RENDERED: OCTOBER 11, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-000667-MR

JAMES D. BREWER APPELLANT

v.

APPEAL FROM PERRY CIRCUIT COURT
HONORABLE ALISON C. WELLS, JUDGE
ACTION NO. 15-CR-00127

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; ACREE AND JONES, JUDGES.

ACREE, JUDGE: James Brewer appeals from the Perry Circuit Court's March 8, 2017 judgment and sentence entered upon a jury verdict convicting him of first-degree manslaughter. Brewer claims several of the trial court's evidentiary rulings were erroneous. We disagree and affirm.

FACTS AND PROCEDURE

In 2015, Brewer was indicted for the murder of Robert Miller (Victim). The indictment alleged Brewer shot the Victim in the face with a pistol.

Prior to trial, the Commonwealth gave notice that it intended to introduce testimony pursuant to KRE[1] 404(b) that: (1) Brewer, upon unlawfully entering the Victim's residence, verbally accosted Rebecca Dillon and then struck her across the face before shooting the Victim; and (2) a few days before the shooting, Brewer struck Dillon with a flashlight and verbally abused her. The Commonwealth claimed this evidence furnished part of the context for the crime and explained Brewer's motive, preparation, and planning. Brewer objected. The trial court ruled the Commonwealth could offer the evidence to show "motive, intent, preparation, and knowledge."

The case proceeded to a four-day jury trial ending on February 2, 2017. Dillon, the Commonwealth's key witness, testified first.

Dillon lived with Brewer as his caretaker from 2001 until January 2015. She said they did not have a romantic relationship and that Brewer was like a father figure to her. Brewer suffered from numerous medical ailments and slept in a hospital bed in the living room. Dillon cooked, cleaned, paid Brewer's bills, and scheduled his medical appointments.

---

[1] Kentucky Rules of Evidence.

Dillon testified that she was injured in two separate accidents in 2013 and 2014, and during each she was a passenger in a vehicle Brewer was driving. She was prescribed medication for injuries sustained in the accidents.[2]

Dillon stated she left Brewer's home in 2015 and moved to Ohio because Brewer became verbally and physically abusive. She testified he had been abusive before, but she did not leave because she did not have any place to go. She returned to Perry County and moved in with the Victim in April 2015. Brewer and the Victim were neighbors; both lived on Coates Branch Road, a one-lane road, in Perry County, Kentucky.

Shortly after Dillon moved in with the Victim, Brewer arrived at the Victim's home to talk to Dillon about a dog they owned together as well as other personal affairs. Dillon testified it was Brewer's habit to carry a revolver and a 9mm handgun but did not see him with either during that visit.

Dillon described an incident that occurred shortly before the Victim's death when Brewer again came to the Victim's home and accused her of stealing his medication. She accompanied Brewer back to his home to help him locate it. While there, Dillon testified Brewer hit her in the knee with a flashlight. He then found his medicine in the bathroom where he had put it.

---

[2] Dillon hired an attorney after the second accident, and agreed she had to sue or make a claim against Brewer to recover for her injuries. Dillon continued to live with him despite filing a claim. She received compensation after each accident.

Dillon testified that on May 5, 2015, she and the Victim went to Brewer's home to collect pictures of Dillon's children. Brewer invited them in, and "no words" were exchanged. Dillon and the Victim returned to the Victim's trailer.

Dillon testified that, twenty to thirty minutes later, Brewer came to the Victim's house. He opened the front door and struck Dillon in the face with his hand. The Victim stood up and told him, "I'm not going to let you hit her in my house." Brewer pulled a gun out of his waistband and shot the Victim in the face under his left eye. Brewer walked out the front door, telling Dillon on his way out, "you better tell them it was an accident." Brewer got in his car and left.[3] The Victim's wound was fatal, but not immediately so. Dillon stated she grabbed a towel and held it to the Victim's face. She called out for help until an ambulance arrived.

Another person was in the Victim's home at the time of the shooting. The Victim's nephew, James Miller, was in the kitchen. Dillon testified James had been outside most of the day. After the shooting, she saw him run down the trailer's middle hallway and jump out a window. Dillon testified he did not break

---

[3] After further questioning, Dillon's testimony changed subtly. At one point she testified she observed Brewer arrive in a white Dodge Avenger and, when Brewer came to the door, the Victim opened it and she stood up. Dillon later testified, as she had previously, that the door was open and Brewer came in.

the glass, but the whole window was off-track. She stated there is no direct exit from the trailer in the Victim's kitchen; the only door out of the trailer is in the living room.

The Victim's nephew, James, testified that he was cutting grass at the Victim's residence on the day of the shooting. James did not recall the Victim ever leaving the trailer that day. He was in the trailer after dark when he saw Brewer drive up in a white Dodge Avenger. James went into the kitchen to get a drink and sat down on a bench; a wall partially obstructed his view of the living room. James testified that when Brewer approached, the Victim answered a closed door, and that Brewer seemed angry. He heard the Victim say, "You can't do that in my house." James did not recall Brewer slapping Dillon or anyone else.

He further testified that Dillon was in the living room the whole time. James stated that Brewer came into the living room, pulled a gun, and shot the Victim in the back of the head, causing the bullet to come out his eye. James testified he only saw Brewer from the back when he pulled the gun. He exited the trailer from the kitchen and went to his uncle's house to get help. On his way, he saw Brewer drive away.

The Commonwealth called ten-year-old Aaron Miller to testify next. Aaron stated that James came into his home where his father, Cutter Miller, and his mother, Robin Miller, were also present and said to Cutter, "James Brewer shot

your brother Earl." Aaron also stated that, on the day the Victim was shot, he saw Brewer drive up to the Victim's trailer in a white car with a red door and a statue of a horse on the hood. Aaron said he saw no one get out and that he went home shortly thereafter. Aaron testified that after James' announcement, he ran to the Victim's residence while his mom, Robin, called 911.

Aaron's mother, Robin Miller, testified that Aaron went to the Victim's home after James reported the shooting, adding that she also went to the Victim's trailer where she tried to talk to the Victim. She told Dillon to get a rag to stop the bleeding. She then stated she saw Dillon pick up a silver makeup kit and put some white pills, which were sitting next to it, inside the kit.

According to Robin, Cutter then arrived and they all tried to help the Victim until the ambulance arrived.[4] Robin testified on cross-examination that she had never known James to make up stories and did not doubt James' statement that Brewer shot the Victim. She also said she knew James was not the shooter.

Teanna Moore, an EMT who responded to the shooting also testified for the Commonwealth. She stated she observed a woman kneeling over the victim, obviously distraught. Moore testified that the woman was the only person

[4] During her testimony, Dillon testified she did not recall Aaron, Robin, or Cutter being at the Victim's residence after the shooting. She later stated Cutter came over, propped open the door for the ambulance, and told her the shooting was her fault.

in the trailer when she arrived. Moore stated she transported the Victim to the hospital where he died the next day.

Medical examiner Dr. William Ralston testified the Victim died from a gunshot wound that entered his left, lower eyelid, went into his skull, and through his brain, exiting the top, back left side of his head. The angle was front to back and upwards by 30 degrees with no lateral movement.

Kentucky State Police (KSP) Sergeant Joel Abner, the lead investigator, also responded to the scene. Sergeant Abner interviewed Dillon and James. He found no physical evidence linking Brewer to the crime. A day or two after the shooting, Sergeant Abner returned to the Victim's trailer, located a bullet hole in the living room ceiling, and collected a .38 caliber full metal jacket round.

Sergeant Abner obtained an arrest warrant for Brewer based on Dillon's and James' statements, and a search warrant for Brewer's property. When police arrived at Brewer's home to serve the warrants, Brewer fled. He was quickly apprehended. Sergeant Abner testified he observed a white Dodge Avenger in Brewer's carport. Numerous firearms were taken from Brewer's property, but none proved to be the gun used in the shooting.

Sergeant Abner's investigation led him to speak to an individual named Oakie Lovins. Lovins testified at trial that he knew Brewer and saw him the day after the Victim was shot. Lovins had caught a catfish and brought it to

Brewer's home the day after the shooting. Lovins testified that Brewer told him, "I had to shoot one last night." Brewer explained to Lovins that Dillon and the Victim had robbed him, taking all his medicine, so he went to the Victim's house.

Lovins recounted Brewer's statement that Dillon attacked him after he already had his gun out and he pushed her while the Victim lunged toward him to reach for the gun at which point Brewer pulled back, raised his hand, and the gun went off. He also testified he had visited Brewer's home about once a month for the past three to five years and had never observed a gun in the home.

During his testimony, Lovins stated Brewer's sister, Loma Brewer, was present when he stopped by with the catfish. Loma also testified and confirmed she was present then. She stated at trial that Lovins and Brewer talked only about fishing and that Brewer did not tell Lovins he had to "shoot one."

Loma testified she had also been at Brewer's home the evening of the shooting, at around 6:00 PM, when Dillon and the Victim were present. She said the three were talking, but that there was no arguing. After Dillon and the Victim left, Loma testified she stayed with Brewer until 10:30 or 11:00 PM. She claimed she had never seen a .38 caliber or 9mm[5] handgun in her brother's home.

KSP Trooper Charlie Moore also responded to the scene and testified for the Commonwealth. He stated that, upon arrival, he saw Dillon, an EMT, the

---

[5] The cartridges used in these handguns are similar in size.

Victim, and another officer inside the trailer, while Cutter and Robin Miller were outside. Trooper Moore testified that he interviewed Dillon who told him Brewer pulled into the driveway, came in the trailer, slapped her and, when the Victim advised Brewer he would not allow him to behave like that in his residence, Brewer turned toward the Victim with a pistol and shot him point blank in the face. Dillon also reported that Brewer told her to say it was an accident.

KSP Detective Chris Collins also assisted in the investigation and testified for the Commonwealth. Detective Collins recorded an interview with Dillon and testified that Dillon told him James Miller and the Victim were present at the Victim's trailer when Brewer came to the door. Detective Collins stated, according to Dillon, the Victim opened the door and Brewer walked in and smacked her in the face. Brewer and the Victim then got into an argument, Brewer pulled a gun from his waist and shot the Victim in the face. Brewer then looked at her and told her to say it was an accident. Dillon told the detective the gun used was a revolver that Brewer carried all the time.

Detective Collins then testified that he located and interviewed James Miller a few days after the shooting. The detective testified that James told him he was cutting grass at the Victim's house and went into the kitchen to get a drink of water. While in the kitchen, James' view of the living area was partially obstructed. James said Brewer pulled up in a white Dodge Avenger, came in, and

an argument ensued. Detective Collins testified that James stated Brewer had his back to him, and the Victim was facing him when Brewer appeared to pull something from his waistband. Then he heard a gun fire. Detective Collins stated James told him he left the kitchen and the trailer and went to his uncle's house.

The jury found Brewer guilty of first-degree manslaughter and recommended a sentence of fifteen years' imprisonment. The trial court entered its judgment and sentence on March 8, 2017, in accordance with the jury's recommendation. This appeal followed.

On appeal, Brewer raises several evidentiary issues; some are preserved and some are not. The distinction is an important one because we do not measure unpreserved and preserved errors by the same standard.

STANDARD OF REVIEW

If properly preserved, we review the trial court's evidentiary rulings for an abuse of discretion. *Matthews v. Commonwealth*, 163 S.W.3d 11, 19 (Ky. 2005). We employ this standard because "the trial court's unique role as a gatekeeper of evidence requires on-the-spot rulings on the admissibility of evidence," a less than simple task. *Clark v. Commonwealth,* 223 S.W.3d 90, 95 (Ky. 2007). 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). We review unpreserved errors for palpable error resulting in manifest injustice. RCr[6] 10.26.

ANALYSIS

Brewer argues the trial court erred in four ways: (1) by admitting evidence of prior bad acts in violation of KRE 404(b); (2) by admitting evidence of unrelated auto accidents in violation of KRE 403; (3) by admitting hearsay and improper opinion testimony; and (4) by imposing court costs. For the reasons explained below, we are not persuaded by the arguments.

A. *Evidence of Prior Bad Acts KRE 404(b)*

Relevant to this case, KRE 404(b) says:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible:
>
> (1) If offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident; or
>
> (2) If so inextricably intertwined with other evidence essential to the case that separation of the two (2) could not be accomplished without serious adverse effect on the offering party.

KRE 404(b).

[6] Kentucky Rules of Criminal Procedure.

As required by KRE 404(c), the Commonwealth gave notice to Brewer it intended to introduce evidence that, a few days before the shooting, Brewer hit Dillon with a flashlight and verbally abused her and threatened to kill her. The Commonwealth claimed exception to KRE 404(b)'s exclusion of such evidence stating: "It is this backdrop which is so inextricably intertwined with the underlying charges and necessary in order to give the jury a complete picture." Also, the Commonwealth said the evidence explained Brewer's motive, and showed why rushing into Miller's residence was not random, but the execution of Brewer's plan to confront Dillon and Miller.

The trial court ruled the evidence was admissible because it was "being offered to prove motive, intent, prep[aration] and knowledge."

Brewer argues both that the evidence fails to fall within a KRE 404(b) exception and that its probative value is outweighed by its prejudicial effect. For both propositions, Brewer cites *Billings v. Commonwealth* in which the Supreme Court said evidence of prior bad acts "other than that being tried is admissible only if probative of an issue independent of character or criminal predisposition, and only if its probative value on that issue outweighs the unfair prejudice with respect to character." 843 S.W.2d 890, 892 (Ky. 1992). He cites *Bell v. Commonwealth*, 875 S.W.2d 882 (Ky. 1994), essentially for the same propositions. But we are persuaded by neither case and neither argument.

Brewer claims the Commonwealth failed to justify an exception to KRE 404(b)'s exclusion of evidence by explaining how the evidence was intertwined or established motive, plan, knowledge, or intent. What our Supreme Court said about these issues and these cases is worthy of repeating here. Regarding the exceptions to KRE 404(b), that Court said:

> Evidence of "other crimes, wrongs, or acts" may be admitted if "offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." KRE 404(b)(1). And, such evidence may be admitted if it is "so inextricably intertwined with other evidence essential to the case that separation of the two (2) could not be accomplished without serious adverse effect on the offering party." KRE 404(b)(2).
>
> . . .
>
> . . . Appellant contends that the Commonwealth never demonstrated how Appellant's [prior bad conduct] tended to establish his intent, motive, plan, or any other relevant purpose bringing it within the 404(b)(1) exception, or that the [prior bad conduct] was inextricably intertwined with evidence essential to proving the crimes charged so as to bring it within the 404(b)(2) exception. . . .
>
> . . .
>
> The trial court conducted a pre-trial hearing on the issue. We cannot say that it abused its discretion upon concluding that Appellant's threat, uttered just a week before the crimes, served a relevant purpose other than to prove Appellant's criminal disposition . . . . *Bell*, 875 S.W.2d at 889-891; *Billings v. Commonwealth*, 843 S.W.2d 890 (Ky. 1992).

Gray v. Commonwealth, 534 S.W.3d 211, 213-14 (Ky. 2017).

We agree with the trial court that this evidence was probative of an issue independent of character or criminal predisposition. It was not introduced to demonstrate Brewer's propensity for violence and, in turn, to prove his conformity with that character trait on the night of the shooting. Instead, the Commonwealth offered it to explain Brewer's intent and motive for going to the Victim's house on the evening in question.

One of the accepted bases for the admissibility of other bad acts evidence arises when such evidence "'furnishes part of the context of the crime' or is necessary to a 'full presentation' of the case[.]" *Norton v. Commonwealth*, 890 S.W.2d 632, 638 (Ky. App. 1994) (quoting *United States v. Masters*, 622 F.2d 83, 86 (4th Cir. 1980)). Part of the Commonwealth's theory was that Brewer went to Miller's residence to assault Dillon. Brewer knew Dillon was there. And Brewer did, in fact, assault Dillon. Evidence that this was not the only time Brewer acted on his animus toward Dillon gave context as to how these three people came to be in the same place at the same time, and why. And although not directly on point because Dillon was a witness and not the Victim (as Brewer points out), what *Lopez v. Commonwealth* says has some applicability here by analogy – "'evidence of similar acts perpetrated against the same victim are [sic] almost always

admissible' to prove intent, plan, or absence of mistake or accident." 459 S.W.3d 867, 875 (Ky. 2015) (citation omitted).

Prior bad acts evidence is also relevant to prove motive. Motive is defined as "[s]omething, especially willful desire, that leads one to act." *Motive*, BLACK'S LAW DICTIONARY (10th ed. 2014). "Need [for motive evidence] is greatest and relevance is clearest where the defense is denial of the criminal act[.]" *White v. Commonwealth*, 178 S.W.3d 470, 476 (Ky. 2005) (citation omitted). That is the defense here.

Brewer's defense theory is that he did not shoot the Victim and that he did not visit the Victim's residence at all on the night of the shooting. He repeatedly points out in his brief that there was no evidence that he was jealous of the Victim and had no reason to be angry with the Victim. Stated another way, he had no motive or intent to harm the Victim. This is precisely why the evidence at issue is relevant. The evidence contradicts the defense theory.

Brewer's past abuse of Dillon also explains why the Victim went to Dillon's aid and tried to protect her, after which Brewer pulled out a gun and shot the Victim. Absent Dillon's testimony that Brewer had been physically and verbally abusive in the recent past, the jury would be left to speculate as to why Brewer would randomly show up at the Victim's residence, with a gun, slap Dillon and shoot the Victim.

This evidence provided context for the shooting and demonstrated both Brewer's motive and intent to cause physical harm.[7] The trial court did not abuse its discretion when it admitted it under KRE 404(b)(1).

Evidence of a prior bad act must also be probative of the commission of the uncharged offense to be admissible. *Billings*, 843 S.W.2d at 893. This test has been met if the evidence is such that "the jury could reasonably infer that the prior bad acts occurred and [the defendant] committed such acts." *Parker v. Commonwealth,* 952 S.W.2d 209, 214 (Ky. 1997). Here, Dillon testified that Brewer had been physically and verbally abusive to her in the past. She also testified that, a few days prior to the shooting, he accused her of stealing his medication, displayed anger, and struck her with a flashlight. The evidence was probative.

Brewer cites *Billings v. Commonwealth, supra*, and *Bell v. Commonwealth,* 875 S.W.2d at 890, for the proposition that evidence of other crimes is always highly prejudicial to a defendant, but such a reading is overbroad. Both cases note the higher danger of prejudice from such evidence, but the particular form of prejudice at issue in those two cases is wholly absent here. In

[7] To be found guilty of first-degree manslaughter, a person must, "[w]ith intent to cause serious physical injury to another person, . . . cause[] the death of such person or of a third person[.]" Kentucky Revised Statute (KRS) 507.030(1)(a). Likewise, "[a] person is guilty of murder when: (a) With intent to cause the death of another person, he causes the death of such person or of a third person[.]" KRS 507.020(1)(a).

both cases relied on by Brewer, the Court expressed concern that introduction of other criminal acts would unfairly imply the defendants had acted in conformity with those acts. *See Billings*, 843 S.W.2d at 894; *Bell*, 875 S.W.2d at 890. Both *Billings* and *Bell* were sodomy cases in which the trial courts admitted evidence of remote criminal sexual acts unrelated to the crime with which the respective defendants were charged. *See Billings*, 843 S.W.2d at 892; *Bell*, 875 S.W.2d at 888. In both cases it was unduly prejudicial to imply that, because the defendant had engaged in other criminal sexual conduct, he must have committed the similar acts in question.

We find no error in the admission of evidence of Brewer's threats to and assault of Dillon a few days prior to the shooting. The evidence was relevant and, therefore, admissible. KRE 401, 402. We find no abuse of discretion in the trial court's decision that the probative value of the evidence was not outweighed by the danger of undue prejudice. KRE 403. Furthermore, we find no abuse of discretion in the trial court's ruling that the evidence was not offered to prove Brewer's character in order to show action in conformity therewith which would violate KRE 404(b). Rather, the evidence was admissible because it was offered for another purpose, namely, as proof of motive, preparation, and planning; it gave context to the shooting and, therefore, was so inextricably intertwined with other

evidence essential to the case that separation of the two could not be accomplished without serious adverse effect on the offering party. KRE 404(b).

B. Evidence of Prior Auto Accidents Involving Brewer and Dillon

Brewer argues evidence that Dillon was involved in two car accidents with Brewer, that she takes medication because of the accidents, and that after the accidents she filed a claim and/or lawsuit against Brewer is irrelevant. He argues in the alternative that even if relevant, the probative value of the evidence is substantially outweighed by its undue prejudice. Given these circumstances, we disagree.

Brewer concedes this argument is not preserved. He made no objection to Dillon's testimony concerning the car accidents. Brewer asks for palpable error review under RCr 10.26.

> Under Criminal Rule 10.26, an unpreserved error may only be corrected on appeal if the error is both palpable and affects the substantial rights of a party to such a degree that it can be determined manifest injustice resulted from the error. For error to be palpable, it must be easily perceptible, plain, obvious and readily noticeable. The rule's requirement of manifest injustice requires showing . . . [a] probability of a different result or error so fundamental as to threaten a defendant's entitlement to due process of law.

Young v. Commonwealth, 426 S.W.3d 577, 584 (Ky. 2014) (citations and internal quotation marks omitted).

Evidence is relevant if it has any tendency to make a fact more or less likely than it would be without the evidence. KRE 401. We agree with Brewer that Dillon's testimony about the accidents had little, if any, probative value. However, we do not believe the little prejudice that might be found in its admission reaches the threshold of *substantially* outweighing its probative value.

If we presume here that allowing the evidence was error, it was certainly harmless error. Considering that we are reviewing this error for manifest injustice, such an error does not constitute manifest injustice. *Turner v. Commonwealth*, 538 S.W.3d 305, 309 (Ky. App. 2017) (manifest injustice results "if, upon consideration of the whole case, a substantial possibility . . . exist[s] that the result would have been different") (quoting *Graves v. Commonwealth*, 17 S.W.3d 858, 864 (Ky. 2000)).

C. Opinion and Hearsay Testimony

Brewer next argues that certain testimony constituted inadmissible hearsay and/or opinion evidence. Again, some of his claims of error are preserved, and others are not. We address each separately.

(i) Aaron Miller

Brewer contends the trial court erred when it allowed Aaron to testify he was at home with his parents, Robin and Cutter, when James came in and said, "Brewer just shot your brother Earl." Brewer argues Aaron's statement constitutes

inadmissible hearsay, and the trial court should have sustained his objection on that ground. The Commonwealth concedes that Aaron's statement should not have been admitted as proof of Brewer's guilt, but it claims it was harmless error. We agree.

Hearsay is an out-of-court statement "offered in evidence to prove the truth of the matter asserted." KRE 801(c). Aaron's testimony conveying James' out-of-court statement, which was offered to prove the truth of that matter (*i.e.*, that Brewer shot the Victim), amounts to inadmissible hearsay. KRE 802. It should not have been admitted.

Nonetheless, we agree with the Commonwealth that its admission was harmless. "A non-constitutional evidentiary error is deemed harmless 'if the reviewing court can say with fair assurance that the judgment was not substantially swayed by the error.'" *Hilton v. Commonwealth*, 539 S.W.3d 1, 19 (Ky. 2018) (quoting *Gaither v. Commonwealth,* 521 S.W.3d 199, 205 (Ky. 2017)).

Aaron's testimony was very brief and practically inconsequential compared to the mass of evidence offered over four days of trial. It also followed lengthy testimony from both Dillon and James describing, in detail, their eyewitness descriptions of the shooting. Aaron's testimony merely parroted James' testimony offered shortly before Aaron testified. While its admission was error, we can say with fair assurance that Aaron's testimony did not so

substantially sway the jury that, but for his testimony, the jury would have acquitted Brewer of any crime. *Hilton*, 539 S.W.3d at 19. The admission of Aaron's statement was therefore harmless error.

(ii) Robin Miller

Robin testified on cross-examination that she never knew James to make up stories or use illegal drugs and did not have any doubt in her mind when he told her Brewer shot the Victim. She also testified she knew James was not the shooter. Brewer admits he did not object to Robin's testimony; he again requests palpable error review.

We agree with Brewer that, "[g]enerally, a witness may not vouch for the truthfulness of another witness." *Stringer v. Commonwealth*, 956 S.W.2d 883, 888 (Ky. 1997). Notably, KRE 608 provides "evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise." KRE 608(a)(2).

Brewer vigorously attacked James' credibility and truthfulness on cross-examination. He asked James: whether he was sure where he was during the shooting; whether James used illegal drugs; whether his testimony had discrepancies; and whether James was being truthful. The Commonwealth sought to rebut Brewer's attack by introducing evidence of James' truthful character by

way of Robin's opinion testimony that she had never known James to make up stories or use illegal drugs.

Robin's testimony was admissible under KRE 608(a)(2) and, to the extent any error occurred, it certainly does not rise to the level of palpable error. *See Young*, 426 S.W.3d at 584 (palpable error must be "obvious and readily noticeable" and result in manifest injustice, meaning there exists a "probability of a different result or error so fundamental as to threaten a defendant's entitlement to due process of law").

Robin's testimony that she believed James when he said Brewer shot the Victim and that she did not believe James was the shooter, however, cannot be classified as opinion testimony to rebut the attack on James' character for truthfulness. Nevertheless, we are convinced that admission of those statements neither amounts to palpable error nor resulted in manifest injustice. There was more than ample evidence indicating Brewer shot and killed the Victim, including that of two eye witnesses. Robin's statements concerning James can hardly be said to have been so influential that they swayed the jury's decision in this case.

(iii) Law Enforcement Testimony

Trooper Moore, Detective Collins, and Sergeant Abner interviewed Dillon, James L. Miller, and Lovins, respectively. When each officer testified, the Commonwealth elicited him to repeat what his interviewee said. Brewer argues

the officers' testimonies repeating Dillon, James, and Lovins' statements constituted both hearsay and improper bolstering. Once again, however, Brewer did not object to the officers' testimonies. Therefore, we review the admission of this testimony for palpable error only.

KRE 801(c) defines "hearsay" as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Generally, pursuant to KRE 802, hearsay is not admissible unless it falls within one of the exceptions found in KRE 803 through KRE 806. There is no exception for investigative hearsay. As the Supreme Court of Kentucky noted in *Sanborn v. Commonwealth*, investigative hearsay is:

> a misnomer, an oxymoron. The rule is that a police officer may testify about information furnished to him only where it tends to explain the action that was taken by the police officer as a result of this information *and* the taking of that action is an issue in the case. Such information is then admissible, not to prove the facts told to the police officer, but only to prove why the police officer then acted as he did. It is admissible *only if* there is an issue about the police officer's action.

754 S.W.2d 534, 541 (Ky. 1988); *see also Burchett v. Commonwealth*, 314 S.W.3d 756, 759 (Ky. App. 2010).

The officers' investigations were not the issue in this case. Therefore, any attempt to explain the investigations of Trooper Moore, Detective Collins, or

Sergeant Abner was not relevant and the trial court should have excluded such testimony as to statements made by individuals that were part of the investigation.

However, the standard by which their testimony is reviewed under RCr 10.26 is for palpable error. As we indicated above, the evidence against Brewer, other than this objectionable hearsay, was substantial. We cannot say that the nature of the evidence as hearsay would have been a sufficient reason alone to find palpable error or manifest injustice. That takes us to Brewer's claim that the same evidence improperly bolstered the testimony of the lay witnesses.

"A witness cannot be corroborated by proof that on previous occasions he has made the same statements as those made in his testimony." *Smith v. Commonwealth,* 920 S.W.2d 514, 517 (Ky. 1995). In *Tackett v. Commonwealth*, our Supreme Court stated:

> It is improper to permit a witness to testify that another witness has made prior consistent statements, absent an express or implied charge against the declarant of recent fabrication or improper influence. KRE 801A(a)(2). Otherwise, the witness is simply vouching for the truthfulness of the declarant's statement, which we have held to be reversible error. *Bussey v. Commonwealth,* 797 S.W.2d 483, 484-85 (Ky. 1990). *See also LaMastus v. Commonwealth,* 878 S.W.2d 32, 34 (Ky. App. 1994). We perceive no conceptual distinction between testimony that repeats the witness's prior consistent statement verbatim and testimony that the witness previously made statements that were consistent with her trial testimony. Either way, the evidence is offered to prove that the declarant's trial testimony is truthful because it is consistent with her prior statements.

445 S.W.3d 20, 34-35 (Ky. 2014).

The law enforcement officers' recounting of statements taken as part of the investigation essentially bolstered the testimony of three witnesses at the trial. Dillon, James, and Lovins all testified extensively as to what they observed and none of the law enforcement officers' testimony introduced previously unknown facts. However, some of Lovins' testimony supported Brewer's account and Sergeant Abner's testimony would have bolstered that.

After careful consideration, we conclude the admission of this evidence was not such an error that it could be called palpable. The jury heard more substantial evidence than this upon which to reach the verdict. Additionally, "the error was harmless under RCr 9.24 because the improper testimony was cumulative due to the fact that the sources of the alleged hearsay statements, [Dillon, James, and Lovins], . . . testified and were subject to thorough cross-examination." *Brewer v. Commonwealth*, 206 S.W.3d 343, 352 (Ky. 2006).

Nevertheless, we caution against the future practice of allowing law enforcement officers to repeat what a testifying witness told them. *Bussey v. Commonwealth*, 797 S.W.2d 483, 485 (Ky. 1990) ("[The criminal] process was flawed when four law enforcement witnesses were permitted to bolster the victim's testimony by repeating what he had told them."); *Sanborn*, 754 S.W.2d at 541; *Burchett*, 314 S.W.3d at 759.

Brewer also claims Sergeant Abner rendered an improper legal conclusion when he testified that nothing after his active investigation made him doubt his conclusion as to the suspect. Brewer contends a witness cannot testify that a defendant is guilty of the charged crime. *Tamme v. Commonwealth*, 973 S.W.2d 13, 32 (Ky. 1998) ("[A] witness generally cannot testify to conclusions of law.").

Generally, a witness's opinion that a defendant is guilty is not admissible at trial. "The issue of guilt or innocence is one for the jury to determine, and an opinion of a witness which intrudes on this function is not admissible, even through a route which is, at best, 'back door' in nature." *Chumbler v. Commonwealth*, 905 S.W.2d 488, 496 (Ky. 1995) (citation and internal quotation marks omitted). Sergeant Abner's statement could be construed by the jury to mean he believed the information he received from witnesses he interviewed. Such testimony allows the witness to insinuate guilt or innocence.

The Commonwealth claims to have offered this statement solely to demonstrate why Sergeant Abner did not pursue other leads or continue to investigate, despite Brewer's claim that he was not the shooter at all. Brewer made no argument as to an alternative perpetrator and he did not object to this testimony at trial, so we review this testimony for palpable error.

In the past, our Supreme Court found testimony similar to Sergeant Abner's to be reversible error when properly preserved. *Bussey*, 797 S.W.2d at 485. However, under palpable error review, we are not convinced that Sergeant Abner's testimony swayed the jury's decision such that, absent the testimony, there is any reasonable possibility that the jury would have reached a different outcome. Ample eyewitness testimony was available to the jury without Sergeant Abner's conclusion. Finding no manifest injustice, there is no palpable error here warranting reversal.

D. Court Costs

Finally, Brewer argues the trial court erred when it assessed $155 in costs and ordered Brewer to pay $50 per month upon his release from imprisonment. Brewer contends the record conclusively established that he is a poor person, as defined in KRS 453.190(2), and there is no reasonable basis for believing he can or will be able to pay the imposed court costs.

This error is also unpreserved. Brewer did not ask the trial court to determine his poverty status at sentencing. This oversight is fatal to his argument.

> The assessment of court costs in a judgment fixing sentencing is illegal *only* if it orders a person adjudged to be "poor" to pay costs. Thus, while an appellate court may reverse court costs on appeal to rectify an illegal sentence, we will not go so far as to remand a facially-valid sentence to determine if there was in fact error. If a trial judge was not asked at sentencing to determine the defendant's poverty status and did not otherwise presume

> the defendant to be an indigent or poor person before imposing court costs, then there is no error to correct on appeal. This is because there is no affront to justice when we affirm the assessment of court costs upon a defendant whose status was not determined.

Spicer v. Commonwealth, 442 S.W.3d 26, 35 (Ky. 2014). Private counsel represented Brewer at trial and there was no evidence establishing, prior to sentencing, that Brewer was a poor person immune from court costs. The trial court did not err when it imposed upon Brewer $155 in court costs.

CONCLUSION

Based on the foregoing analysis, we affirm the Perry Circuit Court's March 8, 2017, judgment and sentence.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Kathleen K. Schmidt
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Andy Beshear
Attorney General of Kentucky

Emily Bedelle Lucas
Assistant Attorney General
Frankfort, Kentucky