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RENDERED: AUGUST 21, 2014
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2012-SC-000703-MR
2012-SC-000704-MR

CUDDIE HOLBROOK — APPELLANT

V.

ON APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA GOODWINE, JUDGE
NO. 08-CR-01012-002
HONORABLE THOMAS L. CLARK, JUDGE
NOS. 11-CR-01184 & 11-CR-01466

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING IN PART AND VACATING AND REMANDING IN PART

Appellant, Cuddie Holbrook, Jr., appeals from two final judgments entered against him by the Fayette Circuit Court following two separate trials. As a result of the jury's guilty verdicts in both trials, Appellant was sentenced to a total of sixty years' imprisonment—twenty years resulting from the first case and forty years from the second. He now appeals each judgment as a matter of right, Ky. Const. § 110(b), and, on Appellant's motion, we allowed the two appeals to be consolidated into one brief before this Court and now consider them together.

The first case against Appellant consisted of numerous theft by deception charges pertaining to cold checks issued in late 2008. That case had not yet gone to trial when Appellant, released on bond, was accused of passing additional bad checks in 2011. The 2011 insufficient funds checks formed the basis of the second case against Appellant on further charges of theft by deception. In both cases, Appellant was also charged with being a first-degree persistent felony offender (PFO). Both cases went to trial in August 2012.

Because the crimes in each case were committed years apart, and the facts of each case involve little overlap, we will fully address the background and arguments relating to the first trial before we begin our consideration of the subject matter of the second trial. For the reasons that follow, we affirm Appellant's convictions from the first trial. Additionally, although we affirm Appellant's convictions from the second trial, we remand the second case for resentencing by the trial court because Appellant received a statutorily improper sentence.

APPELLANT'S FIRST TRIAL: 2012-SC-000703-MR

Following Appellant's first trial, a Fayette Circuit Court jury found him guilty of six counts of theft by deception over $300 and of being a first-degree PFO. As a result, the trial court sentenced him to twenty years' imprisonment. Appellant now asserts that (1) the trial court erred by excluding him from bench conferences, (2) the trial court erred by conducting its own questioning of witnesses subpoenaed by him, (3) the trial court erred by not letting him recall a witness during his case in chief, (4) the trial court erred by not allowing him to impeach a witness with a prior inconsistent statement, (5) the trial court

erred by not permitting him to introduce a portion of his confession to the Montgomery County Sheriff, (6) he was improperly denied his right to present a defense, (7) the trial court erred by improperly admitting evidence of other crimes, and (8) he was denied a fundamentally fair trial. For the following reasons, we affirm Appellant's convictions.

I. BACKGROUND

On August 20, 2008, Appellant was indicted by the Fayette County Grand Jury for numerous counts of theft by deception and one count of being a first-degree PFO. The charges arose from Appellant writing numerous cold checks to several different Fayette County businesses during August and September 2007.

After successful directed verdict motions were lodged by Appellant's counsel for three of the counts, the remaining theft by deception charges submitted to the jury were as follows:

1) On August 17, 2007, Appellant obtained furniture by passing a bad check to Furniture World.

2) On August 28, 2007, Appellant obtained a laptop computer by passing a bad check to Rawlings Business Machines.

3) On August 28, 2007, Appellant obtained a printer by passing a bad check to Rawlings Business Machines.

4) On September 11, 2007, Appellant obtained clothing by passing a bad check to National Workwear.

5) On September 12, 2007, Appellant obtained car accessories by passing a bad check to Van Tech.

6) On Septemer 17, 2007 Appellant obtained a concrete mixer by passing a bad check to Janell, Inc.

The jury found Appellant guilty of all six charges. After the Commonwealth presented evidence establishing Appellant's prior convictions, the jury also found Appellant to be a first-degree PFO and recommended the minimum enhanced penalty of ten years on each count to run consecutively for sixty years. At final sentencing, the trial court sentenced Appellant to a total of twenty years' imprisonment so as not to exceed the statutory maximum allowed by KRS 532.080. This appeal followed.

II. ANALYSIS

A. The Trial Court Did Not Err by Excluding Appellant from Bench Conferences

Appellant first argues that the trial court improperly prevented him, as a pro se defendant, from participating in bench conferences. In response, the Commonwealth claims that Appellant mischaracterizes his absence from bench conferences as an exclusion by the trial court when in fact the trial court never prohibited him from participating in the conferences. In further support of its argument, the Commonwealth asserts that standby counsel's participation in the sidebar conferences on behalf of Appellant was not to the exclusion of Appellant but was the result of Appellant's delegation of certain portions of his defense to his co-counsel.

This Court recently considered the effect of a pro se defendant's exclusion from bench conferences in *Allen v. Commonwealth*, 410 S.W.3d 125 (Ky. 2013). *Allen* addressed two different constitutional concerns arising from a defendant's exclusion from bench conferences. First, standby counsel's

participation in bench conferences to the exclusion of the defendant can potentially violate the defendant's Sixth Amendment right to self-representation. *Id.* at 134-35. This is possible when standby counsel's participation diminishes a defendant's actual control over his case or when standby counsel's actions destroy the jury's perception that the defendant is representing himself. *Id.* at 135 (citing *McKaskle v. Wiggins*, 465 U.S. 168, 178 (1984)). Second, if standby counsel fails to adequately represent the defendant at bench conferences, the defendant's exclusion from those conferences may violate his Sixth Amendment right to be present at all critical stages of a criminal proceeding. *Id.* at 138. When a criminal defendant's right to self-representation or his right to be represented at a critical stage is violated, reversal is required "without analysis for prejudice or harmless error." *Id.* at 144 (quoting *Stone v. Commonwealth*, 217 S.W.3d 233, 238 (Ky. 2007)). In the present case, we find no evidence that the trial court excluded Appellant from bench conferences and hold that Appellant's absence from the conferences does not implicate either of his Sixth Amendment rights as outlined in *Allen*.

As noted above, standby counsel's participation in bench conferences to the exclusion of the criminal defendant may violate the defendant's right to self-representation when counsel wrests actual control of the case from the defendant or when the jury no longer views the defendant as in control of his own case. *See McKaskle*, 465 U.S. at 177 ("[T]he objectives underlying the right to proceed pro se may be undermined by unsolicited and excessively intrusive participation by standby counsel . . . ."). However, this Court made it

clear in *Allen* that the right to self-representation is only threatened when standby counsel participates "over the defendant's objection" or "without the defendant's consent." *Allen*, 410 S.W.3d at 135.

In *Allen*, the trial court ordered the defendant excluded from bench conferences because he presented a flight risk. *Id.* at 132. Over Allen's objection, appointed standby counsel handled all of his bench conferences. Unlike the trial court in *Allen*, the trial court in this case never issued an order excluding Appellant from sidebar conferences.[1] Furthermore, although standby counsel handled the bench conferences in this case, Appellant fails to

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[1] Although Appellant's brief repeatedly characterized Appellant as being excluded, prohibited, or not permitted to participate in bench conferences, he failed to cite anything in the record that would tend to indicate that the trial court actively excluded him from approaching the bench. Thus, his absence from the bench conferences was equally consistent with a voluntary delegation of the sidebar conference responsibility to his standby counsel.

After the Commonwealth pointed out that Appellant's brief offered no evidence that the trial court prohibited him from approaching the bench, he responded in his reply brief that Judge Scorsone prevented him from approaching the bench at a pretrial hearing. According to Appellant, the judge's actions that day made it harshly apparent to Appellant that he would never be allowed to approach the bench and that any further objections to this exclusion would be unwelcome and futile. After reviewing the record, we find Appellant's claim dubious.

The pretrial hearing Appellant refers to occurred on June 11, 2010. During the hearing, Appellant, while addressing the court, inexplicably began to step out from behind the podium and approach the bench. Judge Scorsone informed Appellant that he would not speak at the bench and that "the only conversation here is going to be with counsel." Appellant lodged no objection at that time, and his contention that the judge's rebuke was so harsh that he could never again assert his desire to be present at bench conferences is without merit. At the time of the hearing, Appellant had not yet undergone a *Faretta* hearing and was still represented by counsel. Thus, his right to self-representation was not threatened when the judge told him not to approach the bench. Furthermore, Judge Scorsone later recused himself from Appellant's trial. Therefore, Appellant would have been free to let the replacement judge know about his interest in participating in bench conferences.

point to anything in the record that would indicate that standby counsel participated in the conferences over his objection or without his consent.

In fact, the record tends to indicate that Appellant consented to extensive participation by counsel in his defense. For example, counsel successfully argued directed verdict motions on three of the counts against Appellant. Additionally, counsel conducted voir dire, bench conferences, made objections, argued jury instructions, and asked some of the questions to witnesses—particularly when Appellant was unable to elicit the information he desired from the witness or properly identify a document for introduction. In light of standby counsel's extensive participation in various aspects of Appellant's defense and Appellant's failure to point to any objection to counsel's actions at any point in the record, we find no reason to believe that counsel's participation threatened Appellant's right to self-representation. A criminal defendant may not delegate aspects of his defense to counsel and then complain that his right to self-representation was violated—this would be akin to invited error.

Having determined that Appellant's right to self-representation was not violated under the facts of this case, we now ask whether he was excluded from a critical stage of the proceeding against him. *Id.* at 138. In *Allen*, the defendant's counsel was appointed by the court and limited to an advisory role, as opposed to active participation in the case. *Id.* at 139. The trial court's order specifically stated that standby counsel's role was only to answer Allen's questions and assist him with approaching the bench and handling witness

documents. *Id.* at 142-43. When standby counsel moved for a directed verdict, the trial court would not consider the motion until made by Allen. *Id.* at 143. Allen's counsel was placed in the awkward position of being restricted to an advisory capacity, but being present during bench conferences to Allen's exclusion. *Id.* This resulted in standby counsel remaining silent during bench conferences, acting merely as a messenger, and failing to argue Allen's position at bench conferences he was excluded from. *Id.* For these reasons, this Court determined that Allen had been excluded from critical stages of the criminal proceeding against him. *Id.* at 138-44.

The present case differs from *Allen* in that the trial court never ordered Appellant excluded from bench conferences, and it never limited counsel's role in the proceedings to the advisory capacity of the attorney in *Allen*.[2] Standby counsel in *Allen* only passively asserted the pro se litigant's position at bench conferences due to confusion over her role created by the trial court. *Id.* at 143. By contrast, counsel in the present case zealously represented Appellant in various stages of his defense, even winning three directed verdicts.

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[2] Although referred to by the trial court as "standby counsel," Appellant's attorney extensively participated in his defense in a manner belying that title. In this respect, Appellant's counsel behaved more like hybrid representation than standby counsel. The hybrid form of representation occurs when a defendant specifies the extent of legal services he desires, but undertakes the remaining portion of his defense pro se. *Allen*, 410 S.W.3d at 139 (quoting *Stone v. Commonwealth*, 217 S.W.3d 233, 236 n.1 (Ky. 2007)). Under the hybrid form of representation, the self-represented defendant and the attorney act as co-counsel for the defense. *Id.* at 138-39. *Allen* held that a defendant's right to be present at critical stages will generally be violated when an attorney acts as true "standby" or "advisory" counsel during a bench conference because of the limited nature of the standby counsel role. *Id.* at 139. However, we acknowledged in *Allen* that the threat of a defendant going unrepresented at a sidebar conference is not present when appointed counsel acts as hybrid representation at the conferences. *See id.* at 137-38.

Moreover, Appellant fails to point to instances in the record where counsel passively asserted or contradicted Appellant's position at bench conferences. In actuality, the record reveals that counsel repeatedly argued for Appellant's position and frequently conferred with Appellant about the issues raised at the bench conferences. Appellant was well represented by zealous and competent counsel during sidebar conferences. Therefore, we hold that the trial court did not violate his right to be present at all critical stages of the criminal proceeding against him.

B. The Trial Court Did Not Commit Palpable Error by Questioning Appellant's Subpoenaed Witnesses

During the first scheduled day of Appellant's trial, the trial court questioned several of the witnesses subpoenaed by Appellant to get a general sense of the testimony each witness would offer at trial. Appellant asserts that this procedure was fundamentally unfair and that it resulted in reversible error.

Since the issue was unpreserved by objection, we review only for palpable error. RCr 10.26. Under the palpable error standard, an unpreserved error may be noticed on appeal only if the error is "palpable" and "affects the substantial rights of a party," and even then relief is appropriate only "upon a determination that manifest injustice has resulted from the error." RCr 10.26. "[W]hat a palpable error analysis 'boils down to' is whether the reviewing court believes there is a 'substantial possibility' that the result in the case would have been different without the error." *Brewer v. Commonwealth*, 206 S.W.3d 343, 349 (Ky. 2006) (citations omitted).

In order to put the actions of the trial court in context, we note that Appellant had subpoenaed approximately forty witnesses. Furthermore, Appellant's subpoenas were the subject of numerous motions to quash and protective orders. Even more, one of Appellant's subpoenaed witnesses threatened to file harassment charges against him after being repeatedly subpoenaed.

Knowing Appellant's abusive subpoena tendencies, the trial judge required the subpoenaed witnesses to tell her if they had any relevant information about the case. Those witnesses that possessed relevant information were given a date and time to return and testify. Considering the circumstances in this case, we find no palpable error resulted from the trial court's questioning.

Nothing in our case law prohibits a trial court "from quashing a subpoena that has the sole purpose of causing a witness to attend and testify . . . ." *See Bowling v. Lexington-Fayette Urban Cnty. Gov't*, 172 S.W.3d 333, 340 n.3 (Ky. 2005). "[A] trial court at all times retains the authority to call and excuse subpoenaed witnesses." *Id.* (citing *Anderson v. Commonwealth*, 63 S.W.3d 135, 142 (Ky. 2001). "[O]nce subpoenaed, the witness is answerable to the court and can only be excused by the court." *Anderson*, 63 S.W.3d at 142. A subpoenaed witness's obligation to appear at trial exists only "until the case [i]s concluded or *until he [is] dismissed by the court.*" *Otis v. Meade*, 483 S.W.2d 161, 162 (Ky. 1972) (emphasis added).

Here, the trial court properly exercised its discretion to excuse subpoenaed witnesses. Appellant's actions in the time leading up to the trial gave the trial court ample reason to believe he was wasting the time of witnesses who possessed only irrelevant information. It was within the trial court's authority to dismiss subpoenaed witnesses. Appellant fails to allege a "substantial possibility" that the result in the case would have been any different if the trial court had not questioned Appellant's subpoenaed witnesses. *See Brewer*, 206 S.W.3d at 349. Thus, we find no palpable error by the trial court.

C. The Trial Court Did Not Err by Not Permitting Appellant to Recall Mary Ann Lakin

Appellant next alleges that the trial court committed reversible error by not permitting him to recall Mary Ann Lakin as a witness during his case in chief. "[T]he trial court has inherent authority to control the trial proceedings and specific authority under KRE 611(a) to control the mode of interrogation of witnesses." *Mullikan v. Commonwealth*, 341 S.W.3d 99, 104 (Ky. 2011). Thus, we review a trial court's decision regarding the examination of witnesses for an abuse of discretion. *Id.* The test for abuse of discretion is "whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

Prior to trial, Appellant questioned Lakin at length during a suppression hearing. The questions were frequently irrelevant, including one line of questioning regarding a man that Lakin was supposed to marry. Appellant and

Lakin's interactions during the pretrial hearing, and at trial, were highly acrimonious.

On the day of her trial testimony, Lakin informed the trial court that she had to be in Louisville at 3:00 a.m. for work the next day. The trial court then exercised its discretion and determined that it would release Lakin after cross-examination. Appellant claimed that he needed to be able to question her the next day because he was not prepared at that time. The trial court allowed Appellant to confer with his counsel for nearly an hour but required him to proceed with the questioning of Lakin that night.

KRE 611(a) permits a court to establish parameters to "[a]void needless consumption of time" and to "[p]rotect witnesses from harassment or undue embarrassment." Knowing that Appellant and Lakin had previous vehement interactions at a hearing and in court and that Appellant had a long history of delaying and postponing his trial, the trial court exercised its discretion and required Appellant to complete his questioning of Lakin that night. The trial court's ruling avoided needless consumption of time and protected Lakin from further harassment by Appellant as encouraged by KRE 611(a). Thus, the trial court's decision to proceed with Lakin's questioning was "[]supported by sound legal principles." *English*, 993 S.W.2d at 945. We, therefore, find no abuse of discretion in the trial court's handling of this issue.

D. The Trial Court Did Not Err When It Prevented Appellant from Impeaching a Witness with an Alleged Prior Inconsistent Statement

Appellant next alleges that the trial court committed reversible error when it prevented him from impeaching a witness with a prior inconsistent statement. More specifically, Appellant claims that the trial court should have allowed him to impeach Faye Rawlings with a recording of an alleged inconsistent statement she made during an interview prior to trial.

While on the stand, Faye Rawlings testified that Appellant and a female associate visited her store, Rawlings Business Machines, and that Appellant gave Rawlings a check to purchase a laptop. Rawlings further testified that Appellant later returned to the store alone and gave her a separate check to purchase a printer. Both checks were signed by Mary Ann Lakin and both were later returned for insufficient funds.

On cross-examination of Rawlings, Appellant asked her if she remembered being interviewed by Bluegrass Private Investigations.[3] Rawlings recalled the interview. Appellant then asked if she remembered telling the private investigators that she did not remember who had come to her store and given her the cold checks. Rawlings disputed making such a statement and attempted to clarify that she had in fact said, "I didn't know if I would remember him again." At this point, Appellant requested to play Rawlings's statement. The Commonwealth objected and a bench conference ensued. During the conference, the Commonwealth explained that there was no prior

[3] Bluegrass Private Investigations is a private firm hired by Appellant to aid him in gathering information for his defense.

inconsistent statement because what Rawlings said on the stand was true—she had told investigators that she did not know if she would remember Appellant if she saw him. The Commonwealth further clarified that Rawlings did not categorically say she did not remember who had given her the checks as Appellant was attempting to show. The record does not indicate that the trial judge ever listened to the recording before she sustained the Commonwealth's objection to the alleged prior inconsistent statement.

Our review of the voluminous record in this case has failed to uncover a recorded copy or transcript of Rawlings's interview with Bluegrass Private Investigations, nor do the parties direct us to such. Therefore, we are unable to assess whether Appellant suffered any prejudice by the exclusion of Rawlings's statement, as we cannot determine whether her statement was, in fact, inconsistent with her testimony. *See McDaniel v. Commonwealth*, 341 S.W.3d 89, 96 (Ky. 2011) (holding that no error was preserved where complaining party failed to get excluded photograph into the record); *see also Hart v. Commonwealth*, 116 S.W.3d 481 (Ky. 2003) (determining that documents must be included in the record by complaining party). It is undeniably Appellant's duty to designate the contents of the record on appeal. *E.g.*, *McDaniel*, 341 S.W.3d at 96; *Chestnut v. Commonwealth*, 250 S.W.3d 288, 303 (Ky. 2008). Appellant has failed in this duty; consequently, with regard to the contents of Rawlings's prior statement, there is nothing to review. "This Court is not in the business of making baseless presumptions." *Chestnut*, 250 S.W.3d at 303. Therefore, "[w]hen the record is incomplete, this Court must

assume that the omitted record supports the trial court." *Id.*; *see also McDaniel*, 341 S.W.3d at 96. Thus, we find no error by the trial court in its ruling that Appellant could not impeach Rawlings with her recorded statement to Bluegrass Private Investigations.

E. The Trial Court Did Not Err when It Prohibited Appellant from Introducing a Portion of His Confession

As part of his defense, Appellant hoped to convince the jury that he was involved in a conspiracy to illegally transport guns and drugs. As best as this Court can glean from Appellant's brief, Appellant believed his part in the alleged conspiracy would be a defense to the cold checks passed by him because the figures behind the conspiracy were supposed to have provided him with funds to write the checks. Therefore, Appellant thought that he would have money from drug- and gun-running in his bank account, and he lacked knowledge that the checks would be returned for insufficient funds. Appellant tried to introduce his "Bluegrass conspiracy" theory during cross-examination of Montgomery County Sheriff Fred Shortridge.

The Commonwealth called Sheriff Shortridge as part of its case against Appellant. The Commonwealth asked the Sheriff if he had interviewed Appellant about checks that were written in Montgomery County and what Appellant told him about those checks. Sheriff Shortridge answered that he had asked Appellant about checks issued to three businesses and that Appellant admitted to passing the checks. The Sheriff also testified that Appellant told him he had deposited money into his bank account, but more

money was being credited out of it than he was depositing into it. The trial court admitted this testimony as an admission under KRE 801A(b).[4]

On cross-examination, Appellant asked the Sheriff about additional statements he had made to the Sheriff at the time of his putative confession. More specifically, Appellant asked the Sheriff if, in addition to giving the confession, Appellant had also told the Sheriff that he was involved in a conspiracy to illegally transport guns and drugs. The Commonwealth objected, arguing that KRE 801A(b) would not apply to the additional statements Appellant sought to introduce because they were not "offered against a party." The trial court agreed and ruled that the conspiracy statements constituted inadmissible hearsay evidence. Nonetheless, the trial court permitted Appellant to ask whether he had informed Sherriff Shortridge that someone was providing him with funds to cover the bad checks. The trial court also informed Appellant, who had indicated that he was going to testify in his case in chief, that he could testify to his own statements at that time, when they would not be inadmissible hearsay.

Appellant now argues that the trial court should have admitted the conspiracy-related statements under the rule of completeness, which is codified in KRE 106[5] for written and recorded statements and applied to oral

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[4] KRE 801A(b) states in pertinent part, "Admissions of parties. A statement is not excluded by the hearsay rule, even though the declarant is available as a witness, if the statement is offered against a party and is: (1) The party's own statement, in either an individual or representative capacity[.]"

[5] KRE 106 provides, "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

statements through KRE 611.[6] *James v. Commonwealth*, 360 S.W.3d 189, 204 (Ky. 2012). Although Appellant's standby counsel argued for the admission of Appellant's conspiracy-related statements, neither Appellant nor counsel ever mentioned KRE 106 or the rule of completeness. Therefore, this issue is unpreserved and we review only for palpable error. RCr 10.26.

Our recent opinion in *James v. Commonwealth* thoroughly examined the contours of the rule of completeness, and it is highly instructive in this case. *James* explained, "The basic rule is simple: 'a party purporting to invoke [the rule of completeness] for the admission of otherwise inadmissible hearsay statements may only do so to the extent that an opposing party's introduction of an incomplete out-of-court statement would render the statement misleading or alter its perceived meaning.'" *James*, 360 S.W.3d at 205 (quoting *Schrimsher v. Commonwealth*, 190 S.W.3d 318, 330-31 (Ky. 2006)) (footnote omitted). The inquiry, then is "whether the meaning of the included portion is altered by the excluded portion." *Schrimsher*, 190 S.W.3d at 331 (quoting *Young v. Commonwealth*, 50 S.W.3d 148, 169 (Ky. 2001)). Thus, there are limits on which out-of-court statements may be admitted under the rule of completeness. *James*, 360 S.W.3d at 205. In fact, "Contrary to Appellant's

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any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it."

[6] KRE 611 requires trial courts to "exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to . . . [m]ake the interrogation and presentation effective for the ascertainment of the truth; [and] . . . [a]void a needless consumption of time . . . ." KRE 611 is "generally read as including a rule of completeness for non-written and non-recorded statements—a gap left by KRE 106." *James v. Commonwealth*, 360 S.W.3d 189, 205 n.6 (Ky. 2012) (citations omitted).

position, KRE 106 [and KRE 611] do[] not 'open the door' for introduction of the entire statement or make other portions thereof admissible for any reason once an opposing party has introduced a portion of it." *Schrimsher*, 190 S.W.3d at 331 (quoting *Gabow v. Commonwealth*, 34 S.W.3d 63, 69 n.2 (Ky. 2000)).

The limits on what may be introduced under the rule of completeness apply even when a defendant has confessed to a crime but also made exculpatory statements:

> The completeness doctrine is based upon a notion of fairness—namely, whether the meaning of the included portion is altered by the excluded portion. The objective of that doctrine is to prevent a misleading impression as a result of an incomplete reproduction of a statement. *This does not mean that by introducing a portion of a defendant's confession in which the defendant admits the commission of the criminal offense, the Commonwealth opens the door for the defendant to use the remainder of that out-of-court statement for the purpose of asserting a defense without subjecting it to cross-examination.*

Id. (quoting *Gabow*, 34 S.W.3d at 69 n.2).

Here, Appellant attempted to do exactly that prohibited by *Schrimsher* and *Gabow*—to use his out-of-court statements, which were not needed for context, to assert a defense. The meaning of Appellant's statements that he had passed checks to three businesses and that he did not have money in his bank account to cover them was not distorted by the exclusion of Appellant's statements that he was part of a gun- and drug-running operation. In the interest of fairness, the trial court allowed Sheriff Shortridge to testify that Appellant had told him someone else was supposed to be providing him with funds to cover the checks, which provided the context necessary for a clear

understanding of Appellant's statements. The rule of completeness "guarantee[s] that admitted statements are fully understandable and clear . . . ." *James*, 360 S.W.3d at 205. There was no need for the jury to also hear that Appellant was supposedly receiving the funds needed to cover the checks for his role in a conspiracy to run guns and drugs. The trial court did not err by excluding these statements.

F. The Trial Court Did Not Deny Appellant His Right to Present a Defense

As explained in the previous section, Appellant sought to introduce a defense theory based on a drug- and gun-running conspiracy during his cross-examination of Sheriff Shortridge, but he was rebuffed by the trial court. Appellant also asserts that he attempted to subpoena a member of the conspiracy, but the trial court, influenced by the Commonwealth, recalled the subpoena by telephone before it could be served. Appellant claims that these rulings by the trial court somehow denied him a fair opportunity to establish the context of the crime, and that he may not have written bad checks if those behind the guns and drugs conspiracy had only paid him on time. According to Appellant, he was "double teamed constantly by the combination of court and Commonwealth," and the trial court's rulings denied him his right to present a complete defense by ensuring the exclusion of any evidence of his "Bluegrass conspiracy" defense theory.

The right to present a complete and meaningful defense is guaranteed by both the Kentucky and the United States Constitutions. *E.g.*, *Malone v. Commonwealth*, 364 S.W.3d 121, 127 (Ky. 2012); *Holmes v. South Carolina*,

547 U.S. 319 (2006). "A defendant is not at liberty, however 'to present unsupported theories in the guise of cross-examination and to invite the jury to speculate as to some cause other than one supported by the evidence.'" *Malone*, 364 S.W.3d at 127 (quoting *Davenport v. Commonwealth*, 177 S.W.3d 763, 772 (Ky. 2005)). As explained in the preceding section of this opinion, this is precisely what Appellant tried to do through Sheriff Shortridge's testimony, and Appellant's conspiracy theory was properly excluded by the trial court.

Furthermore, Appellant's claim that the trial court recalled a subpoena to prevent Appellant from being able to call a member of the conspiracy is unsupported by the record. The subpoena indicates that it was recalled by the judge just before the end of the trial because the company hired by Appellant to serve the subpoena, Bluegrass Private Investigations, had been unable to locate the witness by that point. Appellant simply failed to get his subpoena served, and "[t]he Commonwealth is under no duty to produce witnesses for a defendant in criminal case." *Sykes v. Commonwealth*, 553 S.W.2d 44, 46 (Ky. 1977). Appellant's claim that he was denied the right to present a defense is meritless, and we find no error by the trial court on this issue.

G. The Trial Court Did Not Improperly Admit Evidence of Other Crimes

Appellant next alleges that the trial court improperly admitted prior bad acts evidence against him. More specifically, Appellant claims it was improper for the court to allow the admission of evidence that he had given bad checks in Frankfort and Mt. Sterling. The specific evidence Appellant complains of is outlined below.

First, the Commonwealth presented evidence that Appellant had passed a bad check to Brian Stigers Truck Sales in Frankfort on August 21, 2007. Lakin's signature was on the check, but defendant negotiated and signed the attendant sales contract, leaving a copy of his driver's license. Second, the Commonwealth sought to prove that Appellant passed a cold check to Gateway Cycles in Mt. Sterling on August 25, 2007. Although Lakin signed the check, just like with the check to Stigers, Appellant's name was on the accompanying sales contract. Third, the Commonwealth entered evidence that Appellant passed a bad check to Amburgey's Farm Machinery in Mt. Sterling on August 31, 2007. Like the others, the check was signed by Lakin. However, the associated receipt included Appellant's name and driver's license number. Fourth, the Commonwealth introduced evidence that Appellant passed a cold check to Arnett's Trailer Service in Mt. Sterling on November 6, 2007. Once again Appellant's signature and driver's license were found with the related sales contract. Finally, as previously mentioned, the Commonwealth called Sheriff Shortridge to testify to Appellant's confession to writing bad checks in Mt. Sterling.

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." However, prior bad acts may be admissible if the evidence falls within one of the exceptions set forth in KRE 404(b)(1). Permissible "other purposes" include "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident," KRE 404(b)(1).

Furthermore, 404(b)(1)'s list of exceptions is illustrative rather than exhaustive, and prior bad acts may be admitted to show other unenumerated exceptions. *Commonwealth v. English*, 993 S.W.2d 941, 943-45 (Ky. 1999). We review the trial court's application of KRE 404(b) for an abuse of discretion. *Anderson v. Commonwealth*, 231 S.W.3d 117, 119 (Ky. 2007).

Appellant asserted several different defenses at trial. One of his defenses was that Lakin had written all of the bad checks Appellant was accused of writing herself and that Appellant was not aware of her actions. At a pretrial hearing, the trial judge indicated that the evidence of Appellant's participation in the earlier passing of several bad checks was admissible to prove that Appellant was aware of Lakin's actions and that he participated in passing bad checks.

Under the knowledge exception to KRE 404(b), other crimes evidence may be admissible "to refute defensive claims of lack of knowledge." Robert G. Lawson, *The Kentucky Evidence Law Handbook* § 2.30[4][c] (5th ed. 2013). Evidence that he had previously passed bad checks alone or in concert with Lakin was admissible to rebut Appellant's claim that he had no knowledge that Lakin was signing bad checks in Fayette County. *See Muncy v. Commonwealth*, 132 S.W.3d 845, 847 (Ky. 2004) (evidence that defendant had earlier sold drugs held admissible under KRE 404(b) to refute his testimony that he did not know about presence of drugs in sofa cushions in his home); *Young v. Commonwealth*, 25 S.W.3d 66 (Ky. 2000) (evidence that defendant had earlier manufactured methamphetamine held admissible under KRE 404(b) to

refute his testify that he did not know how to manufacture methamphetamine). Therefore, the trial court did not abuse its discretion by admitting evidence of Appellant's knowledge of and role in passing other bad checks signed by Lakin.[7]

H. Appellant Was Not Denied His Right to a Fundamentally Fair Trial

Appellant argues that he was denied due process under the Fourteenth Amendment to the United States Constitution by the trial court's failure to provide him with a fundamentally fair trial. In support of his argument he asserts that the cumulative errors presented in all of his preceding arguments amounted to a trial that was fundamentally unfair.

"The Appellant is guaranteed a fair trial. This does not mean, however, a perfect trial, free from any and all errors." *McDonald v. Commonwealth*, 554 S.W.2d 84, 86 (Ky. 1977) (citing *Michigan v. Tucker*, 417 U.S. 433 (1974). Nonetheless, "a litigant is entitled to at least one tolerably fair trial of his action." *Id.*

Although Appellant alleged a litany of errors, we ultimately found each of his arguments to be meritless. Thus, Appellant has failed to prove that the trial court erred in any manner during his trial. Therefore, we find no merit in Appellant's argument that he did not receive a fundamentally fair trial. *See id.*

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[7] Although the Commonwealth argued that the bad checks were admissible under numerous additional KRE 404(b) exceptions, we find that the checks were admissible under the theory advanced by the trial court—the knowledge exception. Therefore, we offer no opinion in favor of or against the admissibility of the evidence under the various exceptions advanced by the Commonwealth.

III. CONCLUSION

Based on the foregoing analysis, we affirm Appellant's convictions. Having reached the conclusion of our consideration of the first trial, we now direct our attention to the facts and arguments relating to the second trial against Appellant, which arose from additional bad checks passed by Appellant while he was released on bond and awaiting trial in the first case.

APPELLANT'S SECOND TRIAL: 2012-SC-000704

Following Appellant's second trial, a Fayette Circuit Court jury found him guilty of two counts of theft by deception over $10,000, three counts of theft by deception over $500, one count of theft by deception less than $500, and of being a first-degree PFO. As a result, Appellant was sentenced to forty years' imprisonment. Appellant now asserts that (1) the trial court erred by not granting him a continuance, (2) the trial court erred by excluding him from bench conferences, (3) he was improperly denied his right to present a defense, (4) the trial court erred by not granting him a directed verdict on two of the counts against him, (5) the trial court erred by running his sentences consecutively, and (6) he was denied a fundamentally fair trial. For the following reasons, we affirm Appellant's convictions, but we hold that his sentencing was improper. Consequently, we remand to the trial court for resentencing consistent with this Opinion.

I. BACKGROUND

While out on bond and awaiting trial in the preceding case, Appellant continued to pass cold checks to Fayette County businesses. Two indictments

were issued against Appellant and consolidated for trial. The new charges lodged against Appellant were as follows:

1) On May 20, 2011, Appellant passed a $10,330 check from his mother's checking account to Ray Newton to obtain trailers.

2) On June 10, 2011, Appellant deposited a $20,000 check from his mother's account to his own business account at BB & T for Holbrook Stone Mason and Excavating.

3) On May 20, 2011 Appellant passed a $1,154.34 check from his mother's account to Bobcat to obtain construction equipment.

4) On June 17, 2011, Appellant obtained a golf cart by passing a bad check from his Holbrook Stone Mason and Excavating account to Dever, Inc.

5) On June 17, 2011, Appellant committed theft by deception by selling the golf cart to Ray and Stella Roslan for $500 or more.

6) On June 17, 2011, Appellant passed a $361.62 check from his Holbrook Stone Mason and Excavating account to 84 lumber to obtain property worth less than $500.

7) Being a first-degree PFO.

The second trial against Appellant began August 28, 2012 with Appellant once again representing himself. The jury returned guilty verdicts on all seven counts. After the Commonwealth presented evidence establishing Appellant's prior convictions, the jury also found Appellant to be a first-degree PFO and recommended respective sentences of twenty years, twenty years, ten years, ten years, and ten years. The jury recommended that the two twenty-year sentences be served consecutively and the three ten-year sentences be served concurrently for a total of forty years' imprisonment. At final sentencing, the trial court adopted the jury's recommendation. This appeal followed.

II. ANALYSIS

A. The Trial Court Did Not Err by Denying Appellant's Request for a Continuance

Appellant first claims that the trial court abused its discretion by denying his motion to continue the trial. A week before trial, Appellant moved for a continuance. In his motion, Appellant made various assertions, but his overarching complaint was that he did not have enough time to prepare for this second trial because he was already in the midst of the first trial against him.

RCr 9.04 permits the trial court to grant a continuance "upon motion and sufficient cause shown by either party . . . ." A motion for continuance is a "general motion, and 'a trial court has broad discretion in granting or refusing to grant a continuance and that ruling will not be disturbed absent an abuse of discretion.'" *Pelfrey v. Commonwealth*, 842 S.W.2d 524, 525 (Ky. 1992) (quoting *Walker v. Farmer*, 428 S.W.2d 26, 28 (Ky. 1968)). Denial of a continuance motion "does not provide grounds for reversing a conviction unless that discretion has been plainly abused and manifest injustice has resulted." *Bartley v. Commonwealth*, 400 S.W.3d 714, 733 (Ky. 2013) (citations and internal quotation marks omitted). Appellate review examines the totality of the circumstances, as guided by the following factors: length of delay; previous continuances; inconvenience to litigants, witnesses, counsel, and the court; whether the delay is purposeful or is caused by the accused; availability of other competent counsel; complexity of the case; and whether denying the continuance will lead to identifiable prejudice. *Snodgrass v. Commonwealth*,

814 S.W.2d 579, 581 (Ky. 1991), *overruled on other grounds by Lawson v. Commonwealth*, 53 S.W.3d 534 (Ky. 2001).

Appellant claims five identifiable prejudices resulting from the trial court's failure to grant him a continuance. First, he argues that the short time between trials robbed him of a chance to write down questions for his standby counsel to ask him during his testimony as he had done in the previous trial. Second, he claims prejudice because, while testifying, he occasionally had to call his counsel to the bench to tell counsel what to ask him. Third, Appellant claims he was prejudiced by the trial court's exclusion of a handwriting expert's report that was not provided to the Commonwealth until a week before trial. Fourth, he claims prejudice resulted when the Commonwealth redacted a portion of a statement he had given to a detective and purportedly did not provide it to him until a day before trial. Finally, he claims prejudice because he was excluded from introducing photographs of his job sites because he did not timely turn them over to the Commonwealth in discovery.

In our recent opinion in *Bartley v. Commonwealth*, 400 S.W.3d 714, 733 (Ky. 2013), we reiterated the importance of identifiable prejudice in the trial court's decision of whether to grant a continuance. "Conclusory or speculative contentions that additional time might prove useful are insufficient. The movant, rather, must be able to state with particularity how his or her case will suffer if the motion to postpone is denied." *Id.* (citing *Hudson v. Commonwealth*, 202 S.W.3d 17, 23 (Ky. 2006).

Although Appellant now points to five instances of alleged prejudice, his motion for continuance focused mainly on the availability of witnesses from Amarillo, Texas and the Fayette clerk's "refusal" to copy records. Now, Appellant alleges prejudice flowing from five circumstances that do not logically flow from the specific issues mentioned in his motion before the trial court. The filing of a motion for continuance does not entitle an Appellant to assert that every issue that could have possibly been aided by a grant of additional time, no matter how vaguely stated or alluded to in the motion, entitles him to reversal. Appellant's motion, as it was presented to the trial court, did not reveal facts sufficient to justify a grant of continuance, and the arguments advanced by Appellant now have no relation, and were completely unsupported by, his motion for continuance. The trial court did not abuse its discretion by denying Appellant's motion, which failed to state with any particularity how additional time would have aided him in avoiding the unrelated prejudice now asserted in his brief. *Bartley*, 400 S.W.3d at 733 (citing *Hudson*, 202 S.W.3d at 23).

B. The Trial Court Did Not Err by Excluding Appellant from Bench Conferences

Just as he did in the previous appeal, Appellant alleges that the trial court improperly excluded him from bench conferences. Appellant makes no new argument but simply urges this Court to incorporate his argument from the previous case into this case. We resolve this argument on the same grounds by which we resolved it previously.

Appellant has not pointed us to anything in the record that would tend to show that the trial court ordered his exclusion from bench conferences or that he ever objected to his counsel representing him at the conferences. Furthermore, Appellant has not supplemented his argument from the previous case with any citation to the record that would tend to show that counsel failed to adequately represent Appellant at bench conferences in the second trial.

Pursuant to CR 76.12(4)(c)(v), arguments included in the contents of a brief must be accompanied by "ample supportive references to the record and citations of authority pertinent to each issue of law . . . ." Here, Appellant utterly failed to provide references to the record. It is not the responsibility of this Court to research Appellant's arguments for him. *See Harris v. Commonwealth*, 384 S.W.3d 117, 130-31 (Ky. 2012). Therefore, we undertake no further consideration of this argument and hold that there is no evidence that Appellant's Sixth Amendment rights were violated in the second trial.

C. Appellant Was Not Denied His Right to Present a Defense

Appellant next argues that he was denied his right to present a defense when the trial court failed to permit him to play the entirety of a statement he gave to Detective Jeremiah Davis of the Lexington Police Department, which the Commonwealth partially redacted, playing only a few minutes of it. As best as this Court can ascertain from the briefs, Appellant wished to play portions of his statement that indicated he had a friend in the ATF who could somehow aid in exonerating him. Additionally, the redacted portions of the statement would

have covered Appellant's involvement in the "Bluegrass conspiracy" to transport illegal guns and drugs.

As noted above, the right to present a defense does not include the right " 'to present unsupported theories in the guise of cross-examination and to invite the jury to speculate as to some cause other than one supported by the evidence.'" *Malone*, 364 S.W.3d at 127 (quoting *Davenport v. Commonwealth*, 177 S.W.3d 763, 772 (Ky. 2005). Yet, this is precisely what Appellant sought to do through the redacted portion of Detective Davis's testimony. Therefore, the remainder of Appellant's theory was properly excluded by the trial court, and his right to present a complete defense was not implicated. *See id.*

Furthermore, we note that the trial court informed Appellant that he could play the entire statement in his case in chief so long as it was admissible and relevant. Appellant presents no evidence that he ever attempted to play the statement during his case in chief. Any failure to introduce the unredacted statement was entirely Appellant's.

D. The Trial Court Did Not Err by Denying Appellant's Motions for Directed Verdict

Appellant next asserts that the trial court committed reversible error by failing to grant his motions for directed verdict on counts one and three of his indictment. Count one concerned a $10,330 check passed by Appellant from his mother's checking account to Ray Newton for the purchase of trailers. Count three involved a $20,000 check from Appellant's mother's checking account that was deposited into his BB&T account for Holbrook Stone Mason and Excavating. Appellant's mother had provided him with signed blank

checks, which she gave to him to use for gasoline purchases. She testified that she had no income and that she told him to limit the checks to about $100 total.

A trial court presented with a motion for directed verdict "must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth" and "[i]f the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given." *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991). On appellate review, a directed-verdict decision will be reversed only "if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt." *Id.*

Under KRS 514.040(1), a person commits theft by deception "when the person obtains property or services of another by deception with intent to deprive the person thereof." The deception may occur when a person "[i]ssues or passes a check . . . knowing that it will not be honored by the drawee." KRS 514.040(1)(e).

Concerning count one, Appellant argues, with no legal support, that because he received the trailers from Newton prior to sending him a fraudulent check, he did not commit theft by deception. Appellant's argument is contrary to longstanding Kentucky law recognizing that "[s]imultaneous consideration is not necessary under KRS 514.040 in order to create the offense of theft by deception." *Rice v. Commonwealth*, 621 S.W.2d 911, 914 (Ky. 1981) (internal quotation marks omitted). Appellant did not have the money to purchase the

trailers when he took possession. It is the "intent of the person at the time the property was obtained [that] governs instead of at the time the check was given." *Id.* Under the evidence as a whole, it was reasonable for the jury to find Appellant guilty of count one even though he may not have passed the bad check until he had possession of Newton's trailers, therefore, a directed verdict was not merited on count one. *See Benham,* 816 S.W.2d at 187.

Turning to count two, Appellant argues that he did not commit theft by deception because the $20,000 check he wrote to himself on his mother's account and deposited at BB&T ultimately bounced and was removed from his BB&T account. He asserts that he cannot be guilty of theft by deception because $20,000 was never taken from his mother's account.

It is true that $20,000 was never removed from his mother's account. When the check was presented to her bank, it came back for insufficient funds. Thus, Appellant did not obtain any "property or services" from his mother. KRS 514.010(1). However, this argument ignores bank statement evidence presented by the Commonwealth at trial showing that $20,000 was deposited into Appellant's BB&T account, and he was able to use his check card to make several thousand dollars worth of purchases before the money was removed several days later. Furthermore, a BB&T employee testified that the money was deposited on June 11, 2011 and not removed until June 15, 2011.

The evidence indicates Appellant "passe[d] a check . . . knowing that it [would] not be honored by the drawee." KRS 514.040(1)(e). Furthermore, although Appellant may not have obtained property from his mother through

the fraudulent check, he "obtained" property from BB&T when the bank gave him access to $20,000 for four days. *See* KRS 514.010(1); *see also Allen v. Commonwealth*, 395 S.W.3d 451, 457-58 (Ky. 2013) (noting the expansive definition of property under KRS 514.040(1)(e) and the "*all-inclusive scope* of theft offenses under the code").

"The requirement that the property be 'obtained' does not mean that the victim is permanently deprived of the property. A temporary deprivation is enough." *Allen*, 395 S.W.3d at 460. In the present case, Appellant passed a bad check to BB&T, which enabled him to access $20,000. Although Appellant did not spend the entire $20,000 during the time he had access to the money, the evidence indicates he made several thousand dollars in purchases. "[U]nder the theft by deception statute, so long as the defendant deprives the owner of the property, even if only for a period of time, by deceptive means, the defendant has committed theft by deception. It does not matter whether the victim could get the property back by a civil conversion action or that the defendant had a change of heart and returned the property." *Id.* Likewise, in this case, it does not matter that Appellant was unable to spend the entire $20,000 before the bank returned the check.

Viewing this evidence in the light most favorable to the Commonwealth, it was not clearly unreasonable for the jury to find Appellant guilty of theft by deception relating to the $20,000 check. *See Benham*, 816 S.W.2d at 187. Therefore, Appellant was not entitled to a directed verdict on this issue. *Id.*

E. The Trial Court Erred by Running Appellant's Sentences Consecutively

Appellant next argues that his forty-year sentence violates the statutory maximum sentence allowed under the law for his convictions in the second trial. As previously noted, the trial court sentenced Appellant to ten years for each theft by deception over $10,000 count, enhanced each count to twenty years based upon his PFO status, and then ran the sentences consecutively for a total of forty years.[8] Because this issue is unpreserved, we review for palpable error. RCr 10.26.

Theft by deception over $10,000 is a Class C felony. KRS 514.040(8)(b). The maximum term of imprisonment for a Class C felony is ten years. KRS 532.060(2)(c). When that sentence is enhanced by first-degree PFO status, the maximum possible term becomes twenty years. *See* KRS 532.080(6)(b) ("If the offense for which he presently stands convicted is a Class C . . . felony, a [PFO] in the first degree shall be sentenced to an indeterminate term of imprisonment, the maximum of which shall not be . . . more than twenty (20) years.").

Appellant contends that his consecutive sentence contravenes the maximum aggregate sentence allowed under KRS 532.110(1), which provides, in pertinent part:

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[8] Additionally, Appellant received three ten-year sentences for his remaining convictions, which were run concurrently with his forty-year sentence. These convictions do not factor into the calculus of his maximum possible sentence in this case, which is based on the highest class of crime for which any of the sentences is imposed. *See* KRS 532.110(1)(c).

> When multiple sentences of imprisonment are imposed on a defendant for more than one (1) crime . . . the multiple sentences shall run concurrently or consecutively as the court shall determine at the time of sentence, except that:
>
> > (c) The aggregate of consecutive indeterminate terms shall not exceed in maximum length the longest extended term which would be authorized by KRS 532.080 for the highest class of crime for which any of the sentences is imposed.

Because the maximum length authorized by KRS 532.080 for an enhanced Class C felony is twenty years, Appellant asserts that the trial court erred by entering a sentence of forty years. The Commonwealth concedes the sentencing error, citing *Blackburn v. Commonwealth*, 394 S.W.3d 395, 397-402 (Ky. 2011), a case in which we held that the statutory maximums established by the interplay of KRS 532.080 and KRS 532.110(1)(c) control over the jury's discretion in recommending consecutive sentences.

Here, just as in *Blackburn*, the trial court incorrectly entered a total sentence of forty years based upon the jury's recommendation that Appellant's sentences should run consecutively. Similar to Blackburn, Appellant did not contemporaneously object to his improper sentence. *Id.* at 401. Nevertheless, an erroneous sentence is "injurious to [his] substantial rights." *Id.* at 401-02 (quoting *Peyton v. Commonwealth*, 253 S.W.3d 504, 512 (Ky. 2008). Accordingly, we vacate Appellant's forty-year sentence and remand for resentencing by the court, not the jury. *Id.* at 402 (citing *Peyton*, 253 S.W.3d at 512).

F. Appellant Was Not Denied His Right to a Fundamentally Fair Trial

Appellant, renewing his argument from the previous case, claims that he was denied due process under the Fourteenth Amendment to the United States Constitution by the trial court's failure to provide him with a fundamentally fair trial. He adds nothing new to his argument from the previous case and asserts that the combined cumulative errors presented by all of his preceding arguments in this case contributed to a fundamentally unfair trial.

As we noted in our analysis of the previous case, "The Appellant is guaranteed a fair trial. This does not mean, however, a perfect trial, free from any and all errors." *McDonald*, 554 S.W.2d at 86 (citing *Tucker*, 417 U.S. 433). Nonetheless, "a litigant is entitled to at least one tolerably fair trial of his action." *Id.* at 86.

Although Appellant alleged a litany of errors, the only error this Court found was that Appellant received an improper sentence. As a result of that error, we vacate the sentence and remand for resentencing by the trial court. Remand for resentencing is a sufficient response to an error of this nature. *See, e.g.*, *Blackburn*, 394 S.W.3d at 402; *Peyton*, 253 S.W.3d at 512. Thus, Appellant received a "tolerably fair trial of his action." *McDonald*, 554 S.W.2d at 86.

III. CONCLUSION

For the foregoing reasons, we affirm Appellant's convictions. However, we vacate his sentence of forty years and remand to the trial court for resentencing consistent with this opinion.

All sitting. All concur.

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