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Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001831-MR

COMMONWEALTH OF KENTUCKY

APPELLANT

v. APPEAL FROM TODD CIRCUIT COURT
HONORABLE KELLY MARK EASTON, SPECIAL JUDGE
ACTION NO. 07-CR-00001

NORMAN GRAHAM

APPELLEE

OPINION
AFFIRMING

** **

BEFORE: GOODWINE, LAMBERT, AND MAZE, JUDGES.

MAZE, JUDGE: The Commonwealth appeals from the Todd Circuit Court's order granting Norman Graham's motion to set aside, correct, or amend judgment pursuant to CR¹ 60.02, entered October 5, 2017. After careful consideration, we affirm the circuit court's order granting a new trial.

¹ Kentucky Rules of Civil Procedure.

I. Background

Further details of this case may be found in the Kentucky Supreme Court's opinion on direct appeal. *Graham v. Commonwealth*, 319 S.W.3d 331 (Ky. 2010). At some point during the evening hours extending from June 29 to June 30, 1980, Kay Williams² was raped and murdered in her boyfriend's trailer at Tiny Town Trailer Park, in Todd County, Kentucky. Kay's boyfriend, Norman Graham, alleged he had been out drinking with his ex-wife at a bar the previous evening and was not home when Kay was attacked. According to Graham, he fell asleep in his vehicle in the bar parking lot, woke up after 4:00 a.m., and drove back to his trailer, where he discovered Kay's body. Her hands and feet had been bound with bootlaces, her throat had been cut, and she had been stabbed in the chest approximately twenty-five times. Her jumpsuit had been cut or torn away from her body, and she was positioned in the nude on the bed with her legs splayed out. Upon discovering the body, Graham alerted Kay's sister, who lived in the neighboring trailer, and they contacted the police. Investigators discovered semen inside Kay's vagina and on her jumpsuit, but forensic science at the time could not determine who the contributor was. Graham acknowledged he and Kay had engaged in sexual relations on the day leading up to the murder.

² The record in this case sometimes refers to the victim as Kay Abney, Janice Kay Williams, or variants thereof. The Kentucky Supreme Court referred to her as Kay Williams on direct appeal; therefore, we will use this name for the sake of consistency.

The Commonwealth prosecuted Graham for Kay's murder in 1981, but the jury could not agree on a verdict, resulting in a mistrial. The Commonwealth elected to dismiss the indictment without prejudice. The case remained largely dormant for over twenty years. The case became active again when, in 2003, the Commonwealth reexamined the biological evidence using DNA testing. The semen recovered at the scene matched Graham's DNA to a statistical probability of one in 506 trillion individuals. Other suspects were excluded as contributors to the recovered DNA. In 2007, a Todd County grand jury indicted Graham for first-degree rape as well as murder. Graham was convicted on both counts at jury trial. On December 30, 2008, the trial court sentenced Graham to a concurrent term of forty years' imprisonment.

Within a few months of conviction, Graham moved for a new trial pursuant to CR 60.02 and RCr³ 10.06. As support, the motion alleged juror misconduct and the defense's receipt of sworn statements from witnesses who had not previously testified. The witness statements included two worth mentioning here. The first was Tina Rigsby, who was married to Roy Wayne Dean from approximately 1981 to 1982. Over the years, Dean had become a leading candidate as an alleged alternative perpetrator in Kay's murder. In 1984, Dean committed two separate and unrelated murders of women in the Todd County area.

³ Kentucky Rule of Criminal Procedure.

He is currently serving out a life sentence with the Kentucky Department of Corrections. Tina, who would later testify in the evidentiary hearing in the current matter, gave Graham's defense an affidavit relating the following incident:

Roy, for some unexplained reason, told me one day about the murder of a young lady and described it in, what I consider, great detail. I am in the medical profession, so I have knowledge of the body and trauma to it. He described the scene to me. He said the young girl was lying sprawled out on a bed with blood splattered all over her and the walls and the bed. He said she was nude. He said she was stabbed 30 to 32 times in the chest area. When I asked how he knew this, his only explanation was, well, he saw the crime scene. I believe the only explanation was that Roy Dean was the perpetrator of the crime and was at the scene and created the scene which he described. Based upon Roy Dean's statements to me, I strongly believe he committed the crimes of which Norm Graham stands accused.

The second statement was from Graham's ex-wife, Sandra Burnette. As previously mentioned, Graham's alibi for the night of the murder was that he was spending time with his ex-wife at a bar. However, she was not called to testify in either trial. In her statement, Sandra asserts that, if she had been called as a witness, she would have testified to being with Graham until she left him in the bar parking lot in Clarksville, Tennessee, at approximately 3:00 to 4:00 a.m. Later, in a deposition she gave in 2008, Sandra said the drive back to Tiny Town from the bar would have taken approximately another thirty minutes, even if Graham had left immediately after she did. Based on her personal experience with him, Sandra

did not believe Graham would commit this crime, and she further believed Graham *could not have done so*, because he was with her that night. She also expressed her willingness to testify as to these matters.

The trial court denied Graham's motion for a new trial, finding the juror misconduct did not prejudice Graham to such an extent that he did not receive a fair trial. The trial court also found Tina's statement had little probative value, while Sandra's statement could have been offered at Graham's trial if the defense had exercised reasonable diligence in doing so. In addition, the trial court found Sandra's statement was "inconsistent with the statement she gave officers on December 5, 1980, wherein she stated . . . she parted company with the defendant in Clarksville, Tennessee at an unknown time in the early hours of the date in question." Ultimately, the trial court held Graham "failed to demonstrate that if Sandra Burnette were permitted to testify at a new trial, there is a reasonable certainty that the result would be different."

Graham's conviction was upheld in his direct appeal to the Kentucky Supreme Court. *Graham*, 319 S.W.3d 331. He subsequently moved the trial court for relief pursuant to RCr 11.42, asserting ineffective assistance of counsel. The trial court denied the RCr 11.42 motion, and we upheld the trial court's ruling on appeal. *Graham v. Commonwealth*, No. 2012-CA-002181-MR, 2015 WL 7822146 (Ky. App. Dec. 4, 2015), *as modified on denial of reh'g* (Ky. App. June 24, 2016),

disc. rev. denied (Ky. Oct. 13, 2016). Of note, our previous opinion disagreed with the trial court's assessment that there was no reason to suspect Dean was a viable suspect in Kay's murder. We opined that Kay's murder bore a significant resemblance to the murders for which Dean is currently incarcerated:

Dean is a suspected serial killer who lived in the same trailer park at the time of the victim's murder. There were numerous similarities between the murders, which the detective in the case noted in his Uniform Offense Report. These similarities include: overkill, rape, bound wrists, similar positions, and nudity of the victims. The only dissimilarity was the weapon used to murder the victims. Graham's contention that Roy Dean should have been offered as an alternate suspect is clearly not "without a minimum factual basis."

Id. at *4. Nevertheless, we upheld the trial court's ruling, stating that "[e]ven if trial counsel's failure to present Roy Wayne Dean as an alternative suspect was deficient, given that none of Dean's DNA was ever linked to the crime scene, we cannot say that it was prejudicial." *Id.*

Graham subsequently filed two concurrent CR 60.02 motions, and these motions were heard by the assigned special judge. Graham's first motion, filed on August 1, 2016, alleged his convictions for rape and murder should be vacated because the Commonwealth had dismissed the rape charge against him *with prejudice* in 1981, so it was erroneous to charge and convict him of that offense in his 2008 trial. Before the trial court could rule on the motion, however, Graham made a separate motion for relief under CR 60.02 and RCr 10.02. This

second motion asserted new evidence had surfaced against Dean as the actual perpetrator of the crime, in the form of two eyewitnesses who saw Dean outside Graham's trailer on the night of the murder. The witnesses, Renee Dean and Barbara Keaton, were young teenagers at the time of the murder and had not been questioned by police during the investigation. Although the details of their statements differ, as discussed below, both women assert they heard a woman's scream that night and then saw Dean running from the area behind Graham's trailer. This Court is currently holding Graham's first motion in abeyance pending the outcome of his second motion in the case *sub judice*.

The trial court held a two-day evidentiary hearing, on April 24 and June 12, 2017, to receive Graham's new evidence. The trial court also considered Dean's deposition, which was taken on June 27, 2017. Finally, when counsel began to repeat facts and issues which were raised previously, the trial court kept the hearing focused on the new testimony by informing counsel he had examined the history and the record in this case in great detail. As a result, the trial court was very well prepared to thoroughly consider the matter.

In the April 24, 2017, evidentiary hearing, the first witness of note to testify was Dean's former spouse, Tina Rigsby. Tina's testimony provides valuable background on Dean as a viable alleged alternative perpetrator for Kay's murder. Tina testified as to the incident, related *supra*, wherein Dean described the

scene of Kay's murder as though he had personal knowledge of it. Tina admitted she was not involved with Dean when Kay was killed, so she had no direct knowledge of his activities during that time period. However, she described a subsequent incident in which she accompanied Dean's family to visit him while he was incarcerated. According to Tina, Dean asked his father, "Daddy, didn't I kill something in Tiny Town once?" Dean's father replied, "Yeah, son, but that was dogs." Upon leaving, Dean's grandmother disputed the "dogs" statement, but the Commonwealth objected to Tina's further recollection of the conversation on hearsay grounds.

In a rather disturbing vignette from when they were dating, Tina described an incident in which she went fishing with Dean. He began repeatedly stabbing a catfish and laughing. Tina said, "I mean, he just kept stabbing and stabbing and stabbing, and laughing and stabbing. And I'm just—it scared me." Responding to counsel's questioning on the point, Tina made it very clear that Dean was *not* cleaning the fish.

Tina testified how she thought Dean was not law-abiding when they were married, but now believes he is guilty of far worse than she originally imagined. Tina explained how, during their marriage, she supposed Dean was merely a thief, because he would come home with odd scratches on his arms, blood on his pants, and, on one occasion, she found women's wedding rings in Dean's

pockets when she did laundry. In retrospect, Tina believed these things were connected to women who disappeared from the areas where Dean lived. She explained to the court how the local newspaper showed murdered and missing area women from 1980 to 1984, aside from Kay, but the incidents stopped once Dean was imprisoned in 1984. The Commonwealth objected to the testimony as non-responsive, but the trial court asked for clarification: “In other words, if I look at the Todd County paper, 1980 to 1984, I might find reference to people missing? Is that what you’re telling me?” When defense counsel confirmed this to be Tina’s impression, the trial court overruled the Commonwealth’s objection. Tina testified how she kept track of Dean and his parole status because she would be afraid of him if he were to be released. Finally, when defense counsel asked Tina why she was testifying, she simply stated, “With all due respect to the Commonwealth of Kentucky, I believe you have an innocent man in the penitentiary.”

Lisa Potter and Danny Moles each testified at the evidentiary hearing, and their testimonies explained how the new eyewitness accounts were discovered in this case. Lisa Potter is a friend and advocate for Graham, and she described herself as “devastated” by his conviction. She has worked tirelessly to exonerate Graham following his conviction and sentence. Danny Moles is Lisa’s friend, and

he also happens to be Dean's second cousin.⁴ Danny and Lisa had discussed the case, and both believed Graham to be innocent. Danny had recently heard Dean's father talk about the night Kay was murdered and had learned Dean had apparently come home with bloody clothing that evening and said, "dogs got after him." However, according to the account Danny had heard from Dean's father, there were no cuts on Dean's body after the alleged dog attack, and Dean took the bloody clothing to the dumpster after changing clothes. Danny testified to his belief that Dean was responsible for the murder, saying "there's nothing [Dean] wouldn't do."

Lisa had long wanted to speak to Dean's family in order to ask them if Dean had anything to do with Kay's murder. However, Danny refused to take Lisa to see the family while Dean's mother, Patsy, was alive. Patsy Dean was *very* protective of her son and would not allow anything to be said against him; therefore, a meeting with the Deans would not have been productive. Danny implied Patsy may even have attacked Lisa if she had dared ask those questions. After Patsy died in 2014, Danny finally agreed to take Lisa to visit the Dean family, which they did in a series of meetings. The dates of the meetings are not

⁴ To avoid confusion, we note here that the witnesses and the record occasionally refer to Danny Moles as "Uncle Danny," instead of his actual familial status as a cousin to the testifying members of the Dean family.

clear from the record, but Danny and Lisa appear to have met with the Deans three or four times in 2016.

Lisa testified she originally intended to speak to Dean's father about the case, and she was unaware that Dean had a younger sister, Renee Dean. Lisa met Renee during her first meeting with the Deans. During her second meeting with the family, Renee told Lisa she heard screams on the night of the murder. However, Renee also said Dean had written to the family and told them he would be getting out of prison. Sensing Renee perhaps had more information to give, Lisa took documentation to her third meeting with Renee which showed that the parole board had ordered Dean to serve out his life sentence; he would *not* be released. Lisa once again asked Renee if she knew anything about the case. With the knowledge that Dean would not be coming home, Renee spoke freely about the night of Kay's murder. She gave Lisa a notarized affidavit the next day, and Lisa sent it to the Kentucky Innocence Project (KIP). The KIP investigator followed up on Renee's affidavit and found a second witness, Barbara Keaton, who was with Renee on the night of Kay's murder and could largely corroborate her account.

On the evening of June 29, 1980, Renee Dean was approximately thirteen years old and living with her parents and siblings in Tiny Town Trailer Park. Her older brother was eighteen-year-old Roy Wayne Dean. That night, she was breaking curfew with her cousins, Barbara Keaton (then fourteen-year-old

Barbara Dean) and Connie Powell (then twelve-year-old Connie Dean). According to Renee, curfew was at 9:30 or 10:00 p.m., but the girls would simply wait for the adults to go to sleep before sneaking outside. Renee, Barbara, and Connie were playing hide-and-seek in the area around the trailer owned by Connie and Barbara's parents. Neither Renee nor Barbara could testify as to exactly what time of night they were outside, but they both recall that it was after dark. The trial court took judicial notice of official data by the United States Naval Observatory, which established sunset that evening occurred at 8:11 p.m. in Guthrie, Kentucky, with end of twilight at 8:42 p.m. When it got too dark, Connie went inside to go to bed, but Renee and Barbara continued to play.

Renee believed what happened next occurred around 11:00 p.m. or later, though she admitted uncertainty on that point. Renee and Barbara had stolen a cigarette from inside the trailer and smoked it, then went back to playing their game. Renee was hiding from Barbara behind a bush when she heard a woman scream. The scream was such that Renee distinctly remembered being frightened when she heard it. Approximately three to five minutes after hearing the scream, Renee saw her brother, Roy Wayne Dean, coming from the area behind Graham's trailer, near the trailer's rear door. She testified she did not actually see Dean exit the rear door of the trailer, but merely received an impression that he did so. Dean was wearing a white shirt with what appeared to be blood all over it. He was also

wearing blue jeans and carrying a small duffel bag. Renee asked Dean what he was doing, but Dean only shushed her before running away.

Barbara Keaton also testified at the evidentiary hearing. Unlike Renee, Barbara testified that she actually knew Kay personally and considered her a friend. She recalled how Dean constantly made a nuisance of himself when she would be sunbathing with Kay, and they would have to chase him away. Dean would threaten them, calling them “bloody hogs.” Dean would also frequently lurk at the trailer windows to look at Kay. In Barbara’s words, Dean “creeped them out.”

Barbara recalled the events of the evening somewhat differently, but she corroborates the key points of Renee’s account. The girls were playing hide-and-seek outside the trailer, and it was completely dark outside. Connie went to bed. It was Renee’s turn to hide, and Barbara remembered sitting on a trailer hitch and smoking a cigarette. At that point, she heard a loud, piercing scream. Barbara is uncertain what time she heard the scream, but it may have been as late as midnight. She then saw Dean running up to where she was sitting on the hitch and smoking. Barbara testified that Dean was not wearing a shirt, but he was wearing blue jeans and carrying a black, military-style boot in his hand. Dean looked at Barbara with wide eyes, a “deer in headlights” expression on his face, before running away. She did not see Dean for several months after that. The next day,

Barbara realized the scream must have come from Kay, but no one ever spoke to her about it.

Connie Powell testified at the evidentiary hearing, though she had little substance to add to Renee and Barbara's testimony regarding that evening. Connie confirmed she was playing hide-and-seek with Renee and Barbara that evening. She also confirmed she went inside to go to bed when the night became too dark. Connie then testified she heard a scream which woke her up from a sound sleep. She described it as "a scary scream . . . it wasn't a kid scream. It was like a . . . somebody-is-being-hurt scream."

Renee testified she and Barbara went back inside the trailer, and then Renee went home to her own trailer about an hour after that. Forty-five minutes after she got home, Renee saw Dean come into the kitchen. She asked Dean what he was doing, and he replied it was none of her business. Renee then asked Dean what happened to his hand, because it looked like he had a cut with a small amount of blood on it. He again told her it was none of her business and she should go to her room. Renee remembered Dean took a shower, which was unusual because the hour was very late. The next day, Renee watched as a mattress covered with blood was taken out of Graham's trailer and Kay's body was removed. Even though Renee was uncertain as to the exact calendar date of these occurrences, the sight of

the bloody mattress and the removal of the body were linked in Renee's mind to the events she witnessed the night before.

Renee and Barbara testified how they were kept inside their families' trailers and away from police during the investigation. Law enforcement did not approach to ask them any questions, and they did not tell anyone outside the family about what they had witnessed the night before. Connie testified that she did not tell anyone about the scream she heard. She also confirmed that the police did not question the girls, who were kept inside the trailer. According to Connie, police questioned individuals standing outside; however, she was certain they did not knock on her trailer door.

In a coda to Renee's recollection of the events surrounding Kay's murder in 1980, she testified about a conversation she had with Dean which came several weeks after the police investigation:

And then one time I'll never forget, we was at a bridge. We – it was a creek we swim in, but I stayed up on the bridge looking over. And my brother come up behind me, and he said, "You're going to learn how to swim today." I said, "What do you mean?" He said, "We'll push you off." And he said, "If you don't swim, you'll get drowned." I said, "No, you're joking." I said, "If you do, I'll tell Mama." **And he said, "If you do, I'm going to do you like I did that damn woman in that trailer."** And I don't know what he meant by it.

(Emphasis added.) In retrospect, the conversation appeared to be one more piece of information implicating Dean in Kay's murder.

The Dean family dynamic, as it surrounded Roy Wayne Dean, was truly horrifying. Dean was struck in the head with an axe when he was young; after that time, he suffered from memory blackouts and radical mood swings. Renee testified how Dean would do things and then not remember doing them afterward. According to Barbara, Dean sexually molested her from ages nine to twelve and raped her when she was ten years old. In her deposition, Barbara stated Dean had raped Renee. Barbara's younger sister, Connie, testified how Dean had tried to molest her, then threatened her into silence, saying, "if [she] told [her] mom that he tried to molest [her], that he was going to kill [her], and [she] would never see daylight again." Connie believed Dean's threat. In another incident which further illustrated how Dean terrorized his younger female relatives, Barbara and Connie testified how Dean left a tape recorder under Barbara's bed. In the recording, Dean said he would rape and kill all of them, and he would "cut them up like pigs."

As Dean's sibling, Renee could relate more incidents of his abuse. She testified how Dean once broke her arm by pushing her out of a swing. On another occasion, he chased her in a field while driving his car, and she escaped by climbing a tree. On both occasions, Renee was beaten for informing her parents about Dean's behavior. As previously mentioned, Patsy Dean doted upon her son to an extreme and would not tolerate anything said against Dean for any reason.

Dean's father did nothing to counter Patsy on this point. Renee grew up knowing that anything she said against Dean would only result in her being severely beaten. Simply put, Renee feared her brother. All of Dean's female relatives who testified were afraid of him. All of them *still* fear him to this day, based on the mere *possibility* that he might someday escape from confinement.

When Dean was arrested for murder and imprisoned, Renee believed it was for Kay's murder. In contrast, Barbara knew Dean had been arrested for the murder of a different woman. However, she did not come forward because she believed Dean being in prison for murder was sufficient justice, and she did not wish to disrupt the lives of her other family members.

Aside from the testimony by Lisa Potter, Danny Moles, and the women of the Dean family, the trial court heard testimony from the Commonwealth during the evidentiary hearing. Detective Scott Smith of the Kentucky State Police testified that he participated in later interviews with Renee and Barbara, but he did not know anything about these witnesses until after their affidavits were submitted to KIP. The trial court also heard testimony from Kay's sisters, Regina Alexander and Judy Blick. Regina did not believe Kay would have befriended Barbara, because Barbara was several years younger than Kay. She also testified that Kay knew Dean, but Kay never mentioned being afraid of him. For her part, Judy testified how she lived next door to Graham's trailer, and she did

not see any teenagers playing, nor did she hear a scream on the night of Kay's murder. Judy also related how she looked out her window twice that evening, once at 10:15 p.m. and again at 12:20 a.m. Judy did not see Graham's vehicle or Kay's vehicle at 10:15 p.m., but she saw Kay's vehicle at Graham's trailer at 12:20 a.m.

Finally, the trial court considered the deposition of Roy Wayne Dean, taken at LaGrange, Kentucky, on June 27, 2017. Dean's deposition provided little information because, when questioned, Dean chiefly denied wrongdoing or stated he could not remember. At the time of the deposition, Dean had been incarcerated for approximately thirty-two years. Dean is serving out a life sentence after taking *Alford*⁵ pleas in the murders of Brenda Church and Dee Ann Rapp. Dean remembered portions of the rape and murder of Brenda Church, but he did not remember anything about Dee Ann Rapp's murder. Dean denied committing any other murders, did not remember ever stabbing anyone, and did not remember Graham or Kay from the trailer park. Dean denied raping or abusing Renee, Barbara, or Connie. Dean asserted that Tina, his ex-wife, lied in her testimony about him because his conviction ruined her life. He also asserted that Renee is a liar, but admitted his mother favored him over her. Dean denied running from

⁵ *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970). An *Alford* plea "permits a conviction without requiring an admission of guilt and while permitting a protestation of innocence." *Wilfong v. Commonwealth*, 175 S.W.3d 84, 103 (Ky. App. 2004). "The entry of a guilty plea under the *Alford* doctrine carries the same consequences as a standard plea of guilty." *Id.* at 102 (citation omitted).

Graham's trailer on the night Kay was murdered. Finally, Dean stated he has suffered from blackouts, memory problems, and periods of confusion after a childhood accident in which he was struck in the head with an axe.

After considering all the evidence, the trial court granted Graham's CR 60.02 motion in a detailed, nineteen-page order entered October 5, 2017. The trial court began by observing the new evidence did not establish "actual innocence," but actual innocence would not be required to prevail on the motion for a new trial. The trial court then confined itself to two issues: whether Graham exercised due diligence to discover the new evidence; and, quoting *Commonwealth v. Harris*, 250 S.W.3d 637 (Ky. 2008), whether the new evidence was "of such decisive value or force that it would, with reasonable certainty, have changed the verdict or that it would probably change the result if a new trial should be granted." *Id.* at 640-41 (citation omitted).

In determining whether Graham exercised due diligence to discover the new evidence, the trial court focused its attention on the testimony of Renee Dean and Barbara Keaton. The trial court found "[t]he keys to the late disclosure are Dean's mother, Patsy, and the incarceration of Dean." The trial court considered how all the witnesses agreed that Patsy was very protective of Dean, and Renee could not speak any ill of Dean or her mother would punish her instead. The court found Renee would not have come forward until after Patsy died in

2014. Furthermore, the trial court observed that “Dean is a proven murderer and psychopath. . . . Barbara and Renee were and are afraid of him.” Renee only told Lisa Potter her story after Lisa showed proof that Dean would serve out his life sentence. The trial court also observed that Detective Smith of the Kentucky State Police, who thoroughly investigated the case, also had no idea these witnesses existed until their affidavits appeared. Because the witnesses were previously afraid to come forward, and the information they provided was not available in Graham’s trial or previous post-conviction motions, the trial court found Graham had exercised due diligence in producing this new evidence.

The trial court here noted a procedural anomaly in this case, whereby Graham filed multiple CR 60.02 motions. The trial court stressed that, “[b]ecause of the strong public policy favoring finality of judgments, serial CR 60.02 motions are discouraged.” However, the trial court also pointed out that counsel for both sides had ignored the issue. Furthermore, the trial court considered “the equitable nature of CR 60.02” and found the “uncoordinated presentation” of the issues should not preclude relief under these circumstances.

In evaluating the quality of the evidence, the trial court found Renee’s testimony to be “essentially credible,” to a greater degree than that of Barbara. Nonetheless, the trial court acknowledged Barbara’s testimony “had at least some probative value when combined with that of Renee.” The trial court did not

consider the possible effect of testimony from Dean’s ex-wife Tina, nor that of Graham’s ex-wife Sandra, in considering the present motion, because their testimonies were not newly discovered. The trial court merely acknowledged how the evidence fit with the rest of the evidence in the record, and how this evidence could conceivably affect a possible future trial.

Ultimately, the trial court found the case presented a “truly extraordinary situation[,]” in which two new eyewitnesses saw Dean near the crime scene on the night of the murder. Furthermore, Dean’s appearance and conduct “strongly suggest[ed] his participation in the murder[,]” and Dean himself “later committed at least two murders with some disturbing similarity to the murder in this case.” Considering all the evidence before it and comparing this evidence to that against Graham, the trial court held a new trial was justified. This appeal followed.

II. Standard of Review

This appeal stems from the trial court’s grant of relief under CR 60.02. The Kentucky Supreme Court has described the standard of review in such cases as follows:

“[I]n order for newly discovered evidence to support a motion for new trial it must be ‘of such decisive value or force that it would, with reasonable certainty, have changed the verdict *or* that it would probably change the result if a new trial should be granted.’” *Commonwealth v. Harris*, 250 S.W.3d 637, 640-41 (Ky. 2008) (emphasis

added and quotation omitted). “We review the denial of a motion for a new trial to determine whether such decision was an abuse of discretion.” *Bedingfield v. Commonwealth*, 260 S.W.3d 805, 810 (Ky. 2008) (citations omitted). “The test for abuse of discretion is 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).

Commonwealth v. Clark, 528 S.W.3d 342, 344-45 (Ky. 2017). Furthermore, “we will affirm the lower court’s decision unless there is a showing of some ‘flagrant miscarriage of justice.’” *Foley v. Commonwealth*, 425 S.W.3d 880, 886 (Ky. 2014) (quoting *Gross v. Commonwealth*, 648 S.W.2d 853, 858 (Ky. 1983)). “This is a difficult standard for the Commonwealth to satisfy.” *Clark*, 528 S.W.3d at 345.

III. Analysis

The Commonwealth presents a variety of issues which we have grouped into four main arguments on appeal. First, the Commonwealth argues the trial court should not have considered this CR 60.02 motion because it is successive. Second, the Commonwealth argues the trial court abused discretion when it held Graham had exercised due diligence in locating the new witnesses in this case, Renee Dean and Barbara Keaton. Third, the Commonwealth argues the trial court erroneously held a new trial with testimony from the newly discovered witnesses would probably result in a different outcome. Fourth, and finally, the

Commonwealth argues the trial court erred because the facts involved in this case are fundamentally different from those of other cases which have warranted relief under CR 60.02. We consider each argument in turn.

A. Successive motions under CR 60.02

In its first argument, the Commonwealth argues the trial court should not have considered this CR 60.02 motion because it is successive, pursuant to *Foley*, 425 S.W.3d at 884. Graham argues his post-conviction motions were neither “haphazard” nor “overlapping” in their issues and were therefore permissible, citing *Gross*, 648 S.W.2d at 856. Graham also argues the Commonwealth failed to raise the successiveness argument before the trial court. The Commonwealth responds by asserting the Court of Appeals “can determine for itself that jurisdiction is proper.”

Although the Commonwealth is correct in stating successive CR 60.02 motions are disallowed, the Commonwealth cites no law supporting its argument that a *successive* CR 60.02 motion creates a question of *jurisdiction* which must be considered on appeal. Nor have we independently found any Kentucky case law supporting the Commonwealth’s jurisdictional argument. However, even if we were to assume the Commonwealth is correct, the jurisdictional question would involve particular-case jurisdiction, not subject-matter jurisdiction. “Subject matter jurisdiction refers to a court’s authority to

determine ‘this kind of case’ (as opposed to ‘this case’).” *Kelly v. Commonwealth*, 554 S.W.3d 854, 860 (Ky. 2018) (citation omitted). In contrast, “[p]articular-case jurisdiction ‘refers to a court’s authority to determine a specific case (as opposed to the class of cases of which the court has subject matter jurisdiction).” *Id.* (quoting *Commonwealth v. Steadman*, 411 S.W.3d 717, 722 (Ky. 2013)). “[U]nlike subject-matter jurisdiction, particular-case jurisdiction is subject to waiver.” *Id.* (citing *Steadman*, 411 S.W.3d at 724). The Todd Circuit Court unquestionably has the authority to hear motions raised pursuant to CR 60.02 stemming from its judgments. Therefore, the jurisdictional defect alleged here could only be on grounds of particular-case jurisdiction.

The Commonwealth does not dispute its failure to raise the successiveness issue below, and its silence “effectively waived any potential error as to particular-case jurisdiction.” *Id.* at 861. Without the Commonwealth’s jurisdictional argument, we need not consider whether the CR 60.02 motion at the heart of this matter is truly successive. “A new theory of error cannot be raised for the first time on appeal.” *Springer v. Commonwealth*, 998 S.W.2d 439, 446 (Ky. 1999). “Our jurisprudence will not permit an appellant to feed one kettle of fish to the trial judge and another to the appellate court.” *Owens v. Commonwealth*, 512 S.W.3d 1, 15 (Ky. App. 2017) (footnote omitted).

B. Due diligence

In its second argument, the Commonwealth argues the trial court abused its discretion when it held Graham had exercised due diligence in locating the new witnesses in this case, Renee Dean and Barbara Keaton. A motion under CR 60.02(f) “shall be made within a reasonable time” and “[w]hat constitutes a reasonable time in which to move to vacate a judgment under CR 60.02 is a matter that addresses itself to the discretion of the trial court.” *Gross*, 648 S.W.2d at 858. The Commonwealth repeatedly stresses the extraordinary length of time which has passed since Kay Williams’s murder in order to argue the trial court abused its discretion. “The trial court held that even though Keaton and Renee did not come forward and make their allegations for over thirty-six (36) years, Graham had acted with due diligence in securing their testimony.” (Commonwealth’s brief at 7.) The Commonwealth also argues Graham should have been able to discover Renee Dean and Barbara Keaton’s testimonies earlier, because Dean himself had been a longstanding alternative suspect in this case, and it would have been reasonable to locate and question his relatives. Finally, the Commonwealth argues the trial court unreasonably speculated that the witnesses involved would not testify or agree to be interviewed, and the delay in obtaining these witnesses was due solely to Graham’s inaction.

The Commonwealth's initial emphasis on "thirty-six years" as the proper timeframe for an alleged failure to exercise due diligence ignores how Graham was not incarcerated or even under indictment for the bulk of that time. He was tried to a hung jury in 1981, and then the case lay dormant, as far as Graham was concerned, until the grand jury re-indicted him in 2007. Graham had no reason to seek exculpatory evidence during the twenty-five-plus years he was not charged with an offense. For its due diligence analysis, the trial court focused on what Graham could have done for his 2008 trial and afterward. The trial court did not abuse its discretion in doing so.

Next, the Commonwealth assumes too much, with the benefit of hindsight, regarding how easy it ought to have been to discover the new testimonies in this case. Multiple witnesses testified how Renee's mother, Patsy, would not allow anyone in the family to speak ill of Dean. Renee and Barbara testified that they were never asked about what they saw during the police canvass following the murder. Both of them testified as to being terrified of Dean, who had physically and sexually assaulted them as children. They are still afraid of him even now, when he is in prison serving out a life sentence. Focusing on these facts, the trial court was persuaded by the reasoning from one of our sister courts in *Rhymer v. State*, 627 N.E.2d 822 (Ind. App. 1994). This case held the appellant did not violate his duty of due diligence when witnesses' testimonies were not

discovered before trial; the witnesses in the case did not come forward because they feared reprisal by the alternate perpetrator.

Here, the trial court accepted Renee's testimony that she felt "safer" testifying knowing Dean had been ordered to serve out his life sentence. The other witnesses, Barbara and Connie, were only discovered after Renee disclosed what she knew. Because Patsy Dean died in 2014, and the parole board only ordered Dean to serve out his life sentence in 2015, the trial court found these factors sufficed to explain why Renee did not come forward. The trial court also noted how the investigating officer, Detective Smith, testified he himself had no inkling of Renee and Barbara as fact witnesses until their affidavits surfaced. The trial court pointed out Detective Smith also had a motivation to find these witnesses—to discover the truth—yet their testimonies eluded him as well. The trial court then concluded Graham acted with the required due diligence under the circumstances. The trial court's findings and conclusions are supported by the evidence. We discern no abuse of discretion.

C. Effect of the new evidence

In its third argument on appeal, the Commonwealth argues the trial court erroneously held a new trial with testimony from the newly discovered witnesses would probably result in a different outcome. The Commonwealth asserts: (1) the witnesses' testimonies are inconsistent with each other; (2) the trial

court failed to consider how Lisa Potter improperly influenced the proceedings; and (3) the trial court improperly speculated and weighed evidence from Graham's prior trial. As previously mentioned, "[t]he determination as to whether newly discovered evidence warrants a new trial lies within the sound discretion of the trial court and will only be overturned upon a demonstration that this discretion was abused." *Commonwealth v. Harris*, 250 S.W.3d 637, 641 (Ky. 2008). Apart or in sum, the Commonwealth's adjunct arguments do not persuade us that the trial court abused its discretion in evaluating the effect of the new evidence.

First, the Commonwealth asserts Renee and Barbara's testimonies contradicted each other and the facts asserted by other witnesses in the case. The Commonwealth focuses on how Renee and Barbara recall the details of the event differently. For example, Renee remembered Dean wearing a bloody shirt, whereas Barbara remembered Dean wearing no shirt; Renee remembered Dean carrying a duffel bag, whereas Barbara remembered him carrying a boot. The Commonwealth also points out how portions of Barbara's testimony conflicted with the testimony of Kay's sisters. Regina did not believe Kay would befriend Barbara, who was only fourteen years old. Judy did not believe Kay was afraid of Dean, as Barbara testified. Judy also did not hear a scream on the night of the murder, nor did she see children playing outside.

Second, the Commonwealth asserts the trial court did not properly consider how Lisa Potter may have improperly influenced the proceedings. Renee admitted on cross-examination how Lisa had bought groceries for her, and her cousin Danny had given her a used vehicle to get to work. In its cross-examinations of Renee, Lisa, and Danny, the Commonwealth focused on these gifts and implied they were given in exchange for Renee's testimony.

Third, the Commonwealth asserts the trial court improperly weighed evidence from Graham's prior trial. The Commonwealth argues the trial court engaged in speculation regarding evidence which was not present in Graham's original trial and improperly questioned why some evidence was inconsistent with what the trial court believed should be present. Therefore, the Commonwealth argues the trial court engaged in an unreasonable "pyramiding of inferences" to arrive at a ruling on the newly discovered evidence.

In essence, the Commonwealth's arguments ask us to reweigh the evidence heard by the trial court. We decline the Commonwealth's invitation to do so. First, the trial court was in the best position to evaluate the weight and credibility of the witnesses and their testimonies. "[D]ue regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses' because judging the credibility of witnesses and weighing evidence are tasks within the exclusive province of the trial court." *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky.

2003) (quoting CR 52.01 and citing *Bowling v. Natural Resources and Environmental Protection Cabinet*, 891 S.W.2d 406 (Ky. App. 1994)). An appellate court defers to factual findings of the trial court unless those findings are clearly erroneous. CR 52.01. Clearly erroneous findings are those which are unsupported by substantial evidence. *Jones v. Livesay*, 551 S.W.3d 47, 50-51 (Ky. App. 2018); *Moore*, 110 S.W.3d at 354. It should not surprise anyone when witness testimonies differ in the details regarding an incident which happened thirty-seven years previously. The trial court considered Renee’s testimony to be credible. The trial court did not completely credit Barbara’s testimony, but opined it had probative value when combined with Renee’s account. These are determinations properly within the purview of the trial court, and the trial court did not clearly err in its assessment.

Similarly, we defer to the trial court’s evaluation of the evidence regarding Lisa Potter’s involvement in Graham’s case. Lisa testified she provided Renee with a tent and some groceries worth about thirty-eight dollars, and she did so only because Renee was living under extremely impoverished circumstances. Danny Moles testified he offered to repair an old truck in his possession to give it to Renee, and he did so with the intent of helping a family member. Renee admitted receiving these items. Despite these admissions, however, Renee insisted her testimony was not purchased, saying she “want[ed] to do the right thing[.]”

The trial court heard the testimonies and determined Renee’s statements were credible. Determining credibility of witnesses is a task “within the exclusive province of the trial court.” *Jones*, 551 S.W.3d at 51.

Finally, the Commonwealth explicitly asks us to find fault with the manner in which the trial court weighed the evidence. Again, we decline. The Commonwealth argues the trial court was improper in weighing the evidence from Graham’s previous trial, stating that this controverted what the previous factfinder, the jury, had determined. However, weighing all of the facts in evidence is precisely what the trial court *must* do in order to find whether the new evidence would result in a different outcome. “[T]he standard for adjudging whether a new trial is warranted based upon newly discovered evidence is whether such evidence carries a significance which would with reasonable certainty, change the verdict or that it would probably change the result if a new trial should be granted.”

Bedingfield v. Commonwealth, 260 S.W.3d 805, 809-10 (Ky. 2008) (citations and internal quotation marks omitted). The trial court must view the evidence as a whole, as well as the strength of that evidence, in order to determine a likely outcome. The *Bedingfield* court itself engaged in this sort of analysis:

For clarity’s sake we emphasize: the presence of sperm which DNA testing proves did not belong to Appellant does not exonerate him; however, the presence of this new evidence does cast a long shadow and assuredly merits consideration in the form [of] a new trial. It cannot be overlooked that in Appellant’s initial trial, all

other arguments were enhanced and corroborated by the supposition that the sperm found belonged to Appellant.

Id. at 814-15.

The Commonwealth also asserts the trial court erred by engaging in a “pyramiding of inferences.” However, the Kentucky Supreme Court has held a trial court may compound inferences, provided the inferences are reasonable. “[A]s long as an inference is grounded in common sense and experience, in reason and logic, and in the evidence at trial, it should be allowed and, indeed, embraced.” *Southworth v. Commonwealth*, 435 S.W.3d 32, 46 (Ky. 2014). As the appellant, the Commonwealth bears the burden of showing the inferences were unreasonable. The Commonwealth has not successfully carried that burden. At best, the Commonwealth points out how the trial court incorrectly understood that Dean’s father admitted to destroying Dean’s bloody clothing. After examining the record, we have determined the Commonwealth is correct on this point; Danny Moles testified it was Dean himself who destroyed the clothing, not Dean’s father. Nevertheless, the error has little import in view of the other substantial testimony in the case, and the trial court’s inferences do not rely on it in any significant way.

Here, the trial court appropriately weighed the evidence from Graham’s trial and evaluated the additional evidence produced at the hearing. The trial court primarily relied on Renee and Barbara’s testimonies and found this new

evidence would probably lead to a different result in a new trial. *Bedingfield*, 260 S.W.3d at 810. The trial court did not abuse its discretion in its determination.

D. Difference in facts *sub judice* from previous cases meriting relief

For its final argument on appeal, the Commonwealth argues the facts involved in this case are fundamentally different from those of other cases which have warranted relief under CR 60.02(f). As support, the Commonwealth cites to previous cases which involved claims of perjury affecting the trial, *see, e.g.*, *Commonwealth v. Spaulding*, 991 S.W.2d 651 (Ky. 1999); newly discovered DNA evidence, *see, e.g.*, *Commonwealth v. Clark*, 528 S.W.3d 342 (Ky. 2017); *Bedingfield*, 260 S.W.3d 805; and intellectual disability claims, *see, e.g.*, *Wilson v. Commonwealth*, 381 S.W.3d 180 (Ky. 2012). Thus, the Commonwealth contends Graham’s case does not rise to the level of these precedents because Graham has not presented “actual proof of innocence.”

The Commonwealth correctly cites previous cases in which the courts have granted relief under CR 60.02. However, the Commonwealth has not cited to any authority which restricts the grant of CR 60.02(f) relief to *only* those particular categories of cases. The language of the rule itself is flexible, allowing the trial court to grant a new trial for “*any other reason* of an extraordinary nature justifying relief.” CR 60.02(f) (emphasis added). The trial court’s order stated, “Graham is not required to prove actual innocence; only the result of a new trial

would probably be different.” The trial court was correct. *See Harris*, 250 S.W.3d at 640-41 (citations omitted) (to warrant new trial, new evidence must be “of such decisive value or force that it would, with reasonable certainty, have changed the verdict or that it would probably change the result if a new trial should be granted”); *see also Bedingfield*, 260 S.W.3d at 815 (holding that new DNA test results did not exonerate the appellant, but nevertheless “cast a long shadow” meriting a new trial). Although a criminal defendant is not entitled to a perfect trial, he is entitled to a fundamentally fair one. *Michigan v. Tucker*, 417 U.S. 433, 446, 94 S. Ct. 2357, 2365, 41 L. Ed. 2d 182 (1974). In this case, the combination of newly discovered evidence, along with the evidence produced at trial and on Graham’s prior post-conviction motions, convincingly demonstrates Graham did not receive a fundamentally fair trial.

CR 60.02(f) allows the trial court to grant a new trial for “any other reason of an extraordinary nature justifying relief.” The trial court heard Renee and Barbara’s testimonies, evaluated it alongside the other evidence, and found “[t]his case presents a truly extraordinary situation.” The trial court’s conclusions were supported by evidence in the record. There was no abuse of discretion.

IV. Conclusion

For the foregoing reasons, we affirm the Todd Circuit Court’s order granting relief pursuant to CR 60.02.

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