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RENDERED: AUGUST 20, 2015
NOT TO BE PUBLISHED

# Supreme Court of Kentucky

2013-SC-000024-MR

RONALD CHRISTOPHER FAIRCHILD — APPELLANT

V.

ON APPEAL FROM ROWAN CIRCUIT COURT
HONORABLE WILLIAM B. MAINS, SPECIAL JUDGE
NO. 12-CR-00238

COMMONWEALTH OF KENTUCKY — APPELLEE

**MEMORANDUM OPINION OF THE COURT**

**AFFIRMING**

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

Fairchild's appeal presents numerous allegations of error. He claims the trial court erred by: (1) denying his motion to suppress his confession and permitting the Commonwealth to play for the jury the original version of the videotape of that confession; (2) failing to grant his motion for a continuance; (3) failing to excuse for cause five prospective jurors; (4) permitting a witness's wife to testify that he had previously told her the same version of events he

[1] Ky.Const. § 110(2)(b).

testified to at trial; (5) allowing testimony of an incriminating statement made by Fairchild despite evidence that the declarant conceded she may have imagined it in a dream; and (6) failing to provide a facilitation-to-murder instruction as a lesser-included offense of complicity to commit murder. We affirm Fairchild's convictions because none of his arguments merit reversal.

## I. FACTUAL AND PROCEDURAL HISTORY.

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

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

Before the murders, Dodson and Fairchild had been longtime friends and, at the time of the murders, shared an apartment in Ohio. Jackson—married to Dodson's sister, Alena—was involved with Walker in selling

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

marijuana. When Walker's local marijuana source dried up, Jackson, with Dodson's help, found another source in Ohio. Jackson then began shuttling Walker to and from Ohio so Walker could purchase large quantities of marijuana. Walker paid Jackson roughly $100 per pound of marijuana purchased. On each of these trips to Ohio, Walker and Jackson stopped at Dodson's apartment to pick him up before continuing to the drug transaction.[3] At least once, Fairchild was present at the apartment when Walker and Jackson stopped by.

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

Jackson testified he informed Fairchild and Dodson of these incidents, and Fairchild was upset about the attempted baby buying and sexual assault. But Dodson dismissed these incidents as a motive for murder. In fact, Dodson

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[3] Dodson testified he only assisted on one transaction.

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

testified he was not aware of these incidents until after the murder. Dodson alleged the murders were simply motivated by money.

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

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

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

It is at this point that the co-defendants' respective stories begin to diverge. According to Jackson and Dodson, Fairchild turned around and began shooting Walker, then Mauk as she attempted to flee the room.[6] They all

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

[6] Jackson and Dodson's versions agree Fairchild was the shooter. There are minor distinctions regarding how many shots were fired, which victim was shot first,

immediately fled the trailer, but Jackson realized he forgot the car keys inside. Jackson alleged that upon returning to the trailer, Fairchild stood over Walker and Mauk and shot them again. Then, according to Jackson, Fairchild grabbed an envelope full of cash Walker was known to carry and handed Jackson $1,000. Fairchild also handed Jackson the 9mm pistol and told him to get rid of it.[7] Jackson shut and padlocked the trailer door, and the trio made a quick getaway.

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

According to Fairchild, Jackson was the shooter. By his account, Fairchild waited outside for Jackson and Dodson to finish their business; and he heard gunfire after Dodson came outside. Upon entering the trailer, Fairchild saw Walker lying face down and smelled gunpowder. Jackson then

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how Walker fell when he was shot initially, and Dodson's whereabouts when Walker was shot a second time.

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

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

Additional facts will be provided below as necessary.

## II. ANALYSIS.

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

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

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

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

Due process requires exclusion of confessions or statements procured when the defendant's "will has been overborne and his capacity for self-

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

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

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[8] *Schneckloth v. Bustamonte*, 412 U.S. 218, 225 (1973).

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

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

[11] *Bailey*, 194 S.W.3d at 301 (quoting *Henson v. Commonwealth*, 20 S.W.3d 466, 469 (Ky. 1999)).

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

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

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

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

First, Fairchild claims the detectives coerced him into taking a "fake" polygraph examination. Nothing in the record indicates any overt coercion associated with the detectives' request. But the implication was that if Fairchild declined to submit to a polygraph examination, he would remain a suspect in the investigation. This implication could not have risen to the level of coercion. That Fairchild would have remained a suspect in the investigation was factually accurate and presented no threat of future action. The only

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[14] 384 U.S. 436 (1966).

coercion that may be found in that circumstance is perhaps a heightened fear of detection. Following the detectives' direction, Fairchild spent the evening before the polygraph test at home—insulated from any coercive effects—and returned voluntarily to the sheriff's department the following morning.

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

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

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

[16] *See id.*; *Silverburg v. Commonwealth*, 587 S.W.2d 241, 244 (Ky. 1979); *Morgan v. Commonwealth*, 809 S.W.2d 704, 707 (Ky. 1991); *Powell v. Commonwealth*, 994 S.W.2d 1 (Ky.App. 1998).

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

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

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

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

[19] *Id.*

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

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

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

Similarly unsupported by the record, Fairchild's allegation that Van Nuys threatened him must fail. The nearest "threat" that has been cited to us in the record is a plea for Fairchild to tell the truth in order to help himself so he could be present for his young daughter. Taking this statement at its worst—an implication that Fairchild could be put to death because of the seriousness of the crimes in which he was implicated—it still does not amount to coercion.

"[T]ruthful, non-coercive advisement of potential penalties," and comments relating thereto, do not render a statement or confession involuntary.[21]

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

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

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

Now that we have concluded that Fairchild's statement to police was not involuntarily made, we must address the manner in which the evidence was presented to the jury. Fairchild claims the trial court erred when it permitted the original version of the video-recorded statement to be played for the jury.

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

[22] *Id.* at 787.

Specifically, he takes issue with the admission of portions of the statement pertaining to his prior bad acts in violation of Kentucky Rules of Evidence (KRE) 404(b).

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

All this preparation and sanitizing was for naught because Fairchild's counsel went into detail in opening statement describing how, in his estimation, Fairchild was coerced into submitting to a polygraph to "bulldoze" him into confessing. Simply put, Fairchild's counsel interjected the polygraph and its administration into the trial. So the Commonwealth sought permission from the trial court to play the full video version of Fairchild's statement as opposed to the redacted audio version created in anticipation of trial. The trial court took the Commonwealth's motion under careful consideration ultimately

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

concluding the Commonwealth could play the original video, excluding the actual administration of the polygraph examination (which consisted of only the final six pages of the 172 pages of the transcribed statement). Fairchild later requested the polygraph examination also be played, a request the trial court granted.

When the Commonwealth moved the court to play the original video of his statement to police, Fairchild remained silent regarding the admissibility of the prior-bad-acts evidence he now claims was admitted in error. He nonetheless claims his pre-trial motion in limine outlining audio segments he sought to have redacted as violative of KRE 404(b) preserved this issue for appeal. Admittedly, our case law and rules of evidence hold motions in limine resolved by an order of record sufficient to preserve evidentiary errors for appellate review.[24] But to avail themselves of the benefit of this rule, parties must specifically detail the alleged inadmissible evidence in their motion in limine to ensure their position is "fairly brought to the attention of the court."[25] Here, we are hard-pressed to conclude that Fairchild's position regarding the prior-bad-acts evidence with which he now takes issue was ever fairly brought to the attention of the trial court.

When Fairchild first filed his motion in limine, all parties—and the trial court—were preparing for trial under the impression the Commonwealth would

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

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

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

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

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

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

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

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[26] RCr. 10.26.

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

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

clearly relates to prior crimes and bad acts committed by Fairchild and serves only as character evidence.

As clear as this error is, though, it does not rise to the level of palpable error. Putting aside the prior-bad-acts evidence, Fairchild's statement puts him in the trailer alongside Jackson and Dodson with knowledge of the impending criminal acts when Walker and Mauk were murdered. He also received cash proceeds from the crime. Fairchild was heavily implicated by the trial testimony of Jackson and Dodson, even though with conflicting levels of his involvement. On review of the evidence and convictions, it becomes clear the jury found the version of events most favorable to Fairchild (with the exception of his testimony that he was in Ohio during the commission of the murders) to be the truth. Based on its verdict, the jury appears to have found Fairchild's statement to police very credible—a statement confessing to complicity to murder in substance if not in form.

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

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

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

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

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

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

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

[31] *Id.* at 854.

the trial court's alleged error must be presented to the trial court *before* the jury is empanelled.[32]

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

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

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

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

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

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

tender his list of potential strikes until *after* the jury was empanelled, thus, failing to satisfy the standard set forth in *Gabbard*.

We have held compliance with *Gabbard* to be strictly required.[36] Following this precedent, we hold this error is unpreserved for appellate review. And Fairchild failed to request palpable error review[37] even in light of the Commonwealth's strong challenge to his claim of preservation. So we decline to engage in palpable-error review of this assignment of error on our own initiative.[38] Therefore, we do not reach the merits of Fairchild's claim.

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

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

Fairchild objected to this portion of Alena's testimony at trial and argued it was inadmissible hearsay and impermissible bolstering of Jackson's testimony. The trial court rejected Fairchild's arguments because it found that

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

[37] *See* RCr 10.26.

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

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

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

*Hearsay* is an out-of-court statement "offered in evidence to prove the truth of the matter asserted."[42] Absent an enumerated exception, hearsay is generally inadmissible.[43] The hearsay exception the trial court ostensibly

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

[40] *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

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

[42] KRE 801(c).

[43] KRE 802.

applied was that pertaining to prior consistent statements. Found in KRE 801A(a)(2), this exception reads:

> (a) Prior statements of witnesses. A statement is not excluded by the hearsay rule, even though the declarant is available as a witness, if the declarant testifies at the trial or hearing and is examined concerning the statement, with a foundation laid as required by KRE 613, and the statement is:
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> . . . .
>
> (2) Consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive.

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

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

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

falls within an exception to the hearsay rule.[46] We now apply this standard to the facts at hand.

It cannot be disputed that Jackson's statements to Alena constitute hearsay. They were made outside of court and are offered by the Commonwealth as evidence to prove Fairchild was the shooter. It is likewise beyond cavil that the Commonwealth presented sufficient evidence regarding elements (1) and (3). Jackson, the original declarant of the hearsay statements proffered through Alena's testimony, testified extensively at trial and was available for recall at Fairchild's discretion because he was in custody throughout the trial. And Jackson's hearsay statements were consistent with his in-court testimony. In fact, Jackson's hearsay statements were so consistent with his trial testimony that Fairchild alleges their admission amounted to improper bolstering. The real dispute[47] here comes where it so often does in relation to this hearsay exception: whether there was a charge of fabrication or motive to falsify and if the prior statement predated that motive.[48]

Jackson was assailed by both express and implied allegations of fabrication or motive to falsify by Fairchild. The express allegation—Jackson,

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

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

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

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

Implicit in the trial court's admission of Jackson's statements was the conclusion that they predated Fairchild's allegations of fabrication or motive to falsify. Otherwise, Jackson's prior statements would have no probative value to rebut Fairchild's allegations. This conclusion is supported by the record. Alena testified that Jackson's statements were relayed to her *the first time* they discussed his involvement in the murders, thus precluding and predating any collusion between her and Jackson. Fairchild presents no argument that calls this conclusion into question. Jackson's statements also clearly preceded his plea negotiations, which Fairchild implied gave reason to falsify his trial testimony. When Jackson made his statements to Alena, he could have had no

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

expectation of leniency or beneficial treatment in any future prosecution.[50] Certainly, Alena had no authority to grant leniency and Jackson had not yet been arrested or charged.

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

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

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

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

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

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

Fairchild's next allegation of error also implicates Alena's testimony, albeit tangentially. At trial, the Commonwealth proffered testimony through Alena that while she napped one afternoon, Fairchild, Jackson, and Dodson entered the room and Fairchild made a statement to this effect: killing Walker and Mauk was easy for him because his military training and experience hardened his heart. Alena conceded she was unsure whether Fairchild made the statement in reality or if she dreamed that Fairchild made the statement. In light of this revelation, the trial court prohibited Alena from testifying about Fairchild's alleged statement, presumably because she had an insufficient basis of knowledge to testify accurately about the statement.[53]

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

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[53] *See* KRE 602.

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

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

We also conclude the trial court's decision to permit evidence of Fairchild's incriminating statement was not an abuse of discretion. With all the facts and testimony before it, the trial court concluded the Commonwealth

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

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

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

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

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

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

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

[59] KRE 402.

[60] KRE 401.

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

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

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

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

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

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

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

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

Fairchild's argument that the trial court was required to provide a facilitation instruction focuses on the required mental state—indifference to the

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

[64] *Id.*; *Houston v. Commonwealth*, 975 S.W.2d 346, 348 (Ky. 1998).

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

commission of the crime. Fairchild argues there was sufficient evidence of record pointing to Jackson as the shooter and Dodson as his co-conspirator. Because of this evidence, Fairchild claims the jury may have found he did not take part in planning the murder but was aware of the conspiracy between Jackson and Dodson and remained "wholly indifferent" when it came to fruition, thus, entitling him to a facilitation instruction.

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

The Commonwealth is correct in its assessment that the evidence of record supports one of four conclusions regarding Fairchild's involvement in the murders: he was the shooter, he conspired with Jackson and Dodson to commit the murders or aided in their commission, he was merely a bystander with no intent the murders be committed and provided no aid, or he was in Ohio during the murders and was unaware of them until later. Fairchild's argument that that the jury reasonably could have found him "wholly indifferent" to the murders, without any evidence he provided the "means or opportunity" for their commission, falls within the third scenario outlined by

the Commonwealth: that Fairchild was a bystander that neither intended the crime's commission nor provided any assistance or opportunity for its commission. Such a verdict was an option available to the jury as instructed by the trial court. Had the jury found Fairchild's mental state was "wholly indifferent" and he did not actively aid in the commission of the murders, the jury would have returned a not-guilty verdict. This, of course, was not the case.

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

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

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

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

continue his trial. Fairchild asserts he was entitled to a continuance because the interjection of two new eyewitnesses created a substantial change in trial strategy for his defense team.

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

Here, the trial court analyzed each factor. While perhaps factor (4) weighs clearly in Fairchild's favor, the remaining factors weigh either in favor of the Commonwealth or are, at worst, even. So this issue is somewhat of a close call. As we have previously stated, "[i]n a close case, we hold that the trial

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[67] RCr 9.04.

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

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

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

court did not err in denying this continuance."[71] There is sufficient evidence that granting the continuance would have caused significant inconvenience for both the trial court and the Commonwealth.

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

Turning to the other factors, the length of delay if Fairchild's continuance was granted brought into play concerns with the Commonwealth's representation because a new Commonwealth's Attorney was set to take over on January 1, 2013, within the sixty-day minimum continuance Fairchild

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[71] *Foley v. Commonwealth*, 953 S.W.2d 924, 937 (Ky. 1997).

[72] *Id.*

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

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

requested. At most, Fairchild's trial would not have begun until April 2013 meaning the case would have pended for nearly two years.

This was not the first continuance requested in Fairchild's case. Trial was originally scheduled for May 2012; but, in April 2012, all three defendants requested a continuance. At the time, the trial court noted that Fairchild's trial was not scheduled because a competency hearing was pending. That said, the trial court granted the continuance for all three defendants. The next hearing was scheduled for August 2012. As a result, Fairchild's case pended for over a year even before requesting the continuance in issue.

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

Fairchild's abuse-of-discretion argument primarily centers on *Eldred v. Commonwealth*,[75] a case somewhat similar factually. In *Eldred*, late at night a mere three days before trial was slated to begin,[76] the defendant's ex-wife

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[75] 906 S.W.2d 694 (Ky. 1994).

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

accepted a plea bargain and, as a condition of the plea, agreed to testify against Eldred. This plea agreement, however, was not made known to Eldred until the morning of trial. Eldred's counsel requested a continuance and argued, among other things, insufficient time to perform an adequate investigation because of the "vast difference between the statement [the ex-wife] must have made during the plea agreement and her previous statements."[77] The trial court gave Eldred a week to investigate but denied his primary request that trial be postponed sixty days. On appeal, we found the trial court abused its discretion, and the sixty-day continuance was appropriate.

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

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

appropriate for reaching a sound decision. But unlike in *Eldred*, the instant circumstances do not weigh in favor of granting Fairchild's continuance request.

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

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

## III. CONCLUSION.

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

All sitting. All concur.

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

COUNSEL FOR APPELLANT:

Brandon Neil Jewell
Assistant Public Advocate

COUNSEL FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

James Daryl Havey
Assistant Attorney General