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RENDERED: AUGUST 25, 2011
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2009-SC-000435-MR

BILLY FRANKLIN FIELDS — APPELLANT

ON APPEAL FROM CHRISTIAN CIRCUIT COURT
V. HONORABLE EDWIN M. WHITE, JUDGE
NO. 08-CR-00834

COMMONWEALTH OF KENTUCKY — APPELLEE

AND

2009-SC-000457-MR

JIMMIE CRAMER — APPELLANT

ON APPEAL FROM CHRISTIAN CIRCUIT COURT
V. HONORABLE EDWIN M. WHITE, JUDGE
NO. 08-CR-00833

COMMONWEALTH OF KENTUCKY — APPELLEE

AND

2009-SC-000732-TG

JEFFREY LEE BOYD — APPELLANT

ON APPEAL FROM CHRISTIAN CIRCUIT COURT
V. HONORABLE EDWIN M. WHITE, JUDGE
NO. 08-CR-00835

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellants, Billy Franklin Fields, Jimmie Cramer, and Jeffrey Lee Boyd appeal from final judgments entered against them by the Christian Circuit Court[1] following a joint trial. Fields was convicted of murder, first-degree rape, kidnapping, first-degree sodomy, and tampering with physical evidence; Boyd was convicted of murder, first-degree rape, and kidnapping; and Cramer was convicted of first-degree manslaughter, rape, and kidnapping. For these crimes, Fields and Boyd were each sentenced to a total term of life imprisonment and Cramer was sentenced to a total of sixty years' imprisonment. Because Appellants were tried together and they raise common issues on appeal, we have consolidated their appeals and resolve each in this opinion.

Appellants each present the following claims for our review:

1. That the trial court erred by refusing to grant each Appellant a separate trial;
2. That Cramer's out-of-court incriminating statement was improperly admitted into evidence in violation of the rule against hearsay and in violation of Boyd's and Fields's right of confrontation; and otherwise should have been admitted only with a cautionary instruction concerning the use of testimony by an inmate informant;

[1] The crimes occurred in Muhlenberg County; however, a change of venue was granted transferring the case to Christian County.

3. That their kidnapping convictions are barred by the kidnapping exemption contained in KRS 509.050;
4. That the trial court erroneously admitted evidence that Boyd was previously associated with a crime ring, in violation of KRE 404;
5. That the trial court denied Appellants' right to present a defense by excluding, because of lack of authentication and hearsay, a tape recorded statement purporting to be a confession made by a deceased individual allegedly confessing to the crimes; and,
6. That the trial court erred in denying their motions for directed verdicts.

Additionally, Fields individually raises the claim that the Commonwealth failed to turn over to him exculpatory material in violation of *Brady v. Maryland,* 373 U.S. 83 (1963). Boyd individually raises the claim that the trial court erred in admitting a witness's out-of-court identification of him. Finally, Cramer and Boyd both raise the claim that the convictions should be reversed because of cumulative error.

For the reasons stated below, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

On the morning of October 2, 1987, a city street worker in the Muhlenberg County town of Central City noticed a vehicle with blood on it parked near the city garage. He contacted police, who opened the vehicle and discovered the body of Corrina Mullen. An autopsy revealed that Mullen had been beaten and stabbed to death and that the injuries she suffered were

extraordinarily brutal.[2]

At the time of her death, Mullen was the girlfriend of Jimmy Springer, but she was also involved in a relationship with Fields, then a lieutenant on the Central City Police force. Fields and Springer were friends with Appellants Cramer and Boyd. In the weeks before her death, Mullen had falsely claimed that she was pregnant and that Fields was the father. She also reported to Central City Police Officer John Scott that Boyd, Springer, and a person named Dale Duncan were involved in criminal activity involving illegal drugs and stolen property. Scott told Fields about Mullen's tip.

The initial investigation of Mullen's murder resulted in murder charges against Jimmy Springer. However, in 1988, Springer was tried and acquitted. Thereafter, the case languished until 2005.

In 2005, Kentucky State Police Detective Steve Silfies, while investigating a different crime, learned that a person named Samantha Robinson had information about an unsolved murder in Central City. He passed her name on to Detective Damon Fleming, who had recently begun to reinvestigate the Mullen murder. Fleming interviewed Robinson who told him she was an eyewitness to Mullen's murder. Her statement, along with other evidence

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[2] Mullen suffered multiple severe facial injuries; she had two stab wounds and one cut to her neck; she had bruises on her back and arms; one of her nipples was cut off; there were tears and one deep laceration of her vagina; and she suffered defensive wounds to her wrists, fingertips and palms.

gathered during the investigation, led to Appellants' indictments. Mullen's roommate, Angela Smith and Jimmy Springer were also indicted.[3]

In the light most favorable to the verdict, the facts established at trial are as follows. On the evening of October 1, 1987, Robinson, then sixteen-years old, was standing outside her residence when two men abducted her. The men, later identified as Fields and Boyd, grabbed and forced her into their car. They drove her to the apartment where Mullen and Smith lived and took her into the residence. Mullen, Smith, Cramer, Springer, and another man that Robinson could not identify were inside.

Fields began to argue with Mullen. Robinson was unsure of what the argument was about, but testified it could have been about Mullen's supposed pregnancy. Fields then took Mullen into a bedroom and Boyd pushed Robinson in after them. Robinson testified that, Fields continued to argue with Mullen about "opening her mouth" and told her that he was going to make sure "she got what she deserved." Fields began beating Mullen with a metal bar. He then raped Mullen, after which Cramer, Boyd, and Springer each raped her. Fields then held down Robinson and sodomized her. After that, Fields beat Mullen again and then stabbed and cut her with a knife.

Mullen, by then either dead or unconscious, was placed in the trunk of her own car. Fields ordered Robinson to drive Mullen's vehicle to the city

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[3] Because of his 1988 acquittal on murder charges arising out of Mullen's death, Springer was charged only with kidnapping, rape, and sodomy. Smith was charged with perjury in connection with the 1988 trial, and being complicit in the murders, rape and kidnapping of Mullen.

garage in Central City, and she did so. When she arrived, Boyd was already there. Robinson places her arrival at the garage around sunrise. She testified that after parking the vehicle she fled and ran to her mother's home. She had no subsequent contact with any of the codefendants concerning her participation in the events. At the time, Robinson told only her adoptive mother what she had seen.

Other witnesses observed Appellants near the city garage that night. Brian Robinson[4] was helping to close his father's business when he saw Fields and Boyd walking together near the old city garage at about 1:00 a.m. Central City Police Officer Michael Phillips testified that he saw Boyd walking toward the garage around 3:00 a.m.

Fields was the first policeman to arrive at the city garage after Mullen's car was found. He also was involved in the initial stages of the investigation. He handled some of the evidence that was gathered, including evidence that was sent to the state police lab. Some of the evidence handled by Fields was lost and never found again. That missing evidence forms the basis for his present conviction of tampering with physical evidence.

We now review in turn each of the claims of error.

II. THE CASES WERE PROPERLY CONSOLIDATED FOR TRIAL

Appellants first argue that the trial court erred by joining their cases for trial. RCr 9.12 permits consolidation of separate indictments for trial if, under

[4] No relation to Samantha Robinson.

RCr 6.20, the charges could have been joined in a single indictment.[5] Initially, the trial court consolidated all of the related indictments for a common trial, but later granted Springer and Smith's motions for separate trials pursuant to RCr 9.16. The cases against Fields, Cramer, and Boyd remained joined over their objections.

RCr 9.16 requires separate trials whenever it appears that either party will be prejudiced by a joint trial. The burden upon the party seeking severance is to make a positive showing that the joinder is prejudicial. Antagonistic defenses, including defendants casting blame on each other, do not inherently result in unfair prejudice and do not invariably mandate separate trials. We have stated recently that the expectation of defendants to present conflicting versions of the events in question may be a reason for, rather than against, a joint trial because if either one is lying, it is easier for the truth to be determined if all are required to be tried together. *See Paulley v. Commonwealth*, 323 S.W.3d 715, 728 (Ky. 2010).

We held in *Wilson v. Commonwealth*, 836 S.W.2d 872, 887 (Ky. 1992), *overruled on other grounds by St. Clair v. Roark*, 10 S.W.3d 482 (1999), that convictions will not be reversed for the failure to grant separate trials unless "the likelihood of prejudice was so clearly demonstrated to the trial judge as to make his failure to grant severance an abuse of discretion." To demonstrate

[5] RCr 6.20 provides as follows: "Two (2) or more defendants may be charged in the same indictment, information or complaint if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately, and all of the defendants need not be charged in each.

this prejudice, "[a] defendant must show that antagonism prevented a jury from being able to separate and treat distinctively evidence that is relevant to each particular defendant at trial and that the antagonism between codefendants will mislead or confuse the jury." *Id.*

Appellants now identify several distinct grounds to support the claim that their trials should have been of severed. We consider these, in turn, below.

A. The Additional Charges Against Fields

Cramer and Boyd complain that being tried alongside of Fields, who faced two charges (sodomy against Robinson and tampering with physical evidence) that they were not charged with prevented them from receiving a fair trial, because the jury may have unjustly associated them with those crimes. However, Appellants offer no reason why the jury would be unable to differentiate between the separate crimes for which Fields was individually charged, and crimes in which the entire group allegedly participated. Juries are often required to differentiate among multiple charges against a single defendant and regularly do so without bias or prejudice. We see no reason that they would be unable to do so when presented with different charges against multiple defendants. The fact that evidence may pertain to one defendant, but not the other, does not establish the kind of prejudice that compels separate trials. *See Humphrey v. Commonwealth*, 836 S.W.2d 865, 869 (Ky. 1992). The generalized concern that one may be tainted as a result of a codefendant's

deeds does not constitute a positive showing of prejudice and is therefore, not cause for reversal of Appellants' convictions.

B. Testimony Concerning Cramer's Incriminatory Out-of-Court Statement

Next, Appellants argue that their trials should have been severed because of the introduction at trial of incriminating out-of-court statements made by Cramer. Prior to trial, Cramer shared a jail cell with inmate-informant Billy Gibson. Gibson claimed that Cramer, while viewing his case discovery materials saw photographs of Mullen's body and exclaimed, "Look what we did . . . look what they did." Appellants argue that Gibson's testimony compelled separate trials because Cramer's decision not to testify left them with no opportunity to confront and cross-examine Cramer about the alleged statement, and that Gibson's testimony would not have been admissible in their individual trials.

This question arises frequently in connection with joint trials and it is resolved, not by severing the trials of multiple defendants, but by compliance with principles established under *Crawford v. Washington*, 541 U.S. 36 (2004) and *Bruton v. United States*, 391 U.S. 123 (1968), which we discuss below in Section VII, *infra*. If Cramer's alleged statement had a prejudicial effect, the remedy would ordinarily be addressed with a limiting instruction and a redaction of the prejudicial parts of the statement. Separate trials would not be required, and the trial court therefore did not abuse its discretion in failing to order separate trials on account of Gibson's testimony.

C. The Commonwealth's Evidence of Conflicting Motives

Appellants also allege that separate trials were required because the Commonwealth attributed to Appellants differing and conflicting motives for the commission of the crimes, specifically that Mullen was killed: (1) because she was pregnant with a child fathered by Fields; (2) because she was planning on reporting Boyd's and Springer's alleged involvement in a crime ring; and (3) because she did not pay money she owed to Boyd and others.[6] These conflicting motives, Appellants contend, forced them into presenting antagonistic defenses.

Regardless of the multiple theories suggested by the Commonwealth concerning motive, the defenses of the three codefendants were not antagonistic. None of the three attempted to blame the others for the crimes in an attempt to exonerate himself. Instead, they were unified in their defense that Robinson fabricated her story implicating them in the crimes against Mullen. Each Appellant sought to undermine Robinson's credibility and portray her testimony as entirely unbelievable. Their defenses were harmonious, not antagonistic. That Appellants may have each had individual motives for killing Mullen, as the Commonwealth theorized, does not render their defenses inconsistent or antagonistic.

Moreover, a degree of inconsistency among the defenses, rather than *ipso facto* requiring separate trials, is but one factor for the trial judge to consider in

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[6] On the day of Mullen's murder, Boyd was observed pointing a gun at her and threatening her by stating, "You owe us. Pay or you'll die."

deciding whether defendants will be prejudiced by a joint trial. *Rachel v. Commonwealth*, 523 S.W.2d 395, 400 (Ky. 1975); *Tinsley v. Commonwealth*, 495 S.W.2d 776 (Ky. 1973) (Trial court did not abuse discretion in denying severance of trial to two defendants charged with the murder of two police officers where the defenses were not antagonistic or hostile because there was no attempt on the part of one defendant to directly incriminate the other defendant in the shooting of one of the officers and the record failed to disclose any prejudice resulting from the joint trial). Accordingly, the fact that the Commonwealth presented alternative motives for the crimes did not compel separate trials.

D. Prevention of Rebuttal Testimony by Fields

Finally, Fields argues that the joint trial kept him from presenting evidence that would have bolstered his defense. Part of the Commonwealth's theory for Fields's involvement in murdering Mullen was that he wanted to prevent her from disclosing Boyd's involvement in a crime ring. To rebut this, Fields, a former police officer, wanted to show that he had once arrested Boyd as a rape suspect, and participated in a police investigation aimed at Boyd. This evidence, he argues, was inadmissible because of its prejudicial effect on Boyd, but at a separate trial he could have presented it.

The fact that Fields may have once arrested Boyd and otherwise investigated him does not negate the Commonwealth's theory that Fields was also involved in criminal activities with Boyd, and thus the relevance of those

facts was not clearly established. Fields could have been involved in the crime ring with Boyd, and performed his police duties as cover for his criminal acts. Accordingly, we are not persuaded that Fields's inability to introduce evidence of his police work adverse to Boyd's interest was so essential to his case as to compel the trial judge to grant separate trials.

E. Conclusion

"If upon the consideration of the case a trial judge orders a joint trial, we cannot reverse unless we are clearly convinced that prejudice occurred and that the likelihood of prejudice was so clearly demonstrated to the trial judge as to make his failure to grant severance an abuse of discretion." *Rachel*, 523 S.W.2d at 400. Appellants were not prejudiced by the joint trial, and therefore we do not find any abuse of discretion by the trial court's joining of these cases for a single trial.

III. CRAMER'S OUT-OF-COURT INCRIMINATING STATEMENT WAS PROPERLY ADMITTED

Appellants next argue that Cramer's out-of-court incriminating statements which were admitted into evidence through the testimony of Billy Gibson should have been inadmissible. As briefly discussed in Section II, *supra*, prior to trial Cramer shared a jail cell with Gibson and eight other inmates. While in jail, Cramer received copies of discovery material relating to his case, including various photographs. Over the objection of all Appellants, Gibson was permitted to testify that Cramer boastfully displayed photographs of Mullen's body and exclaimed, "Look what we did" and "look what they did."

Accordingly, Gibson's testimony may reasonably be interpreted as an admission to his involvement in the crimes against Mullen. Each Appellant contends that Gibson's testimony was inadmissible, but given their distinguishable positions, Fields and Boyd do so for slightly different reasons than Cramer.

A. Cramer's Inculpatory Statement was Admissible Against Cramer as a Statement Against His Penal Interest under KRE 804(b)(3)

Acknowledging that KRE 804(b)(3) excepts from the hearsay rule statements that "so far tended to subject the declarant to civil or criminal liability . . . that a reasonable person in the declarant's position would not have made the statement unless believing it to be true," Cramer argues nonetheless that Gibson's testimony is inadmissible. He relies upon the additional requirement for admissibility set forth in the last sentence of KRE 804(b)(3): "A statement tending to expose the declarant to criminal liability is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement." *Id.* He argues that Gibson's testimony fails to meet that requirement because it was inherently untrustworthy.

Crawley v. Commonwealth, 568 S.W.2d 927 (Ky. 1978) identifies four factors by which the trustworthiness, and hence the admissibility, of a statement against penal interest is to be assessed: 1) the time of the declaration and the party to whom it was made; 2) the existence of corroborating evidence in the case; 3) the extent to which the statement is against the declarant's interest; and 4) the availability of the declarant as a

witness. *See also Harrison v. Commonwealth,* 858 S.W.2d 172, 175 (Ky. 1993).

Here, Cramer was unavailable as a witness because he exercised his constitutional right not to testify. KRE 804(a)(1); *Taylor v. Commonwealth,* 821 S.W.2d 72 (Ky. 1990), *overruled on other grounds by St. Clair v. Roark,* 10 S.W.3d 482 (Ky. 1999). Reasonably construed, Cramer's statement, as repeated by Gibson, is a strong admission of responsibility for the crime depicted in the photo. It is corroborated by Robinson's testimony identifying Cramer as one of the perpetrators of the crimes. Gibson, an inmate himself with prior felony convictions, may be a less than ideal witness, but inmates and convicted felons regularly testify with credibility in our courts. The trial judge is in the best position to evaluate the circumstances in applying the trustworthiness element of KRE 804(b)(3). The elements for the admission of Cramer's inculpatory statement under KRE 804(b)(3) are satisfied. The trial court plainly determined that the probative value of Gibson's testimony outweighed its prejudicial effect. KRE 403. We find no abuse of discretion here and will not disturb the trial court's decision. *Brown v. Commonwealth,* 313 S.W.3d 577 (Ky. 2010).

B. Cramer Was Not Entitled to an Instruction Regarding Jailhouse Informants

Cramer further argues that upon admission of Gibson's testimony, the trial court should have admonished the jury that the testimony of a "jailhouse informant," such as Gibson, should be met with a degree of skepticism.[7] A

[7] The trial court did admonish the jury regarding Gibson's credibility as a convicted felon.

similar request was rejected by this Court in *Parrish v. Commonwealth,* 121 S.W.3d 198, 203 (Ky. 2003), *overruled on other grounds by Brown,* 313 S.W.3d 577. Cramer acknowledges *Parrish* but urges that we reconsider and adopt rules similar to those in California and Alaska providing for such an admonition. We remain convinced of the soundness of our holding in *Parrish,* and decline Cramer's invitation to revisit the decision.

C. *The Use of Cramer's Admission Did Not Violate Boyd's and Fields's Sixth Amendment Right of Confrontation under Crawford and Bruton*

Fields and Boyd additionally argue that Cramer's statement was inadmissible against them under *Crawford v. Washington,* 541 U.S. 36 (2004), because it was an out-of-court statement implicating them in the crimes and that they were not able to cross-examine Cramer regarding the statement, in violation of their Sixth Amendment Confrontation Clause rights.

Cramer's statement did not identify those he included among "we" and "they." However, Boyd and Fields contend that their association with Cramer as codefendants undoubtedly suggested to the jury that Cramer's remark included them, and thereby inferentially linked them to the crimes depicted in the photographs. Thus they argue that Cramer's statement was incriminating to them as well as to Cramer. It was certainly the Commonwealth's theory of the case that "we" included Boyd and Fields. They accordingly contend that *Crawford* barred the introduction of the statement. *Stone v Commonwealth,* 291 S.W.3d 696, 700 (Ky. 2009) ("*Crawford* . . . applies when the out-of-court statement is offered as evidence against a defendant other than the declarant.")

Crawford holds that, notwithstanding the applicability of traditional hearsay exceptions, "testimonial" hearsay statements may not be admitted as evidence against one other than the declarant, unless there is, or has been, an opportunity to cross-examine the declarant regarding the statement. *Crawford,* 541 U.S. at 54. In this matter, Cramer could not be cross-examined because he invoked his right to refuse to testify, and he had not otherwise been subject to cross-examination about his statement. Therefore, if his incriminating statement was "testimonial," *Crawford* precludes its admission.

The United States Supreme Court has yet to define "testimonial" hearsay with any degree of precision. However, *Crawford* does distinguish testimonial statements from casual remarks made to friends. *Id.* at 51 (An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not). Since Cramer's remarks were spontaneously made to his fellow inmates, we do not regard them as "testimonial" under *Crawford. Brown v. Commonwealth,* 313 S.W.3d 577, 622-623 (Ky. 2010); *Hartsfield v. Commonwealth,* 277 S.W.3d 239, 245 (Ky. 2009) (Spontaneous, informal statements unsolicited by law enforcement officers or their surrogates is not testimonial under *Crawford.*) Therefore, admission of Cramer's statement did not infringe upon Boyd's and Fields's right of confrontation.

Fields and Boyd also contend that the admission of Cramer's statement violated *Bruton v. United States,* 391 U.S. 123 (1968), which holds that the

Confrontation Clause forbids "the use of a non-testifying codefendant's confession that 'expressly implicate[s]' the other defendant." *Shepherd v. Commonwealth*, 251 S.W.3d 309, 314 (Ky. 2008). However, when a codefendant's confession does not expressly implicate the other defendant, but rather inferentially "links" him to the crime, the Confrontation Clause is not offended so long as the evidence itself is otherwise "properly admitted" and "the confession is redacted to eliminate all references to the defendant's existence." *Id.* at 314-15 (citing *Richardson*, 481 U.S. at 202).[8]

The *Bruton* analysis presumes that the prejudicial effect of a codefendant's confession will be eliminated by the redaction of the statement to eliminate references to non-declarant defendants and an instruction to the jury admonishing it to consider the statement as evidence *only* against the declarant. Ordinarily, the combination of a redaction and a limiting instruction satisfies Sixth Amendment concerns. *Rodgers v. Commonwealth*, 285 S.W.3d 740, 747 (Ky. 2009). KRE 105(a) expressly provides for such admonitions, but it also provides, "In the absence of such a request [for an admonition], the admission of the evidence by the trial judge without limitation shall not be a ground for complaint on appeal, except under the palpable error rule.

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[8] It has been held that plural pronouns like "we" and "they" are so broad in scope that they cannot be regarded as implicating specific codefendants, where circumstances make it apparent that the crimes were committed by multiple parties. *See, e.g., Plater v. U.S.*, 745 A.2d 953, 961 (D.C. 2000) ("The use of the plural neutral pronoun, 'we,' when referring to the group who attacked the decedent, in no way specifically linked [Appellant] to the crime because there was no dispute that the incident was a group assault. Thus, the use of 'we' was not prejudicial because the term 'we' does not connote a particular number of people or single out any individual person.")

Neither Fields nor Boyd requested a redaction of Cramer's statement or a limiting instruction. They argued only that Cramer's testimony mandated separate trials for each defendant. Their failure to request an appropriate admission restricting the use of Cramer's statement waives the issue on appeal. *Id.* In *Barth v. Commonwealth*, 80 S.W.3d 390, 396 (Ky. 2001), we noted:

> The "upon request" qualification of the [KRE 403] is but a codification of the principle that "[t]he admission of mixed admissibility evidence without an accompanying admonition cannot be questioned on appeal by a party who failed to request an admonition at trial." R. Lawson, *The Kentucky Evidence Law Handbook* § 1.05, at 17 (3d ed. Michie 1993) (citing 1 Wigmore, Evidence 697 (Tiller's rev. 1983) ("[T]he opponent of the evidence must ask for that instruction. Otherwise, he may be supposed to have waived it as unnecessary for his protection.")). Kentucky has long adhered to this view[.] (Citations omitted)

Boyd and Fields declined to request a redaction of the Cramer statement and an instruction limiting its use. The failure of the trial court to so provide *sua sponte* was not error.

D. Conclusion

In summary, the admission of Billy Gibson's testimony with respect to Cramer's incriminatory statement presents us with no reversible error. While Cramer's statement was perhaps subject to redaction and a limiting instruction to exclude its use against Boyd and Fields, the failure to request these remedies waives further consideration of the matter on appeal.

IV. THE KIDNAPPING CONVICTION WAS NOT PRECLUDED BY THE KRS 509.050 EXEMPTION

Appellants next contend that they should have been granted a directed verdict on the kidnapping charges upon application of the kidnapping exemption statute, KRS 509.050. Specifically, they argue that any interference with Mullen's liberty was incidental to and occurred contemporaneously with the underlying crimes of murder and rape, and that such interference was no more than was necessary to commit the rape and murder.

The kidnapping statute, KRS 509.040, provides, in relevant part, that "[a] person is guilty of kidnapping when he unlawfully restrains another person and when his intent is . . . to accomplish or to advance the commission of a felony; or to inflict bodily injury or to terrorize the victim or another . . . ." KRS 509.040(1)(b)(c); *Hatfield v. Commonwealth*, 250 S.W.3d 590, 598 (Ky. 2008). However, KRS 509.050 provides, in certain circumstances, an exemption from a kidnapping charge:

> A person may not be convicted of unlawful imprisonment in the first degree, unlawful imprisonment in the second degree, or kidnapping when his criminal purpose is the commission of an offense defined outside this chapter and his interference with the victim's liberty occurs immediately with and incidental to the commission of that offense, unless the interference exceeds that which is ordinarily incident to commission of the offense which is the objective of his criminal purpose. The exemption provided by this section is not applicable to a charge of kidnapping that arises

from an interference with another's liberty that occurs incidental to the commission of a criminal escape.[9]

The trial court, rather than the jury, determines whether the exemption applies, and we review that determination under the abuse of discretion standard. *Duncan v. Commonwealth*, 322 S.W.3d 81, 94 (Ky. 2010).

This Court has applied the following three-prong test to determine the applicability of the exemption statute:

1. The underlying criminal purpose must be the commission of a crime defined outside of KRS 509;
2. The interference with the victim's liberty must have occurred immediately with or incidental to the commission of the underlying intended crime;
3. The interference with the victim's liberty must not exceed that which is ordinarily incident to the commission of the underlying crime.

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[9] In the commentary to KRS 509.050, the drafters pointed to the policy considerations behind the kidnapping exemption statute:

> The provision seeks to express a policy against the use of kidnapping to impose sanctions upon conduct which involves a movement or confinement (of another person) that has no criminological significance to the evil toward which kidnapping is directed. It then provides a flexible standard by which courts are to enforce that policy. Before criminal behavior that is directed toward the completion of robbery, rape, or some other offense can constitute kidnapping, there must be an interference with liberty in excess of that which ordinarily accompanies that offense.

KRS 509.050 (Drafters Commentary 1974). "Thus, the drafters expressed a willingness to alleviate the problem of overzealous prosecution, by tacking on kidnapping charges to certain crimes through a hyper-technical application of the statutory language. The commentary noted that restriction of another's liberty is often an essential or incidental element to the commission of certain violent crimes. KRS 509.050 (Drafters Commentary 1974)." *Hatfield*, 250 S.W.3d at 599 (citation omitted).

All three prongs must be satisfied in order for the exemption to apply. *Hatfield,* 250 S.W.3d at 599.

We agree that Appellants easily satisfy the first two prongs of the foregoing test. In conjunction with the kidnapping of Mullen, Appellants were also charged with her rape and murder, both crimes being codified outside of KRS Chapter 509. And, the rape and murder of Mullen required restraint of her liberty incidental to and contemporaneously with the commission of those crimes.

The proper application of KRS 509.050 requires that we read the third prong of the test in conjunction with the second. To meet the third prong, the interference with the victim's liberty must not go beyond that which would normally be incidental to the commission of the underlying crimes. As was noted in *Hatfield,* 250 S.W.3d at 600, "[I]t is difficult to pin down precisely what is the 'appropriate' amount of restraint one would normally use to attempt to take one's life."

Thus, the exception will apply when the restraint used to accomplish the commission of the underlying crime is a part of, or incident to, the act of committing the crime itself and, as such, temporally coincides with the commission of the crime. Deprivation of liberty that segues into a more pronounced, prolonged or excessive detainment falls outside the limits of the exemption statute, and the accused should be held separately accountable for those actions. *Id.*

By Robinson's testimony, Mullen was detained over a period of several hours, during which time she was forcibly raped four times, and beaten and stabbed to death. We need not specify an amount of time reasonably required for murder and multiple rapes in order to say that the testimony presented clearly established that Mullen was held for a period that well exceeded the time "ordinarily incident" to the commission of such crimes.

If nothing else, the testimony indicated Mullen was not free to leave during the time Fields sodomized Robinson. Further, Robinson's testimony and the medical evidence reflect that Mullen was excessively brutalized during the course of events, far beyond her rape and murder. The additional confinement associated with this superfluous brutalization plainly supports a finding that the detention exceeded what was necessary for her rape and murder.

In view of these factors demonstrating excessive detainment, we are constrained to conclude that the trial court properly declined to apply the kidnapping exemption.

V. REFERENCE TO BOYD'S OTHER CRIMINAL CONDUCT WAS PROPERLY ADMITTED

Appellants next contend they were prejudiced by the admission of evidence concerning Boyd's other criminal acts. Four days before the commencement of trial, the Commonwealth filed a notice of its intention to introduce evidence under KRS 404(b). The notice provided that Central City Police Officer John Scott would testify that, on the day before her death, Mullen

told him that Boyd, Springer and others were engaged in the interstate trafficking of stolen property, and that Officer Scott then told Fields about Mullen's tip. Appellants argue that the trial court erred in admitting this evidence because the notice was untimely and because the probative value was substantially outweighed by the danger of undue prejudice.

A. Timeliness of Notice

Appellants contend that notice of the Commonwealth's intention to use this evidence was untimely because it came sixteen days after the deadline set by the trial court for 404(b) disclosures, and that providing the notice four days prior to the commencement of trial was not "reasonable," as required by KRE 404(c).

KRE 404(c) requires the prosecution to provide a defendant with "reasonable pretrial notice" of its intent to offer evidence described under KRE 404(b), "Other crimes, wrongs, or acts." The purpose of the notice requirement is "to provide the accused with an opportunity to challenge the admissibility of this evidence through a motion *in limine* and to deal with reliability and prejudice problems at trial." *Bowling v. Commonwealth*, 942 S.W.2d 293, 300 (Ky. 1997) (quoting Robert G. Lawson, *The Kentucky Evidence Law Handbook*, § 2.25 (3rd ed. 1993)). Whether reasonable pre-trial notice has been given is decided on a case-by-case basis. *Id.*

Appellants complain that the trial court did not hold the Commonwealth to the disclosure deadline established by the court in a pre-trial scheduling

order. The failure of the trial court to adhere to that deadline is not determinative of KRS 404(b) compliance. The pretrial disclosure deadline presumably was entered to satisfy the court's ability to efficiently manage the litigation, and does not serve to define compliance with KRE 404(c).

In *Bowling*, and again in *Dant v. Commonwealth*, 258 S.W.3d 12 (Ky. 2008), we concluded that the reasonableness requirement of KRE 404 (c) was met where the defendant had actual notice of the proposed evidence in time to challenge its admissibility by way of a motion *in limine*. The facts in this case compel the same result as *Bowling* and *Dant*. Mullen's comments to Officer Scott were provided to Appellants through pretrial discovery and Appellants challenged the admissibility of the evidence at an *in limine* proceeding held the day prior to trial. Further, Appellants had the opportunity to object to the admission of the evidence during trial and did not request the continuance designated by KRE 404(c) as an appropriate remedy for late disclosure.

We do not assume that in the days immediately preceding a trial, a lawyer has an abundance of free time to deal with unanticipated contingencies. We allow that other cases may present circumstances in which a late disclosure would not permit defense counsel to drop his other responsibilities in order to hastily draft a motion *in limine* and prepare for a last-minute hearing. But Appellants fail to identify with specificity any prejudice resulting from the timing of the notice given here. As such, we are constrained to conclude that Appellants were not prejudiced by the timing of the

Commonwealth's 404(b) disclosure.

B. Balancing the Prejudicial Impact and Probative Effect of the KRE 404(b) Evidence

Appellants next argue that evidence about the alleged crime ring should have been excluded because its prejudicial effect substantially outweighed its probative value, because there was a lack of corroboration that a crime ring even existed, and because the evidence was an impermissible attack on their character. As this Court has previously stressed, KRE 404(b) is "exclusionary in nature," and as such, "any exceptions to the general rule that evidence of prior bad acts is inadmissible should be 'closely watched and strictly enforced because of [its] dangerous quality and prejudicial consequences.'" *Clark v. Commonwealth*, 223 S.W.3d 90, 96 (Ky. 2007) (quoting *O'Bryan v. Commonwealth*, 634 S.W.2d 153, 156 (Ky. 1982)). One of the exceptions expressly identified in the rule is evidence that shows motive. The relevance of Scott's testimony fits squarely within that exception. Mullen's inclination to tell police what she knew about Boyd's and Springer's criminal activity strongly suggests a motive for Mullen's murder. The purpose of its admission into evidence was not simply to impugn Appellants' character, and therefore it is admissible per KRE 404(b).

Nevertheless, KRE 404(b) "like the other rules providing for the admission of evidence, are all subject to the KRE 403 balancing test, which permits the exclusion of otherwise admissible evidence '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.'" *Dennis v. Commonwealth*, 306 S.W.3d 466 (Ky. 2010). "The trial court's decision regarding KRE 404(b) matters is reviewed by this Court under an abuse of discretion standard[.]" *Montgomery v. Commonwealth*, 320 S.W.3d 28, 34 (Ky. 2010).

The prejudicial impact of the victim's statement arises from the concern that when the jury learns that Boyd was involved in a scheme to possess and transfer stolen property, it might be tempted to impute to him a general disposition toward the commission of other crimes. The probative value arises from the indication that Mullen was about to alert the police to the criminal enterprise and that Fields was tipped off about her intended disclosure a few hours before Mullen was killed. Whether the probative value exceeds the prejudicial effect is a matter entrusted to the trial judge's discretion. We do not conclude that the trial court abused its discretion in determining that such evidence was admissible to prove motive, and that its probative value substantially outweighed its prejudicial effect.

VI. THE EXCLUSION OF THE CRANDALL GIBSON RECORDING WAS PROPER AND DID NOT VIOLATE APPELLANTS' RIGHT TO PRESENT A DEFENSE

Appellants argue that their right to present a defense was violated because they were unable to introduce into evidence out-of-court statements allegedly made by a person named Crandall Gibson, who, Appellants contend, by incriminating himself tended to exculpate Appellants.

Among the items in the police file of the Mullen murder investigation was

a tape recording of a police interview with Gibson.[10] Appellants believed that the content of this interview was exculpatory evidence because the person being interviewed states, apparently in connection with the Mullen murder, "You can't get me without the other two." Therefore, Appellants wanted to introduce testimony from Detective Fleming that Gibson had made that statement to police investigators. However, between the time of the interview and the trial, Gibson died.

The Commonwealth gave two reason for its objection to the testimony: the recording had not been properly authenticated; and it was hearsay not subject to any hearsay rule exception. The trial court sustained the Commonwealth's objection and excluded the proffered evidence. Appellants contend the ruling deprived them of their right to present a defense.

The recording had been made before Fleming was assigned to the Mullen case and Fleming was not present at the interview. Fleming instead received the recording when he took over the case. Appellants interpret Gibson's recorded statement to be a confession that he and two other unnamed individuals murdered Mullen. They argue the tape is therefore exculpatory because Robinson did not identify Gibson as one of the perpetrators, and so, by inference, Robinson is lying and the murderers must be Gibson and two unknown individuals.

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[10] Cramer and Boyd also contend that their right to present a defense was violated by the trial court's failure to allow trial counsel to question Detective Fleming regarding a fight involving Jimmy Springer, Chris Daniels, and Corinna Mullen. They provide no supporting analysis for this claim, however, and we accordingly will not review this sub-issue on the merits. CR 76.12; *Cherry v. Augustus*, 245 S.W.3d 766, 781 (Ky. App. 2006).

The fundamental right of a criminal defendant to present a defense is well established. *Chambers v. Mississippi*, 410 U.S. 284 (1973); *Rogers v. Commonwealth*, 86 S.W.3d 29, 39-40 (Ky. 2002). We recognize that "[I]t is crucial to a defendant's fundamental right to due process that he be allowed to develop and present any exculpatory evidence in his own defense, and we reject any alternative that would imperil that right." *McGregor v. Hines*, 995 S.W.2d 384, 388 (Ky. 1999). However, the "right to present a defense" does not supersede the rules of evidence. Implicit in the accused's right to present a defense is that he do so within the bounds of the established evidentiary law. *Chambers*, 410 U.S. at 302 ("In the exercise of [the right to present a defense], the accused, as is required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.") In this vein, an audio taped conversation such as Gibson's is subject to the authentication requirements of KRE 901; *Parker v. Commonwealth*, 291 S.W.3d 647, 665 (Ky. 2009).

KRE 901 provides: "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." The burden of authentication is slight, requiring "only a prima facie showing of authenticity." *Johnson v. Commonwealth*, 134 S.W.3d 563, 566 (Ky. 2004) (citing *United States v. Reilly*, 33 F.3d 1396, 1404 (3rd Cir. 1994)). The trial court's determination in this respect is reviewed for an abuse of discretion. *Id.*

In the present case, Appellants offered no evidence to authenticate the recording. The recording could have been authenticated by the officer who conducted the interview or someone else who could identify Gibson's voice. In light of Appellants' failure to authenticate the tape recording as required under KRE 901, we conclude that the trial court did not abuse its discretion by excluding the evidence.[11] The exclusion of such evidence, based upon a sound application of our evidentiary rules, was not a denial of Appellants' right to present a defense. This conclusion applies with equal force to Cramer's individual claim that exclusion of the recording was a denial of his right to present evidence of an alternative perpetrator.

VII. APPELLANTS WERE NOT ENTITLED TO A DIRECTED VERDICT

Appellants next argue that they were entitled to a directed verdict on all charges contained in their respective indictments. In particular, they direct us to numerous inconsistencies and deficiencies in the Commonwealth's case, including credibility issues relating to Robinson's testimony.

In considering a motion for a directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth, and otherwise assume that evidence for the Commonwealth is true, reserving for the jury any question as to credibility and weight to be given to the evidence. *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991).

[11] Because of our disposition of this argument, we need not address whether the statement was admissible under the hearsay rule.

On appellate review, test of directed verdict is whether, under the evidence as whole, the jury's finding of guilt was clearly unreasonable. *Id.*

It is apparent that the Commonwealth's case, as a whole, had gaps, unexplained events, and inconsistencies. At first impression, aspects of Robinson's story may seem implausible to some. However, "[t]he court acting as an appellate court cannot . . . substitute its judgment as to credibility of a witness for that of the trial court and jury." *Brewer v. Commonwealth*, 206 S.W.3d 313, 319 (Ky. 2006) (quoting *Commonwealth v. Jones*, 880 S.W.2d 544, 545 (Ky. 1994)). It is only where the testimony on behalf of the Commonwealth fails to incriminate the accused, or is wholly insufficient to show guilt, that a directed verdict of acquittal should be given. *Bradley v. Commonwealth*, 465 S.W.2d 266, 267 (Ky. 1971).

Robinson testified that she saw Fields, Cramer, and Boyd rape and kill Mullen. Her testimony alone was sufficient to sustain the rape, homicide, and kidnapping convictions against the codefendants if the jury believed her. *Commonwealth v. Suttles*, 80 S.W.3d 424, 426 (Ky. 2002) ("The testimony of even a single witness is sufficient to support a finding of guilt, even when other witnesses testified to the contrary if, after consideration of all of the evidence, the finder of fact assigns greater weight to that evidence."). Likewise, Robinson testified that Fields sodomized her, and so he was not entitled to a directed verdict on this charge. The testimony of the victim alone is sufficient to support a sodomy conviction. *Garrett v. Commonwealth*, 48 S.W.3d 6, 8 (Ky.

2001).

Guided by the appropriate standards described above, we conclude that the trial court properly regarded the Commonwealth's evidence case as true, and drew the reasonable inferences in its favor. Appellants were not entitled to a directed verdict.

VIII. NO BRADY VIOLATION OCCURRED

Fields individually argues that his verdicts should be reversed because the Commonwealth failed to disclose a midtrial "exculpatory" statement made by his ex-wife, Theresa Puckett, in violation of *Brady v. Maryland*, 373 U.S. 83 (1963).[12]

Puckett was subpoenaed by the Commonwealth with the expectation that she would testify that on the night of Mullen's murder, Fields left their house in the evening and returned later wearing different clothing. When the time came for her testimony, however, the prosecutor informed the court that the he no longer desired to call her. The prosecutor did not disclose why she would not be called, but it is suggested that during midtrial discussions with her, Puckett placed Fields's late night departure on an evening other than the night of the murder. This, Fields argues, was exculpatory information that should have been disclosed. We disagree.

[12] During pretrial proceedings Fields sought to prevent Puckett from testifying by application of the Spousal Privilege rule contained in KRE 504(b); however, the merits of that issue are not relevant to our discussion.

Our consideration of the matter is somewhat impeded by the fact that Puckett's pretrial statement is not in the record of this case.[13] Bearing in mind that Puckett did not testify at all, the fact that she might have originally told the prosecutor that Fields went out on the night of the murder, and then later changed her statement to say that he went out on a different night is neither exculpatory nor inculpatory; it is irrelevant. There is nothing exculpatory about her recollection of his whereabouts at times having no connection to the murder or to other evidence presented in the case.

Fields next alleges that Puckett stated in her midtrial discussions with the prosecutor that he was home with her on the night of the crimes. If she made such a statement, it would be exculpatory and therefore subject to disclosure under *Brady*. However, a closer examination of paragraph four of Puckett's post-trial affidavit discloses only that she said "[t]o the best of my memory and recollection, Billy Fields was home with me the Thursday night/Friday Morning when Ms. Mullen was killed." She clearly does *not* claim to have told the prosecutor or any agent of the Commonwealth that Fields was home with her on the night of the murder, and there is otherwise no evidentiary support for the proposition that the prosecution was informed during the trial of that claim. Because the statement contained in the affidavit

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[13] Appellant had a responsibility to present a "complete record" before the Court on appeal. *Steel Technologies, Inc. v. Congleton*, 234 S.W.3d 920, 926 (Ky. 2007). "Matters not disclosed by the record cannot be considered on appeal." *Montgomery v. Koch*, 251 S.W.2d 235, 237 (Ky. 1952); *see also Wolpert v. Louisville Gas & Elec. Co.*, 451 S.W.2d 848 (Ky. 1970).

arose *after* the completion of the trial, *Brady* is not applicable. Accordingly, we find no *Brady* violation here.

IX. ROBINSON'S IN-COURT IDENTIFICATION OF BOYD WAS PROPERLY ADMITTED

Boyd next argues that the trial court should have granted his motion to suppress Robinson's in-court identification of him. At trial, Boyd moved to suppress Robinson's in-court identification of him as one of the perpetrators of Mullen's murder because the identification was induced by an unduly suggestive process. When interviewed by police concerning the Mullen murder, Robinson was unable to identify by name the man who, together with Fields, abducted her in front of her home. She told them that, although she did not recall having seen the man before and did not recall the name he used, she remembered what he looked like and that he was a "bigger guy, a real big guy." The police then showed her a single photograph of Boyd from Department of Corrections files. She was told that the photo was of Boyd, and asked if he was one of the perpetrators of the crimes. She affirmed that he was. Following a suppression hearing, the trial court overruled Boyd's motion to suppress Robinson's photographic identification.[14]

Ordinarily, when reviewing a trial court's ruling on a motion to suppress an identification based upon a photographic line-up, we first determine if the circumstances leading to the identification were "unduly suggestive." Only if the circumstances were unduly suggestive do we move on to the next step of

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[14] No written order on the motion is contained in the record.

determining if the identification was, nevertheless, reliable. Because Robinson's identification of Boyd was based upon being shown a single photograph, coupled with a question of whether the person depicted was the perpetrator, we agree that the procedure used here was unduly suggestive.

Accordingly, we consider the five-factors identified in *Neil v. Biggers*, 409 U.S. 188, 199–200 (1972), for determining whether the suggestive nature of the process improperly tainted Robinson's in-court identification of Boyd. Those factors are: (1) the opportunity of the witness to view the criminal at the time of the crime, (2) the witness's degree of attention, (3) the accuracy of the witness's prior description of the criminal, (4) the level of certainty demonstrated by the witness at the confrontation, and (5) the length of time between the crime and the confrontation.

Three factors weigh in favor of the identification. The events of the night of the crime were of a prolonged duration, beginning with Robinson's abduction, which involved Boyd, continuing at the apartment with the rapes, sodomy, and murder, during which time Boyd was present, and ending at the city garage, where Boyd's presence was confirmed by an independent witness. Robinson therefore had an extensive period of time in which to observe Boyd. Also, Robinson testified that when she looked at the photograph and heard Boyd's name she had no doubt that he was one of the perpetrators, expressing a high degree of certainty. Her description of him as a large man apparently comports accurately with the identification of Boyd.

The remaining factors are less determinative. There was no direct testimony citing Robinson's degree of attentiveness, but it is obvious that she was not a casual observer to the events she claims to have seen that night. It is reasonable to infer, given the nature of the events transpiring, that she was paying close attention. Certainly the lapse of nineteen years between the crimes and Robinson's identification of Boyd as one of the perpetrators weighs against the veracity of her identification.

We agree that for the trial court this was a close call. We cannot say that the trial court's decision to admit Robinson's identification, in light of the *Biggers* factors, was clearly erroneous, or that it was so "arbitrary, unreasonable, unfair, or unsupported by sound legal principles" so as to constitute an abuse of discretion. *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). We therefore affirm the trial court's ruling that the identification was admissible.

X. CUMULATIVE ERROR DID NOT OCCUR

Finally, Cramer and Boyd each contend that their convictions should be reversed on the basis of cumulative error. Fields does not raise this particular claim.

Cumulative error is "the doctrine under which multiple errors, although harmless individually, may be deemed reversible if their cumulative effect is to render the trial fundamentally unfair." *Brown*, 313 S.W.3d at 631. Here, however, as reflected in our discussions above, there were no errors at all —

even harmless errors – to accumulate into cumulative error, and so the doctrine is inapplicable. In summary, our review of the entire case reveals that the appellant received a fundamentally fair trial and that there is no cumulative effect or error that would mandate reversal. *Hunt v. Commonwealth*, 304 S.W.3d 15, 55-56 (Ky. 2009).

XI. CONCLUSION

For the foregoing reasons, the judgment of the Christian Circuit Court is affirmed.

All sitting. All concur.

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