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RENDERED: DECEMBER 19, 2024
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2022-SC-0147-MR

PAUL OLIVER BROCK — APPELLANT

V.

ON APPEAL FROM WHITLEY CIRCUIT COURT
HONORABLE DANIEL BALLOU, JUDGE
NO. 18-CR-00069

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Paul Oliver Brock appeals from his conviction by the Whitley Circuit Court following a jury trial. The jurors' verdict was that Brock was guilty of three counts of murder, domestic violence; one count of fetal homicide, first degree; and tampering with physical evidence. Rather than risk being sentenced to the death penalty, prior to the penalty phase Brock entered into a sentencing agreement for life without the possibility of parole.

Brock argues the trial court erred by failing to: suppress his police interrogation statements; exclude a deceased victim's statement; sever the charges; and change the venue. Brock also argues that the Commonwealth committed a *Brady v. Maryland*, 373 U.S. 83 (1963), violation by failing to preserve and test potentially exculpatory evidence. As the trial court's rulings were appropriate and Brock's unpreserved claim of a *Brady* violation cannot be established, we affirm.

I. FACTUAL AND LEGAL BACKGROUND

In 2018, an extended family lived together in a house in Corbin, Kentucky, consisting of: (1) Justin Collins; (2) his sister, Tiffany Myers[1] (who was pregnant at the time); (3) Myers's husband, Aaron Byers; and (4) Collins's and Myers's grandmother, Mary Jackson. Brock, who Collins only knew by his first name of "Paul," regularly visited the residence, in part to purchase drugs from Myers.

On February 17, 2018, Collins woke up to hearing Brock and Myers talking in another room of Collins's residence. Brock was discussing purchasing pain pills from Myers. Collins heard a gunshot followed by Myers saying, "Paul, you shot me." He then heard Brock say, "I'm gonna kill you."

Collins jumped from a window and ran to his neighbor's house. While he was fleeing, he heard a second gunshot. He knocked on his neighbor's door and no one answered. Collins then tried to kick down the door and when that didn't work, he sat down and waited. Collins heard a third gunshot while he was standing on his neighbor's porch. After about ten minutes, Collins saw Brock leave the residence and then observed a silver pickup truck driving away.

Collins then tried to reenter his residence. The door was locked, so he had to break a window to get inside. Once inside, he discovered the bodies of

[1] Tiffany Myers has been referred to alternatively as having the last name of Byers (like her husband). To avoid confusion with him, we refer to her as Myers.

Myers and Jackson. Jackson was sitting in her recliner and Myers was lying in front of Collins's bedroom door.

Collins called 911 and the police and emergency services responded. Officers observed that several rooms in the house appeared to have been ransacked. Collins informed emergency medical services that someone named "Paul" who was driving a silver truck had committed the murders.

On the morning of February 18, 2018, the police located Brock in the passenger seat of a vehicle which was driven by his wife. They took his picture and then Corbin Chief of Police Rusty Hedrick interviewed Brock. Chief Hedrick read Brock his rights before questioning him. Initially, Brock claimed he had been to the victims' residence twice on the day of the shooting, but later insisted that he did not visit their residence at all that day. Brock also stated that he drove a gray Nissan pickup truck. At the end of the interview, Brock was permitted to leave.

The police showed Collins various photos of men named Paul. He rejected other photos as being the "Paul" who had visited his residence on multiple occasions but identified a 2015 photograph of Brock as looking like the "Paul" he knew. After being shown a recent photograph of Brock, Collins made a positive identification.

Based on this identification, later that day the police located Brock again and then brought him in for another interview, this time by Detective Coy Wilson. Detective Wilson read Brock his rights before questioning him and Brock consented to being interviewed.

During that interview, Brock claimed he had been having an affair with Myers and knew she was pregnant.[2] Brock asserted that Byers came to Brock's house to threaten him after the murders of Myers and Jackson occurred. Brock claimed that Byers committed the murders and explained his motives to Brock, telling him that if Myers was "gonna continue to keep doing drugs and hurting [his] baby, then there's no reason for her to live." Brock made inconsistent statements about whether he had seen Byers with a gun. He did not claim that Byers attacked him.

Brock stated that his son had messed up his truck by getting mud on it and had broken his back windshield. Brock also claimed he poured bleach in his truck because his son spilled milk in it. Following this interview, the police arrested Brock for the murders of Myers and Jackson.

Also, on February 18, 2018, the police applied for search warrants for Brock's house, his truck, and another vehicle, and these were executed on the 18th and 19th.

When law enforcement searched Brock's property, they discovered the body of Byers on a nearby plot of land. Byers had been shot and buried in a shallow grave and was wearing pants but no shirt. Following this discovery, on February 20, 2018, the police applied for another warrant for Brock's truck, which was executed that same day.

[2] Brock did not state whether he was or was not the father of Myers's unborn child and apparently no paternity test was conducted on the fetus's remains.

According to Detective Glenn Taylor, when they searched Brock's pickup truck "the bleach smell was awful" and there appeared to be discolored areas inside the truck. An unspent .38 round was discovered in the passenger seat and there appeared to be blood in several places inside the truck, including on a seatbelt and the driver's side door. Upon spotting what appeared to be a bullet hole in the passenger seat, law enforcement peeled the cushion back and discovered what appeared to be a bloodstain. The back passenger side window was broken out, but there did not appear to be any glass inside the truck. Further analysis revealed the presence of Byers's DNA in several places inside Brock's truck.

A search of the truck bed revealed a lampshade, a section of rope and a piece of fabric that appeared to match the pants Byers was wearing when his body was found. The truck bed also contained a "come along" which is a mechanical tool that can be hooked to a stationary object and ratcheted. Law enforcement officers suspected that this tool could have been used to place Byers's body where they found it.

Sergeant Jeff Hill was able to obtain video surveillance footage taken on February 17, 2018, from a business located on a road adjoining the street along which the victims' residence was located. The footage captured a silver Nissan truck, which had a lampshade in its truck bed, entering the area at 3:37 p.m. and leaving the other way at 4:14 p.m. Dispatch logs revealed that police received the call from Collins reporting the murders at 4:23 p.m.

DNA testing on the sweatpants Brock was wearing when he was arrested yielded a mixture of at least two individuals, and the major profile matched Byers.

On April 16, 2018, Brock was indicted by the grand jury for: (1) murder, domestic violence for the death of Byers; (2) murder, domestic violence for the death of Myers; (3) murder, domestic violence for the death of Jackson; (4) fetal homicide, first degree, for the death of Myers's fetus; (5) tampering with physical evidence; and (6) being a persistent felony offender, first degree (PFO-1).

On June 20, 2019, Brock filed a motion to suppress the statements he made to Detective Wilson. On September 4, 2019, the trial court held an evidentiary hearing and later the parties submitted memoranda. On January 16, 2019, the trial court denied this motion.

On June 8, 2021, Brock filed a motion to sever the counts of the indictment. On July 21, 2021, the trial court denied this motion.

On August 17, 2021, Brock filed a motion to exclude Collins from testifying that Collins heard Myers say "Paul, you shot me." On August 25, 2021, the trial court denied this motion.

On September 9, 2021, Brock entered into a plea agreement. The trial court's order, entered on September 16, 2021, detailed Commonwealth's sentencing recommendations. Under the terms of the plea agreement, Brock was to serve fifty years concurrently on counts 1-4, and five years on Count 5,

enhanced to twenty years based on his PFO-1 status, to be served consecutively for a total of seventy years.

Before sentencing, Brock learned that he did not qualify as a PFO-1 and was unwilling to agree to the Commonwealth's solution of amending the indictment so that he could incur the same seventy-year sentence.[3] At the sentencing hearing held on October 13, 2021, the trial court permitted Brock to withdraw from his plea and in an order entered on October 14, 2021, the trial court set the matter for trial.

On November 9, 2021, Brock filed multiple motions, including a motion to dismiss the PFO-1 charge on the basis that he had been discharged from parole more than five years prior to the murders being committed, and a petition for a change of venue. On December 8, 2021, the trial court dismissed the PFO-1 charge. The petition for a change of venue was later denied.

Brock's jury trial began on March 1, 2022, and lasted for four weeks. Many additional facts came out at trial.

Michael Christie, who was friends with Brock and also sold him marijuana, testified about his past interactions with Brock. Christie recalled that Brock told him that Brock and Byers were not on great terms because a deal had gone bad, and Byers owed him approximately $1,400.

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[3] According to an Order entered on February 11, 2022, Brock did not qualify as a PFO because his parole was "inexplicable terminated three months prior to its original expiration date" and the Commonwealth's plan to reach a sentence of seventy years of incarceration without a PFO enhancement was to add charges for felon in possession of a firearm and a second tampering with physical evidence charge, which when combined with the first tampering charge would add fifteen years to the sentences he could serve for the other charges.

Around Valentine's Day 2018, Christie let Brock borrow a .38 Smith & Wesson revolver because Brock claimed he needed it for protection. On February 17th or 18th, Brock went back to Christie to return the gun. Dylan Hatfield, Christie's cousin, was with Christie at that time.

According to Christie, Brock brought both the gun and a sock with bullets in it, even though Christie had not given him any ammunition. Christie interpreted statements Brock made, including that Brock had "put this dog in the dirt," as Brock hinting he wanted help burying a body. Christie declined to help Brock or to accept the return of the firearm because he was suspicious that Brock might have "done something bad with it." Brock said something about discarding the gun around a bridge in the Corbin area before leaving with the gun.

Hatfield testified Brock told them his back was hurting and Brock claimed to need help with "something along the lines of" burying a body. Roy Frazier, who owned some land that adjoined Brock's property, recalled seeing Brock with a gun that looked like a .38 Smith & Wesson revolver.

Jennifer Owens, a firearm and tool-mark examiner, testified and based on toolmarks matched the following bullets, which were all .38 caliber, as having been fired from the same firearm: a bullet recovered from Byers's body, a bullet near Jackson's body, a bullet removed from Myers's body, and a bullet near Myers's body. Owens also testified that the unfired bullet recovered from Brock's truck had the same physical features as the fired bullets. Although she could not positively identify a recovered Smith & Wesson .38 revolver as having

fired those bullets based on test-firing it, she testified that the bullets could have been fired by that type of gun.

Dr. William Ralston, a forensic pathologist, completed autopsies on the three adult victims. He testified that Myers had been shot two or three times and one gunshot wound may have been consistent with a defensive injury. He noted Myers was pregnant when she was shot, and the fetus was alive at the time of her death. Dr. Ralston testified Jackson was shot one time in the face and Byers had been shot either four or five times.

Brock's theory of the case was that Byers killed Myers and Jackson, as established by the fact that Byer's DNA was found underneath Jackson's fingernails, before Byers attacked Brock. Brock admitted to killing Byers, but claimed it was in self-defense.

Brock testified that he and Byers worked together to resell pain medication and he spent time with Byers at his residence. Brock stated that on the day of the murders he observed Byers and Myers arguing so he left their residence and went to his truck to wait for Byers. Brock testified that while he was waiting, they came outside, Myers threw something at Byers, and then Byers chased Myers back into the house. Brock stated that when Byers came out again, he was upset.

Brock testified he and Byers drove away together and along the way Byers asked Brock to take him to Richmond and when Brock refused, Byers got very angry. Brock explained after their argument escalated, Byers refused to get out of the truck as requested, and then Byers took out a gun. Brock

stated they wrestled over the gun and after Brock got the gun he shot Byers, who grabbed for it again, and Brock shot Byers again and did not stop shooting him until Byers stopped moving.

Brock stated that after he killed Byers, he started taking Xanax pills and continued to take pills for almost twenty-four hours. He was then pulled over by police and questioned by them but was permitted to leave.

Brock explained he took a jug of bleach to his truck and slung it everywhere. After that, he drove to Christie's house to request help burying Byers and Christie agreed to help. Brock stated that while moving Byers to his makeshift grave, they pulled off Byers's sweatshirt and later Brock put it into a trashcan at a gas station, along with Byers's shoes and cell phone.

Brock testified that when he was questioned by the police (both times), he repeatedly lied to them. These lies included lying about having a sexual relationship with Myers and lying that Byers had come by with a gun to threaten him. Brock explained that during the interview he was intoxicated. However, Brock confirmed knowing that Myers was pregnant and explained she had told him about being pregnant before she told Byers.

Dr. John Matthew Fabian, a forensic psychologist and neuropsychologist, opined that post-traumatic stress disorder was a factor in how Brock had conducted himself.

Dr. Elijorn Don Nelson, a Professor of Pharmacology and Systems Physiology at the University of Cincinnati College of Medicine, opined that

Brock was under the influence of "a considerable amount of" Suboxone and Xanax during the police interview and was impaired and sedated.

On March 24, 2022, the jury convicted Brock on the five remaining counts. On March 29, 2022, before the jury made a sentencing recommendation, Brock entered into a sentencing agreement with the Commonwealth to avoid the death penalty. Brock agreed to serve to life in prison without the possibility of parole for each of the three murders, life for fetal homicide, and five years for tampering with physical evidence, to run concurrently with each other. Brock waived the right to appeal with respect to any penalty phase issue but otherwise reserved his right to appeal. The trial court sentenced Brock in accordance with this agreement.

II. ANALYSIS

Brock argues: (1) the trial court erred by denying his motion to suppress the statements from his police interview because he was intoxicated; (2) the trial court erred by admitting Myers's statement implicating him in shooting her as a dying declaration; (3) the trial court erred by failing to sever the murder charges for Myers and Jackson from the one for Byers; (4) the trial court erred by failing to deny his motion for a change of venue; and (5) the Commonwealth committed a *Brady* violation when it declined to test Byers's pants for DNA and give him the results.

A. Should the Trial Court have Granted Brock's Motion to Suppress his Statements from his Interview with Detective Wilson?—Preserved

This matter was thoroughly explored in the hearing on Brock's motion to suppress. The trial court watched video of Detective Wilson's interview with

Brock and heard testimony from Detective Wilson for the Commonwealth and Dr. Nelson for the defense.

Detective Wilson testified he had experience with intoxicated persons and in his opinion, Brock appeared tired but was not showing any indications of extreme intoxication and Detective Wilson was satisfied that Brock was not acting under the influence of intoxicants.

Dr. Nelson opined that, based on reviewing the recorded police interviews and comparing those to Brock's normal and sober behavior when Dr. Nelson interviewed Brock at the detention center, Dr. Nelson believed that during the police interviews Brock was impaired by psychopharmacological agents that had a sedating effect. Dr. Nelson testified that Brock's interview behavior (nodding off, not wanting to be bothered by lengthy discussions, and being easily moved to cry) was consistent with Brock's claim that prior to his interview with Detective Wilson, Brock had ingested Suboxone, Neurontin, and Xanax. Dr. Nelson opined that Xanax can effect someone's judgment by removing all sense of anxiety, causing people to make decisions without considering the consequences, and such a person tends to go along with things and acquiesce to requests.

On January 16, 2020, the trial court denied Brock's motion to suppress. The trial court determined Brock's statements were voluntary and reliable, explaining:

> Testimony elicited during the hearing indicated that, during the course of the interview, Mr. Brock advised the officer of the identities of the people living in the home—including his paramour. He informed the detective of the relationship between him and

> Tiffany [Myers], and between Tiffany [Myers] and her boyfriend, "Bigs." He was able to recount a time that Tiffany showed him bruises on her arms and blamed Bigs for domestic abuse. The detective's questions were conversational and largely open-ended, rather than leading, and Mr. Brock was able to formulate complete, and sometimes complex, answers to the questions. These pieces of reliable information show that Mr. Brock was in "sufficient possession of his faculties" to make a reliable statement. There is no evidence that the police exploited Mr. Brock's mental state in order to obtain a statement or confession . . . .
>
> It is the Commonwealth's burden to establish by a preponderance of evidence that the confession was voluntary, and that burden has been met. Under the totality of the circumstances, this Court finds that Mr. Brock was in sufficient possession of his faculties to make a reliable statement. Furthermore, there is no evidence to show that Brock was "intoxicated to the degree of mania" or was hallucinating, functionally insane, or otherwise "unable to understand the meaning of his statements." Because he was alert and spoke [of] his own free will, Mr. Brock's statement was knowingly, voluntarily and intelligently made and should not be suppressed.

The trial court further determined that Brock's waiver of his *Miranda* rights was knowing and voluntary, explaining:

> Upon Det. Wilson's delivery of Miranda rights to Mr. Brock and asking if he understood them, Mr. Brock responded, "Yes," many times. Mr. Brock then says, "Yes, I understand these rights, and I am willing to talk to you." Brock further stated, "I can shut up at any time."
>
> Nothing in the recorded interview suggests the use of intimidation, coercion, or deception on the part of the officer in eliciting the statement from Mr. Brock. At no point during the interview did the officer threaten or pressure Mr. Brock to answer questions, nor was the manner coercive or otherwise overbearing. Mr. Brock was in the detective's office, not in a jail cell or an atmosphere that is inherently coercive or hostile.
>
> Upon review of the recorded interview, and in light of the context provided by the testimony at the hearing and a review of the record, the Court is persuaded that, based on the totality of the circumstances, the Defendant understood his rights and made a deliberate choice to cooperate with the police by making a

> voluntary statement. The Court finds that his waiver was a product of a free and deliberate choice and was made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it.

Brock argues on appeal that he was so intoxicated and impaired by the drugs in his system at the time that he was being questioned by Detective Wilson that his waiver of his *Miranda* rights was not knowingly, intelligently, and voluntarily made, explaining:

> he did not have full awareness of both the nature of the right abandoned and the consequences of the decision to abandon it, and it was not made in the sense that it was the product of free and deliberate choice rather than intimidation, coercion, or deception.

Brock further argues that his intoxication was obvious from his slurring of his speech and him appearing ready to fall sleep, and he could not under such circumstances waive his rights.

The Commonwealth argues that Brock can neither establish that his level of intoxication allowed police coercion to overcome his will, nor that he was intoxicated to such a degree that he was experiencing mania, was hallucinating, was functionally insane or unable to understand the meaning of his own statements. Therefore, it argues that the weight to give his interview was a matter properly left to the jury.

"When reviewing a trial court's denial of a motion to suppress, we utilize a clear error standard of review for factual findings and a *de novo* standard of review for conclusions of law." *Jackson v. Commonwealth*, 187 S.W.3d 300, 305 (Ky. 2006). We deem the trial court's findings of fact as conclusive if they are

supported by substantial evidence. *Smith v. Commonwealth*, 410 S.W.3d 160, 165 (Ky. 2013).

In considering whether a confession is involuntary under the Fifth Amendment,

> [t]he ultimate test of voluntariness lies in an examination of the totality of the circumstances. . . . [A] confession is voluntary unless, under the totality of the circumstances, a defendant's "will has been overborne and his capacity for self-determination critically impaired." *Schneckloth* [*v. Bustamonte,* 412 U.S. 218,] 225 [(1973)]. This requires an examination of both the "characteristics of the accused and the details of the interrogation." *Id.* at 226[.]

Soto v. Commonwealth, 139 S.W.3d 827, 847 (Ky. 2004).

"The three criteria used to assess voluntariness are 1) whether the police activity was 'objectively coercive;' 2) whether the coercion overbore the will of the defendant; and 3) whether the defendant showed that the coercive police activity was the 'crucial motivating factor' behind the defendant's confession." *Tigue v. Commonwealth*, 600 S.W.3d 140, 167 (Ky. 2018) (quoting *Dye v. Commonwealth*, 411 S.W.3d 227, 232 (Ky. 2013)).

As thoroughly explained in *Smith*:

> Generally speaking, no constitutional provision protects a drunken defendant from confessing to his crimes. "The fact that a person is intoxicated does not necessarily disable him from comprehending the intent of his admissions or from giving a true account of the occurrences to which they have reference." *Peters v. Commonwealth,* 403 S.W.2d 686, 689 (Ky. 1966). As noted by Justice Palmore in *Britt v. Commonwealth,* "[i]f we accept the confessions of the stupid, there is no good reason not to accept those of the drunk." 512 S.W.2d 496, 500 (Ky. 1974). "We are not at all persuaded that it would make sound law to hold that the combination of intoxication and police custody must add up to a violation of due process." *Id.* at 501.

> However, there are two circumstances in which a defendant's level of intoxication might play a role in the suppression decision. First, intoxication may become relevant because a "lesser quantum" of police coercion is needed to overcome the will of an intoxicated defendant. *Hill v. Anderson,* 300 F.3d 679, 682 (6th Cir.2002) (quoting *United States v. Sablotny,* 21 F.3d 747, 751 (7th Cir.1994)) ("When a suspect suffers from some mental incapacity, such as intoxication or retardation, and the incapacity is known to interrogating officers, a 'lesser quantum of coercion' is necessary to call a confession into question."); *United States v. Haddon,* 927 F.2d 942, 946 (7th Cir.1991) ("[W]hen the interrogating officers reasonably should have known that a suspect is under the influence of drugs or alcohol, a lesser quantum of coercion may be sufficient to call into question the voluntariness of the confession."); *Jones v. Commonwealth,* 560 S.W.2d 810, 814 (Ky.1977) (intoxication may be a factor that, "under certain circumstances," could cause a confession to be suppressed for lack of voluntariness). Thus, trial courts must consider a defendant's level of intoxication when considering whether police coercion has overborne a defendant's will so as to render the confession involuntary for purposes of the Due Process Clause.
>
> Second, a confession may be suppressed when the defendant was "intoxicated to the degree of mania" or was hallucinating, functionally insane, or otherwise "unable to understand the meaning of his statements." *Halvorsen v. Commonwealth,* 730 S.W.2d 921, 927 (Ky.1986) (quoting *Britt,* 512 S.W.2d at 499); *Peters,* 403 S.W.2d at 688. Under those circumstances, suppression may be warranted not because the confession was "coerced" but because it is unreliable. *Britt,* 512 S.W.2d at 500 (quoting Marshall & Steiner, *The Confessions of a Drunk,* 59 ABAJ 497 (1973)) ("[W]hen intoxication reaches the state in which one has hallucinations or 'begins to confabulate to compensate for his loss of memory for recent events' . . . the truth of what he says becomes strongly suspect.").

Id. at 164-65.

Regarding this second ground for suppression, a high degree of intoxication does not necessarily render a confession unreliable. As explained in *Britt*, 512 S.W.2d at 500, "[l]oss of inhibitions and muscular coordination, impaired judgment, and subsequent amnesia do not necessarily (if at all)

indicate that an intoxicated person did not know what he was saying when he said it. 'In vino veritas' is an expression that did not originate in fancy." Accordingly, "the basic question is whether the accused was[,]" despite the intoxication, "in 'sufficient possession of his faculties to give a reliable statement.'" *Anderson*, 352 S.W.3d at 583 (quoting *Britt*, 512 S.W.2d at 500).

Having reviewed Brock's interview with Detective Wilson, we first observe that nothing indicates that the interview was at all coercive. Brock was given his *Miranda* rights, and in response expressed his understanding that he could stop the interview at any time. Additionally, as the trial court found, the questions were mostly open-ended.

As to Brock's susceptibility to have his will overborne, no indications existed that he was particularly susceptible to this or that given his intoxication, the lesser degree of coercion sufficient to satisfy such a standard was present. Brock appeared sleepy and slow, but not particularly intoxicated. At times he yawned, closed his eyes, blinked slowly, and bent his head down. He also occasionally shifted and groaned like he was suffering physical pain.

While Dr. Nelson suggests Brock's intoxication could make him more likely to agree to the interview because he would want to "go along," his personal degree of cooperation was not the result of any inappropriate police conduct. Undoubtedly some individuals want to cooperate to please police officers regardless of intoxication.

Assuming that Brock was indeed under the influence of intoxicated substances, no evidence, including his own testimony or that of Dr. Nelson's,

which would support an inference that he was "so intoxicated as to reach the point of mania or give an unreliable statement." *Meiskman v. Commonwealth*, 435 S.W.3d 526, 532–33 (Ky. 2013); *Anderson*, 352 S.W.3d at 583. There was also no evidence that Brock was suffering from hallucinations, was insane, was unable to understand what he was saying, or was unable to communicate truthfully. It appears that like the defendants in *Meskimen*, *Anderson*, and *Soto*, Brock was able to give a valid waiver of rights, understood the detective's questions, and was able to answer appropriately with specific details. When answering Detective Wilson's questions, Brock sometimes rambled, but he was coherent and cogent, providing specific details such as reciting a phone number he called. He knew what day it was, recalled his earlier police interview, and asked for a pen to calculate on paper when he had last seen the victims. When confronted with what Collins had heard, he noticeably became more alert in responding.

We therefore agree with the circuit court that Brock has failed to establish that his confession to Detective Wilson was involuntary and should have been suppressed. The jury was in the best position to judge the veracity of Brock's second taped interview based upon reviewing the recordings of his interviews and hearing the testimony of Detective Wilson, Brock, and Dr. Nelson. It was up to the jury to determine the appropriate weight to give these interviews in determining its verdicts.

B. Should Myers's Statement "Paul, You Shot Me" have been Excluded as Inadmissible Hearsay?—Preserved

In an order entered on August 25, 2021, the trial court rejected Brock's motion *in limine* to exclude Myers's statement, "Paul, you shot me[,]" which was heard by Collins after he heard a gunshot, as inadmissible hearsay. The trial court ruled this statement admissible as a dying declaration, finding Myers was shot twice. Based on that conclusion, the trial court ruled that Myers's awareness of her impending death could be inferred from her being shot immediately prior to being shot a second time. Alternatively, the trial court noted that Myers's statement could possibly be admissible under the present sense impression or the excited utterance exceptions.

Brock argues that Myers's statement constituted inadmissible hearsay which did not qualify for the dying declaration exception because there was no evidence that Myers believed her death was imminent at the time she made the statement. He argues that since Collins did not see what was happening, "[i]t is entirely possible that Tiffany [M]yers could have thought she was shot, or perhaps she was 'grazed' by a bullet or not shot at all." Accordingly, he argues that this statement "likely had a prejudicial effect on the jury" and should have been excluded.

The Commonwealth argues that this statement was properly admitted as either an excited utterance or as a dying declaration, and that the trial court did not abuse its discretion by admitting such statement under either exception.

The dying declaration exception to the rule for excluding hearsay is found in Kentucky Rules of Evidence (KRE) 804(b)(2).

> The proponent of a dying declaration need prove only three elements: (1) the declarant is unavailable as a witness as that term is defined in KRE 804(a); (2) the declaration was made at a time when the declarant believed that his death was imminent; and (3) the declaration concerned the cause or circumstances of what the declarant believed to be his impending death.

Turner v. Commonwealth, 5 S.W.3d 119, 121 (Ky. 1999). "[A] declarant's belief in his own impending death can be inferred from circumstantial evidence." *Id.*

While element (1) is easily satisfied regarding Myers's statement, it is much more difficult to establish element (2), and whether element (3) can be established, hinges on the establishment of element (2).

Brock's unreasonable speculation that Myers was perhaps just grazed or not shot at all is not supported by any evidence. The medical evidence presented at trial was that Myers was shot two *or* three times because she had three gunshot wounds, one to her right lateral face (which injured the inferior aspect of the frontal lobes of her brain and caused central nervous system trauma), one to her right chest and one to her wrist. It was unknown whether her wrist wound was from a bullet that passed through her and then struck her elsewhere.

However, Collins heard three shots, one of which is accounted for by Jackson being shot in the head, and only three fired bullets were collected from the scene and these victims. Therefore, it was reasonable for the trial court to find that Myers was shot twice, not three times.

The shot to Myers's head would have rendered her unable to speak, therefore the first shot had to hit her chest (and it does not matter if it passed through her wrist to do so). The shot to her chest was obviously life-threatening and would certainly cause her death without immediate medical treatment, treatment she could not access when still faced with an armed gunman. Therefore, under these circumstances, Myers's statement qualifies as a dying declaration.

Additionally, there are ample other grounds upon which to admit her statement. KRE 803 provides three other bases to affirm the admission of Myers's statement:

> (1) Present sense impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.
>
> (2) Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.
>
> (3) Then existing mental, emotional, or physical condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

For a declarant's statement to qualify for the present sense impression exception to hearsay in KRE 803(1), "the statement must be made while the declarant is observing the event." *Bray v. Commonwealth*, 68 S.W.3d 375, 381 (Ky. 2002). There can be no doubt that Myers was commenting on what was happening to her, that she had been shot and by who.

To determine whether a declarant's statement qualifies for the excited utterance exception to excluding it as hearsay,

> [f]actors that should be considered include the lapse of time between the act and the declaration, the opportunity, likelihood or inducement to fabricate, the place of the declaration, whether it was made in response to a question, whether the declaration is against interest or is self-serving, the presence of visible results of the act to which the utterance relates and the emotional state of the declarant.

Heard v. Commonwealth, 217 S.W.3d 240, 246 (Ky. 2007). Myers's contemporaneous statement under the immediate distress of being shot clearly qualifies for admission as an excited utterance.

To have an out-of-court statement qualify for admission under KRE 803(3), the declarant's statement must express her "mental or physical condition 'then existing' at the time the statement is made." *Martin v. Commonwealth*, 686 S.W.3d 77, 90 (Ky. 2023). Myers's statement expressing her present physical condition as having been shot is admissible under this exception. While it is a closer question as to whether the identify of her shooter could be admissible as well, we need not resolve that as pursuant to KRE 803(1) and (2), her whole statement is clearly admissible.

Therefore, it was appropriate to admit Myers's hearsay statement as testified to by Collins because it properly qualified for multiple hearsay exceptions justifying its admission.

C. Should the Trial Court have Severed the Counts of the Indictment which related to Separate Crime Scenes?—Preserved

On July 21, 2021, the trial court denied Brock's motion to sever the murder charge of Byers from the other charges. The trial court explained that

Brock had not shown he would be unreasonably prejudiced by trying the counts together, observing:

> [I]t is apparent that much of the proffered evidence would be admissible in the murder trials of all victims. The silver Nissan truck would be relevant evidence in both cases. The caliber, kind and type of ammunition/firearm would be admissible in both cases. The mutuality of evidence cannot be ignored[.]
>
> Ultimately, the strength of the evidence and whether these murders were part of a continuous scheme or plan are questions best reserved for the jury. However, in this limited role as determining the severability of offenses, the Court is persuaded that the offenses should remain joined, as evidence incident to each and every count has some mutuality and overlap to one another. Looking far beyond the simple concept of judicial economy, there is nothing fundamentally unfair or prejudicial about all murders being tried pursuant to the same indictment.

(Paragraph numbering omitted).

Brock argues on appeal that the counts of the indictment relating to the two murders that took place at the victims' residence (counts one, two, and four), should have been severed from the count for the murder of Byers and tampering (counts three and five), because there were two separate crimes scenes, sets of facts and alleged victims, separate evidence was involved, and he had separate defenses for each group of counts. Brock argues in trying these counts together that "it can be reasonably concluded that the jury inferred that because he killed Aaron Byers out of self-defense, he must have killed Mary Jackson and Tiffany [M]yers as well" even though "[t]here was not a scintilla of evidence linking [Brock] to the crime scene in which Mary Jackson and Tiffany [M]yers were killed."

The Commonwealth argues that pursuant to Kentucky Rules of Criminal Procedure (RCr) 6.18, joinder was appropriate as all of the counts were part of a common scheme and, pursuant to KRE 404(b)(1), these acts would have been admissible in each trial to prove Brock's identity given that the same firearm and types of bullets were used to kill each individual. The Commonwealth further argues that under KRS 404(b)(2), these acts would have been admissible in each trial to present a complete picture of the crimes as the same truck was used, the victims all resided in the same household, the crimes took place close in time to each other around when Brock borrowed and tried to return the firearm, and a possible affair with Myers could have provided motivation for murdering the married couple. The Commonwealth also argues that Brock's defenses were not antagonistic, and the crimes were quite factually intertwined and would have been difficult to separate.

We first review the relevant rules involved, RCr 6.18 and RCr 8.31. RCr 6.18 provides in relevant part that two or more offenses "may be charged in the same indictment . . . in a separate count for each offense, if 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." RCr 8.31 provides in relevant part that "[i]f it appears that a defendant . . . is or will be prejudiced by a joinder of offenses . . . in an indictment . . . , the court shall order separate trials of counts[.]"

> RCr 6.18 defines the circumstances in which separate acts of criminal conduct can be properly joined together in a single indictment or information. It allows for joinder of offenses in the same indictment only when the offenses are 1) "of the same or

> similar character" or 2) "are based on the same acts or transactions connected together or constituting parts of a common scheme or plan."

Elam v. Commonwealth, 500 S.W.3d 818, 822 (Ky. 2016). "RCr 8.31 sets the standard for the severance or separation of charges otherwise properly joined or consolidated." *Elam*, 500 S.W.3d at 822.

"Even if the requirements of Criminal Rule 6.18 are met, the trial court should nevertheless order the offenses be tried separately if joinder would be prejudicial to either the defendant or the Commonwealth." *Cherry v. Commonwealth*, 458 S.W.3d 787, 793 (Ky. 2015). "RCr 8.31 permits properly joined offenses to be severed for separate trials when a party has satisfied the burden of showing that he would be 'unfairly prejudiced' by the joint trial." *Davidson v. Commonwealth*, 548 S.W.3d 255, 258 (Ky. 2018). "These two rules, RCr 6.18 and 8.31, thus seek to strike a balance between the prejudice inherent to joining separate charges in a single trial and the interests of judicial economy." *Smith v. Commonwealth*, 520 S.W.3d 340, 353 (Ky. 2017).

A certain degree of prejudice is inherent in the joinder of offenses. *Peacher v. Commonwealth*, 391 S.W.3d 821, 838 (Ky. 2013). However, in determining whether prejudice is present, our Court weighs the extent to which evidence from one offense would be admissible in a separate trial of any severed offenses. *Murray v. Commonwealth*, 399 S.W.3d 389, 406 (Ky. 2013). Therefore, "the 'prejudice' calling for severance or other relief under [RCr 8.31] is 'undue prejudice,' *i.e.,* prejudice that goes beyond the inherent prejudice to that which is unnecessary and unreasonable." *Peacher*, 391 S.W.3d at 838.

We vest our trial courts with great discretion in determining whether to join or sever offenses and decline to disturb that discretion unless there is a showing of a clear abuse of that discretion and actual prejudice. *Davidson*, 548 S.W.3d at 258; *Smith*, 520 S.W.3d at 353; *Murray*, 399 S.W.3d at 405. Actual prejudice is unlikely when the same acts would still be admissible in severed trials. *Smith*, 520 S.W.3d at 354. Additionally, when "the evidence of each offense, standing alone, was so strong as to be fairly overwhelming—there was little likelihood of prejudice resulting from trying the separate counts together." *Id.*

We are satisfied that joinder and the trial court's refusal to sever the counts was proper, and Brock has both failed to establish a clear abuse of the trial court's discretion or actual prejudice. The Commonwealth is correct that evidence regarding the crimes would have been admissible in each trial had the counts been severed. Brock's truck was clearly connected to each crime scene, and the bullets found in conjunction with all of the murders were consistent with the same gun being used for each murder. As observed in *Murray*, 399 S.W.3d at 406, the use of the same instrumentality to cause two separate murders, makes a joint trial proper.

However, there were more connections between the two sets of murders than simply the use of the same gun. The murders involved members of the same family who lived together, and the murders were very similar and occurred very close in time. Byers and Myers were married, and Jackson was Myers's grandmother, and all three of them lived in the same residence with

Collins. Brock admitted to engaging in a sexual relationship with Myers and being her "confidant" about her pregnancy and to engaging in drug dealing with Byers.

The evidence of each group of offenses, standing alone was overwhelming. As to the murders of Myers and Jackson, Collins's testimony placed Brock at the residence as the perpetrator based upon hearing Myers specifically identify Brock as her shooter, knowing which Paul he heard, and seeing Brock's truck leave. Additionally, Collins's report was confirmed by the video footage of Brock's truck (as identified through its appearance and the distinctive contents of the truck bed) going toward and away from the residence within the relevant time frame of the 911 call. Brock's statements to police established that he knew the victims and had been at their residence the same day as their murders.

As to the murder of Byers, the physical evidence and testimony from witnesses strongly connected Brock to that murder. This included the contents of Brock's truck (the bullet, the broken window, the blood splatter, the DNA evidence from Byers, the bleach smell, and the "come along" to move the body), the location of the Byers's body close to Brock's property, the witnesses who testified Brock approached them for help burying a body, and Brock's statements to police which provided motivation for enmity between Brock and Byers based on Brock's sexual relationship with Myers.

Accordingly, the denial of Brock's motion to sever was proper.

D. Should the Trial have been Moved?—Preserved

Prior to moving for a change of venue, Brock filed motions designed to "weed out" potential jurors who had been exposed to pretrial publicity. On May 21, 2021, he filed two motions; he requested individual *voir dire* in accordance with RCr 9.38 and that the jurors be given a questionnaire. On June 15, 2021, both motions were granted. The jury questionnaire specifically asked how the jurors kept up with the news and if they read print or online newspapers.

On November 9, 2021, Brock filed a detailed petition for change of venue before the trial court. In it, he asked that his trial be moved outside of Whitley County, which had a population of 36,712 according to the last census, and not be transferred to Knox or Laurel counties which also contained portions of the City of Corbin, where the majority of the news coverage took place, and be instead transferred to Pulaski County. Brock explained that over twenty-six "news events" were run in print, television, internet formats about the allegations against Brock and the criminal case against him, with nearly a quarter of these references to his guilty plea or withdrawal from it. Brock referenced and cited to particular articles and internet postings by newspapers and the Commonwealth Attorney in conjunction with his plea which referenced his guilt (which took place six months before his trial). This included a Times-Tribune tweet and Facebook post in which Assistant Commonwealth Attorney Bowling was quoted as saying, following Brock's plea: "Make no mistake: Paul is a cold-blooded murderer who does not belong in society; this resolution achieved that." Brock expressed concern that "[t]he news coverage of Mr.

Brock's guilty plea and the voiding of that plea will defeat the presumption of innocence in the minds of the juror[,]" stories could easily be found from an internet search, and given the size of the Whitley County, "a sensational crime such as a triple murder and the death of a fetus is certain to remain on the minds of residents and generate widespread discussion among its citizens."

Brock attached lengthy exhibits to this motion including sixty pages of news articles, which demonstrated constant coverage since he was first tied to the murders of Myers and Jackson. The articles repeated the circumstances of the discovery of the bodies when they updated readers as to the latest legal proceedings in the case against Brock, including various motions his counsel filed (to exclude his confession, sever the charges, and exclude the identification by Collins). The coverage continued with multiple articles about his guilty plea in September 2021, and then the withdrawal of his guilty plea in October 2021.

Brock also attached two venue affidavits in which two citizens affirmed that "the public opinion in Whitley County is that Paul Brock is guilty of the offenses with which he is charged and deserves a severe penalty" and "cannot receive a fair and impartial trial with a jury comprised of Whitley County residents."

Brock also simultaneously filed a motion on *voir dire* requesting a three-part jury selection procedure consisting of "(1) judicial voir dire (2) individual voir dire and (3) attorney lead general voir dire."

It does not appear that Brock's motion for a change of venue was ever formally denied by a written order. However in a February 11, 2022, order which addressed Brock's motion to strike the death penalty which was tied to the Commonwealth Attorney's press release concerning Brock's guilty plea, the trial court appears to have at least implicitly resolved the change of venue issue. In that order, the trial court explaining that the Commonwealth's press release announcing details of the plea agreement and its narrative of the case were appropriate post-trial and removed from social media since that time. The trial court concluded:

> The subject of pretrial publicity is of concern to the Court, but is a topic that can be adequately covered in voir dire. The Kentucky Rules of Civil Procedure offer the parties wide latitude in exploring pretrial publicity and prior knowledge of the case. This is a sufficient and necessary safeguard to prevent jurors who are apprised of the Defendant's prior plea of guilty from sitting on this case.

The jury questionnaire contained questions designed to determine whether the jurors had been exposed to pretrial publicity. An extensive *voir dire* process which included group and individual *voir dire* took place which lasted six days. On March 4, 2022, Brock asked for the removal of Juror #5 for cause on the basis that this juror was aware that Brock had previously pled guilty from having seen a local newspaper article about it, and could not easily put aside such knowledge, and also stated his unwillingness to consider mitigating evidence. This motion was orally granted by the trial court.

Brock argues on appeal that his right to a fair and impartial jury was violated where the trial court did not grant his motion for a change of venue.

Brock argues there was substantial press coverage about his case, including his entering into a guilty plea (which the Commonwealth Attorney characterized as a confession of guilt) and then his withdrawing from it, and as a result he could not receive a fair trial. He argues:

> People selected for the jury, in all likelihood, searched [Brock's] name on the internet in a Google search where these stories and posts appeared. Whitley county is a small county and a crime such as a triple murder involving homicide of an unborn fetus certainly had to remain on the minds of the resident jurors who were selected for [Brock's] trial.

Therefore, he argues that the totality of the circumstances dictated his trial be moved because he could not otherwise receive a fair trial.

The Commonwealth admits that there was substantial publicity surrounding the case but argues that publicity alone is not sufficient to demonstrate that public opinion is so arouses as to preclude a fair trial, and "the tincture of time" (that four years elapsed between the murders and the trial) had an ameliorating effect on any possible prejudice. The Commonwealth also argues that Brock has not alleged any actual prejudice because the one juror he cites who was aware of his previous guilty plea was removed from the panel and the extensive venire process addressed any potential concerns.

"Under both the due process clause and KRS 452.210, the defendant is entitled to a change of venue if it appears that he cannot receive a fair trial in the county where the prosecution is pending." *Dunn v. Commonwealth*, 360 S.W.3d 751, 768–69 (Ky. 2012). A change of venue is appropriate upon a showing there has been prejudicial news coverage prior to trial and that the

effect of such news coverage is reasonably likely to prevent a fair trial." *Id.* at 769 (internal quotation marks and citation omitted).

"Every case in respect to a change of venue must be determined on its own state of facts." *Tarrence v. Commonwealth*, 265 S.W.2d 40, 46 (Ky. 1953) (superseded by statute on other grounds). This includes whether the county is large enough to allow for a fair jury to be selected despite extensive publicity, or whether the crimes at issue are the "talk of the town" and arouse the population's emotions. *See Dilger v. Commonwealth*, 88 Ky. 550, 11 S.W. 651, 652 (1889) (explaining that the considerable population of 200,000 people Louisville and additional people outside Louisville in Jefferson County made it "fair to presume that from all of them an unprejudiced jury could be selected, not subject to be influenced by public sentiment"); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 601 n. 22 (1976) (Brennan, J. concurring, joined by Stewart, J. and Marshall, J.) (observing "the smaller the community, the more likely there will be a need for a change of venue in any event when a heinous crime is committed").

However,

> [o]ur precedent appropriately reflects that focusing on the number of jurors who have been exposed to some form of pretrial publicity about the case is not the relevant inquiry in a change of venue analysis. Instead, the trial court is tasked with determining whether the defendant can have a fair trial.

Hubers v. Commonwealth, 617 S.W.3d 750, 776 (Ky. 2020).

"The mere fact that jurors may have heard, talked or read about a case is not sufficient to sustain a motion for change of venue, absent a showing that

the accounts or descriptions of the investigation and judicial proceedings have prejudiced the defendant." *Bowling v. Commonwealth*, 942 S.W.2d 293, 298 (Ky. 1997) (*overruled on other grounds by McQueen v. Commonwealth*, 339 S.W.3d 441, 447–48 (Ky. 2011)). "It is not the amount of publicity which determines that venue should be changed; it is whether public opinion is so aroused as to preclude a fair trial." *Foster v. Commonwealth*, 827 S.W.2d 670, 675 (Ky. 1991) (*quoting Kordenbrock v. Commonwealth*, 700 S.W.2d 384, 387 (Ky. 1985)). A trial court can appropriately address the issue of prejudicial press coverage by examining witnesses about their exposure to pretrial publicity and removing jurors from the panel who have formed an opinion of the case based on such publicity. *Hilton v. Commonwealth*, 539 S.W.3d 1, 7 (Ky. 2018).

"Whether to grant a change of venue is within the sound discretion of the trial court and will only be disturbed for an abuse of discretion." *Sluss v. Commonwealth*, 450 S.W.3d 279, 285 (Ky. 2014) (overruled on other grounds by *Floyd v. Neal*, 590 S.W.3d 245, 249–50 (Ky. 2019)).

> When pretrial publicity is at issue, "primary reliance on the judgment of the trial court makes [especially] good sense" because the judge "sits in the locale where the publicity is said to have had its effect" and may base her evaluation on her "own perception of the depth and extent of news stories that might influence a juror." *Mu'Min* [*v. Virginia*], 500 U.S. [515,] 427, 111 S.Ct. 1899 [(1991)]. Appellate courts making after-the-fact assessments of the media's impact on jurors should be mindful that their judgments lack the on-the-spot comprehension of the situation possessed by trial judges.

Skilling v. United States, 561 U.S. 358, 386 (2010).

The question is whether the new, potentially prejudicial publicity aroused the public to the extent that Brock could not receive a fair trial. The trial court was very concerned about having a fair trial and, accordingly, put in additional safeguards. These included signing a February 11, 2022, order, in which the trial court ordered that the jurors would be required to leave their cellular telephones and electronic communication devices in their vehicles, or have the bailiff take possession of them during each day, and provided instructions that during each day of the trial they were not access to their cell phones, giving them instructions that they were not to go online at any time to get information about the case, to communicate with anyone about the case, or do research about the case; and warning them not to do such things during deliberations. The jurors were to be specifically warned: "If you do not follow these instructions, you may be guilty of juror misconduct, and a new trial may have to be ordered."

While there was evidence from which the trial court could conclude that a change in venue was warranted, Brock only speculates that he was prejudiced by the failure to change the trial venue. Brock fails to provide any proof that actual prejudice occurred or that he did not receive a fair trial by being tried in Whitley Circuit Court. The trial court addressed the matter of the potential influence of pretrial publicity on the jury through a jury questionnaire and permitting an extensive *voir dire* process designed to eliminate any biased jurors. It appears that this process worked well as Brock was able to eliminate for cause a juror that was aware of his plea agreement and could not put it

aside. Under these circumstances, Brock has failed to establish he was prejudiced, or that prejudice could be implied.

E. Did the Commonwealth Commit a *Brady* Violation by Failing to Preserve and Test Byers's Pants for DNA?—Unpreserved

Brock argues that the Commonwealth committed a *Brady* violation when it failed in its affirmative duty to disclose to the defense all material exculpatory or impeaching information possessed by an investigating agency. He argues there was a reasonable possibility that exculpatory evidence would be found on Byer's pants. He argues the fact that Byers's DNA was found under the fingernails of Jackson, means that if Byers's pants had been tested for DNA and the DNA of Myers or Jackson been found on the pants and disclosed to Brock, that the results of the trial would have been different, because this would lead to the conclusion that it was Byers, rather than Brock, who killed Myers and Jackson. Therefore, he asserts, the Commonwealth should have tested these pants for DNA and provided him with the results.

The Commonwealth argues that this claim is unpreserved and is not palpable, and there can be no *Brady* violation stemming from the failure to test Byers's sweatpants where there is no indication whether such evidence would be favorable to Brock. The Commonwealth further argues that even if DNA from Myers and Jackson had been found on Byers's clothing, the fact that he lived in the same household with Myers and Jackson could explain its presence and, therefore, such evidence would not be exculpatory to Brock. Finally, the Commonwealth argues that given all the other evidence implicating Brock in

the murders that there is simply no possibility that favorable results of testing would have altered the outcome at trial.

Regarding preservation, Brock makes general statements in his appellant brief and reply brief that all of his claims are preserved. While Brock named specific motions and provided record citations to establish this as true regarding his other arguments, Brock did not provide any citations to the record to support his statement that he raised a *Brady* claim regarding the preservation and testing of Byers's pants before the trial court.

Having independently reviewed the record, we determine this argument is unpreserved. Brock's general motions for discovery, filed on April 12, 2019, and April 17, 2019, do not qualify as preserving this argument. Byers's pants simply are not obviously the type of physical evidence that needed to be preserved and tested and it appears that Brock failed to ever request that the Commonwealth test such material or to allow him to test such material. While Brock made other motions related to evidence he considered to be in violation of *Brady*, none of these pertained to Brock requesting that Byers's pants be preserved or tested for DNA even though he knew that Byers's DNA was found under Jackson's fingernails prior to trial.[4]

[4] On February 23, 2021, Brock filed a motion to dismiss or exclude the death penalty as *Collins's clothes* that he was wearing the day of the murder were not preserved, and if they had been Brock would have requested testing on them for gunshot residue and blood. Regarding *Collins's clothing*, on March 26, 2021, the trial court granted the relief of a missing evidence instruction, and on April 7, 2021, denied the motion to dismiss on the basis that Brock had not shown that failure to maintain Collins's clothes constituted bad faith. Brock's August 29, 2021, motion to dismiss Count One of the indictment, indicated Brock had recently learned that Jackson had Byers's DNA under her fingernails. Accordingly, by the time this motion was filed,

A general statement of preservation is insufficient to comply with the Rules of Appellate Procedure (RAP). RAP 32(A)(4) requires that the argument section of the appellate brief, contain "a statement with reference to the record showing whether the issue was properly preserved for review and, if so, in what manner." Brock failed to comply with this requirement. Accordingly, a sanction would be permissible pursuant to RAP 10(B), such as striking the portion of the brief pertaining to an unpreserved argument under RAP 10(B)(3) and, therefore, not considering that argument at all.

Brock requests in his reply brief that if our Court should find that his *Brady* claim was not properly preserved, that he be granted palpable error review. We consider his argument under this standard. However, even if we were to consider it under the more generous review provided to a preserved error, Brock could not establish any kind of *Brady* violation under the circumstances.

As explained in *Arizona v. Youngblood*, 488 U.S. 51, 57–58 (1988), the failure of the state to preserve potentially useful (as opposed to known to be exculpatory) evidence is not a *Brady* violation and does not constitute a denial of due process unless the defendant establishes the police acted in bad faith in failing to preserve such evidence. In *Illinois v. Fisher*, 540 U.S. 544, 548 (2004), the Court clarified that the *Youngblood* requirement of bad-faith before a due

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Brock would have a reason to inquire as to whether the Commonwealth had Byers's pants and to request DNA testing of them. Brock's March 23, 2022, motion to declare a mistrial or to void the death penalty involved a *Brady* violation for not receiving the audio for *Collins's third interview*.

process violation will be found for failing to preserve potentially exculpatory evidence applies even when there is a pending discovery request or such lost evidence "provides a defendant's 'only hope for exoneration[.]'" The Court reiterated that *Brady* applying rather than *Youngblood* hinges "on the distinction between 'material exculpatory' evidence and 'potentially useful' evidence." *Fisher*, 540 U.S. at 549.

In Kentucky, our Court has repeatedly stated unequivocally that, in accordance with *Youngblood*, "[a]bsent a showing of bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." *Kirk v. Commonwealth*, 6 S.W.3d 823, 826 (Ky. 1999). In *Collins v. Commonwealth*, 951 S.W.2d 569, 573 (Ky. 1997), our Court clarified that a failure of the Commonwealth to *collect* potentially useful evidence, even if negligent, does not satisfy the bad faith requirement. We additionally explained in *Commonwealth v. Parrish*, 471 S.W.3d 694, 698 (Ky. 2015), that *Brady* does not apply where it is known at trial that information is missing, and a witness is actively cross-examined about the failure to preserve an item.

Brock engages in speculation that testing of Byers pants would have produced exculpatory evidence. However, at best, this evidence was only potentially useful, as it was unknown whether, if the pants were preserved and tested, they would provide results which were exculpatory, inculpatory, or not useful to either party. Therefore, there can be no *Brady* violation and, instead, at most there could be a *Youngblood* violation. However, because Brock has

completely failed to argue or present any evidence to establish bad faith on the part of the police for failing to preserve such evidence, no *Youngblood* violation can be established, either.

III. CONCLUSION

We affirm Brock's convictions and sentences because the Whitley Circuit Court properly rejected Brock's motion to suppress police interview statements, appropriately permitted Myers's statement to be admitted, and appropriately exercised its discretion to decline to sever the murder charges or change the trial venue. As to Brock's unpreserved error of a *Brady* violation, Brock failed to establish any error, palpable or otherwise, in the Commonwealth failing to preserve and test Byers's pants for DNA and give Brock the results.

All sitting. All concur.

COUNSEL FOR APPELLANT:

John A. Combs
Combs Law, PLLC

COUNSEL FOR APPELLEE:

Russell M. Coleman
Attorney General of Kentucky

Christopher Henry
Assistant Attorney General