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RENDERED: SEPTEMBER 24, 2015
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2013-SC-000604-MR

MARK TAYLOR — APPELLANT

V.

ON APPEAL FROM McCRACKEN CIRCUIT COURT
HONORABLE CRAIG Z. CLYMER, JUDGE
NO. 10-CR-00580-001

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Following an eight-day trial, a circuit court jury convicted Mark Taylor of first-degree murder, kidnapping, and tampering with physical evidence, for which the jury recommended sentences of life imprisonment, life imprisonment without parole, and five years' imprisonment, respectively. The trial court sentenced Taylor to life imprisonment without the possibility of parole.

Taylor now appeals the resulting judgment as a matter of right,[1] asserting various errors: (1) the trial court erred by refusing to strike Venirepersons 1 and 2[2] under *Batson v. Kentucky*; (2) it was error for the trial court to refuse to strike Jurors 1 and 2 for cause; (3) he was unconstitutionally convicted of kidnapping because the statutory kidnapping exemption applied to

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[1] Ky.Const. § 110(2)(b).

[2] We have used numerals as descriptors in an attempt to avoid unnecessary disclosure of prospective jurors' names.

his case; and (4) the trial court erred by denying Taylor's motion for a continuance.

We affirm the judgment because we find that Taylor was afforded a fair trial.

I. FACTUAL AND PROCEDURAL BACKGROUND.

Levi Langston was turning twenty-five and having a birthday party. Langston and his partner, Ricky Ort, hosted the party at their apartment. Taylor's daughter, Jasmine, attended this small gathering at the invitation of a mutual friend of Langston's.

Jasmine's behavior at the party turned irrational. At one point, Jasmine was found rifling through drawers and a cabinet in Ort and Langston's bathroom, wildly strewing items. In her rummaging, Jasmine found some purple hair dye and smeared it on her face and arms. Jasmine's friend took her home at approximately 2:30 a.m.

Around 9:00 a.m., Sergeant David Shepherd responded to a welfare-check dispatch. Sergeant Shepherd found Jasmine sitting in the middle of the road about two miles from her home. Her appearance was bizarre: her bra was around her waist and on the outside of her clothes, she had on multiple layers of clothing, and over her shoulder were slung several handbags containing an assortment of household items. She had dark paint on her face and clothing. Sergeant Shepherd took Jasmine home and spoke briefly with her mother, Jamie Taylor.

Later in the afternoon, Sergeant Shepherd was dispatched to the hospital. Taylor and Jamie had taken Jasmine to the Emergency Room because her behavior was so strange. While there, Jasmine told Taylor and Jamie that she had been raped at the party. More specifically, Jasmine told her parents that CaSondra Evrard—one of Jasmine's close friends during high school—had drugged her and sold her out to be raped "for $100 a pop." A rape kit was requested; but after speaking with Jasmine privately, Sergeant Shepherd ultimately concluded that no sexual assault had occurred and no investigation was warranted. Jasmine was admitted to the psychiatric ward where she stayed for five days.

Taylor and Jamie believed Jasmine's account of the party and decided to perform their own investigation.[3] Brandi Marshall, Taylor's niece, returned to Langston and Ort various items that Jasmine had taken while at the party. Ort informed Brandi that Langston's cell phone was still missing. Taylor used this to his advantage: he phoned Darren Wood, the mutual friend of Jamie and Langston's who had taken Jamie to the party and informed Wood that he had Langston's cell phone. Taylor also informed Wood that Langston and Ort could come by his house to get the phone. Of course, Taylor did not actually have Langston's phone, it was just a ruse to talk with the men from the party.

Ort and Wood went to Taylor's house to retrieve Langston's phone. Their conversation with Taylor began calmly enough. Taylor informed the men of

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[3] It should be noted that Jasmine reiterated her sexual-assault claims upon being released from the psychiatric ward.

Jasmine's allegations, effectively accusing them of raping Jasmine because they were the only men at the party. Wood explained to Taylor that nothing of the sort had happened at the party and that, in fact, he had brought Jasmine home. At some point, the conversation deteriorated and Taylor's demeanor shifted. Taylor lit a cigarette, grabbed a nearby bucket, yelled at the men, and then threw the bucket at them, dousing them in ammonia. This was merely a warning, according to Taylor. The two men immediately returned to their car and left.

The focus of the Taylors' ill-fated investigation centered on Evrard. Both Taylor and Jamie wanted to talk directly with Evrard and expressed their willingness to resort to physical tactics if Evrard would not talk. The two began scheming how they could get Evrard to their residence. Eventually, with the help of some relatives, it was settled that they would tell Evrard they were having an ice cream and cake party for Jasmine. Jamie, with relatives in tow, picked up Evrard from her home and brought her to the Taylors' residence.

Evrard denied Jasmine's rape allegations, even claiming at one point that she loved Jasmine and would never treat her like that. Despite Evrard's protestations, Taylor and Jamie persisted in their belief that Jasmine's rape allegations were true. Jamie struck first, punching Evrard in the face. A short exchange of blows ensued, after which Jamie grabbed Evrard by the hair and dragged her through the master bedroom into the bathroom where she threw Evrard into the bathtub. Already standing in the bedroom when the fight occurred, Taylor walked into the bathroom.

As Evrard continued to maintain her innocence, Jamie grabbed a hunting knife from the sink and placed it to Evrard's throat. Meanwhile, Taylor grabbed a knife and sliced open Evrard's cheek. Eventually, Evrard gave in and admitted to Jasmine's allegations.

Jasmine then entered the bathroom with a hammer, but Taylor traded her a knife for the hammer. Jasmine made a superficial cut on Evrard's stomach. Taylor then cut Evrard's wrist, sufficiently deep to sever a tendon, and sprayed Evrard in the face with bug spray. Jamie left the bathroom for a few minutes; and, while she was gone, Taylor stabbed Evrard in her chest, puncturing her lung.[4] In Taylor's own words to Jamie upon her return, he "stuck her like a pig." Evrard was unresponsive.

Evrard was carried outside to the back steps and sat upright. One of Taylor's relatives struck Evrard in the head with a baseball bat, causing Evrard to fall over, face up. Jamie grabbed a nearby knife and slashed Evrard's throat, cutting her trachea, carotid artery, and chipping a neck vertebrate. Taylor then placed Evrard's body into a trash can and loaded the trash can into the bed of his truck. Before leaving his residence, Taylor gathered the various knives and Evrard's belongings. When he arrived at a nearby illegal dump site, Taylor wrapped Evrard's body in two tarps and left it at the dump. Taylor then threw the knives and Evrard's belongings off a bridge near the dumpsite. As for Evrard's other belongings and any bloodstained items, Taylor sent them up in flames in a burn pile near his residence.

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[4] In addition, two relatives hit Evrard.

Police began searching for Evrard a few hours after she was murdered because Evrard's mother became worried when she did not return home that day. They found Evrard's body the next afternoon. The medical examiner's report confirmed that multiple sharp-force injuries caused Evrard's death. In the medical examiner's opinion, either the stab wound to Evrard's neck or the stab wound to her chest were potentially fatal.

A little over a week after Evrard's body was found, Taylor was arrested. During his interview with police, Taylor confessed to murdering Evrard. Taylor admitted that he planned to bring Evrard to his residence and that he had even directed that she be brought there. In his view, answers regarding Jasmine's allegations could be more readily obtained if Evrard were on his turf.

Eventually Taylor, Jamie, and Jasmine were indicted for capital murder and kidnapping. Taylor and Jamie were additionally charged with tampering with physical evidence. Of all the various individuals charged with crimes relating to Evrard's murder, Taylor was the only one to proceed to trial.[5]

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[5] Jamie pleaded guilty to murder, kidnapping, and tampering with physical evidence for a sentence of life imprisonment. Jasmine pleaded guilty to first-degree manslaughter and kidnapping for a sentence of eighteen years' imprisonment. As for Taylor's relatives, the Marshalls: Denise pleaded guilty to complicity to commit kidnapping for twelve years' imprisonment; Brandi pleaded guilty to conspiracy to commit kidnapping for seven years' imprisonment; and Destini pleaded guilty to conspiracy to commit kidnapping for six years' imprisonment. Zach Finley, Brandi's boyfriend at the time, who accompanied the others to obtain Evrard, pleaded guilty to criminal facilitation to commit kidnapping for five years' imprisonment.

II. ANALYSIS.

A. The Trial Court Properly Denied Taylor's *Batson* Challenge.

During jury selection, Taylor made a *Batson*[6] challenge to the Commonwealth's use of its peremptory strikes. The basis for the motion was the Commonwealth's strike of Venirepersons 1 and 2, the two remaining African-American potential jurors. Taylor is an African-American male charged with murdering a white female, so his counsel argued he could not receive a fair trial by an all-white jury. In response to Taylor's motion, the Commonwealth informed the trial court it struck Venireperson 1 because she had two brothers convicted of drug crimes and one convicted of murder and the instant Commonwealth's Attorney had prosecuted the murder charge. As for Venireperson 2, the Commonwealth stated it struck her because she knew the family of one of Taylor's co-defendants.

Of course, deliberate racial discrimination is prohibited during jury selection. The United States Supreme Court in *Batson v. Kentucky* outlined a three-step process for analyzing an allegation that a party peremptorily struck a juror based on race:

> First a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race[; s]econd, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question[; and t]hird, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination.[7]

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[6] *Batson v. Kentucky*, 476 U.S. 79 (1986).

[7] *Miller-El v. Cockrell*, 537 U.S. 322, 328-29 (2003) (internal citations omitted).

It is important to point out that a trial court's decision on a *Batson* challenge is "akin to a finding of fact, which must be afforded great deference by an appellate court."[8] A trial court's ruling, accordingly, "will not be disturbed unless clearly erroneous."[9] In addition, "the ultimate burden of showing unlawful discrimination rests with the challenger."[10]

Taylor successfully made an initial prima facie showing of racial discrimination as *Batson* requires. He is African-American, the venirepersons in question are African-American, and the Commonwealth struck them from the pool of potential jurors. Under our case law, nothing more is required to permit an inference of racial discrimination.[11] In any event, the Commonwealth essentially conceded Taylor's prima facie claim by forgoing any

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[8] *Chatman v. Commonwealth*, 241 S.W.3d 799, 804 (Ky. 2007).

[9] *Washington v. Commonwealth*, 34 S.W.3d 376, 380 (Ky. 2000).

[10] *Rodgers v. Commonwealth*, 285 S.W.3d 740, 757-58 (Ky. 2009).

[11] *Johnson v. Commonwealth*, 450 S.W.3d 696, 702-03 (Ky. 2014) (citing *Blane v. Commonwealth*, 364 S.W.3d 140, 149 (Ky. 2012)). In *Blane*, we noted that a prima facie case is presented when a defendant:

> (1) "show[s] that he is a member of a cognizable racial group, and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race";
>
> (2) "rel[ies] on the fact . . . that peremptory challenges constitute a jury selection practice that permits those to discriminate who are of a mind to discriminate"; and
>
> (3) show[s] "that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race."

Blane, 364 S.W.3d at 148-49 (internal quotation marks omitted).

challenge to the trial court and, instead, offering in response only a race-neutral justification for the strike.[12]

The circumstances surrounding each venireperson's responses during voir dire are important, so we provide a somewhat detailed recitation here. Turning to Venireperson 1 first, the following exchange occurred during voir dire:

> Commonwealth: [A]nyone in the jury panel here, either yourself or a close family member, charged with a crime or have been charged with a crime, something other than vehicle related stuff?
>
> [Venireperson 1 raises her hand]
>
> Commonwealth: See a few. Let me go through these. [Venireperson 1]?
>
> Venireperson 1: I have several family members. I don't know.
>
> Commonwealth: Several? Two, three? Several is a vague number. What kind of cases have they had?
>
> Venireperson 1: That they were convicted on?
>
> Commonwealth: Yes.
>
> Venireperson 1: Okay. Two brothers were convicted on drug charges.
>
> Commonwealth: Okay.
>
> Venireperson 1: One convicted on murder.

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[12] *See Mash v. Commonwealth*, 376 S.W.3d 548, 555 (Ky. 2012) ("In this case, there is no need to determine whether a prima facie showing of discrimination was made under the first *Batson* prong because the prosecutor volunteered an explanation for his strike.").

Commonwealth: Okay. What was your cousin's name on the murder case?

Venireperson 1: Brother.

Commonwealth: Your brother?

Venireperson 1: [Brother's name].

Commonwealth: [Brother's name], yeah. [He] pled guilty in that case, I remember that. Anything about that that would affect you here for Mr. Taylor or for the Commonwealth?

Venireperson 1: No.

Commonwealth: Do you think the result was, was right for your brother, . . .?

Venireperson 1: Yeah, I mean . . . [inaudible].

Venireperson 1 was questioned further during individual voir dire. The Commonwealth below remembered the facts and circumstances of her brother's case.

As for Venireperson 2, she was personally acquainted with the Marshalls—the family of Taylor's co-defendant, Brandi Marshall. This relationship with the Marshalls only came to light during individual voir dire, despite Venireperson 2 being asked by the trial judge twice before whether she knew any of the Commonwealth's listed potential witnesses, of which the Marshalls were included. During individual voir dire, Venireperson 2, a journalist by trade, acknowledged that she knew Brandi Marshall's father. She stated that she considered publishing some information she received from various sources but ultimately refrained. Venireperson 2 also seemed to struggle with the imposition of the death penalty. Personally speaking, she was

against the death penalty; but she admitted she could perhaps vote for the death penalty if the victim's family desired it. And, at one point during her waffling, Venireperson 2 acknowledged that as a newsperson she would just go along with what the jury decided; but she wanted Taylor to stay alive.

We are left, then, with the Commonwealth exercising its strikes because a potential juror had family members convicted of various crimes, including at least one murder prosecution by the Commonwealth's attorney, and another potential juror withholding her knowledge of co-defendants despite repeated questioning. Both are race-neutral reasons for exercising peremptory strikes.

With regard to Venireperson 1, the Sixth Circuit, in highly similar circumstances, recently found race-neutral nearly the identical argument the Commonwealth presented to the trial court below. In *United States v. Beverly*,[13] the prosecution exercised a peremptory challenge to strike the last remaining African-American venireperson from the venire. For its race-neutral reason, the prosecution stated it removed the venireperson "because she had a brother who had spent time in prison and also had a nephew in jail with whom she still had contact."[14] Affirming the trial court, the Sixth Circuit found the prosecution's reason to be "plausible and race-neutral" lacking any inherent discriminatory intent.[15] We agree. Here, the Commonwealth clearly offered a race-neutral reason to strike Venireperson 1.

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[13] 369 F.3d 516 (6th Cir. 2004).

[14] *Id.* at 527.

[15] *Id.*

The Commonwealth's strike of Venireperson 2 is likewise facially race-neutral. Venireperson 2's acquaintance with co-defendants who were also witnesses for the Commonwealth is sufficient in itself.[16] Even if that was not enough, however, Venireperson 2 was, at worst, actively concealing her acquaintance with the co-defendants, or, at best, simply not paying attention during voir dire. Either way, the Commonwealth would be justified to exercise a peremptory strike to excuse Venireperson 2 from participating on the jury.[17]

It is worth repeating that "the ultimate burden of showing unlawful discrimination rests with the challenger."[18] In the end, Taylor has simply not carried his burden. Other than the mere fact that the remaining two African-American venirepersons were struck, Taylor is unable to show unlawful discrimination. This, alone, is insufficient in light of the Commonwealth's non-discriminatory reasons for striking Venirepersons 1 and 2.[19]

B. Taylor's Motion to Strike Jurors 1 and 2 for Cause was Properly Denied.

Taylor next argues that the trial court erroneously declined to strike Jurors 1 and 2 for cause. The issue is somewhat improperly preserved. In any

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[16] *See United States v. Williamson*, 53 F.3d 1500, 1509 (10th Cir. 1995).

[17] *See Briggs v. Grounds*, 682 F.3d 1165, 1180 (9th Cir. 2012) (noting that "[a]t a minimum, [the juror] was not forthcoming with his answers during voir dire."); *Thomas v. Commonwealth*, 153 S.W.3d 772, 777-78 (Ky. 2004) (compiling cases acknowledging that "inattentiveness and demeanor can be race-neutral reasons.").

[18] *Rodgers*, 285 S.W.3d at 757-58.

[19] *See, e.g., Commonwealth v. Hardy*, 775 S.W.2d 919, 920 (Ky. 1989) ("*People v. Wheeler*, [583 P.2d 748 (Cal. 1978)], indicated that the use of two peremptories to excuse the only two black jurors was found insufficient for a [prima facie] showing.").

event, Taylor alleges the trial court's error was sufficiently prejudicial to constitute reversal, preservation aside.

Juror 1 was a former teacher in the local school system. During individual voir dire, Juror 1 was asked if she had followed any of the media coverage surrounding the crime and Taylor's arrest. She responded that she had seen some information on television. When asked to disclose her knowledge of the case, Juror 1 provided only generalities: the victim had been stabbed and the body was found near her church in the Wilmington Road area.

That said, Juror 1 had a relatively personal encounter with the crime scene. Juror 1's residence was about two miles farther down the same road as the Taylor residence. In fact, Juror 1 often drove past the Taylor residence. On the day Evrard's body was found, Juror 1 was at church for its Christmas program. She remembered it well because the road was blocked such that people had trouble getting to the church and everyone was talking about all the flashing lights. At that point, she had no knowledge of what happened, just that it must have been really bad. Following that evening, Juror 1 followed the news somewhat closely for a short period.

Juror 1 was emphatic that she had not formulated an opinion on Taylor's guilt. Specifically, Juror 1 stated that she truly believed a person was innocent until proven guilty and that Taylor was deserving of a fair and just trial. As for imposing a penalty if Taylor was proven guilty, Juror 1 wrestled with the possibility of the death penalty. Juror 1 made clear her belief that the punishment should fit the crime and stated repeatedly that she could consider

the full range of penalties but admitted struggling with a sentence of twenty years' imprisonment for murder. Taylor keys in on this struggle and argues Juror 1 was unable realistically to consider the full range of possible penalties. This is a reasonable argument, to be sure, but one that only seems plausible when viewing Juror 1's comments out of context. In totality, it seemed clear that what Juror 1 was really struggling with was discussing punishment without knowing more facts. Juror 1 desperately wanted to fit the punishment to the crime—without facts, though, this is nearly impossible to do.

Taylor sought to strike Juror 2 for cause because he was a former local police officer and had been involved in the search for Evrard and because he was allegedly unable to consider mitigating evidence. Juror 2 was clear that he remembered nothing about Taylor's case, but he acknowledged vaguely remembering a missing-girl report around the time of the murder. His department was contacted to check a couple homes within city limits to see if the girl happened to be there. Juror 2 checked those houses, found nothing, and that was the end of it. He did not recall the name of the missing girl and was unable to say with any degree of confidence that it was Evrard. There were rumors around the police station, but he was unable to be sure of any relation.

The mitigation-evidence aspect of Taylor's argument is misplaced and, again, is founded in reading voir dire responses in a vacuum. When Juror 2 was asked if he could consider mitigation evidence, he candidly responded that he was unsure because he believed everyone was responsible for their own actions regardless of personal circumstance. The particular facts of the case,

according to Juror 2, would dictate how much weight he could afford such evidence. Perhaps if Juror 2's voir dire stopped here, it would be questionable whether he could be a fair juror. After more questions, however, the Commonwealth finally clarified that mitigation evidence would be presented in the *sentencing* phase rather than the *guilt* phase. In Juror 2's view, this changed everything and he freely admitted he could consider mitigation evidence with regard to punishment.

Taylor's challenge to the trial court's denial of his strike requests is somewhat improperly preserved. The jurors Taylor would have struck had he not had to exercise all his peremptories on jurors that should have been stricken for cause were specified at the bench during the hearing on the motion. But Taylor did not write the names of the jurors on the jury strike sheet per the requirements of *Gabbard v. Commonwealth.*[20] In addition, the Commonwealth argues the issue is unpreserved because Taylor was silent in the face of a second opportunity to request the jurors he would have stricken be removed from the panel.[21] Preservation is of little import because we find the trial court did not commit error, whether we operate under reversible-error or palpable-error review.

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[20] 297 S.W.3d 844, 854-55 (Ky. 2009).

[21] Because Taylor's case was tried as a capital case, the trial court seated sixteen jurors—twelve with four alternates. At the close of all evidence, the trial court asked the jury if there were any jurors who had an issue that would make it difficult for them to continue. No juror expressed any such issue. Taylor made no request of the trial court to remove any jurors. The trial court proceeded accordingly and had the clerk call twelve names. The two jurors Taylor would have stricken were included in the twelve.

Kentucky Rules of Criminal Procedure (RCr) 9.36(1) provides that a potential juror shall only be removed for cause "[w]hen there is reasonable ground to believe [he or she] cannot render a fair and impartial verdict on the evidence[.]" The test for making this determination is relatively straightforward: "whether, after having heard all of the evidence, the prospective juror can conform his views to the requirements of the law and render a fair and impartial verdict."[22] The decision to strike a juror for cause "lies within the sound discretion of the trial court and is reviewed only for a clear abuse of discretion."[23]

We simply cannot say the trial court clearly abused its discretion in the instant case. Of course, both Juror 1 and Juror 2 expressed some sentiment that if viewed alone appears problematic; but deciding whether to strike jurors turns on the totality of the circumstances. A quick review of the entirety of voir dire dispels the notion that Jurors 1 and 2 were unable to conform their views to the law and render a fair and impartial verdict. The trial court did not err.

C. The Trial Court Properly Denied Taylor's Directed-Verdict Motion on his Kidnapping Charge.

In order to prevent the "misuse of the kidnapping statute to secure greater punitive sanctions for rape, robbery and other offenses which have as

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[22] *Mabe v. Commonwealth*, 884 S.W.2d 668, 671 (Ky. 1994); *see also Wainwright v. Witt*, 469 U.S. 412, 424 (1985) (framing the critical question as "whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.") (internal quotation marks omitted).

[23] *Soto v. Commonwealth*, 139 S.W.3d 827, 848 (Ky. 2004).

an essential or incidental element a restriction of another's liberty."[24] The Kentucky kidnapping exemption statute provides, in relevant part:

> A person may not be convicted of unlawful imprisonment in the first degree, unlawful imprisonment in the second degree, or kidnapping when his criminal purpose is the commission of an offense defined outside this chapter and his interference with the victim's liberty occurs immediately with and incidental to the commission of that offense, unless the interference exceeds that which is ordinarily incident to commission of the offense which is the objective of his criminal purpose.[25]

The kidnapping exemption outlined above, according to Taylor, precludes his conviction for the capital kidnapping of Evrard. To the extent Evrard was restrained, Taylor argues it was only when Jamie had her in the bathtub and that restraint was incidental to the murder. Taylor essentially argues that he intended to murder Evrard all along, not kidnap her. At the trial court below, Taylor filed a directed-verdict motion so this issue is properly preserved for our review.[26] But Taylor's contention is meritless.

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[24] *Gilbert v. Commonwealth*, 637 S.W.2d 632, 635 (Ky. 1982).

[25] KRS 509.050.

[26] Our method of review with regard to trial court rulings on directed-verdict motions is well settled. In *Commonwealth v. Benham*, 816 S.W.2d 186 (Ky. 1991), we detailed this method:

> On motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If 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. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given such testimony. *Id.* at 187.

Given the totality evidence, we must determine if "it would be clearly unreasonable for a jury to find guilt[.]" *Id.* Only then is a defendant entitled to a directed verdict of acquittal. The Commonwealth must only produce more than a "mere scintilla" of

When reviewing the application of the kidnapping-exemption statute, we undertake a three-prong approach:

> (1) "[T]he underlying criminal purpose must be the commission of a crime defined outside of KRS 509[";]
>
> (2) "[T]he interference with the victim's liberty must have occurred immediately with or incidental to the commission of the underlying intended crime[]"; and]
>
> (3) "[T]he interference with the victim's liberty must not exceed that which is ordinarily incident to the commission of the underlying crime."[27]

For the statute to apply, all three prongs must be satisfied. The problem with Taylor's argument becomes evident at the initial prong—he is simply unable to prove his criminal purpose lay outside KRS 509.

During Taylor's confession, he acknowledged that not only was he aware of the plan to kidnap Evrard, he planned the kidnapping and directed the others to carry it out. Taylor wanted Evrard to come to his residence not to murder her but because he was confident that he could get answers out of her. The kidnapping was central to this purpose, not the murder. Taylor and the others sought to intimidate and interrogate Evrard in a location she was uncomfortable with and had no control over. And it is illogical to argue Evrard's liberty was restrained only at the time when Jamie held her by knifepoint in the bathtub. Evrard was away from her home with no available mode of transportation—unquestionably, her liberty was restrained.

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evidence to defeat a defendant's directed-verdict motion. *Commonwealth v. Sawhill*, 660 S.W.2d 3 (Ky. 1983).

[27] *Wood v. Commonwealth*, 178 S.W.3d 500, 515 (Ky. 2005).

Much more than a scintilla of evidence was produced by the Commonwealth. As a result, the trial court did not err in denying Taylor's directed-verdict motion.

D. Taylor was not Entitled to a Continuance.

For his final allegation of error, Taylor asserts the trial court improperly denied his motion for a continuance. The issue is preserved for appeal although the facts and circumstances leading to that preservation are somewhat convoluted. Taylor was indicted on the instant charges on December 23, 2010. An attorney from the Department of Public Advocacy was assigned to Taylor's case. On September 30, 2011, the Commonwealth filed notice that it would seek the death penalty. So, in October, the DPA assigned Craig Newbern from its Capital Trial Branch as co-counsel. Trial was then set for September 10, 2012, following a determination that a mitigation specialist would need eleven months to prepare adequately.

In July of 2012, Taylor's original DPA counsel withdrew from the case because he was representing a key witness in a separate, unrelated matter. This left Newbern, ostensibly a capital trial specialist, as Taylor's sole counsel. Jason Pfeil appeared as Taylor's counsel on August 10, 2012. In response to this shift of counsel, the trial court postponed trial until January 2, 2013—meaning Taylor's case would pend for more than three years. Newbern argued Pfeil could not be adequately prepared for trial in the roughly five months remaining to trial. In addition, the entire local DPA office had been disqualified because of conflict—the same conflict that required Taylor's original counsel to

withdraw—leaving Taylor without an investigator. A motion to continue the trial was filed on December 6, 2012; but the trial court refused to delay the trial past January 2013.

At the first day of trial, Taylor's counsel emphasized they had made no announcement that they were ready for trial and renewed their motion for a continuance. The trial judge read from an affidavit from Taylor's mitigation specialist, which stated there had been no fact investigator on Taylor's behalf for a number of months. The hearing confirms the existence of this affidavit, but it is missing from the appellate record. In the end, the trial court stated it was unaware there was no fact investigator for a period of time but did not see what a fact investigator could accomplish that a mitigation specialist (who had worked on Taylor's case for over a year) could not. The trial court then denied Taylor's motion for a continuance.

Under our criminal rules, a trial may be postponed upon a showing of "sufficient cause."[28] Whether or not to postpone trial rests wholly within the trial court's discretion.[29] And we will not overturn a trial court's decision on appeal "unless that discretion has been plainly abused and manifest injustice

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[28] RCr 9.04.

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

has resulted."[30] Our case law has developed a group of factors for trial courts to consider when faced with a motion for continuance: (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.[31]

Before going into an unnecessarily detailed analysis with regard to each factor listed above, we highlight that "there is absolutely no evidence of identifiable prejudice to [Taylor] arising from the denial of the continuance."[32] Recently, 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."[33]

Even at this juncture, with the benefits of time and hindsight, Taylor 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."[34] Instead, Taylor simply argues, "If co-counsel had been better prepared, Taylor very likely would have received a

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[30] *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).

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

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

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

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

lesser conviction and sentence." That perfunctory statement leaves us with more questions than answers, *e.g.*, what exactly would counsel's preparation have produced that would have resulted in a lesser conviction or sentence or what facts or evidence was Taylor unable fully to review or discover in three years?

While Taylor's most recent counsel was only on the case for a few months, he was equipped with counsel specially trained in capital cases for almost a year *before* the addition of the allegedly ill-prepared co-counsel.[35] Without more specific evidence presented, we are unable to speculate as to what would have happened at Taylor's trial if he had been given more time. It is impossible for this Court, then, to find the trial court abused its discretion in denying Taylor's continuance motion.

III. CONCLUSION.

For the foregoing reasons, the judgment is affirmed.

All sitting. All concur.

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[35] And Taylor's mitigation specialist initially claimed he would need eleven months to prepare. The trial court provided that period of time. In the end, the mitigation specialist had nearly seventeen months to prepare and alleged he still yet needed more time.

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