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**COMMONWEALTH OF KENTUCKY**  
**KENTUCKY SUPREME COURT**  
**No. 2022-SC-00181-MR**  
 \*\*Electronically Filed\*\*

**ERIC ANTHONY BERRY**

**APPELLANT**

v. Appeal from Jefferson Circuit Court  
 Hon. Angela McCormick Bisig, Judge  
 Indictment No. 18-CR-0276

**COMMONWEALTH OF KENTUCKY**

**APPELLEE**

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**Brief for the Commonwealth of Kentucky**

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**CERTIFICATE OF SERVICE**

I certify that the record on appeal has been returned to the Clerk of this Court and that a copy of the Brief for the Commonwealth of Kentucky has been served February 20, 2023, as follows: by mailing to the trial judge, Hon. Angela McCormick-Bisig, Judge, Jefferson County Judicial Center, 700 W. Jefferson St., Louisville, Kentucky 40202; by sending via email to Hon. Andrew Reinhart and Hon. Jason Moore, Jefferson Assistant Commonwealth Attorney, 514 W. Liberty St., Louisville, Kentucky 40202; and via messenger mail to Hon. Robert Yang, Assistant Public Defender, 5 Mill Creek Park, Section 100, Frankfort, Kentucky 40601.

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## **INTRODUCTION**

This is a criminal case wherein Eric Berry was convicted of first-degree burglary, first-degree sexual abuse, two counts of fourth-degree assault, two counts of third-degree assault, first-degree fleeing or evading, resisting arrest, and being a first-degree persistent felony offender. He was sentenced to 25 years in prison. He now appeals as a matter of right from the judgment of the Jefferson Circuit Court.

## **STATEMENT REGARDING ORAL ARGUMENT**

The Commonwealth does not believe oral argument is necessary in this matter as the issues are fully addressed by the parties' briefs.

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## COUNTERSTATEMENT OF THE CASE

### A. Facts

On April 6, 2017, the Appellant, Eric Berry, sexually abused his ex-girlfriend, K.A.<sup>1</sup> (TR, 1-9, 452-455; VR: 2/9/22, 10:21:43, 10:23:46.) On December 3, 2017, after K.A. had taken out a no-contact protective order, Berry broke into K.A.'s house in the middle of the night and assaulted her and her new boyfriend. (TR, 1-9, 342-392, 452-455; VR: 2/9/22, 10:27:45, 10:32:00, 10:55:00, 10:56:45.) While fleeing from the house, Berry assaulted police, fled from police, and resisted arrest. (VR: TR, 1-9, 342-392, 452-455; VR: 2/9/22, 10:58:50, 2:40:00, 3:42:03; 4:36:25.)

K.A. met, and began dating, Berry in 2012. (VR: 2/9/22, 10:18:44.) Around 2013, Berry moved into K.A.'s apartment in Bullitt County, and she lived there with him until 2016 when the relationship turned intolerably bad, and she ended it. (VR: 2/9/22, 10:18:44-10:19:50, 10:20:59.) Shortly thereafter in 2016, K.A. took out a protective order which required Berry to have no unlawful contact with her. (VR: 2/9/22, 10:20:59, 11:49:10, 12:04:55, 2:26:10.)

Between breaking up in 2016 and April 6, 2017, K.A. no longer had an intimate relationship with Berry, but she still communicated with him, mainly via text and emails. (VR: 2/9/22, 10:20:54-10:21:43.) On April 5, 2017, K.A. came home sometime after it was dark. (VR: 2/9/22, 10:21:43-10:23:09.) When she pulled into her driveway, Berry immediately pulled in behind her, making K.A. believe Berry had been waiting close by. (VR: 2/9/22, 10:21:43-10:23:09.) Reluctantly, K.A. cracked the window to talk to Berry.

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<sup>1</sup> Pursuant to RAP 32(B)(3) (formerly CR 76.12(4)(d)(iii)), the Commonwealth provides a Counterstatement and includes those matters "essential to a fair and adequate statement of the case."

(VR: 2/9/22, 10:22:00, 12:05:15.) Berry came up to the window of K.A.'s car, placed his hand inside, and pushed the button to lower the window all the way down. (VR: 2/9/22, 10:21:43-10:23:09.)

K.A., in an attempt to deescalate the situation, decided to go inside, and Berry followed her in, uninvited. (VR: 2/9/22, 10:21:43-10:23:09.) K.A. stated Berry was intimidating, relentless, and would stay on her until she would finally give in. (VR: 2/9/22, 10:21:43-10:23:09.) After Berry came into the house, he stated he was in a bad place, and he needed to stay all night.<sup>2</sup> (VR: 2/9/22, 10:21:43-10:23:09, 12:07:35; 11/19/20, 3:15:40.) K.A. relented, and she told him he could stay the night, but she made clear nothing was happening that night, that she was going to sleep in her daughter's room, and that he would have to sleep in another room. (VR: 2/9/22, 10:23:09-10:23:46, 10:25:45, 12:07:35.)

In the middle of the night (in the early morning hours of April 6), K.A. heard Berry get up and go to the restroom. (VR: 2/9/22, 10:23:09-10:23:46; 2/10/22, 11:02:50.) Berry then ominously stood in the doorway of K.A.'s bedroom before returning to bed. (VR: 2/9/22, 10:23:09-10:23:46.) Berry got up a second time, came into K.A.'s room, and he got into her bed. (VR: 2/9/22, 10:23:09-10:24:00.) She was awakened by Berry raising up her shirt and kissing her back. (VR: 2/9/22, 10:23:09-10:23:46.) Shocked, she asked, "What are you doing?" (VR: 2/9/22, 10:23:09-10:23:46.) K.A. then reiterated, "I told you not to come in here." (VR: 2/9/22, 10:23:09-10:23:46.)

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<sup>2</sup> Berry had a history of substance abuse which K.A. had tried to help him with before. (VR: 2/9/22, 11:54:00, 11:58:10, 12:01:05, 12:27:23.) He also had a history of manipulating and threatening her. (VR: 2/9/22, 10:22:00-10:23:10, 10:24:26, 10:46:01, 10:49:35-10:53:20, 12:59:30.)

Berry ignored her, and continued to lift her shirt. (VR: 2/9/22, 10:23:46-10:24:18.) A physical struggle ensued as K.A. fought to hold down her shirt, while Berry repeatedly lifted it. (VR: 2/9/22, 10:23:46-10:24:18.) It was a difficult struggle, because Berry was much larger than her. (VR: 2/9/22, 10:26:01.) Berry eventually ripped her shirt, ripped her bra, and bit K.A. on her chest. (VR: 2/9/22, 10:23:46-10:24:18.) He then pulled off her pajama pants, ripped off her underwear, and forced his hand into her vagina. (VR: 2/9/22, 10:23:46-10:24:18, 10:26:05.) K.A. described this as Berry assaulting her with his fingers. (VR: 2/9/22, 10:24:20.) Berry ultimately stopped, but then threatened K.A. that he would “cut [her] head off if he ever caught [her] with anybody else.” (VR: 2/9/22, 10:24:25.) He left the room, and she laid there numb, scared to death, and unable to get back to sleep. (VR: 2/9/22, 10:24:25-10:24:50.)

The next morning, Berry left for work, and K.A. made a plan to proceed to work and immediately thereafter report the assault and domestic violence.<sup>3</sup> (VR: 2/9/22, 10:24:50.) Following her work day, she went to the domestic-violence office, filed a complaint, sought an amended protective order,<sup>4</sup> and was examined by a sexual-assault-nurse examiner (SANE). (VR: 2/9/22, 10:24:50, 10:27:00, 10:29:11.) Ultimately, K.A. did not proceed with charges at that time, relying instead on the protective order. (VR: 2/9/22, 10:32:45, 10:33:15.)

By December of 2017, K.A. had met someone new (Jonathan Bielefeld) at her

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<sup>3</sup> K.A. did not feel like she could miss work, because she worked for a small office that was short staffed, and she did not want to put a strain on the office or disrupt their work. (VR: 2/9/22, 10:27:12.)

<sup>4</sup> An amended order was granted, which required Berry to have no contact and to stay at least 500 feet from her and her residence. (VR: 2/9/22, 10:27:45, 10:31:27, 10:33:45, 11:45:55, 2:27:35, 4:52:32.)

church, and they had begun dating. (VR: 2/9/22, 10:44:20, 10:46:20, 10:53:45.) On December 2, 2017, K.A., her twelve-year-old daughter K.K., and Bielefeld, went to pick out a Christmas tree, brought it back to K.A.'s house, and decorated it. (VR: 2/9/22, 10:53:40.) Eventually they retired for the evening, and they went to sleep. (VR: 2/9/22, 10:53:40, 3:00:52.) Sometime after 3:00 a.m. on December 3, K.A. was awakened by a loud boom, and then a repeated succession of loud booms. (VR: 2/9/22, 10:54:55, 3:01:20.) She knew it was Berry. (VR: 2/9/22, 10:55:00, 10:59:40.) He was banging on the back door and attempting to kick it open, which he ultimately did. (VR: 2/9/22, 10:55:00, 10:59:40, 2:36:01, 3:01:25, 3:02:30, 3:40:35, 3:51:55.)

K.A. grabbed her phone, ran into K.K.'s room, and said, "It's him." (VR: 2/9/22, 10:55:10, 3:02:30.) K.A. told her daughter to call 9-1-1, because K.A.'s attempt to call did not go through. (VR: 2/9/22, 10:55:00, 3:02:30.) K.K. gave K.A. the phone, K.A. hid in the right side of the closet, and whispered to the 9-1-1 operator. (VR: 2/9/22, 10:57:40, 11:03:35, 11:14:10, 3:05:00.) Berry came into the house, went into K.A.'s room where Bielefeld was, attacked him, and yelled, "Where's she at?" (VR: 2/9/22, 10:55:36-10:55:49, 2:36:05, 3:03:27.) Bielefeld responded that he did not know and stated, "Probably hiding from you." (VR: 2/9/22, 10:55:36, 2:36:01, 3:03:40.) Berry yelled, "Fuck you!" and repeatedly hit Bielefeld in the head. (VR: 2/9/22, 10:56:44, 2:37:00, 3:03:45.)

Berry stopped that attack, and he went to K.K.'s room. (VR: 2/9/22, 10:56:44, 2:37:21, 3:03:45.) K.K. was still in her bed, and Berry again yelled and inquired about K.A.'s whereabouts. (VR: 2/9/22, 10:57:00, 3:03:45.) K.K. responded that she did not know. (VR: 2/9/22, 10:57:10, 3:03:45.) Berry looked around the room, under K.K.'s

comforter, and in the left side of the closet. (VR: 2/9/22, 3:04:25, 3:05:00.) Not finding K.A., Berry returned to the other bedroom, where Bielefeld was using his t-shirt to soak up the blood from his face. (VR: 2/9/22, 2:37:30.) Berry ripped the t-shirt away and used it to strangle Bielefeld. (VR: 2/9/22, 2:37:30, 2:37:50, 2:46:30.) Berry stopped just prior to Bielefeld losing consciousness. (VR: 2/9/22, 2:37:30, 2:46:30.)

Berry left the room, continued his search inside and outside of the house. (VR: 2/9/22, 2:38:20, 3:05:10.) Berry came back to the room where Bielefeld was located and attacked him again. (VR: 2/9/22, 2:38:35.) Berry was on top of Bielefeld. (VR: 2/9/22, 2:38:40.) Bielefeld grabbed Berry and pulled him in close so he could not swing his arms, so Berry bit Bielefeld's ear. (VR: 2/9/22, 2:38:45.) Berry got up and returned to K.K.'s room. (VR: 2/9/22, 10:57:45, 2:39:10, 3:05:50.) This time he checked the right side of the closet, ripped off the sliding doors, and he found K.A. (VR: 2/9/22, 10:57:40, 3:05:00, 3:56:35, 4:53:52.)

Berry grabbed K.A. by her hair and dragged her out of the closet to the middle of the floor next to K.K.'s bed. (VR: 2/9/22, 10:57:38, 3:05:10.) Berry got on top of K.A. and began hitting her in the face and head. (VR: 2/9/22, 10:57:40, 11:36:35, 12:39:00, 3:05:10, 3:06:01.) As Berry repeated his attack, "blow after blow," K.A. thought she would die. (VR: 2/9/22, 10:58:00.) K.K. yelled at Berry, "You promised you would never hit my mom again!" (VR: 2/9/22, 10:58:40, 3:06:17.) Twelve-year-old K.K. attempted to intervene, but Berry hit her as well. (VR: 2/9/22, 10:58:40, 3:06:17.)

Berry then returned to, and escalated, his assault on K.A. (VR: 2/9/22, 10:58:19, 10:58:48.) He grabbed her pajama pants and her underwear and ripped them off of her.<sup>5</sup>

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<sup>5</sup> K.A. was bottomless when officers arrived. (VR: 2/9/22, 11:37:20, 12:38:30.) As they

(VR: 2/9/22, 10:58:19, 10:59:18, 3:07:20, 5:28:50.) K.A. thought, “He’s going to rape me in front of my child.” (VR: 2/9/22, 1:03:17.) Fortuitously, at that moment, an officer arrived, and banged on the front door. (VR: 2/9/22, 10:58:20, 10:58:55, 3:07:20, 3:07:57.) Berry got up, and he started towards the back door to flee. (VR: 2/9/22, 10:59:00, 2:39:20, 3:40:15, 4:01:40, 4:36:21, 4:40:00.) Another officer had come around the back and entered the house with his gun drawn. (VR: 2/9/22, 3:40:15-3:52:30, 4:36:21, 4:41:32.) The officer observed Berry, determined he was unarmed, and the officer began holstering his weapon. (VR: 2/9/22, 3:40:15-3:52:30.) Berry advanced toward the officer, hit him in the head, and fled out the back door. (VR: 2/9/22, 3:40:15-3:52:30.) Berry proceeded around the side of the house, toward the front of the house, where another officer was located. (VR: 2/9/22, 3:40:15-3:52:30, 4:37:00-4:50:00.)

Berry saw the officer, lowered his head, charged the officer, and head-butted him. (VR: 2/9/22, 2:40:50, 4:36:30.) While the blow dazed the officer, he was able to grab and slow down Berry, which allowed other arriving officers to close in and assist in subduing Berry. (VR: 2/9/22, 4:36:30, 4:41:30, 4:43:10.) Officers then placed Berry in custody, using two sets of handcuffs because of Berry’s size. (VR: 2/9/22, 4:36:50-4:39:30.)

### **B. Procedural History**

On January 25, 2018, Berry was indicted for first-degree burglary, two counts of second-degree assault, two counts of first-degree sexual abuse, two counts of third-degree assault (police officer), first-degree fleeing or evading, fourth-degree assault, violation of

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were arresting Berry, K.A. asked her daughter to get her a pair of pants so she would not be naked from the waist down while officers were in her house. (VR: 2/9/22, 11:37:20, 12:38:30.)

a protective order, resisting arrest, and being a first-degree persistent felony offender (PFO). (TR, 1-9.) Berry was arraigned on January 26. (TR, 23-26.)

Prior to trial, Berry filed a motion to sever counts five and ten of the indictment (the April sexual-abuse and the violation-of-protection-order charges). (TR, 130-135.) The trial court ultimately denied the motion. (TR, 176-180, 369-370.) During a pretrial conference on April 30, 2020, Berry made a verbal request for a speedy trial, and he filed a written motion on June 18, 2020. (TR, 146-148; VR: 4/30/20, 3:05:10.) On November 30, 2021, Berry filed a motion to dismiss on speedy-trial grounds. (TR, 202-209.) The trial court denied the motion to dismiss finding the trial was delayed because of the COVID-19 pandemic and Berry's own actions. (TR, 213-214.)

A trial began on February 8, 2022. (VR: 2/8/22, 11:03:20.) The jury convicted Berry of first-degree burglary, one count of first-degree sexual abuse (for the April assault), two counts of third-degree assault, two counts of fourth-degree assault, violation of a protective order, and resisting arrest. (TR, 342-392, 452-455.) The jury recommended a total sentence of 25 years. (TR, 342-392, 452-455.) At the formal sentencing, the trial court followed the jury's recommendation. (TR, 452-455.)

## ARGUMENT

### I. Berry Was Not Denied His Right To A Speedy Trial.

The Sixth Amendment of the United States Constitution and Section 11 of the Kentucky Constitution guarantee an accused person the right to a speedy trial. “This Court analyzes alleged violations of the right to speedy trial under the four-factor *Barker* test.” *Henderson v. Commonwealth*, 563 S.W.3d 651, 661 (Ky. 2018) (citing *Barker v. Wingo*, 407 U.S. 514 (1972)) (other citations omitted). The four factors under this test are: “(1) the length of delay, (2) the reason for the delay, (3) the defendant’s assertion of his right, and (4) the prejudice to the defendant caused by the delay.” *Henderson*, 563 S.W.3d at 661 (citing *Dunaway v. Commonwealth*, 60 S.W.3d 563, 570 (Ky. 2001)). “No single one of these factors is determinative by itself.” *Henderson*, 563 S.W.3d at 661 (citations omitted). This Court regards “none of the four factors . . . as either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant.” *Id.* (citations omitted).

#### A. Length of Delay

The speedy-trial analysis begins by determining if the length of delay was presumptively prejudicial to the defendant. *Dunaway*, 60 S.W.3d at 569 (citation omitted). “Whether a delay is presumptively prejudicial depends on both the length of the delay and the seriousness and complexity of the charges involved.” *Smith v. Commonwealth*, 636 S.W.3d 421, 441 (Ky. 2021) (citations omitted). “The length of the delay is the time between the earlier of the arrest or the indictment and the time the trial begins.” *Id.*; see also *Goncalves v. Commonwealth*, 404 S.W.3d 180, 199 (Ky. 2013)

(citations omitted). “This Court has generally considered delays of over one year to be presumptively prejudicial.” *Goncalves*, 404 S.W.3d at 199 (citing *Bratcher v. Commonwealth*, 151 S.W.3d 332 (Ky. 2004)). This Court has also held that charges of first-degree robbery and one count of PFO are considered to be serious in nature and moderately complex. *Goncalves v. Commonwealth*, 404 S.W.3d at 199.

Even in some cases where the delay exceeds what is considered presumptively prejudicial, Kentucky courts have still held no speedy trial violation occurred. In *Smith v. Commonwealth*, 361 S.W.3d 908, 913-14 (Ky. 2012), this Court held that while the delay was presumptively prejudicial, the defendant’s right to speedy trial was not violated by a more than two year delay between his arrest and trial. In *Preston v. Commonwealth*, 898 S.W.2d 504, 508 (Ky. App. 1995), it was found that a 41-month delay was not a speedy trial violation. In *Preston*, it was determined that most of the delay was attributable to the defense, the delay was not the fault of the Commonwealth, that vague allegations of anxiety were insufficient to state a claim of prejudice, and the defendant failed to show that a witness who died during the delay would have been a material witness. *Id.* Lastly, this Court also held that a delay of 56 months (in *Henderson*) and approximately five years (in *Goben*) did not violate the defendant’s right to a speedy trial. *Henderson*, 563 S.W.3d at 661-667; *Goben v. Commonwealth*, 503 S.W.3d 890, 904-906 (Ky. 2016).

Here, Berry was arrested on December 3, 2017, was indicted on January 25, 2018, and went to trial on February 8, 2022. (TR, 1-9, 11-15; VR: 2/8/22, 11:04:00.) Berry was released on bond on May 14, 2021.<sup>6</sup> (TR, 191-193.) The time between Berry’s initial

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<sup>6</sup> Berry failed to show up for the final pretrial conferences on February 4, 2022 and February 7, 2022, and a bench warrant was issued for his arrest. (TR, 266, 280.)

arrest and the trial was approximately four years and two months. The charges were of a serious nature and were at the least moderately complex. Berry was charged with first-degree burglary (class B felony), first-degree sexual abuse, assault against multiple victims, and first-degree PFO. (TR, 1-9.) While the time from arrest to trial may be significant, and fall within the presumptive prejudice category, Berry's speedy-trial rights were not violated. All of the delay is attributable to Berry or a valid, justified reason.

### **B. The Reason for Delay**

The second factor in the analysis is the reason for the delay. *Goncalves*, 404 S.W.3d at 200. There are three categories of reasons for delay: (1) a deliberate attempt to delay the trial in order to hamper the defense; (2) a more neutral reason such as negligence or overcrowded courts; and (3) a valid reason, such as a missing witness. *Dunaway*, 60 S.W.3d at 570.

When balancing the reasons for delay to determine if a speedy trial violation has occurred, a reviewing court must first identify the type of delay in order to assign the appropriate weight. *Goncalves*, 404 S.W.3d at 200 (citation omitted). "A deliberate attempt by the Commonwealth to cause delay in order to hamper the defense will be accorded the heaviest weight in this analysis." *Id.* "Neutral reasons for delay, such as negligence or an overcrowded docket, will be weighed less heavily against the Commonwealth, but will nonetheless tip in the defendant's favor." *Id.* "Finally, a valid reason for delay . . . will not be weighed against the Commonwealth, as valid reasons for delay are appropriately justified." *Id.*

An examination of the record reveals that there were a number of reasons for delay in Berry's case. All of which are attributable to him, or to justifiable, valid reasons.

First, on November 18, 2018, Berry alerted the court to potential mental-health issues. (TR, 49-50.) On April 11, 2019, prior to Berry filing a speedy-trial motion, he filed a notice of his intention to introduce insanity, mental-condition, or mental-defect testimony at trial. (TR, 49-50.) Due to this notice and claim, Berry was ordered to be evaluated by the Kentucky Correctional Psychiatric Center (KCPC) for competency, and then criminal responsibility. (TR, 52-54, 55, 62.) The evaluation process took several months and was completed just before an October 7, 2019 pretrial conference. (TR, 72-73; VR: 10/7/19, 10:06:35.)

At the October 7 pretrial conference, the Commonwealth asked to set the case on the trial docket, but the defense stated it was not ready to set the case for trial. (VR: 10/7/19, 10:06:35-10:11:50.) At the next pretrial date on December 3, 2019, Berry did not request a trial date, but the trial court nonetheless directed a trial date be set. (VR: 12/3/19, 9:34:50, 9:36:14, 9:47:10.) A trial date was set for June 2, 2020. (VR: 2/3/20, 10:28:14.)

On April 1, 2020, this Court entered Administrative Order 2020-16 ordering all judicial facilities closed because of the COVID-19 pandemic. It was not until April 30, 2020,<sup>7</sup> that Berry made his speedy-trial request. (VR: 4/30/20, 3:05:15; TR, 138-139.) On May 19, Administrative Order 2020-40 (effective June 1) ordered all jury trials postponed until August 1, 2020. Berry filed his written speedy-trial motion on June 18,

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<sup>7</sup> Berry cites April 3, 2020, in his brief as the date that a request for speedy trial was made and cites the motion to dismiss in the trial record. (Appellant's Brief, 12; TR, 202-206.) However, it appears the motion to dismiss may be inaccurate as the court docket and video record indicate April 30, 2020, as the date the first request was made. (TR, 138-139; VR: 4/30/20, 3:05:15.)

2020. (TR, 146-148.) Because of multiple Supreme Court COVID-related orders, Berry's subsequently scheduled trial dates (between April 2020 and April 2021) had to be canceled and postponed. (VR: 1/7/21, 10:36:59; 7/6/21, 9:26:30.)

On January 7, 2021, the trial court attempted to set a trial date for May 18, but the defense attorney was going to be on maternity leave and requested a later date. (VR: 1/7/21, 10:38:40.) An August 3 trial date was agreed upon. (VR: 1/7/21, 10:39:15.) At the final pretrial conference before the August trial date, Berry sought to continue the trial and to hire private counsel. (VR: 7/26/21, 9:25:00, 9:27:50.) The Commonwealth objected to continuing the trial, again stated its desire to proceed to trial, and that it was ready for trial. (VR: 7/26/21, 9:29:40, 9:24:48.) Over the Commonwealth's objection, the trial court granted Berry's request for a continuance. (VR: 7/26/21, 9:34:55.) New counsel was obtained, and the final, firm, trial date of February 8, 2022, was set. (TR, 201.) Trial began on February 8 as scheduled.<sup>8</sup>

The reasons for the delays were attributable to Berry or valid, justified reasons. Initially, in direct response to Berry's own notice, the case had to be continued for an evaluation of competence and criminal responsibility. As this Court stated in *Henderson*, a "valid reason, such as a missing witness, should serve to justify appropriate delay.

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<sup>8</sup> While trial began on February 8, Berry attempted to fire counsel just days before the trial, failed to show up at a February 4 hearing, failed to show up at the final pretrial conference (February 7), and nearly derailed the trial date. (VR: 2/7/22, 3:07:10; TR, 266, 280.) On February 7, Berry failed to show up for the final pretrial conference requiring a bench warrant to be issued. (VR: 2/7/22, 3:07:10; TR, 266, 280.) However, the trial court denied defense counsel's request to move the trial date and allow counsel to withdraw. (VR: 2/7/22, 3:09:00, 3:13:05, 3:14:20.) This denial, along with the threat of bond forfeiture (\$50,000) allowed the trial to proceed on February 8 and secured Berry's appearance. (VR: 2/7/21, 3:18:50; 2/8/21, 11:03:20.) Since Berry appeared for trial, the judge recalled the bench warrant. (VR: 2/8/21, 5:22:40.)

Ensuring a defendant’s constitutional right to be competent is a valid reason and justifies reasonable delay connected to those proceedings.” *Henderson*, 563 S.W.3d at 664 (citations omitted).

The next series of delays were attributable to mandatory court closings as dictated by this Court’s Administrative Orders precipitated by the COVID-19 pandemic. This, again, was a valid, justifiable reason for delay. The final delay was caused by Berry’s own actions and request to continue the trial. A week before the August 3, 2021 trial date, he asked to continue the case to hire private counsel, contributing to the delay. This Court has recognized that a defendant may contribute to the delay of the case, and “delays caused by the defendant cannot be weighed against the Commonwealth[.]” *Goncalves*, 404 S.W.3d at 200 (citations omitted).

In fact, the Commonwealth objected to delays (multiple times) and was prepared to go to trial. None of the delays were caused by the Commonwealth. Tellingly, at the January 2021 hearing discussing possible trial dates, defense counsel acknowledged, “I recognize [the delay]’s not the Commonwealth’s fault . . . I don’t think [the prosecutor] is in charge of a global pandemic that is causing the courts to shut down.” (VR: 1/7/21, 10:41:31.) The reasons for delay strongly cut against Berry. There is no sign of an attempt by the Commonwealth to deliberately delay the trial or prejudice Berry.

### **C. Defendant’s Assertion of the Right**

The third factor concerns a defendant’s assertion of his right to a speedy trial. *Goncalves*, 404 S.W.3d at 202. Berry made his first request for a speedy trial on April 30, 2020, a few weeks after this Court began issuing COVID-19 response orders restricting trials and courtroom participation. (4/30/20, 3:03:00, 3:05:15.) Prior to this,

Berry avoided setting a trial date, while the Commonwealth requested one. (VR: 10/7/19, 10:06:35, 10:10:40.) Moreover, after his initial demand for a speedy trial was made, when trial was imminent, Berry made requests and attempts to continue those trial dates—over the Commonwealth’s objection. (VR: 7/26/21, 9:26:50, 9:29:45; 2/7/22, 3:07:05, 3:08:36, 3:09:35; TR, 213-214.)

The timing of his original request, and the requests to delay the trial “cast doubt on the sincerity of [his] demand for a speedy trial.” *Stacy v. Commonwealth*, 396 S.W.3d 787, 798 (Ky. 2013) (citation omitted). Although Berry did assert his right to a speedy trial, by creating delays and requesting to continue the case, he did not vigorously and sincerely do so. *See Stacy*, 396 S.W.3d at 798. As a result, this factor cannot weigh in Berry’s favor.

#### **D. Prejudice to the Defendant**

The fourth factor is whether there was prejudice to the defendant. *Goncalves*, 404 S.W.3d at 202; *see also Barker*, 407 U.S. at 532. Under this fourth prong courts “must analyze any alleged prejudice by considering the interests that the right to a speedy trial is designed to protect: (1) to prevent oppressive pretrial incarceration; (2) to minimize the anxiety and concern of the accused; (3) to limit the possibility that the defense will be impaired.” *Goncalves*, 404 S.W.3d at 202; *see also Henderson*, 563 S.W.3d at 665. “The last consideration is the most serious.” *Henderson*, 563 S.W.3d at 665 (citations omitted).

Berry’s pretrial incarceration was not oppressive and was due to his own actions. Berry had an extensive criminal history with multiple felonies including aggravated assault and acts of domestic violence. (VR 4/30/20, 3:09:31, 3:17:45; 6/12/20, 2:09:20, 2:10:00; TR, 1-9, 99-123.) There was also substantial evidence of Berry’s guilt on the

violent charges here. Due to Berry's violent actions and history, the bond was set at \$50,000 and resulted in his pretrial incarceration. (TR, 21-23.) Nevertheless, Berry was able to post bond in May 2021, and he was released. (TR, 190-193.)

Next, "general complaints about anxiety or concern are insufficient to state a cognizable claim" of prejudice. *Stacy*, 396 S.W.3d at 799 (citations omitted). "An affirmative showing of unusual anxiety which extends beyond that which is inevitable in a criminal case" is required. *Stacy*, 396 S.W.3d at 799; *see also Dunaway*, 60 S.W.3d at 572. Here, Berry "has not presented any proof of anxiety beyond that which accompanies an ordinary prosecution." *Henderson*, 563 S.W.3d at 665. In fact, Berry makes no argument about anxiety associated with any delay.

Finally, the critical inquiry is whether Berry suffered actual prejudice by showing a demonstrable impairment of his defense. Berry argues in his brief, "While a portion of [the] delay could be attributed to the COVID-19 pandemic, [Berry] was still prejudiced by such a long delay[.]" and "the long delay diminished the memories of the witnesses in this case." (Appellant's Brief, 14-15.) Berry does not specifically identify which witnesses were impaired, or reference any specific instance of "diminished memory" in his argument. This is insufficient. "Conclusory claims about . . . the *possibility* of an impaired defense are not sufficient to show prejudice." *Bratcher v. Commonwealth*, 151 S.W.3d 332, 345 (Ky. 2004). "Appellant must demonstrate actual prejudice." *Stacy*, 396 S.W.3d at 799. He has not.

Looking at all four factors, Berry's right to a speedy trial was not violated. While the delay between arrest and trial was significant, the reasons for delay are directly attributable to Berry's actions or valid, justified reasons. Furthermore, Berry requested,

or acquiesced to, many of the delays undercutting the sincerity of any assertion of his speedy-trial demand. Lastly, any delay did not result in prejudice to Berry. The evidence in this case was overwhelming. The timing of Berry's trial did nothing to change that. Berry's case was not prejudiced and no speedy-trial violation occurred.

## **II. The Trial Court Did Not Abuse Its Discretion When It Denied Berry's Severance Request.**

Berry next claims that the trial court erred when it declined to sever the April 6, 2017 sexual-abuse count. (Appellant's Brief, 15.) Berry filed a motion to sever counts five and ten of the indictment.<sup>9</sup> (TR, 130-135.) The trial court denied the motion. (TR, 176-180; VR: 2/8/22, 12:13:10.) Berry now argues that the April 2017 sexual-abuse charge should have been severed because this crime was not close enough in time and was not "strikingly similar" to the December 2017 crimes. (Appellant's Brief, 18.)

"The decision to sever charges lies within the discretion of the trial court and will be overturned only where an abuse of discretion has occurred." *Debruler v. Commonwealth*, 231 S.W.3d 752, 760 (Ky. 2007) (citations omitted). A trial court abuses its discretion if its decision was "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). "Recognizing that trial courts are in the best position to strike the proper balance, appellate courts have long afforded them much discretion in handling joinder issues." *Smith v. Commonwealth*, 520 S.W.3d 340, 353 (Ky. 2017) (citations omitted). "A criminal defendant is not entitled to severance unless he positively shows prior to trial that joinder would be unduly prejudicial." *Cohron v. Commonwealth*, 306 S.W.3d 489,

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<sup>9</sup> These counts corresponded with the first-degree sexual abuse charge (from April 6, 2017) and the violation of a protective order. (TR, 130-135, 168-172, 176-180.)

493 (Ky. 2010) (citations omitted).

RCr 6.18 permits two or more offenses to be charged in the same indictment provided that “the offenses are of the same or similar character or are based on the same acts or transactions connected together or constituting parts of a common scheme or plan.” Additionally, RCr 8.31 directs when severance is necessary, and states that “[i]f it appears that a defendant or the Commonwealth is or will be prejudiced by a joinder of offenses . . . the court shall order separate trials of counts . . . or provide whatever other relief justice requires.” RCr 8.31. “[A] defendant must prove that joinder would be so prejudicial as to be unfair or unnecessarily or unreasonably hurtful.” *Ratliff v. Commonwealth*, 194 S.W.3d 258, 264 (Ky. 2006).

Additionally, “[i]f evidence from one of the offenses joined in the indictment would be admissible in a separate trial of the other offenses, the joinder of offenses generally will not be prejudicial.” *Cohron*, 306 S.W.3d at 493. Evidence of similar acts perpetrated against the same victim, this Court has “noted many times, is ‘almost always admissible,’ under KRE 404(b), because it will almost always be significantly probative of a material issue aside from the defendant's character.” *Jenkins v. Commonwealth*, 496 S.W.3d 435, 458 (Ky. 2016) (citing *Noel v. Commonwealth*, 76 S.W.3d 923, 931 (Ky. 2002)). “[E]vidence of prior, similar acts of abuse against the same victim of the alleged crime is almost always admissible under KRE 404(b) to prove the defendant's intent, plan, or absence of mistake or accident.” *Dant v. Commonwealth*, 258 S.W.3d 12, 19 (Ky. 2008) (internal quotations and citations omitted).

Berry was indicted on two counts of sexual abuse: one for the April incident and one for the December incident. (TR, 1-9.) Prior to trial, the Commonwealth amended the

December sexual abuse to attempted sexual abuse. (VR: 11/19/20, 3:17:40; TR, 174-175.) The Commonwealth argued joinder of these charges was appropriate because the events were similar in nature and against the same victim. (VR: 11/19/20, 3:15:40-3:23:00; TR, 168-174.) As the Commonwealth argued and trial court recognized, the evidence from the first crime was also important and admissible to show motive, intent, identity, absence of mistake, and modus operandi. (VR: 11/19/20, 3:15:40-3:23:00; 2/8/22, 12:13:10; TR, 168-180.)

Here, Berry embarked upon a common scheme to harass and victimize K.A. (VR: 2/9/22, 10:21:00, 10:22:50, 10:31:50, 10:34:00, 10:38:05; TR, 168-180.) Berry repeatedly came to K.A.'s house and sent her messages in direct contravention of her request and court orders. (VR: 2/9/22, 10:34:00, 10:38:05, 10:48:30, 2:27:33.) He often interacted with K.A. in a threatening and manipulative manner. (VR: 2/9/22, 10:22:00-10:23:10, 10:24:26, 10:46:01, 10:49:35-10:53:20, 12:59:30.) Then, on December 3, 2017, he escalated to his most violent and egregious behavior. (VR: 2/9/22, 10:58:19-10:59:40, 11:37:21, 12:38:30, 5:28:50; TR, 168-180.) However, this action was scarily similar to his actions against K.A. in April, where he attacked her, ripped her shirt and bra, pulled off her pants, and ripped her underwear. (VR: 2/9/22, 10:23:46-10:24:55; 10:58:19-10:59:40, 11:37:21, 12:14:59, 12:38:30, 5:28:50; TR, 168-180.)

Since Berry maintained a common scheme, against a particular victim, the joinder of offenses was not in error. The offenses occurred in a similar way, and since much of the evidence from the first offense would have been admissible to prove identity, plan, and intent in the other offenses, joinder was proper. *See* KRE 404(b); *Cohron*, 306 S.W.3d at 493, 495. Specifically, the fact Berry physically controlled the same victim,

and ripped her clothing in the same manner would have been admissible to show modus operandi, identity, motive, and intent in both crimes. (VR: 2/9/22, 10:23:46-10:24:55; 10:58:19-10:59:40, 11:37:21, 12:14:59, 5:28:50; TR, 168-180); *Dant*, 258 S.W.3d at 19. This evidence would have been relevant to establish his identity and prove that Berry was the perpetrator of the latter crime and his intent and motive.

The crimes were all connected because it was the same victim, at the same house, and there was a common scheme. In *Furnish v. Commonwealth*, this Court affirmed the trial court's consolidation of a theft charge with a burglary-murder case involving the same victim at the same home. *Furnish v. Commonwealth*, 95 S.W.3d 34, 40-52 (Ky. 2002). In *Furnish*, the defendant entered the victim's home and stole jewelry. *Id.* at 40. A month later, the defendant broke into the same house and murdered the homeowner. *Id.* Affirming the trial court's severance denial, this Court stated that the defendant's prior visit to the victim's home was probative because it demonstrated that he was aware of the house and its contents. *Id.* at 52-53. This evidence tended to establish "identity, motive, and part of a plan for criminal action." *Id.* at 52. This Court noted that while joining charges may result in prejudice, nonetheless in *Furnish* (like here), it was "relevant, probative and within the requirements of RCr 6.18." *Id.* at 53.

"The trial court has broad discretion with respect to joinder and will not be overturned in the absence of a showing of prejudice and a clear abuse of discretion." *Cohron*, 306 S.W.3d at 493. Since Berry's crimes were interconnected and the first sexual-abuse crime was evidence of motive, intent, absence of mistake, and modus operandi in the second crime against the same victim, there can be no showing of undue prejudice. "Even if the failure to sever counts was in error, an erroneous severance ruling

does not justify appellate relief unless it resulted in actual prejudice to the party opposing the ruling.” *Smith*, 520 S.W.3d at 353 (citations omitted). The trial court did not abuse its discretion in denying severance, and certainly no “actual prejudice” has been shown.

### **III. The Trial Court Did Not Allow Improper Bolstering Testimony.**

For Berry’s next claim, he argues that the trial court erred by allowing two witnesses, Briana Sheahan (the SANE nurse) and Detective Lisa Livers to bolster K.A.’s testimony. (Appellant’s Brief, 22.) Berry concedes this issue was unpreserved and requests palpable-error review under RCr 10.26. (Appellant Brief, 22.) Contrary to Berry’s claim, the trial court did not err by allowing the testimony.

To begin, no objection was made to the testimony of Sheahan or Livers. RCr 9.22 requires a party to make “known to the court the action he desires the court to take or his objection to the action of the court.” *Cash v. Commonwealth*, 892 S.W.2d 292, 295 (Ky. 2003) (citations omitted). “Failure to comply with this rule renders an error unpreserved.” *Id.* (citing *Bowers v. Commonwealth*, 555 S.W.2d 241 (Ky. 1977)). Unpreserved errors are limited to palpable-error review. *Early v. Commonwealth*, 470 S.W.3d 729, 737 (Ky. 2015); *Potts v. Commonwealth*, 172 S.W.3d 345, 348 (Ky. 2005).

“For error to be palpable, it must be easily perceptible, plain, obvious and readily noticeable.” *Commonwealth v. Goss*, 428 S.W.3d 619, 627 (Ky. 2014) (citation omitted). The error must result in “manifest injustice” which requires “showing . . . [a] probability of a different result or error so fundamental as to threaten a defendant’s entitlement to due process of law.” *Id.* (citation omitted). Palpable error occurs when “the defect in the proceeding was shocking or jurisprudentially intolerable.” *Id.* (citations omitted). “[I]f upon a consideration of the whole case this court does not believe there is a substantial

possibility that the result would have been any different,” then relief is not warranted. *Schoenbachler v. Commonwealth*, 95 S.W.3d 830, 836 (Ky. 2003) (citations omitted).

At trial, the prosecutor asked Detective Livers, “As far as your investigation goes, as far as credibility . . . the statement that you got from [K.A.], and then reviewing the SANE exams, there was some corroboration there, right?” (VR: 2/10/22, 10:40:00.) Detective Livers responded, “Yes, correct.” (VR: 2/10/22, 10:40:00.) Berry argues this testimony and the prosecutor’s reference to Detective Livers’ testimony during closing arguments was improper bolstering. (Appellant’s Brief, 23-24.) Berry also argues that the SANE nurse’s testimony, and the prosecutor’s associated closing-argument remarks, about K.A.’s recitation of her injuries during the SANE examination was additionally improper bolstering. (Appellant’s Brief, 23-24.)

“Rulings upon admissibility of evidence are within the discretion of the trial judge; such rulings should not be reversed on appeal in the absence of a clear abuse of discretion.” *Edmonds v. Commonwealth*, 433 S.W.3d 309, 312 (Ky. 2014) (citations omitted). Here, the trial court did not abuse its discretion. Nevertheless, even if there was error, there was certainly no shocking or jurisprudentially intolerable result, or a result that would have been different absent the testimony.

In addressing claims of bolstering, this Court has stated, “Generally, a witness should not be allowed to vouch for the truthfulness of other witnesses.” *Roach v. Commonwealth*, 313 S.W.3d 101 (Ky. 2010) (citations omitted). However, such “evidence may be admissible if offered to rebut an attack on a witness’s credibility.” *Commonwealth v. Wright*, 467 S.W.3d 238, 247 (Ky. 2015) (citations omitted); *see also Dickerson v. Commonwealth*, 485 S.W.3d 310, 321 (Ky. 2016); *Tackett v.*

*Commonwealth*, 445 S.W.3d 20, 33 (Ky. 2014). Also, “testimony regarding a witness’s background is admissible.” *Tackett*, 445 S.W.3d at 33 (citing *Ernst v. Commonwealth*, 160 S.W.3d 744, 763 (Ky. 2005)). And, “a certain amount of background evidence regarding the victim is relevant to understanding the nature of the crime.” *Ernst*, 160 S.W.3d at 763 (citing *Bussell v. Commonwealth*, 882 S.W.2d 111, 113 (Ky. 1994)).

To begin, the testimony was not improper bolstering evidence, but instead merely background evidence. The information from the detective and SANE nurse both gave background on K.A. and the nature of the injuries she suffered. (VR: 2/10/22, 10:18:00, 10:40:00, 11:02:57, 11:05:30.) It was not improper.

Next, the testimony was relevant to rebut attacks on K.A.’s credibility. K.A.’s “truthfulness was at issue in this case from the very beginning.” *Dickerson*, 485 S.W.3d at 321. Like in *Dickerson*, “the truthfulness of her statements to police . . . was put in issue” early in the case. *Id.* Defense counsel urged the jury during opening statements:

I want you to think about the credibility of the witnesses, particularly [K.A.]. I won’t tell you everything you might hear or won’t hear, but think about that. You’re going to hear that she has a long history of lying, dating back 20 years. Three times she’s been convicted of lying to police . . . lying to get government benefits, on and on. . . . What I can tell you is that what happened allegedly in April of 2017, what [the prosecution and K.A.] say happened, isn’t true.

(VR: 2/8/22, 5:11:55-5:12:47.) Clearly, K.A.’s credibility was attacked. Thus, “[t]he complained-about testimony . . . was rehabilitative proof that tended to rebut the direct and implied charges of fabrication leveled against [K.A.] from the outset as part of the defense’s . . . trial strategy.” *Dickerson*, 485 S.W.3d at 321.

None of the witnesses improperly vouched for K.A.’s truthfulness and there was no improper bolstering. The trial court did not abuse its discretion by allowing the

testimony. Even if there was error, nonetheless, the testimony certainly did not result in a “manifest injustice,” and there has been no showing of the “probability of a different result or error so fundamental as to threaten a defendant’s entitlement to due process of law.” *Goss*, 428 S.W.3d at 627.

#### **IV. Berry Was Not Entitled to An Instruction on Voluntary Intoxication.**

Berry next claims that he tendered an intoxication instruction for first-degree burglary, and the trial court erred in not giving the instruction to the jury.<sup>10</sup> (Appellant’s Brief, 27.) While the trial court recognized there was “some evidence” of drunkenness (Berry smelled like alcohol), the trial court properly determined there was insufficient evidence of the voluntary intoxication legally necessary to give the instruction and denied Berry’s request. (VR: 2/11/22, 9:37:15, 9:50:30; TR, 342-392.)

This Court reviews the trial court’s decision to provide a jury instruction under an abuse of discretion standard. *Downs v. Commonwealth*, 620 S.W.3d 604, 613 (Ky. 2020). “[A] trial court abuses its discretion when its decision is arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Downs*, 620 S.W.3d at 613 (citing *English*, 993 S.W.2d at 945). Further, this Court stated in *Downs*:

A decision to give or to decline to give a particular jury instruction inherently requires complete familiarity with the factual and evidentiary subtleties of the case that are best understood by the judge overseeing the trial from the bench in the courtroom. Because such decisions are necessarily based upon the evidence presented at the trial, the trial judge’s superior view of that evidence warrants a measure of deference from appellate courts that is reflected in the abuse of discretion standard.

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<sup>10</sup> Berry’s argument only specifically mentions the burglary charge in regards to the voluntary-intoxication-instruction claim. (Appellant’s Brief, 27-30.) Further, Berry’s motion for a new trial, likewise, only specifically mentioned the burglary offense. (TR, 400.)

*Downs*, 620 S.W.3d at 613 (citing *Sargent v. Shaffer*, 467 S.W.3d 198, 203 (Ky. 2015)).

The trial court has “a duty to instruct the jury on the whole law of the case.” *Daniel v. Commonwealth*, 607 S.W.3d 626, 644 (Ky. 2020) (citations omitted). “This obligation extends to lesser-included offenses and affirmative defenses, but is dependent upon there being sufficient evidence to warrant the giving of an instruction.” *Turner v. Commonwealth*, 544 S.W.3d 610, 625 (Ky. 2018) (citations omitted). The duty to instruct applies to defenses such as voluntary intoxication. *Fredline v. Commonwealth*, 241 S.W.3d 793, 797 (Ky. 2007). Specifically, “the entitlement to an affirmative instruction is [dependent] upon the introduction of some evidence justifying a reasonable inference of the existence of a defense.” *Id.* (citing *Grimes v. McAnulty*, 957 S.W.2d 223, 226 (Ky. 1997)). KRS 501.080(1) provides that voluntary intoxication is a defense to a criminal charge if it “negatives the existence of an element of the offense.”

However, “mere drunkenness does not equate with the Kentucky Penal Code's definition of the ‘defense’ of voluntary intoxication.” *Rogers v. Commonwealth*, 86 S.W.3d 29, 44 (Ky. 2002). The voluntary-intoxication defense presents a high bar, because “there must be evidence not only that the defendant was drunk, but that [he] was so drunk that [he] did not know what [he] was doing.” *Springer v. Commonwealth*, 998 S.W.2d 439, 451-52 (Ky. 1999). Intoxication can only function as a defense “to an intentional crime if the effect of the intoxication is to completely negate the element of intent [and] it causes the defendant’s mental state to equate with insanity.” *McGuire v. Commonwealth*, 885 S.W.2d 931, 934 (Ky. 1994). “Voluntary intoxication does not negate culpability for a crime requiring a culpable mental state of wantonness or recklessness, but it does negate specific intent.” *Id.* “Burglary . . . require[es] specific

intent as an element of the offense.” *Id.*

Here, there was insufficient evidence of extreme intoxication to justify giving the requested voluntary-intoxication instruction. In this case, there was testimony that while Berry smelled of alcohol,<sup>11</sup> he knowingly went into the house, looked for K.A., and methodically went from room to room until he found her. (VR: 2/9/22, 10:57:40, 11:58:20, 2:55:24, 3:04:00, 3:13:55.) After searching for and finding K.A., he assaulted her. (VR: 2/9/22, 10:57:43, 3:05:45.) When police arrived, he assaulted one officer while he was escaping out the back door. (VR: 2/9/22, 2:40:11, 3:42:00, 3:46:15, 3:49:20, 4:36:20.) Berry was alert enough to run around to the front of the house in an attempt to flee toward his vehicle that he left running. (VR: 2/9/22, 2:39:30, 3:39:00-3:59:00, 4:35:00-4:54:00.) After being cross-examined about Berry’s alleged intoxication, Bielefeld specifically testified on redirect that Berry appeared to know what he was doing, and he was there intently looking for K.A.<sup>12</sup> (VR: 2/10/22, 2:55:24-2:55:59.) Bielefeld testified on cross-examination that he did not specifically recall Berry smelling like alcohol. (VR: 2/9/22, 2:51:50.) The arresting officer also testified that Berry did not seem intoxicated. (VR: 2/9/22, 5:30:09.)

Berry’s intent was clear and was not affected by any intoxication. Berry was also coherent enough to understand the situation and accordingly flee. While there could have

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<sup>11</sup> However, Bielefeld testified that he did not specifically recall Berry smelling like alcohol. (VR: 2/9/22, 2:51:50.)

<sup>12</sup> Berry argues that K.K.’s testimony that Berry did not know what he was doing was evidence to provide the intoxication instruction. (Appellant’s Brief, 29.) However, K.K.’s testimony was not produced in the context of a response about intoxication. (VR: 2/9/22, 3:13:28.) She was not asked about intoxication. Furthermore, K.K. testified that Berry was at the house with the intention to find her mother, and purposefully went from room to room looking for her. (VR: 2/9/22, 3:13:54.)

been some evidence of drunkenness, there was simply not enough evidence in this case that Berry was so intoxicated to justify giving a voluntary-intoxication instruction. “Instructions must be based upon the evidence, and they must properly and intelligibly state the law.” *Sutton v. Commonwealth*, 627 S.W.3d 836, 852 (Ky. 2021) (citations omitted). There was insufficient evidence to meet the clear requirement of an intoxication so great that it negated an element of the offense. There was no basis for a voluntary-intoxication instruction, and the trial court did not abuse its discretion.

**V. The Trial Court Properly Disallowed Introduction of Berry’s Prior Testimony from the DVO Hearing.**

Berry next claims that the trial court erred by not allowing him to enter his testimony from a prior domestic-violence order (DVO) hearing. (Appellant’s Brief, 30.) Berry sought to introduce this testimony at trial under KRE 804 to rebut Detective Livers’s testimony about trying to find Berry during the investigation and the victim’s allegations. (Appellant’s Brief, 30.) Contrary to Berry’s claim, the trial court did not err.

Under KRE 804(b)(1), a witness’s former testimony given at another hearing is admissible if the witness is unavailable and the opposing party “had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.” KRE 804(b)(1). “KRE 804 applies only to situations in which the declarant—the individual whose out-of-court statements are proffered as evidence—is unavailable as a witness.” *Moore v. Commonwealth*, 462 S.W.3d 378, 381 (Ky. 2015).

Berry was required to show that the witness (which would have been Berry) “was unavailable to personally testify at trial about the subject matter of the statements.” *Id.* Berry cannot show this. KRE 804 specifically states, “A declarant is not unavailable as a witness if his exemption, refusal, claim of lack of memory, inability, or absence is due to

*the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.*” KRE 804. As federal courts have stated, interpreting the similar Federal Rule of Evidence (FRE) 804,<sup>13</sup>

The sponsor of a declarant’s former testimony may not create the condition of unavailability and then benefit therefrom. The rule [the appellant] relies upon was designed to ensure one access to testimony where, by the actions of the opponent, or at least through no fault of the testimony’s proponent, a desired witness becomes unavailable. In the instant case, [the appellant] created his own unavailability by invoking his fifth amendment privilege against self-incrimination.

*U.S. v. Kimball*, 15 F.3d 54, 55-56 (5th Cir. 1994); *see also U.S. v. Peterson*, 100 F.3d 7, 13-14 (2nd Cir. 1996). Berry was clearly not unavailable for purposes of KRE 804.

Moreover, as the trial court found, there was not “a similar motive with regard to the testimony” in the prior hearing. (VR: 2/10/22, 12:11:45.) The trial court added, “An EPO[/DVO] proceeding is a civil proceeding . . . There’s not the same standard of proof such that someone cross-examining, not believing they were under a beyond-a-reasonable-doubt standard, and not believing they had to show [Berry] guilty under that standard, would have conducted the same nature of cross-examination of him at that time.” (VR: 2/10/22, 12:12:10.) The trial court then correctly denied introduction of that prior testimony. (VR: 2/10/22, 12:12:25.) There was no error.<sup>14</sup>

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<sup>13</sup> In *Crawley v. Commonwealth*, 568 S.W.2d 927, 931 (Ky. 1978), this Court adopted the definition of unavailability contained in Rule 804(a) of the Federal Rules of Evidence, which is like Kentucky’s current rule. *Hodge v. Commonwealth*, 17 S.W.3d 824, 842 (Ky. 2000); *Epperson v. Commonwealth*, 197 S.W.3d 46, 55 (Ky. 2006).

<sup>14</sup>Even if there was error, any error was harmless error, based upon the overwhelming evidence of guilt. Evidentiary errors are evaluated for harmless error under the non-constitutional “substantial influence” standard, wherein it is determined “whether the error had ‘substantial influence’ upon Appellant’s trial such that it ‘substantially swayed’ his conviction.” *Wiley v. Commonwealth*, 348 S.W.3d 570, 580 (Ky. 2010) (citing *Winstead v. Commonwealth*, 283 S.W.3d 678, 688–689 (Ky. 2009)); *see also* RCr 9.24.

**VI. There Was No Cumulative Error.**

Lastly, reversal is not required for any alleged “cumulative error.” Berry is guaranteed a fair trial. *McDonald v. Commonwealth*, 554 S.W.2d 84, 86 (Ky. 1977). “This does not mean, however, a perfect trial, free of any and all errors.” *Id.* (citations omitted). It means “that a litigant is entitled to at least one tolerably fair trial of his action.” *Id.* at 86 (citations omitted). Ultimately, since there was no specific reversible error in this case, there is no cumulative error. *See Wilson v. Commonwealth*, 836 S.W.2d 872, 892 (Ky. 1992), *overruled on other grounds*. Berry received a fair trial, the evidence was overwhelming, and the jury properly convicted. There was no cumulative error, and the judgment should be affirmed.

**CONCLUSION**

Wherefore, for all the foregoing reasons, the Commonwealth respectfully requests the Court AFFIRM the judgment of the Jefferson Circuit Court.

Respectfully submitted,

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