L. Ed. 2d 922 (1963)). *See also Haynes v. State of Washington*, 373 U.S. 503, 518-19, 83 S. Ct. 1336, 10 L. Ed. 2d 513 (1963) (even when the confession is completely "unnecessary" to the conviction, the defendant is entitled to "a new trial free of constitutional infirmity").

29 *See Harris v. Commonwealth*, 134 S.W.3d 603, 608 (Ky. 2004).

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

31 125 S.W.3d 196 (Ky. 2003).

32 *Id.* at 207 (". . . [a] ***HN11*** trial court may only infringe upon this right [to a complete defense] when the defense theory is 'unsupported,' speculat[ive],' and Tar-fetched' and could thereby confuse or mislead the jury.").

33 KRE 401.

34 KRE 403.

35 KRE 702.

[36] *Id.*

[37] *See* LAWSON, THE KENTUCKY EVIDENCE LAW HANDBOOK, § 6.15(3)(c) (LexisNexis Matthew Bender) (". . . the trial court's inquiry under KRE 702 is whether the qualifications of a witness to testify as an expert are 'adequate' (and not whether they are 'excellent' or 'outstanding').").

[38] *See Chestnut v. Commonwealth*, 250 S.W.3d 288, 294 (Ky. 2008).

[39] KRE 404(a)(1).

[40] KRE 402 (***HN22*** "Evidence which is not relevant is not admissible.").

[41] KRE 401.

[42] KRE 403.

[43] Ironically, for violating an EPO Rowland had taken out against him.

[44] *Foley v. Commonwealth*, 942 S.W.2d 876, 887, 43 12 Ky. L. Summary 11 (Ky. 1996) (threats against a witness in attempt to suppress testimony is evidence tending [**36] to show guilt).

[45] In fact, through other testimony at trial, it seems that Gray did indeed fear what Rowland might tell the police.

[46] *English*, 993 S.W.2d at 943.

[47] *See also Commonwealth v. Jones*, 283 S.W.3d 665, 668 (Ky. 2009) (A manifest injustice occurs when the "error so seriously affected the fairness, integrity, or public reputation of the proceeding as to be 'shocking or

jurisprudentially intolerable."' *Martin v. Commonwealth*, 207 S.W.3d 1, 4 (Ky. 2006)).

48 164 U.S. 492, 17 S. Ct. 154, 41 L. Ed. 528 (1896).

49 RCr 9.57. *See also Commonwealth v. Mitchell*, 943 S.W.2d 625, 44 5 Ky. L. Summary 10 (Ky. 1997).

50 *Mitchell*, 943 S.W.2d at 628.

51 *See Elders v. Commonwealth*, 395 S.W.3d 495 (Ky.App. 2012).

52 *Elders*, 395 S.W.3d at 504. *See also Bell v. Commonwealth*, 245 S.W.3d 738 (Ky. 2008).

53 *Cardine v. Commonwealth*, 283 S.W.3d 641, 647 (Ky. 2009).

54 *Id.* (quoting *Bray v. Commonwealth*, 177 S.W.3d 741, 752 (Ky. 2005)).

55 *Id.*

56 *Id.*

APPENDIX

F

ENTERED
SEP 27 2021
TINA M. FOSTER, CLERK
BY: _____ D.C.

COMMONWELATH OF KENTUCKY
SCOTT CIRCUIT COURT
DIVISION II
07-CR-211

COMMONWEALTH OF KENTUCKY **PLAINTIFF**

vs. **FINAL JUDGEMENT AND SENTENCE OF IMPRISONMENT**

JAMES ANTHONY GRAY **DEFENDANT**

CHARGES: CT. 1: MURDER

CT. 2: MURDER

CT. 3: TAMPERING WITH PHYSICAL EVIDENCE

** ** **

The Defendant entered a plea of not guilty as to Count 1: Murder, Count 2: Murder, and Count 3: Tampering with Physical Evidence, and as a result of a Trial that began on August 9, 2021 and concluded on August 24, 2021, a jury subsequently found and the Court adjudged that the Defendant was guilty of the crimes of **Count 1: Murder, Count 2: Murder, and Count: 3 Tampering with Physical Evidence**. During the penalty phase of the Trial, the Jury by unanimous verdict, recommended a sentence of **Count 1: 20 years, Count 2: 30 years, and Count 3: 5 years**. The Jury also recommended that the sentences imposed for **Counts 1, 2, and 3, run CONSECUTIVELY with one another for a total sentence of fifty-five (55) years.**

On this the 22nd day of September, the Defendant James Anthony Gray, appeared

Appendix F

3262

in open court with his attorney Brian Hewlett, Esq, Ms. Marena Knuckles, the Official Court Reporter of this Court, mechanically recorded the testimony and proceedings of this hearing. The Court inquired of the Defendant and this counsel whether they had any legal cause to show why judgment should not be pronounced, afforded the Defendant and his counsel an opportunity to make a statement on the Defendant's behalf, and to present any information in mitigation of punishment. A victim's impact statement was submitted by the Commonwealth and reviewed by the Court. The Defendant being informed of the factual contents and conclusions contained in the Pre-Sentence Investigation Report, having been given the opportunity to controvert said Report, and the Court having given due consideration to the report, the violent nature and circumstances of the crime, and the Defendant's criminal history, also noting that under the Provisions of KRS 439.3401 the Defendant is not eligible for probation and no sufficient cause being shown why judgment should not be pronounced and sentence imposed upon the Defendant,

It is therefore ORDERED AND ADJUDGED BY THE COURT that the Defendant is guilty of the crimes of **Count 1: Murder, Count 2: Murder, and Count: 3 Tampering with Physical Evidence**, and his sentence is fixed, as recommended by the Jury, at a maximum term of **Count 1: twenty (20) years, Count 2: thirty (30) years, and Count 3: five (5) years, to run CONSECUTIVELY with one another for a total sentence of fifty-five (55) years**, in the State Penitentiary at hard labor.

The Defendant was advised of his right to an appeal, the procedure for filing any notice of appeal, as well as his right to have counsel appointed free of costs to him should he be unable to afford an attorney.

IT IS HEREBY ORDERED BY THE COURT that this sentence run CONSECUTIVELY to any other previous felony sentence the Defendant must serve.

IT IS FURTHER ORDERED BY THE COURT that the Sheriff of Scott County shall deliver the Defendant to the custody of the Department of Corrections at such location within this State as the Department shall designate.

IT IS FURTHER ORDERED AND ADJUDGED that the Defendant shall be awarded custody credit, as calculated by the Division of Probation and Parole, towards service of the maximum term of imprisonment.

The Court finds that unless a fine is imposed, the conditions of KRS 534.030 do not permit the imposition of a fine.

It is further ORDERED that if the Defendant posted a financial bond, then the bond shall be applied to the payment of fines and costs and the balance refunded to the Defendant. If the bond was posted by a third party, then the bond shall be refunded to the surety. If there is a valid bond assignment in place, the clerk shall first release the assigned amount and then the balance, if any, shall be refunded.

This is a final and appealable order.

Thomas L Clark 6-22-21

JUDGE THOMAS CLARK
SPECIAL JUDGE
SCOTT CIRCUIT COURT

CLERK'S CERTIFICAITON OF SERVICE

Hon. J. Keith Eardley
Assistant Commonwealth's Attorney
104 Richmond Avenue
Nicholasville, Kentucky 40356-1234

Hon. Lou Anna Red Corn

Fayette Commonwealth Attorney
116 North Upper Street
Lexington, KY 40507

Hon. Rodney Barens
Assistant Public Advocate
221 St. Clair Street
Frankfort, KY 40601

Hon. Brian Hewlett
108 28th Street
Catlettsburg, KY 41229

Tina M. Foster
Scott Circuit Court Clerk
Justice Building
119 N. Hamilton Street
Georgetown, KY 40324-1786

Probation and Parole
Department of Corrections
Jail
Scott County Sheriff

On this the 27th day of September, 2021

TINA M. FOSTER, C.S.C.C.

BY: Jacqueline Fields D.C.

APPENDIX G

KRS § 26A.015

This document is current through all 2024 regular session legislation.

Michie's™ Kentucky Revised StatutesTITLE IV Judicial Branch (Chs. 21 — 34)CHAPTER 26A Court of Justice (§§ 26A.010 — 26A.400)Judges (§§ 26A.015 — 26A.080)

26A.015. Disqualification of justice or judge of the Court of Justice, or master commissioner.

(1) For the purposes of this section the following words or phrases shall have the meaning indicated:

(a) "Proceeding" includes pretrial, trial, appellate review, or other stages of litigation;

(b) "Fiduciary" includes such relationships as executor, administrator, conservator, trustee, and guardian;

(c) "Financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

1. Ownership in a mutual or common investment fund that holds securities, or a proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, or ownership of government securities is a "financial interest" only if the outcome of the proceeding could substantially affect the value of the interest;

2. An office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization.

(2) Any justice or judge of the Court of Justice or master commissioner shall disqualify himself in any proceeding:

(a) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceedings, or has expressed an opinion concerning the merits of the proceeding;

(b) Where in private practice or government service he served as a lawyer or rendered a legal opinion in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter in controversy, or the judge, master commissioner or such lawyer has been a material witness concerning the matter in controversy;

(c) Where he knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a pecuniary or proprietary interest in the subject matter in controversy or in a party to the proceeding;

(d) Where he or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

1. Is a party to the proceeding, or an officer, director, or trustee of a party;

2. Is acting as a lawyer in the proceeding and the disqualification is not waived by stipulation of counsel in the proceeding filed therein;

3. Is known by the judge or master commissioner to have an interest that could be substantially affected by the outcome of the proceeding;

4. Is to the knowledge of the judge or master commissioner likely to be a material witness in the proceeding.

(e) Where he has knowledge of any other circumstances in which his impartiality might reasonably be questioned.

(3)

(a) Any justice or judge of the Court of Justice disqualified under the provisions of this section shall be replaced by the Chief Justice.

(b) Any master commissioner disqualified under the provisions of this section or unable to discharge the duties of his office for any other reason shall be replaced by a special commissioner who shall be appointed by the judge of the court before whom the action is pending. The special commissioner shall meet the same qualifications as a master commissioner and shall take an oath and execute a bond as the regular commissioner is required to do.

History:
Enact. Acts 1976 (Ex. Sess.), ch. 22, § 4; 1982, ch. 141, § 41, effective July 1, 1982.

Notes:
Compiler's Notes.
This section was amended by § 44 of Acts 1980, ch. 396, which would have taken effect July 1, 1982; however, Acts 1982, ch. 141, § 146, effective July 1, 1982, repealed Acts 1980, ch. 396.

APPENDIX H

Ky. Const. § 110

Current through the 2024 Legislative Session

§ 110. Composition — Jurisdiction — Quorum — Special justices — Districts — Chief justice.

(1) The Supreme Court shall consist of the Chief Justice of the Commonwealth and six associate Justices.

(2)

(a) The Supreme Court shall have appellate jurisdiction only, except it shall have the power to issue all writs necessary in aid of its appellate jurisdiction, or the complete determination of any cause, or as may be required to exercise control of the Court of Justice.

(b) Appeals from a judgment of the Circuit Court imposing a sentence of death or life imprisonment or imprisonment for twenty years or more shall be taken directly to the Supreme Court. In all other cases, criminal and civil, the Supreme Court shall exercise appellate jurisdiction as provided by its rules.

(3) A majority of the Justices of the Supreme Court shall constitute a quorum for the transaction of business. If as many as two Justices decline or are unable to sit in the trial of any cause, the Chief Justice shall certify that fact to the Governor, who shall appoint to try the particular cause a sufficient number of Justices to constitute a full court for the trial of the cause.

(4) The Court of Appeals districts existing on the effective date of this amendment to the Constitution shall constitute the initial Supreme Court districts. The General Assembly thereafter may redistrict the Commonwealth; by counties, into seven Supreme Court districts as nearly equal in population and as compact in form as possible. There shall be one Justice from each Supreme Court district.

(5)

(a) The Justices of the Supreme Court shall elect one of their number to serve as Chief Justice for a term of four years.

(b) The Chief Justice of the Commonwealth shall be the executive head of the Court of Justice and he shall appoint such administrative assistants as he deems necessary. He shall assign temporarily any justice or judge of the Commonwealth, active or retired, to sit in any court other than the Supreme Court when he deems such assignment necessary for the prompt disposition of causes. The Chief Justice shall submit the budget for the Court of Justice and perform all other necessary administrative functions relating to the court.

Notes

Compiler's Notes.

The General Assembly in 1974 proposed (Acts 1974, ch. 84, §§ 1-3) the repeal of sections 109 to 139, 141 and 143 of the Constitution and the substitution in lieu thereof new sections 109-124. This amendment was ratified by the voters at the regular election in November, 1975 and became effective January 1, 1976.

For selection of initial justices see compiler's notes, Const., § 109.