Supreme Court of Kentucky

No. 2022-SC-0507
Electronically Filed

KEVON LAWLESS *Appellant*

v. Jefferson Circuit Court,
Nos. 20-CR-001499-001 & 22-CR-001786

COMMONWEALTH OF KENTUCKY *Appellee*

BRIEF FOR THE COMMONWEALTH OF KENTUCKY

RUSSELL COLEMAN
Attorney General of Kentucky

MATTHEW F. KUHN (No. 94241)
Solicitor General
JOHN H. HEYBURN (No. 100756)
Principal Deputy Solicitor General

Office of the Attorney General
700 Capital Avenue, Suite 118
Frankfort, Kentucky 40601
Matt.Kuhn@ky.gov
Jack.Heyburn@ky.gov
(502) 696-5300

Counsel for the Commonwealth of Kentucky

Certificate of Service

I certify that a copy of this brief was served by U.S. mail on September 3, 2024 on Kevin M. Glogower, 500 West Jefferson Street, Suite 1100, Louisville, Kentucky 40202; Hon. McKay Chauvin, Jefferson Circuit Court, 600 West Jefferson Street, Suite 2008, Louisville, Kentucky 40202; and Gerina D. Whethers and Ryane Conroy, Office of the Commonwealth Attorney, Jefferson County, 514 West Liberty Street, Louisville, Kentucky 40202. I further certify that the record was returned prior to filing this brief.

/s/ John H. Heyburn

INTRODUCTION

At 1:11 p.m. on August 14, 2020, Kevon Lawless shot and killed Brandon Waddles and Waddles' three-year-old daughter, Trinity Randolph. This senseless killing was at least a day in the making. The night before, Lawless enlisted his girlfriend, Akoi Reclow, to contact Waddles and feign interest in starting a relationship. The next day, while Akoi told Waddles she was on her way to him, a trusted friend, Evan Ross, drove Lawless to Waddles' home on Kahlert Avenue in South Louisville. Akoi asked Waddles to come outside to meet her. He complied. Unbeknownst to Waddles, however, Akoi was nowhere near Kahlert Avenue. Instead, Lawless emerged from the back seat of Ross's Chrysler 200 with a .40-caliber handgun. Fifteen seconds and eleven shots later, he and Ross sped away from the scene. Waddles and Trinity Randolph lay dead inside the house.

The jury heard overwhelming evidence of Lawless's guilt, including testimony from Akoi and Ross, text messages revealing the plan to set up Waddles, Lawless's cell-phone location data, video from neighboring homes, and extensive evidence of law enforcement's investigation. The three alleged errors identified by Lawless do not come close to justifying reversal of Lawless's conviction and life sentence. This Court should therefore affirm.

STATEMENT CONCERNING ORAL ARGUMENT

Although Lawless's appeal lacks merit and could be resolved on the briefs, oral argument would be helpful due to the large record in this case.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE

The Commonwealth does not accept Kevon Lawless's statement of the case. By way of background, the Commonwealth addresses the statutory scheme for motions to exclude the death penalty, relevant pretrial motions, and the trial.

I. Statutory Background

Kentucky Revised Statutes 532.130–.140 prohibit the death penalty for certain defendants who would otherwise be eligible for it. The General Assembly amended these provisions in the 2022 Regular Session. *See* 2022 Ky. Acts ch. 109, §§ 1–3. Before 2022, KRS 532.140's death-penalty exclusion applied only to defendants with a serious intellectual disability. And it required the defendant to move to exclude the death penalty 30 days before trial and for the court to rule on that motion 10 days before trial. This changed in 2022 with the passage of House Bill 269. It added a new category of defendants who are excluded from receiving the death penalty: those with a serious mental illness. And it extended the deadlines for filing and ruling on these motions to 120 days and 90 days, respectively.

As amended, KRS 532.140 provides that "a defendant who has been determined to be a defendant with a serious intellectual disability or a defendant with serious mental illness under KRS 532.135 shall not be subject to execution." A defendant meets the serious-mental-illness classification if "[a]t the time of the offense, he or she has active symptoms and a documented history, including a

diagnosis, of one (1) or more of the following mental disorders . . . : 1. Schizophrenia; 2. Schizoaffective disorder; 3. Bipolar disorder; or 4. Delusional disorder." KRS 532.130(3)(a). The defendant bears the burden of proving a serious mental illness by a preponderance of the evidence. *Cf. Woodall v. Commonwealth*, 563 S.W.3d 1, 6 n.29 (Ky. 2018) (citing *Bowling v. Commonwealth*, 163 S.W.3d 361, 381−82 (Ky. 2005)).

House Bill 269 became effective before Lawless's trial. It was signed by the Governor on April 8, 2022—157 days before Lawless's trial. House Bill 269, Legislative Research Commission (last visited, Sept. 3, 2024), https://perma.cc/3BMT-S7EB. And it took effect on July 14, 2022—60 days before the trial. This meant that under the applicable law of July 13, 2022, Lawless still had approximately one month to file his motion to exclude the death penalty. But the next day—when the amendments to KRS 532.130–.140 became effective—his motion suddenly became two months late. As discussed below, however, the Commonwealth waived any objection to the timeliness of Lawless's motion. *Infra* 5. And the circuit court still heard Lawless's motion. *Id.*

II. Pretrial Proceedings

A. The Indictments

Lawless was indicted by a Jefferson County grand jury on October 7, 2020, on two counts of Murder, one count of Burglary in the First Degree, and one count of Possession of a Handgun by a Convicted Felon. TR 1–3, No. 20-CR-

001499.[1] A later indictment charged Lawless with being a Persistent Felony Offender in the Second Degree. TR 3–4, No. 22-CR-001786.[2] The charges arose after Lawless forced entry into a residence and shot Brandon Waddles and Waddles' three-year-old daughter, Trinity Randolph, on August 14, 2020.

On June 7, 2021, the Commonwealth filed a Notice of Aggravating Circumstances under KRS 532.025. TR 50–51. The Commonwealth noticed that the murders were committed while Lawless was engaged in the commission of first-degree burglary and that his acts of killing were intentional and resulted in multiple deaths. *Id.* at 50 (citing KRS 532.025(2)(a)(2), (6)). Accordingly, the Commonwealth provided "formal notice" that Lawless's case would "be prosecuted as a capital offense, in which the Commonwealth w[ould] seek penalties up to and including the death penalty." *Id.*

B. Pretrial Motions Practice

The circuit court (Hon. McKay Chauvin) initially scheduled Lawless's trial to begin on April 15, 2022. *See* TR 73. Two months after the Commonwealth filed the Notice of Aggravating Circumstances, however, Lawless's original

---

[1] All subsequent record citations are for the record in 20-CR-001499, unless otherwise noted.

[2] Lawless was previously convicted of one count each of criminal attempted murder, second-degree assault, third-degree burglary, second-degree escape, and tampering with a prison monitoring device. TR 243–49. He was sentenced to thirteen years' incarceration but was paroled after just under four. *Id.* Lawless was on supervised release when he committed the murders at issue in this case.

counsel moved to withdraw. New counsel took over the representation in October 2021. TR 59. On December 15, 2021, Lawless's new counsel moved for a continuance of the trial date. TR 106–09. The Commonwealth did not object, and the Court granted the motion the next day. TR 156–57. The court scheduled the trial to begin on September 12, 2022, with jury selection to begin on September 9. *Id.*

In granting the continuance, however, the circuit court cautioned that the parties "will be obliged to meet their responsibilities within the more than reasonable time constraints set by the court." TR 156–57. The court explained that "it cannot be said that there is anything about the facts, circumstances or applicable law in the instant case which is especially difficult or unusually complicated." *Id.* at 156. And the court warned against "conflat[ing] that which is difficult with that which is unfair or prejudicial." *Id.* In other words, the court made clear that it expected the trial to begin on the scheduled date.

Lawless filed two motions on August 7, 2022—about one month before the trial. He moved to exclude the death penalty under KRS 532.140, citing his alleged, documented history of schizophrenia. TR 280; *see also* TR 389 (supplemental motion). And he moved to continue the trial date by 120 days. TR 255. Lawless argued that a second continuance was necessary because it was not possible to meet the new deadlines of KRS 532.135 and to give defense counsel more time to develop arguments for his KRS 532.140 motion. These motions,

therefore, were closely related: the latter was filed to gain additional time to prepare his defense for the former.

The circuit court heard Lawless's motions on August 9, 2022. VR 8/9/2022, 3:24:43. Given the unique circumstances stemming from the statutory change in the middle of the proceedings, the Commonwealth waived any objection to the timeliness of Lawless's motion to exclude the death penalty. *Id.* at 3:30:00–3:30:10. The Commonwealth objected to a continuance, however, arguing that Lawless had ample time to prepare for trial without the continuance. *Id.* at 3:36:00–3:39:45.

The circuit court denied Lawless's motion for a continuance and set a new hearing for Lawless's motion to exclude the death penalty. TR 297. The court acknowledged that Lawless missed the 120-day deadline for his death-penalty-exclusion motion, "thereby rendering it impossible for the Court to make the requisite determination under KRS 532.135 at least ninety (90) days before the beginning of the trial." *Id.* But the court nevertheless concluded that it would not "deny the Defendant the opportunity" to raise this motion. *Id.* The court found "that a hearing held thirty (30) days from the date the issue was raised/motion was filed, [would] satisf[y] the due process requirements established in KRS 532.135" because it would give Lawless the same 30 days to prepare his arguments to which he would be entitled under the amended KRS 532.135. *Id.* The circuit court noted that "there is nothing in the language of KRS 532.135 [as

amended] that would require counsel to have changed the scope or focus of the research and investigation into potential mitigation evidence on behalf of the Defendant." TR 298 n.1. The amended statute merely created a new "procedural mechanism" to use that information in a different way. *Id.*

Lawless then petitioned this Court "to issue a writ directing the Jefferson Circuit Court to continue his upcoming trial." TR 407; *see Lawless v. Judge McKay Chauvin*, 2022-SC-0343 (Ky.). This Court denied the petition. It held that because "a sentence of death" "is not a foregone conclusion," Lawless had only "allege[d] a possible future injury, not one that is certainly impending." TR 409. The Court noted, however, that Lawless was free to challenge a death sentence if he, in fact, received it.

C. Death Penalty Hearing

The circuit court held an evidentiary hearing on Lawless's motion to exclude the death penalty on September 9, 2022. The court began by noting that because Lawless's motion was not filed within the 120-day statutory deadline, Lawless was not entitled to the hearing as a matter of law. VR 9/9/2022, 9:24:00–9:28:30. The court stated, however, that it would nevertheless provide Lawless the hearing because declining to do so would be unfair. *Id.* Consistent with its previous waiver of any objection to the timeliness of Lawless's motion, the Commonwealth did not object to the court holding the hearing and addressing the merits of Lawless's motion. *Id.*

Lawless called one witness, Dr. Lauren Kaplan. VR 9/9/2022, 9:32:00–9:42:30. At the time, Dr. Kaplan was a self-employed clinical and forensic physiologist. *Id.* at 9:32:20–9:32:30. She holds an undergraduate degree in psychology and received her doctorate in psychology from Spalding University. *Id.* at 9:32:45. She opined that Lawless suffered from a serious mental illness as defined in KRS 532.130. *Id.* at 9:40:50–9:42:30. As discussed above, it was Lawless's burden at this hearing to prove by a preponderance of the evidence that he had a "documented history, including a diagnosis" of one of the statutorily enumerated mental disorders *and* was experiencing "active symptoms" "[a]t the time of the offense." KRS 532.130(3)(a).

Dr. Kaplan evaluated Lawless for two days prior to the hearing. VR 9/9/2022, 9:34:25. She also reviewed his mental-health records, including his educational records, hospital records, and Kentucky Department of Corrections records. *Id.* at 9:35:00. As relevant here, she testified that Lawless was previously diagnosed with schizoaffective disorder in 2017 while in the Luther Luckett Correctional Complex, and that his symptoms included delusional thinking and hallucinations. *Id.* at 9:36:25–9:40:30. Dr. Kaplan further opined that Lawless must have been experiencing active symptoms on the day of the murders because she believed his symptoms were constant. *Id.* at 9:40:50–9:42:30. Dr. Kaplan did not address whether Lawless suffered from a serious intellectual disability under KRS 532.130.

The Commonwealth's cross-examination of Dr. Kaplan revealed critical flaws in her opinion. VR 9/9/2022, 9:42:30–10:21:00. Specifically, it was revealed that:

- It's possible to be mentally ill but not suffering from active symptoms of mental illness, *id.* at 9:57:55–9:58:10;
- Dr. Kaplan "did not discuss the details of that specific day," meaning the day of the murders, with Lawless, and she did not inquire into whether Lawless was experiencing symptoms of a mental disorder at the time of the offense, *id.* at 9:59:00–10:03:00;
- Dr. Kaplan's opinion about Lawless's symptoms on the day of the murder was based on her "reasonable assumption," *id.* at 9:43:25–9:44:10;
- Lawless likely had antisocial personality disorder (a diagnosis that would not preclude the death penalty), and it's possible to have this disorder and not others, *id.* at 9:55:15–9:56:50;
- Lawless never reported delusional behavior before January 2022—approximately a year and a half after the murders, *id.* at 10:17:25–10:17:45;
- The evidence of Lawless's hallucinations was almost entirely self-reported, as there was no record evidence of any third party observing Lawless having symptoms of auditory hallucinations, *id.* at 9:49:05–9:49:30, and there was no record evidence of a third party observing concrete evidence of hallucinations, such as observing Lawless "to be responding to internal stimuli," since age 11, *id.* at 9:50:10–9:51:10; and
- Lawless understood the stakes of their conversation—*i.e.*, that he could avoid a death sentence if he could establish that he suffered from a serious mental illness, *id.* at 9:51:10–9:51:50.

The circuit court also questioned Dr. Kaplan. VR 9/9/2022, 10:24:40–10:37:40. It asked whether Dr. Kaplan tested Lawless for malingering—that is,

signs that he was feigning psychological symptoms to obtain a desired result (here, exclusion of the death penalty). *Id.* at 10:26:45–10:30:20. Although Dr. Kaplan did not discuss this in her direct testimony, she admitted that Lawless did, in fact, show signs of malingering. *Id.* Dr. Kaplan gave Lawless two tests. On the Structured Inventory of Malingered Symptomology (SIMS) test, Lawless received a score of 17, which is above the threshold of 14 that indicates malingering. *Id.* at 10:27:10–10:28:35. And on the Tests of Memory Malingering (TOMM), Lawless received a score that she described as "murky" and "could go either way" in terms of being indicative of malingering. *Id.* at 10:28:35–10:30:20.

The circuit court also questioned Dr. Kaplan about the basis for her opinion that Lawless was experiencing active symptoms at the time of the murders. VR 9/9/2022, 10:30:20. The court emphasized that Lawless's mental state at the time of the offense is a "big deal" under the statute. *Id.* at 10:34:00. And it questioned why Dr. Kaplan did not even ask Lawless about his mental state at the time of the offense. *Id.* at 10:35:30. Dr. Kaplan responded that it was sufficient that Lawless described, as a general matter, the symptoms he allegedly experienced throughout his life. *Id.* at 10:35:50–10:37:20. She stated that she was "reasonably certain" given this historical information that Lawless would have been experiencing active symptoms at the time of the murders. *Id.*

The circuit court denied Lawless's motion to exclude the death penalty from the bench. VR 9/9/2022, 10:52:30–10:58:55. It acknowledged that Lawless

likely had some sort of mental illness but found that there was not substantial evidence that he had a *documented history*, including a diagnosis, of one the specific mental illnesses listed in KRS 532.130. *Id.* at 10:52:30–10:55:20. The court found that the only reference in Lawless's medical records related to a schizoaffective disorder was a passing reference in one of his treatment records—not a diagnosis. *Id.* at 10:53:30–10:54:15.

Even if Lawless had a documented history of schizoaffective disorder, the circuit court found there was not substantial evidence that Lawless had *active symptoms* on the day of the murders. VR 9/9/2022, 10:55:20–10:58:55. The court noted that Dr. Kaplan's opinion relied solely on assumptions from historical information, not any specific inquiry into Lawless's mental state at the relevant time. *Id.* Dr. Kaplan's opinion on active symptoms, therefore, was "speculative" and "statistical at best." *Id.* at 10:57:25–10:57:45. The court subsequently committed its ruling to writing. TR 471.

III. The Trial

Lawless's trial began on September 15, 2022, and lasted for five days. Capital penalty-phase proceedings were held on the sixth day. A summary of the trial follows.

A. The Commonwealth's Case

The Commonwealth called 17 witnesses and introduced dozens of exhibits. This evidence falls into three general categories: (1) evidence that Brandon

Waddles and Trinity Randolph were murdered at their house on Kahlert Avenue on August 14, 2020; (2) evidence that Lawless, along with Akoi Reclow and Evan Ross, planned a scheme to set up and murder Waddles; and (3) evidence that Kevon Lawless carried out the scheme and was, in fact, the shooter. The Commonwealth addresses each category in turn.

1. ***The Murders***. The jury heard uncontroverted evidence that Brandon Waddles and Trinity Randolph were shot to death by a single individual using a .40-caliber handgun.

The Commonwealth's first witness was Officer Chase Lambert. VR 9/15/2022, 10:44:00–11:06:45. Officer Lambert was the first officer to arrive at the scene. He was parked at a nearby church when he received the call for service at 1:16 p.m. on August 14, 2020. *Id.* at 10:51:35–10:52:35; Commonwealth of Kentucky's Exhibit ("COK Ex.") 1 (Officer Lambert's body-worn camera footage). He arrived at 3728 Kahlert Avenue approximately one minute after receiving the call. VR 9/15/2022, 10:54:55–10:55:10. The jury heard Officer Lambert's testimony and watched video from his body-worn camera. *See* COK Ex. 1.

Officer Lambert approached Brandon Waddles' house on Kahlert Avenue from the back. *See* VR 9/15/2022, 10:55:25–10:55:35. Multiple people were standing around the back yard as he hopped the back fence. *Id.* at 10:53:15–10:53:25. He saw shattered glass and shell casings on the ground inside and outside the house. *Id.* at 10:55:50–10:56:00, 10:56:55–10:57:05. Upon entering the

house, he saw two individuals on the floor bleeding from apparent gunshot wounds: one child and one adult. *Id.* at 10:56:00–10:56:30. Officer Lambert went straight to Trinity Randolph and began performing CPR. *Id.* at 10:56:30–10:57:30. He determined that she had the best chance of surviving if he proceeded directly to a hospital with her rather than waiting for an ambulance. 10:57:30–10:57:50. Officer Lambert carried her to a squad car and continued to perform CPR while another officer drove to the hospital. *Id.* at 10:57:50–10:58:05. "Dozens" of other LMPD officers promptly began blocking intersections and clearing his route to Kosair Children's Hospital. *Id.* at 10:58:05–10:59:00. Approximately half an hour after Officer Lambert delivered Trinity Randolph to the emergency room, he was informed that she did not survive. *Id.* at 10:59:00–10:59:20.

Officer Megan Foster and her partner, Officer Paige Young, arrived at the scene around the same time as Officer Lambert. VR 9/15/2022, 11:09:00–11:21:30. She also testified about her recollection of the crime scene mere minutes after the shooting, which was consistent with Officer Lambert's testimony and body-worn camera footage. *Id.* She testified that the inside of the house was a "mess," an adult male was lying in a hallway in a pool of blood, and she saw Officer Lambert rush to give CPR to Trinity Randolph. *Id.* at 11:14:35–11:15:50. Through tears, Officer Foster testified that it "doesn't matter if you're

a new officer or if you've been on for 20 years, any run with a child involved is very hard. And I'll never, ever forget that day." *Id.* at 11:15:50–11:16:10.

The jury also heard testimony from several detectives assigned to the case. Detective Kevin Carrillo was the scene lead detective responsible for documenting, preserving, and collecting the evidence at the crime scene. VR 9/15/2022, 11:22:00–12:01:00. Detective Carrillo led a neighborhood canvass for witnesses and video. *Id.* at 11:25:50–11:26:10. And he "processed the crime scene in its entirety" by taking photos and video of the scene and collecting any available evidence, including shell casings, spent projectiles, and Brandon Waddles' cell phone, among other things. *Id.* at 11:26:50–11:28:45. The Commonwealth showed the jury Detective Carrillo's video of the crime scene. *Id.* at 11:29:30–11:44:00; COK Ex. 2; *see also* VR 9/15/2022, 12:02:00–12:32:00 (testimony of Rebecca Kimmer, a crime scene technician responsible for processing the crime scene at the direction of the detectives).

Stephen Hughes of the Kentucky State Police Forensic Laboratory also testified. VR 9/15/2022, 2:20:30–3:27:15. He testified that detectives found 11 shell casings and 11 bullets or bullet fragments at the scene, all from a .40-caliber Smith & Wesson. *Id.* at 2:32:20–2:33:20. The lead detective assigned to the case, Timothy O'Daniel, testified that based on testing of the casings, bullets, and bullet fragments, investigators determined that the shooting was carried out by one individual using one gun. VR 9/20/2022, 10:45:45–10:46:15; 12:13:00–12:15:30.

The Commonwealth also presented evidence of the victims' autopsies. An LMPD crime-scene technician, Jacob Brandt, photographed the victims for the autopsies. VR 9/15/2022, 2:11:00–2:19:20; *see also* COK Ex. 32 (autopsy photos of Brandon Waddles); COK Ex. 33 (autopsy photos of Trinity Randolph). Dr. Lauren Lippencott, in the Office of Chief Medical Examiner in Louisville, performed them. VR 9/20/2022, 9:44:30–10:09:00. Dr. Lippencott identified six gunshot wounds to Waddles, with a wound to his torso likely being the fatal one. *Id.* at 9:51:30–10:01:30. She testified that these gunshot wounds were his cause of death, and the manner of death was homicide. *Id.* at 9:51:20–9:51:35; 10:04:40–10:05:20. Dr. Lippencott identified two gunshot wounds to Trinity Randolph—one to the back of the neck and one to the buttocks. *Id.* at 10:05:30–10:05:55. She testified the gunshot to the neck entered the cervical spine and brain stem and was likely instantly fatal. *Id.* at 10:05:55–10:06:20. This wound was the cause of death. *Id.* at 10:06:55–10:07:05. The manner of her death was homicide. *Id.* at 10:08:30–10:08:50.

In sum, the crime-scene evidence demonstrated that one individual, using one .40-caliber firearm, shot and killed Brandon Waddles and Trinity Randolph on August 14, 2020.

2. ***Lawless's Plan***. The jury also heard evidence that, starting the day before the murder, Lawless and two accomplices—Akoi Reclow and Evan Ross—hatched a plan to set up and murder Waddles.

Lawless's plan to murder Waddles was the culmination of a preexisting dispute between the two. The Commonwealth showed the jury a video from Instagram Live, taken some time before the murders, involving Waddles and Lawless. COK Ex. 34; VR 9/20/2022, 10:35:50–10:37:05. Waddles mocked the death of an individual named Dino. *Id.* Detective O'Daniel testified that Dino was a juvenile who was murdered in 2016, and his death held significance for "certain neighborhood groups in Louisville." *Id.* at 11:59:50–12:01:40. Lawless was among those close to Dino. Indeed, when law enforcement arrested Lawless on August 25, 2022, he was leaving the cemetery where Dino is buried. *Id.* at 11:59:15–12:01:40. On the Instagram Live video, Waddles exclaimed, "Let's keep it real, you're missing Dino." COK Ex. 34. In response, Lawless stated, "You's a hoe, n***a. Wait 'til I catch you, boy. And I said it on Live, n***a." *Id.* Waddles responded by flashing a firearm and saying, "Look, he's mad now. Dino's dead, n***a. Dino's dead, n***a. Ain't nothing you can do, Dino's gone." *Id.* At that point, the video ends. *Id.*

Lawless enlisted his girlfriend—17-year-old Akoi Reclow—to get back at Waddles.[3] The Commonwealth presented evidence that Akoi and Lawless loved each other and were in a relationship. Akoi told police investigators that she and

[3] Akoi pleaded guilty to two counts of facilitation of murder and one count of facilitation of burglary. VR 9/16/2022, 2:16:15–2:17:15.

Lawless were "in a relationship" and that "he would come over to [her] house every day." VR 9/16/2022, 4:14:55–4:15:15. Lawless's number was listed in Akoi's phone as "Best Friend" with a heart emoji. *Id.* at 4:18:10–20; VR 9/20/2022, 2:32:30–2:33:05. The two expressed their love for one another on a controlled call that Akoi placed to Lawless during law enforcement's investigation after the murders. VR 9/16/2022, 10:43:20–10:48:55; *see also* COK Ex. 23 (Detective Peter's body-worn camera footage). On the same call, Akoi and Lawless said that they missed one another, and Lawless told Akoi that "we tight for life." VR 9/16/2022, 10:43:20–10:48:55. The Commonwealth also introduced over 100 pages of text messages from the weeks and months before August 14, 2020, demonstrating Akoi and Lawless's preexisting relationship. *See* COK Ex. 44; VR 9/20/2022, 2:32:30–2:40:00.

Akoi testified about the central role she played in helping Lawless set up Waddles. VR 9/16/2022, 1:40:30–2:17:40. She testified that Lawless was with her in her bedroom the night before the murders. *Id.* at 2:06:35–2:06:55. At his direction, she texted Waddles and feigned interest in starting a relationship. *Id.* at 2:07:50–2:08:50. She testified that she hid from Waddles that Lawless had anything to do with her outreach. *Id.* at 2:09:30–2:09:55. Rather, her and Lawless's goal was to make Waddles think that she "liked him" and wanted to meet up, and to "make sure [Waddles] didn't see it coming." *Id.* at 2:09:45–2:11:15. The next day, just before the murders, she was on the phone with Lawless giving him

directions to Waddles' home. *Id.* at 1:41:25–1:43:00; 2:03:30–2:04:40. She was on the phone with Waddles at the same time. *Id.* at 1:56:55–1:57:30. She hung up the phone when she heard gunshots. *Id.* at 1:57:30–1:59:00; 2:02:40–2:03:20. To be sure, Akoi testified that she did not know that Lawless would kill Waddles and Trinity Randolph—instead claiming that she thought Lawless would only rob Waddles and share the money with her. *Id.* at 1:52:00–1:52:55. But regardless of whether that is true, her role in facilitating the set up was clear.

Because Akoi was initially a reluctant witness—repeatedly claiming a lack of memory on subjects she had previously discussed fully with prosecutors and the police, *see* VR 9/16/2022, 11:25:00–12:00:00—the Commonwealth introduced body-worn camera footage from her initial interactions with the police as impeachment evidence. *Id.* at 2:23:00–4:58:00. During the course of law enforcement's investigation, investigators learned of Akoi's involvement, and on August 19, 2020, Detective Brian Peters brought Akoi in to discuss the murders. Fighting back tears, Akoi told Detective Peters:

> I talked to this boy, named Kada.[4] We was in a relationship, and he would come over to my house every day. And one day he was like, we gonna put the play down for somebody named Little B.[5]

---

[4] The jury heard evidence that Lawless went by "Kada." *See, e.g.*, VR 9/19/2022, 11:36:05–11:39:50; VR 9/20/2022, 11:48:15–11:49:20. He also rapped under the name LuKada. VR 9/19/2022, 11:36:05–11:39:50; 2:16:20–2:20:55; 2:25:20–2:29:00.

[5] Akoi's discussion of "Little B" with Detective Peters is consistent with her testimony about Brandon Waddles at trial. *Supra* 16–17.

> So I was like put the play down for what? And he said I ain't gonna do nothing but rob him. And he was like all I need to do is get his address. So me and Little B started texting on Instagram, and I gave him my number. And that's those messages right there. He gave me his address. Then Kada was like, I'm gonna rob him, and get a whole lot of money, and split it with you. And then I was on the phone with Little B, I heard a whole lot of gunshots, and so I closed the phone. I went to sleep, I woke up an hour later, I looked on the news and it said Little B and the baby got shot and killed. But he said he was just gonna rob him and take his money, he didn't say he was gonna kill him or nothing.

Id. at 4:15:00–4:16:30. Akoi also told officers that, just before the shooting, she told Waddles to come outside. *Id.* at 4:16:55–4:17:20. She was also on the phone with Lawless at the same time. *Id.* Shortly thereafter, she heard gunshots and hung up the phone. *Id.* at 4:16:40–4:16:55.

Phone records from both Brandon Waddles' and Akoi Reclow's phone corroborated Akoi's account of the set up. Detective Jason Clopton testified about how investigators pulled texts from Waddles' phone. VR 9/16/2022, 9:47:00–10:07:00; COK Ex. 22. After exchanging phone numbers on Instagram, Akoi texted Waddles and asked him to "lock . . . in" her contact information. VR 9/20/2022, 10:57:00–10:57:20. Akoi complimented Waddles' music, saying she "like[d] [his] style." *Id.* at 10:59:10–10:59:20. Later that night—around 1:30 a.m. on August 14—Akoi texted Waddles, "I'm going to fwy tomorrow," and asked, "what time?" *Id.* at 11:00:15–11:00:45. Waddles told her between noon and 1 p.m. *Id.* at 11:00:45–11:01:00. Akoi then sent Waddles three photos of herself, at his request. *Id.* at 11:01:00–11:01:40. Later in the morning, Akoi texted, "I need

to be with you right now," and, "hold me later on baby." *Id.* at 11:01:40–11:02:25. Waddles responded, "you want me to hold you," and asked, "what else?" *Id.* at 11:02:40–11:02:55. Akoi texted, "I'm feeling you already no cap." *Id.* at 11:03:00–11:03:15.

Starting around noon on August 14, Akoi began sending Waddles regular updates on her (fake) status. VR 9/20/2022, 11:04:30–11:04:50. Waddles sent her his address. *Id.* at 11:04:50–11:05:10. At 12:46 p.m., Akoi texted that she would be at his house in 15 minutes. *Id.* at 11:05:00–11:05:30. At 12:51 p.m., she texted that she would be "15 minutes at most" and that "traffic don't look too bad." *Id.* at 11:05:30–45. At 12:56 p.m., she texted, "8 minutes away." *Id.* at 11:05:40–11:05:50. Then, at 1:02 p.m. she texted, "I ain't never been down this way in the south. Come outside." *Id.* at 11:05:50–11:06:05. At the same time—shortly after 1:00 p.m., video from a nearby house showed Evan Ross's Chrysler 200 circling the block. *Id.* at 11:08:00–11:09:38; 11:25:00–11:27:00; COK Ex. 35. Akoi then called Waddles. VR 9/16/2022, 4:16:55–4:17:20. At the same time, video also shows Waddles outside his house, appearing to be on the phone. VR 9/20/2022, 11:08:30–11:08:50; 11:27:00–11:29:45; COK Ex. 35. The shooting occurred minutes later, at 1:11 p.m.

3. ***Lawless was the shooter***. Finally, the jury heard evidence that Lawless carried out his plan and, with the help of his accomplices, shot and killed Brandon Waddles and Trinity Randolph.

To begin, cell-phone data from Lawless's phone placed him in the general vicinity of the crime scene. The Commonwealth called a custodian of records from T-Mobile, who testified that he provided call-detail records for the number that Lawless was using at the time of the murders. *See* VR 9/19/2022 3:20:30–3:52:45; COK Ex. 31. (As discussed below, Lawless changed his number shortly after the murders.) Detective O'Daniel oversaw the analysis of this data. VR 9/16/2022, 9:57:20–9:58:00. He testified that at 12:59 p.m. and 1:04 p.m., mere minutes before the murders, Lawless placed and received calls using the cell tower that services Waddles' house. VR 9/20/2022, 3:03:00–3:04:00; 3:06:10–3:13:30. And at 1:20 p.m., approximately nine minutes after the murders, Lawless placed a call that used a different tower that does not service the Kahlert Avenue house. *Id.* at 3:04:35–3:05:00.

While the cell-tower data could not pinpoint his precise location, his accomplices could. Akoi testified that in the minutes leading up to the murders, she was on the phone with both Lawless and Waddles. VR 9/16/2022 1:56:55–1:59:00; 2:02:40–2:03:20. Waddles was giving Akoi directions that (he thought) would enable her to find his house; and Akoi was, in turn, giving Lawless directions to find Waddles. *Id.* at 1:41:25–1:43:00; 2:03:30–2:04:40. Detective O'Daniel, testifying about phone records provided to investigators by T-Mobile, confirmed that Akoi was on the phone with Lawless starting at 1:04 p.m. and ending at 1:11 p.m.—the exact time of the murders. VR 9/20/2022, 3:03:00–3:04:00;

3:06:10–3:09:10. Akoi ended the call with Lawless at 1:11 p.m. when she heard gunshots. VR 9/16/2022, 1:57:30–1:59:00; 2:02:40–2:03:20; 4:16:40–4:17:20.

Ross also placed Lawless at the scene of the crime; indeed, he drove Lawless there. VR 9/19/2022, 11:28:30–2:52:30.[6] Ross grew up with Lawless and was like a "big brother" to him. *Id.* at 11:32:30–11:34:10 If Lawless ever needed anything, Ross would "make it happen." *Id.* Ross appeared in one of Lawless's music videos. COK Ex. 43; *see also* VR 9/19/2022, 11:37:50–11:39:45. And he often gave Lawless rides in his Chrysler 200, including on the day of the murders. *Id.* at 11:34:00–11:34:40; 11:40:35–11:41:20. Ross testified that Lawless contacted him for a ride shortly before the shooting. *Id.* at 11:41:35–11:42:10.[7] When Ross picked him up in his Chrysler 200, Lawless got in the back seat. *Id.* at 11:43:30–11:44:45. Other than Ross, Lawless was the only person in the car. *Id.* at 11:43:15–11:43:35. Ross testified that a female—who, we know from other testimony and evidence, was Akoi Reclow—was on the phone with Lawless providing directions. *Id.* at 11:44:40–11:47:10. Ross claimed that he was under the impression that Lawless planned to pick up a girl, and that he would then drop them back off at Lawless's home. *Id.*

---

[6] Ross pleaded guilty to two counts of facilitation of murder and one count of facilitation of burglary. *Id.* at 11:30:20–11:31:00.

[7] Phone records confirm that Lawless called Ross at 12:31 p.m. on August 14, 2020. The call lasted for 30 seconds. Ross and Lawless spoke for another 11 seconds at 12:45 p.m. VR 9/20/2022, 2:14:00–2:15:15.

Ross testified that Lawless exited the vehicle when they arrived at the Kahlert Avenue house. VR 9/19/2022, 11:47:50–11:48:50. In Ross's telling, Lawless got back in the vehicle shortly after he left and told Ross they could go, telling Ross that the girl he planned to meet didn't want to come with him. *Id.* Ross testified that he then dropped Lawless off "somewhere," and he went to his child's mother's house. *Id.* at 11:48:50–11:49:25. Ross was also shown video from a neighboring home that showed Waddles' Kahlert Avenue home at the time of murders. *Id.* at 11:49:40–12:01:00. Ross agreed that the video showed his Chrysler 200 pulling up to Waddles' house minutes before the murders. *Id.* at 11:51:00–11:51:30. He also agreed that the video showed Lawless exiting the car at the exact time of the murders and getting back in the car 15 second later. *Id.* at 11:55:20–11:56:50.

Ross claimed, however, that he did not hear any gunshots. VR 9/19/2022, 11:57:20–11:57:45. When pressed on this point, he claimed that he was playing "pretty loud" music. *Id.* at 11:58:40–11:59:00. Ross also testified that he never asked Lawless what happened. *Id.* at 12:03:30–12:04:30. Ross claimed that he thought, "in the back of [his] mind," that he could have been involved in the shooting when he saw news of the murders. *Id.* at 12:02:10–12:02:50. And he said that he saw Lawless a "couple days after," and that he looked "distraught" and "tired." *Id.* at 12:04:10–12:04:40. But he didn't know for sure that he may

have been involved in the shooting until officers searched his house, seized his car, and brought him in for questioning. *Id.* at 12:04:40–12:07:30.

Ross's feigned ignorance of Lawless's murders lacked credibility. Indeed, he had already placed Lawless at the scene of the crime, exiting the suspect vehicle at the precise time of the shooting. *Supra* 21–22. Video evidence (discussed below) showed that the back door to Ross's car was open the entire time that Lawless was out of the car. *Infra* 25. And one video from a nearby house that captured audio of the gunshots did not capture any music being played. *Infra* 25. Ross also testified that he would do anything for Lawless. *Supra* 21. And he testified that he did not want to give the police Lawless's name because he "watch[ed] him grow up" and thought "he had a good future." VR 9/19/2022, 12:14:00–12:15:15. When asked why he wouldn't just tell the truth, he responded, "It's the right thing to do per se, but it's not what you do to people you love or somebody that you care about. . . . That's not it, not it." *Id.* at 12:15:15–12:15:50. The circuit court later remarked, on the record but only in the presence of counsel, that the jury "laughed" when Ross testified that he didn't hear gunshots. VR 9/19/2022, 2:55:20–2:55:50.[8]

[8] After Ross's testimony, and out of the presence of the jury, the circuit court sua sponte ordered that Ross be taken into custody. *Id.* at 2:54:20–2:56:00. The circuit court remarked that Ross "didn't tell the truth, the whole truth, and nothing but the truth," and that he "clearly lied any number of times." *Id.* It noted that lying under oath in his courtroom was a clear violation of Ross's probation, and

The Commonwealth also introduced video from two houses near Waddles' house. Investigators recovered video from two cameras at 3725 Wheeler Avenue, which abutted Waddles' home on Kahlert Avenue. *See* VR 9/15/2022 3:42:30–3:57:30 (testimony of John Welsh in the video forensics unit of LMPD). One camera was positioned on the garage and faced the back of Waddles' home, while the other faced another direction. *Id.* at 3:48:50–3:49:30. At trial, the Commonwealth introduced a demonstrative video showing the relevant portions of these videos. *See* COK Ex. 20.

Detective O'Daniel testified that the Wheeler Avenue videos confirmed for investigators that Ross's Chrysler 200 was at the scene at the time of the murders. VR 9/20/2022, 10:39:10–10:39:45. The video shows the car circling the block shortly after 1:00 p.m. COK Ex. 20. Then, at 1:09 p.m, the car travelled south on Kahlert Avenue and took a right onto Southern Heights Avenue. *Id.* The car then made a U-turn and pulled into an alley off Kahlert Avenue. *Id.* The car then backed out and pulled up to the corner of Kahlert and Southern Heights—right next to Waddles' home—at 1:11 p.m. *Id.*

The camera facing east from the back of the Wheeler Avenue house captured part of the shooting. *Id.* At approximately eleven seconds after 1:11 p.m.,

---

something that it had a "responsibility" not to ignore. *Id.* This exchange is relevant to Lawless's third argument in this appeal. *See infra* 30–32, 47–54.

the video shows Lawless exiting the back seat of the car. *Id.* Lawless's hands are extended and he appears to be holding a firearm. *Id.* The door remained open, and an individual, who we know to be Ross, can be seen moving around in the driver's seat. *Id.* Detective O'Daniel also noted that investigators recovered shell casings in the area where Lawless would have exited the vehicle. VR 9/20/2022, 10:45:00–10:45:55; *see also* COK Ex. 2 (crime-scene video showing shell casings around the area where the car was parked). Lawless got back in the rear seat of the car 15 seconds later. COK Ex. 20. The door to the back seat of the car remained open for all 15 seconds. *Id.* As soon as Lawless reentered the car, the car took off eastbound on Southern Heights Avenue. *Id.*

Investigators also recovered a doorbell camera at 1440 Southern Heights, which is across the street from Waddles' home. COK Ex. 21. As Detective Steven Snyder testified, the side and backdoor of Waddles' home is visible in this video. *See* VR 9/15/2022, 3:58:00–4:09:30. At least seven gunshots are heard, after which a woman ran out on the front porch and said that there has been a shooting. VR 9/20/2022, 10:47:05–10:49:05. The video shows someone running out of the back door of 3728 Kahlert Avenue and jumping the back fence, heading toward the Chrysler 200, which is then seen fleeing the scene. COK Ex. 21. The woman is heard expressing frustration that she could not see the car's license plate. VR 9/20/2022, 10:47:05–10:49:05. No music, from the Chrysler 200 or from any other source, can be heard in this video. *Id.*

Finally, the Commonwealth also presented evidence that Lawless tried to cover his tracks in the wake of the shooting. Shortly after the murders, Lawless changed his phone number. VR 9/20/2022, 11:50:30–11:51:20. He also told Akoi to do the same. VR 9/16/2022, 4:24:15–4:24:30. And she complied. *Id.*

Text messages recovered by investigators confirmed that Lawless sought to evade police after the murders. Less than two hours after the murders, Lawless texted Akoi that "we gotta lay low." COK Ex. 44 at 100. Akoi responded less than thirty minutes later from a new number. She said, "new number baby only me and you have it right now." *Id.* Lawless "loved" the message. *Id.* The next day Lawless texted, "good you on my team," and "your courage better be strong." And in a string of text messages on August 18, he again emphasized the need to lay low. Lawless texted, "BRA YOU DON'T UNDERSTAND. WE HAVE TO LAY LOW! PPUT YOUR EMOTIONS TO THE SIDE BOO." *Id.* at 119–20. Lawless continued to admonish Akoi, telling her "N***A YOU BUGGING!!!," and "YOU ACT INSECURE YOU SHOULD B STRONGER." *Id.* at 122–23.

Police investigators also arranged for a controlled call from Akoi to Lawless while she was being interviewed by police on August 19, 2020, and before Lawless was apprehended. VR 9/16/2022, 10:43:20–10:48:55; *see also* COK Ex. 23. Lawless said that he couldn't see Akoi because it was "hot down there" in South Louisville. *Id.* When Akoi said that it's been days since they've seen each

other, Lawless responded, "you should know" why they haven't seen each other, and told her, "you're smarter than that." *Id.*

Lawless's and Ross's actions on August 19, 2020, provided additional evidence of their guilt. On that day, the police executed a search warrant on Ross's house and subsequently arrested him. There was a gap of several hours between when the police first knocked on Ross's door and when they entered with a SWAT team, during which time Ross and Lawless exchanged multiple phone calls and attempted calls. VR 9/20/2022, 2:15:10–2:16:20. Lawless also texted Akoi around the same time, asking "DID YOU TELL!!!!!!! OMM WTF IS WRING WIT YOU!!!!!!" He concluded, "YOU AINT RIGHT!" COK Ex. 44 at 124; *see also* VR 9/20/2022, 2:45:40–2:46:30.

B. Lawless's Defense

The defense called one witness: Dr. Adrian Peter Lauf, an associate professor of computer science and engineering at the University of Louisville. Dr. Lauf testified that cell-tower data is often imprecise and can not pinpoint someone's precise location. VR 9/20/2022, 4:23:30–4:54:30. He testified that analyzing cell-tower data is "messy," and opined that the Commonwealth's use of this data involved "overly simplified assumption[s]." *Id.* at 4:33:20–4:35:30.

The defense also relied on limited cross-examination of the Commonwealth's witnesses. Two threads ran through the defense's cross-examinations.

First, the defense tried to paint the Commonwealth's witnesses, particularly Ross, as liars. On cross-examination, the first question defense counsel asked Ross was: "You're a liar, right?" VR 9/19/2022, 2:20:25–2:20:50. The second question was: "You'll tell any story in any situation to get yourself out of trouble, right?" *Id.* at 2:20:45–2:21:00. Defense counsel went so far as to ask Ross if he remembered being admonished by the circuit court for lying on his Presentence Investigation after pleading guilty in this case. *Id.* at 2:22:10–2:22:57. In a sidebar, the court noted that it was "wildly inappropriate" for defense to try to "bring [the court] into this." *Id.* at 2:22:57–2:23:31. It then told the jury that it was "wildly inappropriate" for defense counsel to attempt to bring the court "in to speak to somebody's credibility." *Id.* at 2:23:31–2:23:50. The court instructed the jury to disregard that line of questioning. *Id.*

Defense counsel also pursued a line of questioning meant to elicit testimony that Ross pinned the blame for the murders on Lawless to keep himself out of trouble. Ross denied these accusations. *Id.* at 2:20:30–2:45:45. The defense continued developing this theme in closing argument, telling the jury that the Commonwealth's case involved "lies upon lies from witnesses." VR 9/21/2022, 9:57:15–9:57:25. Defense counsel remarked that "Akoi Reclow clearly was a liar," *id.* 10:06:55–10:07:05, and then told the jury, "Let's talk about another liar: Evan Ross," *id.* at 10:13:10–10:13:25.

Second, the defense sought to portray police investigators as either incompetent or acting in bad faith. *See, e.g.*, VR 9/21/2022, 9:56:10–9:57:00 (the Commonwealth didn't "test evidence," "follow up on leads," or "do the work in order to actually support their burden").

In particular, the defense fixated on the lack of DNA evidence tying Lawless to the murders. Defense counsel questioned LMPD witnesses about why they did not test DNA swabs that were collected by investigators, including from the fence that investigators knew the suspect jumped over and touched. VR 9/20/2022, 3:17:45–3:19:00. Detective O'Daniel explained that it is "very seldom" that investigators can get DNA from someone "just touching something" briefly. *Id.* at 12:22:10–12:23:45. Detective O'Daniel described it as an "investigative myth" that you leave behind DNA on everything you touch. *Id.* at 3:19:00–3:20:30. Accordingly, given the mountain of other evidence investigators had, they decided not to run DNA tests. *Id.* at 3:20:30–3:21:30.

The defense also questioned why investigators did not pursue leads on other individuals, including Ross's roommate, Jerrod Whitfield. VR 9/20/2022, 3:39:40–3:42:30. Detective O'Daniel testified that Waddles unfortunately "had a lot of people that he disagreed with." *Id.* at 4:01:10–4:01:40. Accordingly, the fact that someone had a dispute with Waddles did not necessarily make him a prime suspect in the murder. None of these other suspects had multiple people report

their involvement in the murders, as they did for Lawless, not to mention cell-phone and video evidence placing them at the scene. *Id.* at 3:49:20–3:51:10.

* * *

Counsel for the Commonwealth and Lawless delivered their closing arguments on September 21, 2020. The circuit court then instructed the jury and released them to begin deliberations.

C. The Jury Note

After the jury began deliberations, it sent a note to the court. The note read:

> While in deliberation it was mentioned that there was a statement that Evan Ross was arrested for lying on the stand. This statement has caused a juror to feel they can no longer make a decision truthfully after having heard this. Before having heard this the juror was thinking one way, but is now feeling differently.

VR 9/21/2022, 5:38:52–5:39:40. Defense counsel moved for a mistrial, which the court denied. *Id.* at 5:41:05–5:42:00. The court determined that it would instead instruct the jury that Ross's arrest was not in evidence and thus could not be considered in their deliberations. *Id.* at 5:40:00–5:41:05. It informed counsel that it would ask the jurors if they believed that they could still render a verdict based solely on the evidence. *Id.* The court noted that two alternate jurors were available. *Id.* So as long as no more than two jurors excused themselves, a mistrial would not be necessary. *Id.*

The circuit court then called in the jury. VR 9/21/2022, 6:25:30. The court emphasized that it was "not saying [Ross's arrest] happened" and it was "not saying [it] didn't happen," but what matters is that "it's not evidence." *Id.* at 6:28:10–6:28:30. The court instructed the jury that it needed to know if someone can't render a truthful verdict, and that they needed to answer honestly. *Id.* at 6:28:30–6:29:00. It asked:

> Is there anything that has happened during the course of this trial, up to and including your deliberations, which has impacted your ability to base your decision solely on the evidence that's presented inside this courtroom? Or can you compartmentalize and separate anything else, any extraneous information or misinformation, that may have heard or think you heard, and base your decision solely on the evidence presented inside the courtroom? Is there anyone who cannot do this, and please be honest?

Id. at 6:29:00–6:29:45. One juror raised her hand, and the court excused her from service. *Id.* at 6:29:40–6:30:30. The court asked the remaining jurors if there was anything else that that would give them cause to believe that they couldn't render a fair and impartial verdict. *Id.* at 6:36:55–6:36:40. No one indicated this to be the case. *Id.* The court called in an alternate juror—selected randomly from the two available alternates—who joined the jury that night. *Id.* at 6:36:40–6:37:40.

The court addressed this matter further in a written order on September 23, 2022. The court noted that "[w]hile the parties all agreed that Evan Ross had, in fact, lied on the stand, the fact that he had been taken into custody by the Court following his testimony was not in evidence." TR 474. The circuit court

recounted how it "brought the jury back into the courtroom and conducted the inquiry of record as to whether it was possible in light of the aforementioned extraneous (mis)information, for each juror to render a verdict based solely on the evidence that was presented at trial." *Id.* After one juror was excused, and an alternate was seated, the court instructed the jury to "begin their deliberations anew and the case was re-submitted to them . . . for a decision." *Id.*

D. Conviction, Sentence, and Appeal

Later that night, September 21, 2022, the jury returned its verdict. VR 9/21/2022, 9:37:30–9:39:30. It found Lawless guilty of the murder of Brandon Waddles, guilty of the murder of Trinity Randolph, and guilty of Burglary in the First Degree. *Id.*

The parties then "agreed" "to proceed directly to the capital penalty phase." TR 475. After hearing opening statements from counsel, mitigation evidence from the defense, aggravating-circumstances evidence from the Commonwealth, and closing statements, the jury found that aggravating circumstances existed with respect to the murders of Waddles and Trinity Randolph, namely, that Lawless committed these murders while he was engaged in the commission of Burglary in the First Degree. TR 475–76. Accordingly, the jury recommended

fixing the penalty for both murder convictions "at confinement in the penitentiary for life without benefit of probation or parole." TR 476.[9] At a subsequent hearing, the circuit court adopted the jury's recommendation and sentenced Lawless accordingly. VR 11/03/2022, 1:55:45–1:58:00.

This appeal followed. TR 487.

ARGUMENT

Lawless argues the circuit court erred in: (1) denying his second motion for a continuance; (2) denying his motion to exclude the death penalty; and (3) denying his motion for a mistrial on the basis of the jury receiving extrajudicial information about Evan Ross's arrest. Because these alleged errors are all "non-constitutional," the harmless-error standard applies if the matter was preserved below. *Winstead v. Commonwealth*, 283 S.W.3d 678, 689 n.1 (Ky. 2009). Under this standard, an error is harmless "if the reviewing court can say with fair assurance that the judgment was not substantially swayed by the error." *Id.* To the extent

[9] Before dismissing the jury, the court also addressed Lawless's other charges. *See* TR 477 ("Prior to dismissing the jury, the Commonwealth's moved to sever [t]he remaining/outstanding Possession of a Handgun by a Convicted Felon Charge, and the Defendant, in reliance on the agreement reached with the Commonwealth, waived his right to be sentenced by the jury on the Burglary in the First Degree conviction under Count 3 of the Indictment and withdrew his plea of not guilty and, entered a knowing and voluntary plea of guilty to . . . Persistent Felony Offender in the Second Degree."). The Possession of a Handgun by a Convicted Felon Charge was later dismissed. VR 11/03/22, 1:56:45.

Lawless's arguments were not preserved below (certain aspects of his third argument were not), they are addressed under the more demanding palpable-error standard. *Martin v. Commonwealth*, 207 S.W.3d 1, 3 (Ky. 2006). Under this standard, the Court may vacate a judgment only "upon a determination that *manifest injustice* has resulted from the error." *Id.* (citing RCr 10.26).

Lawless is wrong that the circuit court erred. And even if he were right, none of the alleged errors would have "substantially swayed" the judgment. *Winstead*, 283 S.W.3d at 689 n.1.

I. The circuit court did not commit reversible error in denying Lawless's motions for a continuance or to exclude the death penalty.

Lawless's motion for a continuance and motion to exclude the death penalty are inextricably linked. Indeed, the former was filed for the sole purpose of gaining additional time to prepare Lawless's defense for the latter. *See* TR 260 (moving for continuance so that he could "effectively develop and present evidence of intellectual disability or serious mental illness under KRS 532.140"). Lawless's appeal of the circuit court's denial of both motions fails, therefore, for the same reason: Lawless was not sentenced to death. So even if the circuit court erred in denying these motions (it did not), Lawless cannot show harm.

A. Any alleged error was harmless.

The Commonwealth starts with prejudice because it is the simplest way to resolve Lawless's first two arguments. Both fail for the simple reason that the

jury did not award the death penalty. As a result, any alleged errors relating to the death penalty—whether in the form of Lawless's request for additional time to prepare his motion to exclude the death penalty, or the inclusion of the death penalty as a sentencing option—were harmless.

Lawless cites no case—from this Court or any other court—supporting the relief he seeks. To be sure, this Court has reversed a trial court's *exclusion* of the death penalty. *Commonwealth v. Guernsey*, 501 S.W.3d 884, 885 (Ky. 2016) ("We find error in the circuit court's pretrial ruling excluding the death penalty."); *Commonwealth v. Morsch*, No. 2022-SC-0062-MR, 2023 WL 5444416, at *1 (Ky. Aug. 24, 2023) (not binding) ("[W]e vacate the trial court's orders excluding the death penalty."). But it has not reversed a trial court's decision *not to exclude* the death penalty when the death penalty was not, in fact, imposed.

Pretrial challenges to the inclusion of the death penalty are illustrative. In *Commonwealth v. Bredhold*, 599 S.W.3d 409 (Ky. 2020), three defendants moved before trial to exclude the death penalty as a possible sentence. *Id.* at 413. This Court rejected that challenge because the defendants "ha[d] not yet suffered a concrete and particularized injury by having the death sentence imposed." *Id.* at 418. "At this point," the Court continued, "imposition of the death sentence can only be viewed as hypothetical." *Id.* This Court reached a similar holding in this very case. In denying Lawless's pretrial writ, *see supra* 6, it held that because "a sentence of death" "is not a foregone conclusion," Lawless had only "allege[d] a

possible future injury, not one that is certainly impending," TR 409. The Court noted, however, that nothing in its order would preclude Lawless from exercising his "constitutional right to appeal" a death sentence *if* he actually received it. *Id.*

Lawless's posttrial challenge to the death penalty is the mirror image of these pretrial challenges. In those cases, the defendants could not establish injury because it was purely *hypothetical* whether the death penalty would be imposed. Here, by contrast, Lawless cannot establish injury because it is a *certainty* that the death penalty was not imposed. This Court held as much in an unpublished decision. *Holloway v. Commonwealth*, No. 2003-SC-0089-MR, 2005 WL 2045444 (Ky. Aug. 25, 2005) (not binding). This Court rejected the defendant's argument "that the death penalty should have been excluded," holding that because he "did not receive the death penalty," "the exclusion of the death penalty as a possible penalty is of no consequence." *Id.* at *6. This reasoning applies with equal force here.

In published opinions, moreover, this Court has rejected challenges to capital penalty-phase procedures where the death penalty was not ultimately imposed. In *Francis v. Commonwealth*, 752 S.W.2d 309 (Ky. 1988), for example, the defendant argued that the circuit court erred by holding a sentencing hearing on his non-capital convictions before his capital-penalty hearing. This Court held that even if this were improper, "there was no prejudice and consequently no reversible error" because "a sentence of death was not imposed." *Id.* at 311. This Court reaffirmed that holding in *Marshall v. Commonwealth*, 60 S.W.3d 513 (Ky.

2001), noting that "if the death penalty is not imposed," any "error" regarding the order of penalty-phase hearings "is harmless." *Id.* at 523. True, unlike *Francis* and *Marshall*, Lawless does not challenge the circuit court's penalty-phase procedures. But the principle from these cases applies here: It is unnecessary to resolve death-penalty challenges when the death penalty was not imposed.

This principle is not unique to Kentucky. Indeed, courts in other States have affirmed the common-sense principle that a defendant cannot challenge a death sentence that was not imposed. *See, e.g.*, *Burrell v. State*, 376 S.E.2d 184, 186 (Ga. 1989) ("[A]ny error [regarding the inclusion of the death penalty as a possible sentence] was harmless because the jury did not impose a death penalty and Burrell received a life sentence."); *Commonwealth v. Hosack*, 326 A.2d 352, 354–55 (Pa. 1974) ("[E]ven assuming appellant was correct in his charge that [the death penalty should have been excluded], it is difficult to see any prejudice that resulted to this appellant since the death penalty was in fact not imposed."); *Farrior v. State*, 728 So. 2d 691, 703 (Ala. Crim. App. 1998) ("[The defendant's] argument [regarding the death penalty] is moot because the trial court did not impose the death penalty.").

In sum, because Lawless did not receive the death penalty, he cannot show that he was harmed by the circuit court's denial of his motion for a continuance or his motion to exclude the death penalty. Addressing the merits of Lawless's

death-penalty-exclusion argument, therefore, would be nothing short of an advisory opinion. And as this Court has repeatedly emphasized, "this Court does not issue advisory opinions." *Haney v. Commonwealth*, 653 S.W.3d 559, 568 (Ky. 2022) (citing *Nordike v. Nordike*, 231 S.W.3d 733, 739 (Ky. 2007)); *Commonwealth v. Terrell*, 464 S.W.3d 495, 499 (Ky. 2015) ("As we often say, we do not render purely advisory opinions."); *Philpot v. Patton*, 837 S.W.2d 491, 493 (Ky. 1992) ("Our courts do not function to give advisory opinions, even on important public issues.").

B. The circuit court did not err in denying these motions.

Even if the Court had doubts as to prejudice, the circuit court did not, in fact, err in denying either of these motions.

1. *Motion to exclude the death penalty*. Lawless's argument on his motion to exclude the death penalty faces a high bar. Like the neighboring serious-intellectual-disability provision, whether a defendant has a serious mental illness "is a very fact-specific inquiry." *Woodall v. Commonwealth*, --- S.W.3d ---, 2024 WL 1708575, at *7 (Ky. Apr. 18, 2024) (non-final). Accordingly, this Court "review[s] the trial court's factual findings for clear error." *Id.* (citing CR 52.01). "Under this standard, the trial court's findings of fact will be conclusive if they are supported by substantial evidence." *Id.* (quoting *Simpson v. Commonwealth*, 474 S.W.3d 544, 547 (Ky. 2015)). "Substantial evidence means evidence of substance and relevant consequence having the fitness to induce conviction in the minds

of reasonable men." *Id.* (quoting *Smyzer v. B.F. Goodrich Chem. Co.,* 474 S.W.2d 367, 369 (Ky. 1971)).

The circuit court's denial of Lawless's motion was based on factual findings that were supported by substantial evidence. Recall that to exclude the death penalty under KRS 532.140, a defendant must show that "[a]t the time of the offense, he or she has *active symptoms* and a *documented history*, including diagnosis, of one (1) or more of the following mental disorders . . .: 1. Schizophrenia; 2. Schizoaffective disorder; 3. Dipolar disorder; or 4. Delusional disorder." KRS 532.130(3)(a) (emphases added). The circuit court rightly held that it could not conclude from the record that Lawless had either a documented history of a serious mental illness or that he was experiencing active symptoms at the time of the murders.

Start with the lack of a documented history. Dr. Kaplan testified that Lawless was diagnosed with schizoaffective disorder in 2017. VR 9/9/2022, 9:40:50–9:42:30. But the circuit court disagreed. In reviewing the evidence presented at the hearing, the court found that Lawless's medical records made a "passing reference" to schizoaffective disorder. *Id.* at 10:53:30–10:54:15. But Lawless was not, in fact, *diagnosed* with that disorder. *Id.* In his brief here, Lawless simply recites Dr. Kaplan's testimony about his alleged previous diagnosis. Br. 19. But he does not point to any underlying records that would demonstrate that the circuit

court's factual finding was "clearly erroneous." *Welch v. Commonwealth*, 149 S.W.3d 407, 409 (Ky. 2004).

Perhaps even more stark was the complete lack of evidence that Lawless was experiencing "active symptoms" at the time of the murders. Dr. Kaplan acknowledged that she did not even ask Lawless whether he was experiencing active symptoms at the time of the murders. VR 9/9/2022, 9:43:25–9:44:10; 9:59:00–10:03:00; 10:35:50–10:37:20. Instead, her opinion was based solely on his medical records and self-reported symptoms pre- and post-dating the murders. *Id.* From this information, Dr. Kaplan *assumed* that Lawless would have been experiencing symptoms on August 14, 2020. *Id.* But the circuit court found that this assumption did not constitute sufficient evidence that Lawless's symptoms were active at the relevant time. *Id.* at 10:55:20–10:58:55. Lawless argues here that the circuit court should have taken Dr. Kaplan's opinion at face value. Br. 22–23. But the circuit court would have shirked its duty as the finder of fact if it decided *not* to look under the hood of an expert's opinion. *See Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418, 419 (Ky. 1985) ("[T]he finder of fact . . . has the authority to determine the quality, character and substance of the evidence presented."). Here, this examination revealed that Dr. Kaplan's opinion as to Lawless's active symptoms lacked any meaningful factual foundation.

Lawless's other arguments for reversal are unavailing. He first claims there must be error because "[t]he Commonwealth did not enter any evidence to rebut

Dr. Kaplan's testimony." Br. 22. But this ignores that Lawless bore the burden of proving the requirements of KRS 532.130 by a preponderance of the evidence. *Cf. Woodall*, 563 S.W.3d at 6 n.29. So the Commonwealth had no obligation to present its own evidence. It was more than sufficient for the Commonwealth to argue, as it did, that Lawless had not met *his* burden of establishing a serious mental illness. Lawless also takes issue with how the circuit court weighed the evidence presented at the hearing. Br. 22–23. But it is not this Court's job to review the circuit court's factual findings de novo. Rather, it can reverse only if the circuit court committed clear error. As discussed above, it did not.[10]

2. ***Motion for a second continuance***. The circuit court was on similarly firm ground in denying Lawless's second motion for a continuance.

Lawless faces a high bar for this argument too. A motion to continue a trial "is addressed to the sound discretion of the trial court." *Wells v. Salyer,* 452 S.W.2d 392, 395–96 (Ky. 1970). So this Court "review[s] a trial court's denial of

[10] Lawless also alludes to the circuit court's supposed bias, alleging that "[t]he court questioned [Dr. Kaplan] with a painfully obvious amount of skepticism." Br. 23; *see also id.* (stating the circuit court "tried to get Dr. Kaplan to change her opinion by questioning" her about her opinion). But it is well established that "judicial remarks during the course of a [hearing] that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge." *Liteky v. United States*, 510 U.S. 540, 555 (1994). Plus, the circuit court's questions reasonably explored what it ultimately found to be weaknesses in Dr. Kaplan's presentation. In any event, Lawless does not argue that reversal is justified on this basis. And even if he did, he did not preserve this argument below.

a motion for a continuance under an abuse of discretion standard." *Morgan v. Commonwealth*, 421 S.W.3d 388, 392 (2014) (citing *Snodgrass v. Commonwealth*, 814 S.W.2d 579, 581 (Ky. 1991)). Under this standard, this Court asks "whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

This Court has set out several factors to guide trial courts' exercise of their discretion as to continuance motions. Courts are to consider: "[the] length of delay; previous continuances; inconvenience to litigants, witnesses, counsel and the court; whether the delay is purposeful or is caused by the accused; availability of other competent counsel; complexity of the case; and whether denying the continuance will lead to identifiable prejudice." *Snodgrass*, 814 S.W.2d at 581.[11] "Identifiable prejudice is especially important" if the court is to grant a continuance. *Bartley v. Commonwealth,* 400 S.W.3d 714, 733 (Ky. 2013); *see also Morgan*, 421 S.W.3d at 392 (same). "Conclusory or speculative contentions that additional time might prove helpful are insufficient" to establish prejudice. *Morgan*, 421 S.W.3d at 392.

These factors weighed against granting a continuance. Lawless's request for a 120-day continuance constituted a substantial delay in the proceedings.

[11] In a case such as this, where the continuance is not sought for the purpose of employing new counsel, "[t]he fifth factor, availability of other competent counsel factor, is not at issue." *White v. Commonwealth*, 178 S.W.3d 470, 488 (Ky. 2005).

Lawless cites *Hunter v. Commonwealth*, 869 S.W.2d 719 (Ky. 1994), which reversed a circuit court's denial of continuance motions, to support his argument that a delay of this length was "not unreasonable." Br. 13–14. But "[t]he motions for continuances" in *Hunter* "ranged from a request for '*one day*' to a request for *several weeks*." 869 S.W.2d at 724 (emphases added). In another case cited by Lawless, this Court reversed a circuit court's denial of a defendant's request to continue trial by "*two days*." *Herp v. Commonwealth*, 491 S.W.3d 507, 512 (Ky. 2016) (emphasis added). These cases demonstrate that a trial court *may* abuse its discretion if it denies a motion for a short continuance of a few days or weeks. But Lawless's request here for a four-month delay is nothing like those requests.

Lawless's motion, moreover, came on the heels of the circuit court granting Lawless's previous request for a 150-day continuance. TR 156–57. With this extension, Lawless had nearly two years—one year, eleven months, and five days, to be exact—from the day of his indictment to prepare for his trial. This Court has affirmed the denial of a motion to continue a capital trial where the "Appellant's indictment had been pending for approximately *sixteen months* when he requested the continuance." *White*, 178 S.W.3d at 488 (emphasis added). Here, Lawless's indictment had been pending for over *twenty-two months*. This was more than "ample time to investigate possible mental illness defenses" to the death penalty. *Id.* To be sure, this Court reversed a trial court's denial of a motion for a continuance in a death-penalty case in *Eldred v. Commonwealth*, 906 S.W.2d 694,

700 (Ky. 1994). But there, the "the continuance was the *first* sought by anyone." *Id.* at 699. The circuit court was well within in its discretion to find that the trial needn't be delayed further.

The inconvenience factor also weighed against granting a second continuance. At the time, the Commonwealth already had its witnesses under subpoena for the September 2022 trial dates. *See* Commonwealth's Resp. to Pet. for Writ of Prohibition and Mandamus at 12, *Lawless v. Judge McKay Chauvin*, 2022-SC-0343 (Ky. Aug. 29, 2022). Requiring those witnesses to block off additional days four months later would have inconvenienced them and the Commonwealth. Moreover, the September 2022 trial was already over two years after the murders. Any further delay would have only increased the risk of witnesses becoming unavailable and memories fading.

Lawless argues that any delay was not purposeful, but rather was the result of Jefferson County Public School's delay in providing educational records and the recent amendments to KRS 532.130–.140. As to the JCPS records, Lawless's counsel received them over a month before his pretrial death-penalty hearing. *See* Appellant Br. at 2. This provided ample time to analyze these records and determine that Lawless had no grounds to exclude the death penalty on the basis of serious intellectual disability. Indeed, these records show that Lawless had an IQ of 79, *see* TR 265, which is well over the statutory threshold of 70 needed to

show that a defendant has "[s]ignificantly subaverage general intellectual functioning," KRS 532.130(2). Moreover, aside from the JCPS records, Lawless does not allege difficulties obtaining any other records necessary to develop his defense to the death penalty. And because Lawless's argument for excluding the death penalty was limited to his alleged mental illness, not an intellectual disability, the evidence he needed was primarily medical in nature, not educational.

The amendments to KRS 532.130–.140 also did not justify a second continuance. True, the new 120-day deadline for moving to exclude the death penalty became effective less than 120 days before Lawless's trial. But the Commonwealth waived any objection to the timeliness of Lawless's motion. VR 8/9/2022, 3:30:00–3:30:10. And the circuit court still allowed his motion to be heard. TR 297. Lawless does not claim prejudice, moreover, from the addition of "serious mental illness" as a grounds for excluding the death penalty. Nor could he: Before House Bill 269 was enacted, Lawless was already investigating potential mental illnesses for his mitigation argument. The amendments to KRS 532.130–.140 simply created a new way to use this information.

The Commonwealth does not dispute that death penalty cases are often complex. But that does not mean that they can be delayed endlessly. Lawless had already received a 150-day continuance. And the circuit court made clear that it would be highly unlikely to grant another one. TR 156–57. In total, Lawless had nearly two years from his indictment to prepare for trial. And his trial counsel

had nearly a year after taking over in October 2021. This is ample time to prepare for trial—even a capital trial. Indeed, this Court has held that a shorter delay of 18 months in a murder case presumptively prejudiced a defendant under the Sixth Amendment for taking *too long*. *Bratcher v. Commonwealth*, 151 S.W.3d 332, 344 (Ky. 2004); *see also McLemore v. Commonwealth*, 590 S.W.3d 229, 241 (Ky. 2019) ("eighteen months constituted presumptive prejudice in a complex murder case").

Finally, Lawless points to no "[i]dentifiable prejudice" from the circuit court's denial of his motion. *Morgan*, 421 S.W.3d at 392. As discussed above, Lawless was not sentenced to death. So, as it turned out, there could not be any harm stemming from his lack of additional time to prepare his arguments under KRS 532.130–.140. Lawless makes a vague assertion that the lack of a continuance diverted trial counsel's attention from other matters. Br. 16–17. But Lawless's trial attorneys, who he admits were "highly competent," Br. 15, were more than capable of walking and chewing gum at the same time. In any event, these conclusory allegations are not the sort of specific, identifiable prejudice needed to justify a continuance, much less this Court's reversal of the circuit court's denial of a continuance. *Pope v. Commonwealth*, 629 S.W.3d 5, 14 (Ky. 2021) (denying motion to continue trial where movant "fail[ed] to explain *specifically* how he was prejudiced" (emphasis added)); *Turner v. Commonwealth*, 544 S.W.3d 610, 620 (Ky. 2018) (same); *Hilton v. Commonwealth*, 539 S.W.3d 1, 11 (Ky. 2018) (same).

In sum, the circuit court was well within its discretion to deny Lawless's motion for a second continuance.

II. The circuit court did not commit reversible error in denying Lawless's motion for a mistrial.

Lawless's final argument faults the circuit court for denying his motion for a mistrial after it was informed that the jury knew of extra-judicial information about Evan Ross's arrest. *See* Br. 23–34.

Like his other arguments, Lawless faces a high bar to secure reversal here. This Court has recognized that "[i]t is universally agreed that a mistrial is an extreme remedy and should be resorted to only when there is a fundamental defect in the proceedings which will result in a manifest injustice." *Gould v. Charlton Co.*, 929 S.W.2d 734, 738 (Ky. 1996). This defect "must be of such character and magnitude that a litigant will be denied a fair and impartial trial and the prejudicial effect can be removed in no other way." *Id.* "The decision of a trial court to overrule a motion for new trial," moreover, "will not be disturbed on appeal absent a manifest error or abuse of discretion." *Id.* at 741 (citing *Gray v. Sawyer*, 247 S.W.2d 496 (Ky. 1952)).

Trial courts also have "broad discretion in assessing the impact of extra-judicial information in a variety of settings." *Gould*, 929 S.W.2d at 739. It is not the case that "once a juror is exposed to extra-judicial information that juror is automatically presumed 'legally tainted.'" *Id.* at 740. Such a rule would "rob[] the

trial court of its discretion and deprive[] our system of justice of the benefit of a great resource—the trial judge." *Id.* Instead, this Court has trusted trial courts to "inquire into the juror's views in a manner calculated to discover those views." *Id.* Then, "[r]elying on the totality of the inquiry, . . . it is within the trial court's sound discretion to determine the effect of the extra-judicial information." *Id.* Moreover, "[w]hether removal of prejudice can be accomplished by a curative admonition or whether a mistrial is necessitated is a matter within the sound discretion of the trial court." *Id.*

The circuit court's jury admonition forecloses Lawless's argument for reversal. It is well established that "[j]urors are presumed to have followed an admonition." *Tamme v. Commonwealth*, 973 S.W.2d 13, 26 (Ky. 1998). This presumption can be rebutted "when there is an overwhelming probability that the jury will be unable to follow the court's admonition *and* there is a strong likelihood that the effect of the inadmissible evidence would be devastating to the defendant." *Johnson v. Commonwealth*, 105 S.W.3d 430, 441 (Ky. 2003) (citing *Alexander v. Commonwealth*, 862 S.W.2d 856, 859 (Ky. 1993)). But neither circumstance exists here. The circuit court acted swiftly to cure any possible prejudice stemming from the extra-judicial information. The court inquired into whether any of the jurors could not decide the case based solely on the evidence presented at trial. VR 9/21/2022, 6:29:00–6:29:45. It instructed the jury that the information they heard about Ross's arrest may or may not be true and that, in any event, it was

not in evidence. *Id.* at 6:28:10–6:28:30. And it excused one juror who felt she could no longer render a fair and impartial verdict. *Id.* at 6:29:40–6:30:30.

Lawless speculates that "there was an overwhelming probability that [the jurors] would be unable to follow the court's admonition." Br. 27. But there is no record evidence to back this assertion up. Indeed, "[p]eople disregard what they know or what they think they know all the time." *Bartley*, 400 S.W.3d at 736. To be sure, it was clear that one juror felt she could not follow the court's admonition. VR 9/21/2022, 6:29:40–6:30:30. But she was excused from service. *Id.* The circuit court thoroughly examined the other jurors' views and instructed them not to consider the extrajudicial information. *Id.* at 6:28:10–6:29:45. These jurors confirmed that they would not consider any information about Ross's arrest in rendering their verdict. *Id.* at 6:36:55–6:36:40. There is no basis to depart from the time-honored presumption concerning jury instructions. The circuit court's "admonition was a sufficient curative measure, rendering a mistrial unnecessary." *Parker v. Commonwealth*, 291 S.W.3d 647, 658 (Ky. 2009).

This Court's decision in *Gould* does not bolster Lawless's argument. There, the Court recognized that it has previously "reversed and remanded for a new trial [where] the trial court merely ignored" the extra-judicial information. *Gould*, 929 S.W.2d at 739 (citing *Deemer v. Finger*, 817 S.W.2d 435 (Ky. 1991)). But that is plainly not what happened here. As in *Gould*, the circuit court "gave the jury a detailed curative admonition" and "requested all jurors to reflect and determine

if they would adhere to the admonition." *Id.* at 740. Even though the trial judge in *Gould* individually questioned each juror, this Court did not hold that out as a requirement. *Contra* Appellant Br. 26. The law is not so rigid. Rather than prescribing a specific procedure that all trial courts must follow, this Court made clear that trial courts are invested with "broad discretion" to "assess[] the impact of extra-judicial information." *Gould*, 929 S.W.2d at 739. The circuit court's handling of this matter did not constitute an abuse of that broad discretion.[12]

Even if there were some probability that the jury would consider the extra-judicial information, there is no evidence that this information was "devastating to the defendant." *Johnson*, 105 S.W.3d at 441. Quite the contrary, this information likely bolstered the defense's, rather than the Commonwealth's, case. Recall that a key aspect of the defense's theory was that Ross was a liar. *Supra* 28. Defense counsel explicitly asked Ross whether he was a liar on cross-examination. VR 9/19/2022, 2:20:25–2:20:50. And counsel continued to hammer this theme in closing arguments. VR 9/21/2022, 9:57:15–9:57:25; 10:06:55–10:07:05; 10:13:10–10:13:25.

[12] Lawless also criticizes the court for taking a break during Akoi Reclow's testimony. Br. 31. But defense counsel did not move for a mistrial on this basis below. So the argument is not preserved for this appeal. *Martin*, 207 S.W.3d at 3. In any event, because Lawless cites no authority for the proposition that taking breaks is ever grounds for a new trial, he has failed to establish "palpable error." *Id.*

Most glaringly, defense counsel previously attempted to create the very circumstances about which Lawless now complains: placing the circuit court's views on Ross's credibility before the jury. *Supra* 28. Defense counsel explicitly asked Ross if he recalled being admonished by the circuit court for lying on his PSI. VR 9/19/2022, 2:22:10–2:22:57. The circuit court instructed the jury to disregard that question. *Id.* at 2:23:31–2:23:50. Yet now that this information—the court's alleged views on Ross's credibility—came before the jury by some other means, Lawless asks for a new trial. If this extra-judicial information had any effect, it was to bolster the *defense's* theory of the case, not the Commonwealth's. Defense counsel certainly believed this to be true at trial—why else would they have attempted to question Ross about it? A new trial is therefore not warranted on this ground.

This extra-judicial information—even if it amounted to a judicial assertion that Ross lied on the stand, *see* Appellant Br. 31–34—should have surprised no one. As discussed, counsel for both parties believed, and suggested to the jury, that Ross lied about certain aspects of his testimony. TR 473–74. Indeed, as the circuit court noted, the jury laughed when Ross testified that he didn't hear gunshots at the time of the murders. VR 9/19/2022, 2:55:20–2:55:50. In short, Ross already lacked credibility in the eyes of the jury. This extra-judicial information that Ross was arrested for lying about *something* (the record does not show that

the jury knew what he was arrested for lying about, specifically) almost certainly did nothing to change their views.

This information did not amount to a "fundamental defect" in the proceedings for another reason: The evidence of Lawless's guilt was overwhelming. *Gould*, 929 S.W.2d at 738. In a close case, the introduction of extra-judicial information could arguably be more problematic. But this was not a close case. As discussed above, the Commonwealth presented extensive evidence of Lawless's plan to set up and kill Waddles. *Supra* 14–19. Akoi testified about her central role in the scheme. *Supra* 15–18. And the jury saw the text messages that Akoi sent to Waddles to lure him into Lawless's trap. *Supra* 18–19. The jury also heard testimony, confirmed by cell-tower data, from Akoi and Ross placing Lawless at the scene at the time of the murders. *Supra* 20–23. The jury saw several videos of the incident and extensive evidence of law enforcement's investigation. *Supra* 24–25. And the jury heard evidence that Lawless tried to cover his tracks in the hours and days after the murders. *Supra* 26–27. Against this mountain of unrebutted, damning evidence, knowledge of Ross's arrest was highly unlikely to tip the balance for any juror.

This Court has often held that trial errors are more likely to be harmless where, as here, the evidence of the defendant's guilt was overwhelming. *See, e.g.*, *Burdette v. Commonwealth*, 664 S.W.3d 605, 633 (Ky. 2023) ("Given this over-

whelming evidence, we find the trial court's error to be harmless beyond a reasonable doubt."); *Harman v. Commonwealth*, 898 S.W.2d 486, 489 (Ky. 1995) (finding "no cause for reversal in light of the overwhelming evidence against" the defendant); *Sears v. Commonwealth*, 561 S.W.2d 672, 674 (Ky. 1978) ("[I]n light of the overwhelming evidence of guilt the error was non-prejudicial and therefore harmless."). Indeed, the Commonwealth could have secured a conviction without calling Ross at all. His testimony simply "put[] extra icing on a cake already frosted." *Yates v. United States*, 574 U.S. 528, 557 (2015) (Kagan, J., dissenting).

Lawless's cases do not compel a different result. The circumstances of Ross's arrest are far afield from *Quercia v. United States*, 289 U.S. 466 (1933), and *Turner v. Louisiana*, 379 U.S. 466 (1965). In *Quercia*, the trial judge explicitly told the jury that he "th[ought] that every single word [one witness] said, except when he agreed with the Government's testimony, was a lie." 289 U.S. at 468. The Court ruled that this direct commentary on one of the witness's testimony "was error" and "was highly prejudicial." *Id.* at 472. The circuit court engaged in no such behavior here. *Turner* is even less relevant. It doesn't even involve alleged misconduct by the trial judge, but was a case in which two key prosecution witnesses were sheriffs who were also in charge of watching over the sequestered jury. *Turner*, 379 U.S. at 467–68. In short, neither case helps Lawless's arguments.

One final note on remedies. Even if the Court rules for Lawless (it should not), the remedy could not be, as he suggests, dismissal of the indictment. Appellant Br. 34. This Court has recognized that when an appellate court "revers[es] for a trial error," as opposed to where "the evidence at trial was not sufficient to sustain a verdict of guilt," the "defendant is entitled to a new trial free of this procedural defect," not "dismiss[al]" of his indictment. *Commonwealth v. Mattingly*, 722 S.W.2d 288, 288–89 (Ky. 1986) (citing *Burks v. United States*, 437 U.S. 1, 2 (1978)); *see also Hobbs v. Commonwealth*, 655 S.W.2d 472, 474 (Ky. 1983). So at most, in the unlikely event it sustains Lawless's argument, the Court should vacate the judgment and remand for a new trial.

CONCLUSION

The Court should affirm the circuit court's judgment.

Respectfully submitted,

RUSSELL COLEMAN
Attorney General of Kentucky

/s/ John H. Heyburn
MATTHEW F. KUHN (No. 94241)
Solicitor General
JOHN H. HEYBURN (NO. 100756)
Principal Deputy Solicitor General

Office of the Attorney General
700 Capital Avenue, Suite 118
Frankfort, Kentucky 40601
Matt.Kuhn@ky.gov
Jack.Heyburn@ky.gov
(502) 696-5300

Counsel for the Commonwealth

WORD-COUNT CERTIFICATE

This brief complies with the word limit of RAP 31(G)(3)(a) because, excluding the parts of the brief exempted by RAP 15(D) and 31(G)(5), this brief contains 13,561 words.

/s/ John H. Heyburn