IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: AUGUST 21, 2014
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2012-SC-000785-MR

ALAN BRUNER — APPELLANT

V.

ON APPEAL FROM MEADE CIRCUIT COURT
HONORABLE ROBERT A. MILLER, JUDGE
NO. 11-CR-00076

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Alan Bruner, appeals as a matter of right from a judgment of the Meade Circuit Court convicting him of first-degree arson, attempted murder, and insurance fraud, and sentencing him to a total of thirty-one years' imprisonment.

As grounds for relief, Appellant contends that (1) the trial court abused its discretion by limiting his voir dire questioning; (2) the trial court erred by not permitting his wife to testify regarding his demeanor shortly prior to the arson; (3) the trial court erred by failing to give a jury instruction on third-degree arson; (4) his convictions for both arson and attempted murder violated multiple punishment double jeopardy principles; (5) the trial court erred by ordering that he be shackled during

the penalty phase of the trial; and (6) the trial court erred when it imposed court costs on him.

For the reasons stated below we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

Appellant and his wife, Holly, who was also the intended victim of Appellant's attempt to commit murder, have two young children. Late in the fall of 2010, Appellant and Holly purchased a new residence. Appellant was working long hours to support the family; he was attending college classes in the evening, renovating their prior residence, and along with Holly, was heavily involved in church work. Also during this time period, Appellant was having an illicit affair with a female friend. Because of the stresses and pressures of that busy lifestyle, Appellant was not sleeping well and so he obtained a prescription for Ambien, a sleep-inducing sedative.

On Saturday, February 12, 2011, according to his own admission, Appellant decided to kill Holly. As his first step in the planned murder, Appellant made a batch of pancakes for Holly and laced them with Ambien. After eating the pancakes, Holly became very drowsy. When she returned to bed and fell asleep, Appellant gathered the children and left a note on the kitchen counter that said, "Holly, took [the children] to Mom & Dad['s], get some sleep, love you Alan." He then set fire to the house and left. Alert neighbors very quickly noticed the fire, called 911, and

then began to fight the fire. Firefighters soon arrived and when they entered the home they found Holly lying unconscious on the bed in an upstairs room.

The timely intervention of neighbors and firefighters saved Holly. Appellant feigned innocence, and he and Holly filed an insurance claim for fire damages. Investigators, however, quickly suspected that the fire had been intentionally set. After first denying his culpability, Appellant soon admitted to police that he was having an affair, and that he set the fire "to end the marriage with a tragic accident." Ultimately, Appellant comprehensively confessed to poisoning Holly with Ambien and setting the house on fire.

Appellant was indicted and charged with attempted murder, arson, and insurance fraud. At trial he defended upon the theory that in committing the crimes he was acting under the compelling inducement of an extreme emotional disturbance (EED) brought about by the pressures of his overburdened life. He was convicted of all charges and sentenced to a total of thirty-one years' imprisonment. This appeal followed as a matter of right.

II. APPELLANT'S VOIR DIRE EXAMINATION WAS NOT UNREASONABLY LIMITED

Appellant contends that the trial court improperly limited his voir dire examination of prospective jurors by requiring defense counsel to exclude from his questioning any references to marital infidelity and any

information that both Appellant and Holly had engaged in extramarital relationships. Appellant acknowledges that this issue is not preserved, but he requests palpable error review under RCr 10.26.

During voir dire, Appellant's counsel said to the panel of prospective jurors, "Now you might hear evidence in this case, and you probably will, that [Appellant] and [ ] Holly both had affairs and they cheated on each other." At that point, the prosecutor objected. At the bench, defense counsel argued that this subject was a proper subject for examination because it related to Appellant's stress at the time of the arson, which in turn was connected with his EED defense. The trial court expressed concern that subject was broaching the issue of character. The judge sustained the Commonwealth's objection and defense counsel then moved on to another line of questioning.

Appellant says that, if he had been permitted to continue the examination of jurors about marital infidelity, he would have asked questions like: "What is your opinion on people who cheat while in a relationship?" and "What are some of the reasons people cheat on their spouses?" Appellant contends that the trial court's ruling prevented him from ascertaining if any prospective jurors had personal, religious or moral beliefs about adultery that would interfere with his right to have a fair, unbiased, and impartial jury. Without discussing the bias that such conduct might create, Appellant argues that he was unable to identify and remove jurors that would be biased. As it turned out, the jurors did hear

evidence concerning extramarital affairs of both Appellant and Holly, and so Appellant contends he should have been allowed to examine jurors on the subject, and strike jurors who might have attitudes antithetical to his cause.

"[P]art of the guarantee of a defendant's right to an impartial jury is an adequate voir dire to identify unqualified jurors." *Fields v. Commonwealth*, 274 S.W.3d 375, 393 (Ky. 2008)[1] (quoting *Morgan v. Illinois*, 504 U.S. 719, 729 (1992)). However, "it is within the trial court's discretion to limit the scope of voir dire." *Fields*, 274 S.W.3d at 393 (citing *Webb v. Commonwealth*, 314 S.W.2d 543, 545 (Ky. 1958)). Our review of a trial court's limitations on voir dire is pursuant to the abuse of discretion standard, *Hayes v. Commonwealth*, 175 S.W.3d 574, 583 (Ky. 2005), which inquires into "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).

As noted above, this error is not preserved for review. Under Criminal Rule 10.26, an unpreserved error may only be corrected on appeal if the error "affects the substantial rights of a party" to such a degree that it can be determined that a "manifest injustice resulted from the error." The rule's requirement of manifest injustice requires "showing . . . [a] probability of a different result or error so fundamental as to

---

[1] Overruled on other grounds by *Childers v. Commonwealth*, 332 S.W.3d 64 (Ky. 2010), which was abrogated in *Allen v. Commonwealth*, 395 S.W.3d 451 (Ky. 2013).

threaten a defendant's entitlement to due process of law." *Martin v. Commonwealth*, 207 S.W.3d 1, 3 (Ky. 2006).

We are not persuaded that the trial court's ruling in this case seriously affected the fairness, integrity, or public reputation of the proceeding. First, as we construe the trial court's ruling, the defense counsel was not barred from inquiring into the attitudes of prospective jurors. Rather, he was not permitted to preface his questions to the jury with information about Appellant's and Holly's infidelity. That was a reasonable limitation if it was not readily apparent at that early stage of the trial how such information would impinge upon the evidentiary rules regarding character evidence. Nothing in the trial court's ruling prevented Appellant from directly asking jurors for their opinions about people having extramarital affairs. Accordingly, we conclude that the trial court's voir dire rulings concerning adultery did not result in a manifest injustice.

III. THE TRIAL COURT DID NOT UNREASONABLY LIMIT TESTIMONY ABOUT APPELLANT'S DEMEANOR

By the time the case came to trial, Holly had forgiven Appellant for his transgressions against her and she testified on his behalf. Appellant contends that the trial court impermissibly prevented Holly from testifying about Appellant's demeanor on the morning that he last fixed her pancakes. This evidence, Appellant contends, was critical to his EED defense.

The segment of Holly's testimony that Appellant contends was erroneously cut short by the trial court occurred as follows. Holly testified that on the fateful Saturday morning, she argued with Appellant about which household projects were going to be done that day. Appellant wanted to hang pictures but Holly forcefully insisted on getting other projects done first.

Holly testified: "After my harsh words to him about not being able to hang pictures until I was ready, I looked at him just – *I think his spirit was broken.*" At that point, the prosecutor objected, and the trial court said to Holly: "*You can't testify about what you speculate his thought process was. You can express what your observation of his exterior facial features perhaps look ... was, but ... you cannot characterize his mental process.* Only what the ..."

After a discussion at the bench, and pursuant to the judge's instruction, defense counsel said to Holly: "Ms. Bruner, now, *do not state what [Appellant] was thinking, you're not allowed to do that. State what you saw, what you observed only.* And what was said between the defendant and you, but *not what his thought process was*, you understand that?" Holly responded, "yes, sir."

The trial judge then admonished the jury; "Wait one second, ladies and gentleman of the jury, I'm giving you an admonition. *You cannot consider what she thinks he was thinking. It's guesswork. Speculation.* So, disregard anything now, or from here on out, that she says about what his thought process was going on that morning."

Holly continued: "What I saw, was, this is what I saw, I can't – like the judge said, *I don't know what he was thinking – what I saw was a husband that was very – disappointed. I know my husband. I know his ....*"

She was interrupted by the trial court, and then defense counsel asked her: "Holly, after the disagreement over hanging pictures what did you do?"

Holly answered: "I felt very happy that I had trumped him, that I had gotten my way again, as usual. And there were no more words said about hanging pictures because I had the last say in that."

We begin by noting that Appellant miscasts the trial court's ruling. As demonstrated by the above transcription, the trial court did not prevent Holly from testifying about Appellant's demeanor. The ruling, rather, prevented her from surmising what she thought Appellant was *thinking*. The ruling did not prevent Holly from testifying regarding Appellant's mannerisms, deportment, or bearing after their argument. In that respect, Appellant's argument is based upon an entirely flawed premise. Moreover, because Appellant did not at any point object to the trial court's rulings or otherwise preserve for the record what Holly would have said but for the trial court's intervention, the argument is not properly preserved. Therefore, our review is limited to the manifest injustice standard contained in RCr 10.26.

KRE 701[2] permits a lay witness to testify to opinions based upon her own perceptions, but they are not permitted to testify regarding another person's state of mind. An exception to this principle is the "collective facts rule," sometimes called the "short-hand rendition rule," which recognizes the existence of "situations in which observations of another's appearances and behaviors could produce a perception about the person's state of mind that would be reliable enough to aid jurors and that could not be communicated by the observer without resort to conclusory language." *See* Robert G. Lawson, *Kentucky Evidence Law Handbook* § 6.10[4] at 420 (4th ed. 2003), and *Gabbard v. Commonwealth*, 297 S.W.3d 844, 855 (2009). However, "[n]o such opinion should be admitted unless it is descriptive of the perceptions of the testifying witness [ ] and none should be admitted when the witness can fully describe those perceptions without resort to opinion." Robert G. Lawson, *Kentucky Evidence Law Handbook* § 6.10[4], at 421 (4th ed. 2003).

Ultimately, Holly was permitted to say, based upon her observations, that Appellant was *very disappointed*, apparently because Holly had overridden his desire to hang pictures and demonstrated her dominance. The trial court's rulings were consistent with the above

---

[2] KRE 701: "If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are: (a) Rationally based on the perception of the witness; (b) Helpful to a clear understanding of the witness' testimony or the determination of a fact in issue; and (c) Not based on scientific, technical, or other specialized knowledge within the scope of Rule 702."

authorities and we are therefore persuaded that no error occurred. In any event, however, in light of the overwhelming evidence of Appellant's guilt, we cannot conclude that the limitation imposed upon Holly's testimony created a manifest injustice.

IV. APPELLANT WAS NOT ENTITLED TO THIRD-DEGREE ARSON INSTRUCTION

Appellant next contends that the trial court erred by denying his request for an instruction on third-degree arson. "A trial court is required to instruct on every theory of the case reasonably deducible from the evidence." *Manning v. Commonwealth*, 23 S.W.3d 610, 614 (Ky. 2000). However, "that duty does not require an instruction on a theory with no evidentiary foundation [. . .]." *Neal v. Commonwealth*, 95 S.W.3d 843, 850 (Ky. 2003).

KRS 513.020, the first-degree arson statute, provides as follows:

> (1) A person is guilty of arson in the first degree when, with intent[3] to destroy or damage a building, he starts a fire or causes an explosion, and;
>
> (a) The building is inhabited or occupied or the person has reason to believe the building may be inhabited or occupied; or
>
> (b) Any other person sustains serious physical injury as a result of the fire or explosion or the firefighting as a result thereof.

Here, the evidence indisputably provided that Appellant admittedly started the fire knowing that the house was occupied by Holly at the time, and so his conduct falls squarely within KRS 513.020(1). On the other hand, the elements of third-degree arson are set forth in KRS 513.040(1) as follows:

> (1) A person is guilty of arson in the third degree if he *wantonly causes destruction* or damage to a building of his own or of another by *intentionally starting a fire* or causing an explosion.

(emphasis added). Thus, a defendant is guilty of third-degree arson if he *intentionally* starts a fire without a specific intention to cause damage, but acted *wantonly*[4] with respect to the property damage because he was aware of and consciously disregarded the risk that damage would occur.

---

[3] KRS 501.020(1): "A person acts intentionally with respect to a result or to conduct described by a statute defining an offense when his conscious objective is to cause that result or to engage in that conduct."

[4] As defined in KRS 501.020(3), "A person acts wantonly with respect to a result [such as damage to property] when he is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur[.] The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation."

Upon examination of the elements of third-degree arson, it quickly becomes apparent that the facts in evidence cannot establish that crime. The evidence that Appellant *intentionally* set fire to the house is not contested, and from that evidence no other conclusion can be reasonably drawn. We also believe that the only reasonable inferences that can be drawn from the evidence are that, when he set the fire after leaving Holly unconscious in the building: 1) he intended to cause Holly's death; 2) he intended to cause property damage that would result in an insurance payment; or 3) he intended produce Holly's death *and* a viable insurance claim. Since Holly's death could occur only concurrently with substantial damage to the house, the inescapable conclusion has to be that Appellant acted intentionally, not wantonly, with respect to the damage to the property. With no reasonable inference establishing that the damage was as a result of wantonness, there can be no third-degree arson. "An instruction on a lesser included offense is required only if, considering the totality of the evidence, the jury might have a reasonable doubt as to the defendant's guilt of the greater offense, and yet believe beyond a reasonable doubt that he is guilty of the lesser offense." *Neal*, 95 S.W.3d at 850. That standard was not met here. *Lawson v. Commonwealth*, 53 S.W.3d 534 (Ky. 2001) (no evidence indicated an intent limited to destruction of personal possessions without an intent to damage the house itself); *Quarels v. Commonwealth*, 142 S.W.3d 73, 86 (Ky. 2004) (An instruction on the lesser offense of third-degree arson was not required

where the uncontroverted evidence showed that the defendant ignited lighter fluid around a bed for the sole purposes of killing herself and her children, and little likelihood existed that the jury could have had reasonable doubt that by setting the bed on fire, the defendant did not also intend to cause damage to the house itself).

Appellant also suggests that he was entitled to a third-degree arson instruction because it could be reasonably inferred from the evidence that he did not intend for the house to be totally burned down. After all, he says, if the house was totally destroyed then the note he left to provide a cover story for his absence would also have been lost. That argument is based upon the inaccurate assumption that he could not be convicted of an offense greater than third-degree arson if he did not intend the complete destruction of the house. A review of the relevant statutes discloses that both of the higher degrees of arson require only proof of intent to destroy *"or damage"* a building.[5] Thus, as to the degree of arson, it is immaterial whether Appellant intended the total destruction of the house or if his objective was some lesser scale of damage.

In any event, at trial it was uncontroverted that Appellant intentionally set his house on fire by lighting multiple fires in the residence while Holly was upstairs asleep in her bed under heavy sedation because Appellant had poisoned her food with a sedative. "[A] person is

---

[5] KRS 513.020(1), Arson in the first degree, and KRS 513.030(1), Arson in the second degree.

presumed to intend the logical and probable consequences of his conduct, and a person's state of mind may be inferred from actions preceding and following the charged offense." *Lawson v. Commonwealth*, 85 S.W.3d 571, 579 (Ky. 2002) (quoting *Stopher v. Commonwealth*, 57 S.W.3d 787, 802 (Ky. 2001)). A reasonable jury could have reached but one conclusion: Appellant set the fire intending to cause at least some damage to the building with the knowledge that Holly was in the residence asleep under heavy sedation. That is first-degree, not third-degree, arson. The trial court did not err by denying Appellant's request for a third-degree arson instruction.

V. APPELLANT'S CONVICTIONS FOR BOTH FIRST-DEGREE ARSON AND ATTEMPTED MURDER DID NOT VIOLATE THE STATUTORY DOUBLE JEOPARDY PROVISIONS OF KRS 505.020.

Appellant next contends that his convictions for both attempted murder and first-degree arson violated KRS 505.020, which sets out our statutory protections against being prosecuted for multiple offenses arising from a single course of conduct, as discussed in *Kiper v. Commonwealth*, 399 S.W.3d 736 (Ky. 2012). Appellant does not assert a constitutional double jeopardy violation under *Blockburger v. United States*, 284 U.S. 299 (1932). Appellant concedes that this issue is not preserved; nevertheless, review of an unpreserved claim of a violation of statutory double jeopardy is proper under our manifest injustice rule as contained in RCr 10.26.

KRS 505.020 (1)(b) provides that out of a single course of conduct, a defendant "may not . . . be convicted of more than one (1) offense when: . . . (b) Inconsistent findings of fact are required to establish the commission of the offenses[.]" Appellant claims that his conviction for first-degree arson required the jury to make a factual finding that is inconsistent with a conviction for the offense of attempted murder committed at the same time. Appellant specifically argues that based upon the jury instructions, by convicting him of arson, the jury necessarily determined that he set fire to the house *with the intention to damage or destroy the building.* He then demonstrates from the instructions for attempted murder, that upon convicting him for that crime, the jury found that he set fire to the building with the intention to kill Holly. Appellant argues that the fact that he intended to damage or destroy the building is inconsistent with the fact that he simultaneously intended to kill Holly. We disagree.

In *Kiper*, we explained the double jeopardy limitation contained in KRS 505.020(1)(b). In that case we found that this provision was violated for a conviction of both attempted murder and first-degree assault of the same victim because the attempted murder conviction required a finding by the jury that the defendant specifically intended to kill the victim during the attack while the first-degree assault conviction required the jury to find that he simultaneously acted with the specific intent, not to

kill but merely to injure the victim.[6] Because the defendant could not shoot to kill his victim and simultaneously shoot to cause serious injury, but not death, to his victim, the simultaneous convictions required inconsistent findings of fact which could not withstand the double jeopardy challenge based upon KRS 505.020(1)(b).

Appellant attempts to apply the reasoning of *Kiper* to his convictions for both attempted murder and first-degree arson. But his case is easily distinguishable from *Kiper*, and we find no merit to Appellant's argument that there is an inconsistency between the jury finding that pursuant to his conduct of February 12, 2011, he both (1) intended to destroy the residence; and (2) intended to kill Holly. It is self-evident that a criminal may seek to kill his intended victim, and at the same time devise a plan to accomplish that objective by burning the building occupied by his intended victim. Accordingly, when he carries out his plan by setting fire to the building intending to destroy or damage it, he quite consistently at the same time intends also to kill the victim he knows is within the building. There is no inconsistency. One cannot

---

[6] We recognized in *Kiper* that multiple convictions would not be barred by KRS 505.020(1)(b) where a cognizable lapse in a defendant's course of conduct could have enabled him to act against his victim with an intent to injure (assault) and then after momentary reflection, he resumed his conduct with the inconsistent intention to kill the victim (murder), citing to *Welborn v. Commonwealth*, 157 S.W.3d 608, 611–12 (Ky. 2005). However, we concluded in *Kiper* that the defendant's separate acts of firing his gun occurred in such rapid succession that there was no cognizable lapse between shots that would support a reasonable conclusion that some of the shots were fired with the intent to wound while others were fired with the inconsistent intent to kill. *Kiper*, 399 S.W.3d at 745-46.

act with the intention to kill his victim at the same time he acts with the intent to merely injure the same victim; that is *Kiper*. It is, however, easily possible to act with the intent to damage a building and simultaneously have the intent to kill a person within the building. The two states of mind, in that instance, are not mutually exclusive, and so they do not offend the provisions of KRS 505.020(1)(b). Accordingly, we reject Appellant's claim that he was improperly convicted of attempted murder and arson for the same course of conduct.

VI. SHACKLING APPELLANT DURING THE PENALTY PHASE WAS IMPROPER BUT DID NOT RESULT IN MANIFEST INJUSTICE.

After the jury returned its verdicts of guilty in the guilt phase of the trial, the trial judge revoked Appellant's bond and told him "I'm going to have to have the deputies place leg irons on you, not handcuffs. And you'll be permitted [during the penalty phase of the trial] to sit at the table with [trial counsel]. But, that's just my customary practice. Not singling you out, in fact I'm treating you like I do everybody else in the course of a jury trial." Appellant concedes this issue is not preserved, but requests palpable error review under RCr 10.26.

Under the common law, shackling a defendant during trial, absent exceptional circumstances, was strongly disfavored. *See, e.g., Deck v. Missouri*, 544 U.S. 622, 626 (2005) (noting that "[t]his rule has deep roots in the common law" and discussing in some detail the history of the rule). The general rule against shackling a defendant in a criminal trial is an

elemental aspect of modern trial practice. If not cast in stone, we have at least cast the rule in print by codifying it as part of the Rules of Criminal Procedure: "Except for good cause shown the judge shall not permit the defendant to be seen by the jury in shackles or other devices for physical restraint." RCr 8.28(5); see also *Barbour v. Commonwealth*, 204 S.W.3d 606, 610-611 (Ky. 2006).

The rule against presenting a defendant before a jury extends beyond the guilt phase to other aspects of the criminal trial *Deck*, 544 U.S. at 624 ("We hold that the Constitution forbids the use of visible shackles during the penalty phase, as it forbids their use during the guilt phase, unless that use is 'justified by an essential state interest'—such as the interest in courtroom security—specific to the defendant on trial."); *Barbour* at 612 (the prohibition against routine shackling extends to all jury-observed aspects of a criminal trial). Nevertheless, the rule is not absolute. Shackling of a defendant in a jury trial *is* allowed in "the presence of extraordinary circumstances." *Peterson v. Commonwealth*, 160 S.W.3d 730, 733 (Ky. 2005). Our long-standing practice has been to limit shackling to specific types of "exceptional cases, . . . cases where the trial courts appeared to have encountered some good grounds for believing such defendants might attempt to do violence or to escape during their trials." *Tunget v. Commonwealth*, 198 S.W.2d 785, 786 (Ky. 1947).

In this case, however, the shackling of Appellant was not based on any specific finding of extraordinary circumstances. Much to the

contrary, the trial judge went to some length to assure Appellant that being placed in leg irons was his "customary practice," and that he would be shackled like "everybody else in the course of a jury trial." Thus, while we would ordinarily accord great deference to a trial court's decision to keep a criminal defendant shackled before the jury, *see Tunget*, 198 S.W.2d at 786, it is obvious that this judge failed to exercise any degree of discretion about the matter, and in violation of RCr 8.28(5)'s requirement for a showing of "good cause," shackled Appellant for the arbitrary and capricious reason that doing so is just how things are done there. We therefore conclude that the decision to bind Appellant with leg irons during the penalty phase of his trial was clear error.

However, despite the manifestly erroneous nature of the judge's routine, because the issue is not properly preserved for appellate review, we examine it only to the extent of ascertaining whether a manifest injustice occurred. Manifest injustice occurs when the error creates a substantial probability that the trial "result would have been different," and the error is "so fundamental as to threaten a defendant's entitlement to due process of law." *Graves v. Commonwealth*, 17 S.W.3d 858 (Ky. 2000); *Martin v. Commonwealth*, 207 S.W.3d 1, 3 (Ky. 2006). Here, the evidence of Appellant's culpability was tremendous. And despite the egregious nature of his crimes, we cannot say that the jury's verdict in the penalty phase exhibited a harsh attitude toward him. While he faced the possibility of

sentences totaling seventy years, or life imprisonment,[7] the jury fixed the minimum sentence for each offense: twenty years for arson; ten years for attempted murder; and one year for insurance fraud. We cannot say that under the circumstances of the case that the jury's recommendation that the sentences be served consecutively for a total of thirty-one years was influenced by the leg irons he wore during the final phase of the trial. Thus, we find no palpable error. *Peyton v. Commonwealth*, 253 S.W.3d 504, 518 (Ky. 2008) (finding no palpable error where the jury did not recommend the maximum sentence and Appellant was sentenced within the allowable parameters of the law).

VII. IMPOSITION OF COURT COSTS

Appellant contends that the trial court erred in the final judgment by imposing court costs of $155.00. Appellant concedes that the issue is not preserved because he did not object to the imposition of costs at sentencing. We have held that the improper assessment of court costs may be raised on appeal despite the lack of preservation. *Travis v. Commonwealth*, 327 S.W.3d 456 (Ky. 2010).

---

[7] First-degree arson is a Class A felony, KRS 513.020, and carries a sentencing range of twenty to fifty years, or life. KRS 532.060(2)(a). Attempted murder is a Class B felony carrying a sentencing range of ten to twenty years. KRS 507.020(2) ("Murder is a capital offense"); KRS 506.010(4)(b) ("A criminal attempt is a: . . . (b) Class B felony when the crime attempted is a Class A felony or capital offense[.]"); KRS 532.060(2)(b). Fraudulent Insurance Acts over $500.00 carries a sentence of one to five years. KRS 304.47-020(2)(b)(1).

As defined by KRS 31.110, an "indigent" or "needy" person is one unable to pay attorney's fees, while under KRS 23A.205, a "poor person" is one who is unable to pay court costs "without depriving himself or his dependents of the necessities of life, including food, shelter or clothing." KRS 453.190(2). These two classifications are not mutually exclusive. "A person may qualify as 'needy' under KRS 31.110 because he cannot afford the services of an attorney yet not be 'poor' under KRS 23A.205." *Maynes v. Commonwealth*, 361 S.W.3d 922, 929 (Ky. 2012). An "indigent" person cannot afford to pay an attorney to represent him or her, but may be able to pay court costs without being deprived of the necessities of life, and therefore is not "poor," as contemplated by KRS 23A.205. *See Smith v. Commonwealth*, 361 S.W.3d 908, 921 (Ky. 2012) ("Courts may now impose court costs on an indigent defendant, 'unless the court finds that the defendant is a poor person as defined by KRS 453.190(2)[.]'"). (citation omitted). Thus, the proper inquiry at sentencing for determining whether to assess court costs is not whether the defendant is "indigent" pursuant to KRS 31.110(1)(b), but whether he or she is a "poor person" as defined in KRS 453.190(2). Resolution of this issue is a question of fact to be determined by the trial court. *See Smith*, 361 S.W.3d at 921.

Appellant contends that the trial court ordered him to pay court costs without making the finding that he was a "poor person." We disagree. The final judgment indicates that the trial court did consider Appellant's financial ability and made the requisite finding. It provides:

IT IS FURTHER ORDERED pursuant to KRS 23A.205 that:
___ The Defendant is a poor person defined at KRS 453.190(2) and is therefore exempt from the imposition of court costs.

OR

RAM (judges initials) The Defendant shall pay court costs for this action in the amount of $155.00 to the Clerk of the Court. Said costs shall be paid on or before 120 days after release from incarceration, and if not paid, the Defendant shall appear personally before the court on that date to show cause why he/she should not be held in contempt for the failure to pay court costs as ordered.

By leaving blank the space for granting "poor person" status to Appellant, and then affirmatively selecting the second option ordering the payment of court costs, the trial court implicitly made the essential finding that Appellant was *not* a poor person. Appellant's argument fails because it is founded upon the erroneous premise that the trial court did not make a finding regarding his status as a poor person. If the trial court had selected *both* options there would, indeed, be an error in the judgment that we could correct on appeal despite the lack of preservation, because the judgment would therefore have manifestly violated KRS 23A.205(2), which prohibits the assessment of court costs upon a poor person. The judgment here contains no such irregularity.

At the time of sentencing, the trial court's finding that Appellant was not a poor person was supported by the record. Prior to sentencing, Appellant had private counsel. At sentencing, the court was informed that Appellant could no longer afford private counsel, and that he would

apply for the appointment of counsel for his appeal. Documents filed in support of that application reflect that while Appellant had no income, he and his wife had $40,000.00 in real estate equity; $5,000.00 cash in the bank; and $5,500.00 in automobile equity. In light of Appellant's cash, and his equity in real estate and a vehicle, the trial court's finding that he was not a poor person was not clearly erroneous.

Appellant points out that shortly after entry of the final judgment, he tendered his Notice of Appeal along with a "Motion to Proceed in Forma Pauperis on Appeal." Based upon the same financial information just discussed, the trial court granted the motion allowing Appellant to prosecute the appeal without paying the appellate filing fee. Appellant contends that this inconsistency establishes the error of the earlier imposition of court costs.

The trial court's finding with respect to Appellant's right to proceed on appeal as a pauper could be construed as inconsistent with the finding one month earlier that Appellant was not a "poor person." However, we are not persuaded that this possible inconsistency is sufficient to render the earlier finding to have been clearly erroneous. As discussed above, at the time of sentencing, the information before the trial court constituted substantial evidence that Appellant was not "poor." Appellant offered nothing to challenge the findings; he did not request a waiver of court costs, and there is no manifest error in the judgment itself. Therefore, we decline to vacate the order.

VIII. CONCLUSION

For the foregoing reasons, the judgment of the Meade Circuit Court is affirmed.

All sitting. All concur.

COUNSEL FOR APPELLANT:

Molly Mattingly

COUNSEL FOR APPELLEE:

Jack Conway
Attorney General

James Daryl Havey