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RENDERED: MARCH 22, 2012
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2011-SC-000129-MR

ALLEN SHANE BEASLEY — APPELLANT

V.

ON APPEAL FROM McCRACKEN CIRCUIT COURT
HONORABLE CRAIG Z. CLYMER, JUDGE
NO. 10-CR-00366

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

A McCracken Circuit Court jury found Appellant, Allen Shane Beasley, guilty of theft by deception over $500 and harassing communications. The jury also found him to be a first-degree persistent felony offender (PFO). For these crimes, Appellant received a twenty-year prison sentence. He now appeals as a matter of right, Ky. Const. § 110(2)(b), and asserts that the trial court: (1) erroneously permitted the Commonwealth to introduce certain text messages; (2) committed palpable error by inhibiting him from presenting a crucial piece of his defense; and (3) abused its discretion by refusing to accept his guilty plea.

I. BACKGROUND

This case stems from the renovation of a mobile home purchased by Jesse Day on March 20, 2010. Sometime after Day purchased the home, he

was contacted by Appellant, who indicated that he had a contractor's discount at Lowe's and was therefore able to purchase the flooring materials Day needed at a reduced price.

Based upon Appellant's overture, Day gave Appellant $600 in $100 bills to purchase the laminate flooring he had picked. Appellant, though, never returned that day with the materials, even after Day followed up with several phone calls.

Day then began sending Appellant text messages, which at first complained that he had been "ripped off" and instructed Appellant to "bring any material or my money." However, as Day became angry, he later sent messages encouraging Appellant to "come on and take his medicine."

From March 30 to April 25, 2010, Appellant began sending his own text messages to Day, which could fairly be described as taunting and/or vulgar. Based upon the messages sent by Appellant, as well as the unreturned cash, Day thereafter contacted the Kentucky State Police and eventually provided them his cell phone.

Appellant was subsequently indicted and later found guilty by a jury of theft by deception over $500 and harassing communications; the jury also found Appellant guilty of being a first-degree PFO. This appeal followed.

II. ANALYSIS

A. Text Messages

Appellant first argues that the trial court erred by admitting certain text messages that he sent to Day. Prior to trial, the Commonwealth furnished

Appellant's counsel with a transcript of the several messages sent between March 30 and April 25 of 2010:[1]

> Don't hate on playas. Lame!!
>
> No, 600 dolla Play. Get it right Bitch.
>
> Yeah man. How does it feel 2b a sucker?
>
> We did not steal it first of all you dumbasses gave it to us.
>
> ok this sh-- is played out do whatever your gonna do what you think you can later.
>
> I'm gonna show you what gutless really means
>
> I just have one more thing to say if u really aint scared bring yo bitch ass to the pilot station exit 3 im tired of hearing you run that d--- sucker boy.
>
> Whats wrong u scared im already almost there come on im gonna give u a chance to get the money back that I took from u two d--- ass bitches.
>
> No thanks when I do ill just run over and get it I know anything you got is mine if I but I'm good for now.
>
> Yeah I like that! Believe I'll come take that.
>
> See I wasn't going to go there but sense u want 2 run it. My word I already f---ed your bitch a long time ago. An believe me I gave her way more than that. Shes[2]
>
> I no quit a few guys that don f---ed that little tite wet p---- on your bitch.
>
> Whats up hot stuff? Im about ready to come back 2 P-town an f--- u and your bitches ass out, your 4 the first time hers 4 about the tenth see u soon.

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[1] The text messages are recited in the exact vernacular, misspellings, and form as the transcript provided to the defense prior to trial. However, some of the words have been censored.

[2] The transcript ends with this word.

> Where ya bitch ass at you d--- sucken child molester.
>
> I'm here you're a whore just like I thought don't say I didn't give you the chance to get your money back thanks d--- sucken whore.
>
> Hey I found that old teddy bear you used to snuggle with, now I know why you sleep with your mouth open.
>
> Gamestop called your new game Deep Throat Hero is in U can Pick it up anytime, champ!

The latter two messages were accompanied with a photograph of a teddy bear and black sex toy attached by wire to a gaming console, respectively.

Defense counsel subsequently moved to exclude any evidence of the text messages. After a hearing on the matter, the trial court noted that Appellant had been charged with harassing communications and thus overruled the motion because the messages "seem[ed] to have no legitimate reason but to harass, annoy or alarm" Day.

Based on the court's ruling, the Commonwealth presented the text messages by having Day read several of them from his cell phone to the jury and describe the image of the black sex toy. In so doing, Day admitted that two of the messages were probably sent in response to a message Day had sent that included a picture of an item he had recently bought in attempt to encourage Appellant to come to his home and try to take it,[3] and that he had deleted all of the messages he had sent Appellant from his cell phone. Day then identified the printout of the various messages, which the Commonwealth offered as an exhibit.

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[3] *See infra* note 7.

Appellant now contends that the court abused its discretion by admitting all of the messages rather than ruling on each one individually. *See Berryman v. Commonwealth*, 237 S.W.3d 175, 179 (Ky. 2007) ("[W]e may reverse a trial court's decision to . . . admit evidence only 'after a finding that the decision amounted to an abuse of discretion.'"). In support, Appellant points to KRE 404(b), as well as our evidentiary rule pertaining to relevance and prejudice. We address each argument in turn.

1. KRE 404(b)

KRE 404(b) provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." In order to establish that Appellant was guilty of harassing communications, the Commonwealth had to put forth evidence that Appellant, with intent to intimidate, harass, annoy, or alarm Day, "[c]ommunicate[d] with [him]. . . by telephone . . . in a manner which cause[d] annoyance or alarm and serve[d] no purpose of legitimate communication." KRS 525.080(1)(a).

Simply put, KRE 404(b) has no application to the text messages sent by Appellant, as these messages were not offered as "other crimes, wrongs, or acts." Rather, the messages were the basis for one of the underlying offenses—harassing communications. Additionally, several of the texts showed that Appellant committed theft by deception. *See* KRS 514.040.

2. Relevance

Evidence which is relevant is generally admissible. KRE 402. In *Little v. Commonwealth*, 272 S.W.3d 180, 187 (Ky. 2008), we defined relevancy in the context of a criminal case:

> "Relevant evidence in a criminal case is any evidence that tends to prove or disprove an element of the offense." *Harris v. Commonwealth*, 134 S.W.3d 603, 607 (Ky. 2004) (citation omitted). For evidence to satisfy the test for relevance, "only a slight increase in probability must be shown." *Id.* (citation omitted).

See also KRE 401.[4]

We believe the text messages were relevant and thus presumptively admissible because they increased the probability with respect to several elements of harassing communications. *See* KRS 525.080(1)(a).[5, 6] At minimum, the transcript of text messages established that Appellant communicated with Day by telephone. Moreover, the content of the messages themselves tends to show that such communication served no legitimate

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[4] KRE 401 states that "'[r]elevant evidence' means evidence having 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."

[5] Appellant actually concedes that the trial court could have found that six of the messages were relevant. However, he only specifies four of those messages: (1) "No, 600 dolla Play. Get it right Bitch."; (2) "Yeah man. How does it feel 2b a sucker?"; (3) "We did not steal it first of all you dumbasses gave it to us."; and (4) "Hey I found that old teddy bear you used to snuggle with, now I know why you sleep with your mouth open."

[6] Admittedly, the messages did not, alone, show that their content caused Day to suffer annoyance or alarm. However, the content of the messages was of the manner that *can* cause annoyance or alarm. More importantly, evidence is relevant if it tends to prove or disprove *an* element of the offense; our definition of relevancy does not require evidence to establish *all* the elements of the offense. *See Little*, 272 S.W.3d at 187; KRE 401. Finally, we note that Day testified that the messages harassed him.

purpose and reflected his intent to intimidate, harass, annoy, or alarm.[7, 8] Finally, we reiterate that several of the texts showed that Appellant committed theft by deception.

3. *KRE 403*

Appellant contends that the text messages referencing sexual acts were unduly prejudicial, confused the issues, misled the jury, and were cumulative with respect to other evidence.[9, 10] *See* KRE 403. It is necessary, then, to

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[7] Appellant takes particular umbrage with the admission of two of the text messages—"Yeah I like that! Believe I'll come take that." and "No thanks when I do ill just run over and get it I know anything you got is mine if I but I'm good for now."—because Day admitted that those messages were probably sent in response to a message Day had sent in attempt to encourage Appellant to come to his home and try to take it. Appellant argues that the messages could not "intimidate, harass, annoy, or alarm" Day because he admitted that he sent the opening salvo.

Although the statute's usage of "intimidate, harass, annoy, or alarm" pertains to the perpetrator's intent rather than the victim's response, Appellant makes an interesting point, especially considering that the statute does require that the communication "cause[] annoyance or alarm." KRS 525.080. However, even if we agreed with Appellant, he fails to explain how the admission of these two text messages, in light of the admissibility of the other messages, constitutes reversible error. *See Winstead v. Commonwealth*, 283 S.W.3d 678, 688-89 (Ky. 2009) ("A non-constitutional evidentiary error may be deemed harmless . . . if the reviewing court can say with fair assurance that the judgment was not substantially swayed by the error.") (citation omitted); KRE 103(a) ("Error may not be predicated upon a ruling which admits . . . evidence unless a substantial right of the party is affected.").

[8] Appellant also questions, in light of Day's testimony, how the messages indicating that other men, including Appellant, had had sex with Day's wife were "harassing, alarming, or annoying." With respect to other men, Day testified at trial that it was "neither here nor there" because he had not met his wife "at the church." As to Appellant, Day testified that he would "not give his right arm" to say that his wife hadn't had sex with him. We fail to see how Day's testimony obviates the effect of, much less the purpose behind, these messages.

[9] Specifically, Appellant contests the admission of the following text messages: (1) "See I wasn't going to go there but sense u want 2 run it. My word I already f---ed your bitch a long time ago. An believe me I gave her way more than that. Shes"; (2) "I no quit a few guys that don f---ed that little tite wet p---- on your bitch."; (3) "Whats up hot stuff? Im about ready to come back 2 P-town an f--- u and your bitches ass out, your 4 the first time hers 4 about the tenth see u soon."; (4) "Where ya bitch ass at you d--- sucken child molester."; (5) "I'm here you're a whore just like I thought don't

"make an assessment as to the probative worth of the evidence; to make an assessment as to the probable impact of the evidence (i.e., undue prejudice); and to determine whether the probative worth is substantially outweighed by the undue prejudice of the evidence." *Little*, 272 S.W.3d at 187.

In light of one of the offenses charged (harassing communications), we consider the sexually-oriented text messages to be highly probative. Even though these messages had little to no bearing on whether Appellant committed theft by deception,[11] without them it would be more difficult for the Commonwealth to persuade the jury that such communication had no legitimate purpose and reflected Appellant's intent to intimidate, harass, annoy, or alarm. As Appellant himself noted, Day admitted that two of the messages were probably sent in response to a message Day had sent encouraging Appellant to come to his home and try to take an item he had recently purchased. Had the trial court excluded the sexually-oriented messages, the jury might have been more inclined to believe that the messages received by Day constituted nothing more than one-half of a back-and-forth

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say I didn't give you the chance to get your money back thanks d--- sucken whore."; and (6) "Gamestop called your new game Deep Throat Hero is in U can Pick it up anytime, champ!"

[10] In support of his position, Appellant points this Court to our decision in *Chumbler v. Commonwealth*, 905 S.W.2d 488 (Ky. 1995), as well as *United States v. Stout*, 509 F.3d 796, 803 (6th Cir. 2007). However, we consider these cases to be clearly distinguishable and thus do not delve into their facts or analysis in resolving this matter.

[11] We note, though, that at least one of the texts—"I'm here you're a whore just like I thought don't say I didn't give you the chance to get your money back thanks d--- sucken whore."—was relevant to the offense of theft by deception.

between the two parties rather than harassing communications on the part of Appellant.

Conversely, we do not accept Appellant's argument that the messages were unduly prejudicial, confused the issues, or misled the jury. At best, the trial court could have found *some* of the sexually-oriented messages cumulative with respect to other evidence. Again, though, the admission of the messages in their entirety further strengthened the Commonwealth's ability to contravene any argument by Appellant that the messages represented one-half of a bilateral dispute rather than a unilateral assault. As such, we cannot conclude that the probative value of the messages was substantially outweighed by their inappropriate impact, if any.

In sum, the trial court did not abuse its discretion by admitting all of the text messages.

B. Presentation of Defense

Appellant next contends that the trial court erred by inhibiting him from presenting a crucial piece of his defense. In support, Appellant points this Court to *Schrimsher v. Commonwealth*, 190 S.W.3d 318 (Ky. 2006). Alternatively, he alleges that his constitutional right to present a defense "trumps a state evidentiary rule." However, Appellant admits that he failed to preserve this error at trial and thus requests palpable error review pursuant to RCr 10.26.[12]

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[12] RCr 10.26 reads:

A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court

On the morning of trial, the Commonwealth moved to preclude Appellant from introducing an out-of-court (hearsay) statement he made regarding the incident between himself and Day. Specifically, Appellant had described the incident as a drug deal "gone bad." The Commonwealth indicated that it was not planning to use the statement in its case-in-chief and the trial court thus informed Appellant's trial counsel that the statement could only be admitted if Appellant or someone else with knowledge of the deal testified.[13] *See* KRE 801(c) ("'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."); KRE 802 ("Hearsay is not admissible except as provided by these rules or by rules of the Supreme Court of Kentucky.").

We now address each of Appellant's arguments—his reliance on *Schrimsher* and his constitutional right to present a defense.

1. Schrimsher v. Commonwealth

With respect to *Schrimsher*, Appellant asserts that hearsay is admissible to "guard against any likely misperception that would be created by an opponent's presentation of a fragmented version of the statement." 190 S.W.3d at 331. Based upon this quote, Appellant argues that the trial court's ruling

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on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.

[13] In fact, Appellant's counsel agreed with the court and informed Appellant that he had to be prepared to testify if he wanted to proceed with the defense theory that the incident with Day constituted a drug deal "gone bad." As a result, the Commonwealth believes that we can avoid palpable error review because this issue was waived. However, we need not address the Commonwealth's supposition, as we resolve Appellant's arguments on the merits.

prevented him from testing the believability of Day's testimony and the government's version of the story—that Appellant told Day he could buy and laminate flooring for $600 and that Appellant walked away with the cash without performing the work. Appellant contends that he was instead reduced to cross-examining Day about whether he knew if Appellant knew Day's wife.

Appellant, though, takes the *Schrimsher* quote out of context and, in so doing, ignores the evidentiary rules discussed therein:

> His statements made during the interrogation were inadmissible hearsay—admissible when offered by the Commonwealth as admissions of a party opponent, KRE 801A(b), but inadmissible when offered by himself. Accordingly, KRE 106 applied only to the extent that fairness required the introduction of additional portions of the interrogation to correct or guard against any likely misperception that would be created by an opponent's presentation of a fragmented version of the statement.

Id. (citation omitted). Simply put, *Schrimsher* addressed the interplay between KRE 801A(b)(1), which allows one party to introduce as an admission a statement made by an opposing party (if offered against said party), and the "rule of completeness" as enunciated in KRE 106, which reads:

> When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

Contrary to Appellant's assertion, *Schrimsher* does not manufacture a new rule of evidence that would allow a party to admit his hearsay statement without taking the stand and being subject to cross-examination.

As in *Schrimsher*, Appellant's statement here was "admissible [had it been] offered by the Commonwealth as [an] admission[] of a party opponent,

KRE 801A(b), but inadmissible when offered by himself." *Id.* (citation omitted). Appellant cannot show that the Commonwealth set forth a fragmented version of any statement; his statement describing the incident as a drug deal "gone bad" constitutes an alternative narrative—not a portion of an incomplete narrative—and thus does not conform to the letter or spirit of KRE 106.[14] As such, the trial court did not err.

2. *Right to Present a Defense*

We heed the United States Supreme Court's unequivocal pronouncement that "the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense." *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006) (internal quotations omitted); *see also Chambers v. Mississippi*, 410 U.S. 284, 294 (1973) ("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."). However, "state and federal rulemakers have *broad latitude* under the Constitution to establish rules excluding evidence from criminal trials" because a "defendant's right to present relevant evidence is not unlimited." *U.S. v. Scheffer*, 523 U.S. 303, 309 (1998) (emphasis added). This latitude is impermissibly exceeded when an accused's right to present a defense "is abridged by evidence rules that infring[e] upon a weighty interest of

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[14] We also question the applicability of KRE 106 because, based upon our review of the record, the Commonwealth did not introduce "a writing or recorded statement or part thereof" and Appellant does not now contend that the court should have admitted "any other part or any other writing or recorded statement." In all likelihood, our inability to juxtapose KRE 106 against the facts before us stems from (1) defense counsel's agreement that the statement could only be admitted if Appellant testified, *see supra* note 13, and (2) Appellant's misinterpretation of *Schrimsher*, i.e., that it manufactures a new rule of evidence.

the accused and are *arbitrary or disproportionate* to the purposes they are designed to serve." *Holmes,* 547 U.S. at 324 (internal quotation marks omitted) (emphasis added).

As discussed, Appellant argues that he should have been allowed to introduce his statement—that the incident between Day and himself was a drug deal "gone bad"—without taking the witness stand because his right to present a defense outweighs a state evidentiary rule. However, he fails to argue that our hearsay rules are either "arbitrary or disproportionate to the purposes they are designed to serve" as required by *Holmes*. *See Harrison v. Commonwealth,* 858 S.W.2d 172, 176 (Ky.1993) (explaining that hearsay is inadmissible primarily due to its inherent unreliability).[15] And, as we noted in *Mills v. Commonwealth,* 996 S.W.2d 473, 489 (Ky. 1999), "*Chambers* . . . does not hold that evidentiary rules cannot be applied so as to properly channel the avenues available for presenting a defense."[16] As a result, we cannot say that the trial court's ruling violated Appellant's right to present a defense.

C. Guilty Plea

Appellant finally argues that the trial court abused its discretion when it declined to accept his guilty plea. Here, the Commonwealth initially offered

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[15] *See also Fresh v. Commonwealth,* 2009-SC-000797-MR, 2011 WL 1642275 (Ky. April 21, 2011); *Gatewood v. Commonwealth,* 2009-SC-000644-MR, 2011 WL 2112566 (Ky. May 19, 2011); *Rapone v. Commonwealth,* 2010-SC-000172-MR, 2011 WL 5880911 (Ky. Nov. 23, 2011); *White v. Commonwealth,* 2010-SC-000626-MR, 2011 WL 6826230 (Ky. Dec. 22, 2011).

[16] *See also Fields v. Commonwealth,* 2009-SC-000435-MR, 2011 WL 3793149, at *12 (Ky. Aug. 25, 2011) ("[T]he '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.").

Appellant a twelve month sentence, with $600 restitution, if he agreed to plead guilty to the charges discussed herein. However, Appellant had another pending felony case and thus requested a plea resolving both cases.[17] The Commonwealth then offered to drop the PFO charge in both matters[18] and allow Appellant to serve a five year concurrent sentence;[19] Appellant rejected the deal and counter-offered a two year concurrent sentence, which the Commonwealth never accepted.

As recently as two days before trial, the Commonwealth's five year offer was still in place. The day before trial, the Commonwealth offered Appellant a three year sentence in this case and a five year sentence for the other matter, to be served consecutively for a total sentence of eight years. At 4:15 PM that day, Appellant decided to accept this offer, which the Commonwealth indicated was contingent upon the trial court's agreement.

The trial court, though, refused to accept his plea, and instead indicated that it would only allow him to plead "straight up," i.e., enter a plea that allowed the court to establish the penalty. Appellant declined the court's proposal and the case proceeded to trial.

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[17] With respect to the other case, Appellant had been charged with burglary in the third degree and of being a PFO.

[18] *See supra* note 17.

[19] Specifically, the Commonwealth offered a twelve month sentence, with $600 restitution, in this case and a five year sentence for the other matter, to be served concurrently for a total sentence of five years.

In support of its refusal, the court explained that, after the pre-trial conference, it only accepted "straight up" pleas.[20] The court further noted that defense counsel had called at 4:15 PM on the day before trial, which was after a message had been put on the phone for venire persons to call to see if they need to report the next day. According to the court, accepting a belated plea would thus inconvenience jurors who had already made plans to be in court the next day, as well as the jailers who had already planned the day before to bring Appellant from the jail to the courthouse for trial. Finally, the court lamented that it had already "lost" a scheduled day.

It is well-settled that a trial court may refuse to accept a guilty plea. *Yell v. Commonwealth*, 242 S.W.3d 331, 341 (Ky. 2007); RCr 8.08 ("The court may refuse to accept a plea of guilty . . . .") In *Hoskins v. Maricle*, 150 S.W.3d 1, 22-24 (Ky. 2004), this Court traced federal law in an effort to better articulate when—and how—a trial court could refuse to accept a plea bargain between the Commonwealth and a defendant. In so doing, the Court distinguished varying types of plea bargains:

> A "sentence bargain," which does not involve dismissal or amendment of any charges but does involve a recommendation or agreement not to oppose a particular sentence, can be approved or rejected in the discretion of the trial court. A "charge bargain," which dismisses or amends one or more charges in exchange for a guilty plea to the reduced charges, or a "hybrid bargain," which is a charge bargain with an additional agreement with respect to

[20] Appellant's counsel said that his impression was that the trial court's policy with respect to "straight up" pleas had not existed until after Appellant's pre-trial conference had been held. In response, the court said that it "has been the policy all along," although the court had made "diversions" when the attorneys could "show some reason" such as new evidence or a new attorney.

> sentencing, can be approved or rejected in the discretion of the trial court, but the trial court must articulate the prosecutor's reasons for forming the bargain and the court's reasons for rejecting it. While these rules are not binding on the states, we conclude that they establish sound and reasonable guidelines. Thus, we adopt these principles for Kentucky.

Id. at 24 (citations omitted). To properly address Appellant's contention, then, we must first determine whether his agreement with the Commonwealth constituted a "sentence bargain," a "charge bargain," or a "hybrid bargain."

1. Type of Plea Bargain

Although the final plea bargain only referenced the length of sentence, we give Appellant the benefit of the doubt and presume that it was a "hybrid bargain"[21] based upon the back-and-forth between the Commonwealth and Appellant leading to the agreement. As noted, the Commonwealth agreed to recommend a three-year sentence in this case and (presumably) drop the PFO charge. Because the agreement addressed sentencing and dismissed a charge, it constituted a "hybrid bargain." *See Hoskins*, 150 S.W.3d at 24 (explaining that a "charge bargain" is a plea bargain that "dismisses or amends one or more charges in exchange for a guilty plea to the reduced charges," while a "hybrid bargain" is a "charge bargain with an additional agreement with respect to sentencing").

Having concluded (or at least presumed) that the agreement constituted a "hybrid bargain," we can now properly examine the trial court's decision.

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[21] In his reply brief, Appellant argued that the bargain discussed herein constituted a "hybrid bargain."

2. Rejection of the "Hybrid Bargain"

Again, a trial court can exercise its discretion and reject a "hybrid bargain" so long as it "articulate[s] the prosecutor's reasons for forming the bargain and the court's reasons for rejecting it." *Id.* (citations omitted). However, "[a]lthough the court did not explicitly state the prosecutor's reasons for forming the plea bargain, [Appellant] does not complain about this deficiency." *Yell*, 242 S.W.3d at 341. Moreover, the court clearly articulated that it was rejecting the plea because of the inconvenience it placed on the venire persons, among other things. Simply put, we cannot say the court abused its discretion by refusing to accept Appellant's guilty plea based on the "hybrid bargain" agreement.[22] *See Bratcher v. Commonwealth*, 2008-SC-000151-MR, 2010 WL 252245, at *8 (Ky. Jan. 21, 2010) (affirming the trial court's refusal to accept a guilty plea based on a "sentence bargain" agreement because the defendant "waited until the morning of trial to accept the agreement"); *Bridgewater v. Commonwealth*, 2005-SC-000423-MR, 2007 WL 858814, at *2 (Ky. Mar. 22, 2007) (deeming the lateness of the agreement—

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[22] Appellant takes particular issue with the trial court's lamentation that it had already "lost" a scheduled day, contending that the court's decision to "foist its annoyance and/or irritation at losing the November 16 and 17 days on [Appellant] was arbitrary and an abuse of discretion." Appellant notes that, at the final pre-trial hearing the day before, the court mentioned that it had already lost two trial dates that week—November 16 and 17—because another defendant "took a deal." In other words, by the time the court opined as to the reasons why it would only accept a "straight up" plea in this case, Appellant argues that the court knew it had already "lost" two days and, had it accepted his plea, the court would have "lost" November 18 as well.

Whatever the merits of Appellant's argument, he ignores (1) the other reasons given by the court (pertaining to the venire persons and jailers) and (2) his significant contribution to his plight by refusing to accept the Commonwealth's earlier, better offer.

reached on the day of trial after the jury had been selected and sworn—and the effect on the court's administration "to be sound bases for not accepting the plea agreement").

III. CONCLUSION

For the foregoing reasons, Appellant's convictions and corresponding sentence are affirmed.

All sitting. Minton, C.J., Abramson, Cunningham, Noble, Scott, and Venters, JJ., concur. Schroder, J. concurs in part and dissents in part by separate opinion.

SCHRODER, J., CONCURRING IN PART AND DISSENTING IN PART: I join in the majority opinion except as to one issue, the introduction of certain text messages by the Appellant. From the content of the text messages, it is obvious that it is a heated two-party conversation. The alleged victim deleted the messages he sent, but kept those received from the Appellant, and the Commonwealth prosecutes. With the deliberate deletion of one side of the conversation, I do not believe there is a case for harassing communications.

COUNSEL FOR APPELLANT:

Julia Karol Pearson
Department of Public Advocacy
100 Fair Oaks Lane, Suite 302
Frankfort, Kentucky 40601

COUNSEL FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Courtney J. Hightower
Assistant Attorney General
Office of the Attorney General
Criminal Appellate Division
1024 Capital Center Drive
Frankfort, Kentucky 40601