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RENDERED: AUGUST 29, 2013
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2012-SC-000245-MR

ROBERT G. MCGREGOR, JR. APPELLANT

V.

ON APPEAL FROM CALDWELL CIRCUIT COURT
HONORABLE CLARANCE A. WOODALL, III, JUDGE
NOS. 10-CR-00077 AND 10-CR-00124

COMMONWEALTH OF KENTUCKY APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING IN PART AND VACATING AND REMANDING IN PART

A Caldwell Circuit Court jury found Appellant, Robert McGregor, Jr., guilty of second-degree manslaughter, two counts of first-degree wanton endangerment, and driving under the influence (DUI), second offense. For these crimes, Appellant received a twenty-year prison sentence. He now appeals as a matter of right, Ky. Const. § 110(2)(b), alleging that (1) the trial court's limitations on his presentation of evidence denied him a fair opportunity to present a defense, (2) the admission of gruesome photos was unduly prejudicial, (3) the jury was presented inaccurate and prejudicial information during the sentencing phase, and (4) the trial court erroneously levied a fine upon an indigent defendant. For the reasons that follow, we affirm in part and vacate and remand in part.

I. BACKGROUND

Appellant and Shannon Asher had dated for several years when they were involved in a car accident which resulted in Asher's death. On October 3, 2010, the couple had plans to enjoy a celebration and spend the night with Asher's family. Asher picked up Appellant around 10 a.m., and, according to Appellant, she was already "half-lit." Asher had a couple of cases of beer and a bottle of vodka in the car, and Appellant began to drink at that point.

Around noon, the couple arrived at Asher's sister's house where they both continued to drink. Eventually Asher got into a fight with her sister and was asked to leave because she was too intoxicated. The couple immediately left, and Appellant drove them to Asher's daughter's house. However, Asher's daughter asked them to leave as well. The couple then headed to Appellants' grandparents' house where they stopped to eat dinner. After leaving his grandparents' house, Appellant began driving toward Hancock's Market where Asher could make a couple of phone calls. It was on the way to Hancock's that the accident occurred. Appellant claims to have no recollection of the accident that claimed Asher's life.

A Caldwell County jury ultimately convicted Appellant of second-degree manslaughter, two counts of first-degree wanton endangerment, and DUI. The jury recommended the maximum sentence for each offense – 10 years for second-degree manslaughter and 5 years each for the two counts of wanton endangerment – and recommended the sentences run consecutively for a total

of 20 years. The trial court sentenced Appellant in accordance with the jury's recommendation.

II. ANALYSIS

A. Asher's Intoxication

Appellant argues that the limitations the trial court placed on his presentation of evidence denied him the opportunity to offer a complete defense. Specifically, he alleges that evidence that Asher was extremely intoxicated and had marijuana on her person at the time of the accident was relevant to his defense, and thus should have been admitted. Appellant suggests that his constitutional rights were violated when he was not allowed to present this evidence, and thus this Court should review for constitutional error. However, given that, in essence, all evidentiary issues could be argued as constitutional violations, we review a trial court's evidentiary rulings for an abuse of discretion. *Anderson v. Commonwealth*, 231 S.W.3d 117, 119 (Ky. 2007) (*citing Woodward v. Commonwealth*, 147 S.W.3d 63 (Ky. 2004)). "The test for an abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Id.* (*citing Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000)).

Prior to trial, the Commonwealth filed a motion in limine asking the court to prohibit Appellant from introducing any reference to the toxicology results of the victim, as well as to the marijuana found on her person at the

funeral home.[1] The Commonwealth argued that these items were irrelevant and unduly prejudicial given the undisputed fact that the victim was not driving the vehicle.

Appellant responded that this evidence should be admitted because the victim had been driving earlier, the wreck happened in her vehicle, and it explained why Appellant ended up driving the vehicle the night of the accident. Appellant claims that the victim's level of intoxication was also one reason that he was distracted and turned in front of an oncoming vehicle. Furthermore, Appellant alleges that he was driving due to the victim's level of intoxication, and, therefore, his conduct could be perceived as less wanton or reckless. Given that the jury would have to decide between wanton murder, manslaughter, and reckless homicide, Appellant argues that this evidence is important to his defense. Appellant insists that the evidence would not come in to show that the victim was a bad person, but, rather, to show why Appellant was driving after he consumed alcohol.

The trial court granted the Commonwealth's motion, subject to revisitation upon the presentation of the defense's case-in-chief. At the close of the Commonwealth's case and again after Appellant's testimony, defense counsel renewed his objection to the trial court, arguing that the evidence was necessary to establish why he was driving the car and went directly to the wantonness of his conduct. Both motions were denied as the court again

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[1] Appellant was trying to introduce evidence of Asher's level of intoxication and the fact that marijuana was found on her person. But, it should be clarified that the jury was informed that Asher was intoxicated at the time of the accident.

found there to be no relevance, and, even if relevant, given that Asher's level of intoxication was not at issue, it would only serve to distract the jury.

Appellant further argues that evidence of the Asher's toxicology report is necessary for his defense, which centered around his explanation that he never intended on driving the day of the accident. Appellant alleges that there was no other testimony regarding the victim's level of intoxication,[2] and therefore Appellant felt that the evidence of her blood alcohol content, and the fact that she had marijuana on her person, was necessary in order to support his defense.

1. KRE 401

Appellant argues that the evidence that Asher had a blood alcohol content of .316, and also had marijuana on her person, was relevant to support his defense that his actions were less culpable than charged by the Commonwealth. Furthermore, Appellant suggests that the evidence is relevant given that at the time of the accident he was distracted as a result of Asher's intoxication.

According to KRE 401, "[r]elevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." "[R]elevance is established by any showing of probativeness, however slight." *Webb v. Commonwealth*, 387 S.W.3d 319, 325

[2] But, there was testimony that Asher was, in fact, intoxicated at the time of the accident—just not of her blood alcohol level or the fact that marijuana was found on her person at the funeral home.

(Ky. 2012) (*quoting Springer v. Commonwealth*, 998 S.W.2d 439, 449 (Ky. 1999)).

We recognize that trial courts are in a better position to make relevancy decisions and for that reason give them substantial deference. *See* Robert G. Lawson, *The Kentucky Evidence Law Handbook*, 2.05 at 83 (4th ed. 2003). Thus, we will not disturb the decisions of the trial court without a showing of abuse of discretion. *Partin v. Commonwealth*, 918 S.W.2d 219 (Ky. 1996), *overruled on other grounds by Chestnut v. Commonwealth*, 250 S.W.3d 288 (Ky. 2008). In this case, there is no indication that the trial court abused its discretion in excluding the evidence.

Appellant is correct, of course, that under both the Kentucky and the United States Constitutions, he has the right to present a complete and meaningful defense. *Beaty v. Commonwealth*, 125 S.W.3d 196 (Ky. 2003); *Holmes v. South Carolina*, 547 U.S. 319 (2006). A defendant is not at liberty, however, to present unsupported theories that invite the jury to speculate as to some cause other than one supported by the evidence. *Davenport v. Commonwealth*, 177 S.W.3d 763, 772 (Ky. 2005) (*citing Commonwealth v. Maddox*, 955 S.W.2d 718 (Ky. 1997); *See also Holmes*, 547 U.S. at 326, 126 S.Ct. 1727 ("Constitution permits judges to exclude evidence that is . . . only marginally relevant.") (citation and internal quotation marks omitted). The mere fact that that a victim was intoxicated or may have used drugs, is not, without more, relevant. *Brown v. Commonwealth*, 313 S.W.3d 577 (Ky. 2010).

Furthermore, Appellant argues that the reason he was driving at the time of the accident was because of Asher's level of intoxication. He is of the opinion that this evidence is a deciding factor in whether his actions were committed wantonly or recklessly.[3] The jury was instructed that it could convict Appellant of wanton murder, second-degree manslaughter, or reckless homicide. The jury ultimately found him guilty of second-degree manslaughter, which meant it found that he wantonly caused Asher's death. Whether Appellant should have been found guilty of "wantonly" or "recklessly" causing Asher's death depended on whether the jury believed that he was aware of the risk that he was taking when driving a vehicle while intoxicated.

Asher's level of intoxication had nothing to do with whether Appellant perceived the associated risks in getting behind the wheel of the car – in fact,

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[3] KRS 501.020 defines a wanton mental state, which is necessary for a conviction of wanton murder and second degree manslaughter, as:

> (3) "Wantonly" – A person acts wantonly with respect to a result or to a circumstance described by a statute defining an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstances exists. 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. A person who creates such a risk but is unaware thereof solely by reason of voluntary intoxication also acts wantonly with respect thereto.

Whereas, KRS 507.050 states that a person is guilty of reckless homicide when he causes the death of another person with recklessness, defined as:

> (4) "Recklessly" – A person acts recklessly with respect to a result or to a circumstance described by a statute defining an offense when he fails to perceive a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation.

given that he argues that she was too intoxicated to drive, one could infer that he did perceive the risks associated with his actions. Furthermore, a victim's drinking or use of drugs is not in and of itself relevant. *Malone v. Commonwealth*, 364 S.W.3d 121, 127 (Ky. 2010). Therefore, we do not find that the evidence regarding Asher's level of intoxication was relevant to the defense presented by Appellant.

2. KRE 403

Even if we were to determine that this evidence were relevant, it would still be required to pass muster under KRE 403. Appellant argues that the probative value of the evidence substantially outweighs any undue prejudice that would have been suffered by the victim. KRE 403 provides, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence." There are three basic inquiries that must be made by the trial court when making a determination under KRE 403:

> "(i) assessment of the probative worth of the evidence whose exclusion is sought; (ii) assessment of the probable impact of specified undesirable consequences likely to flow from its admission (i.e., "undue prejudice, confusion of the issues, or misleading the jury, . . .undue delay, or needless presentation of cumulative evidence"); and (iii) a determination of whether the product of the second judgment (harmful effects from admission) exceeds the product of the first judgment (probative worth of evidence.)"

Partin, 918 S.W.2d at 222 (according to Lawson at 2.10).

The Commonwealth argued that Appellant was trying to place the victim "on trial," and complained that the prejudicial effect of this evidence substantially outweighed its probative value. The trial court agreed, adding that it would only serve to "distract" the jury. However, Appellant found it very hard to see how the jury could have been distracted by the blood alcohol content results when it had heard testimony regarding Asher's level of intoxication.[4]

Appellant argues that he wanted to present the evidence, not to place Asher's character on trial, but to show her level of intoxication on the day of the accident and how it played a part in the events that unfolded. He contends it was probative of his motive for driving, i.e., necessity, after having consumed six to eight beers. However, we find this argument to be problematic given that his motive for driving the car is irrelevant – motive is not an element of any of the crimes for which the jury was instructed. Therefore, given that motive is not at issue, the trial court did not abuse its discretion in not allowing the evidence to be presented, and no error occurred.

B. Photographs

Appellant next argues that gruesome photographs presented by the Commonwealth were unduly prejudicial and thus should have been excluded. Specifically, Appellant alleges that photographs taken of Asher after the accident served no other purpose than to inflame the jury, and thus interfered

[4] We find this point to be in contradiction with Appellant's previous argument which stated that the jury did not hear other evidence of Asher's intoxication.

with his ability to obtain a fair trial. As we previously established, we review a trial court's evidentiary ruling for an abuse of discretion. *Anderson v. Commonwealth*, 231 S.W.3d 117, 119 (Ky. 2007) (*citing Woodward v. Commonwealth*, 147 S.W.3d 63 (Ky. 2004)). If the trial court errs, this Court may still determine that the error is harmless pursuant to RCr 9.24 and the standards set forth in *Winstead v. Commonwealth*, 283 S.W.3d 678 (Ky.2009).

Asher was instantly killed when the bumper of an oncoming vehicle went through the passenger's side window and made contact with her head, resulting in an open skull fracture. Asher's head was sliced open and her brain was essentially knocked out of her skull, as the photographs in question clearly depict.

On the morning of trial, defense counsel filed a motion to exclude or limit the gruesome photos of Asher taken after the accident, especially the photo clearly displaying her brain lying in the seat beside her. The Commonwealth responded that it wished to introduce four photos – two of Asher in the car, one taken at the coroner's office, and one photo of the bumper of the car that hit Asher with visible blood and brain matter on it. Defense counsel objected to the admission of all four of the photos, arguing that there was no probative value to the photos because no dispute existed as to the manner in which she died. The trial court denied Appellant's motion and allowed the photographs, including one with Asher's brain lying on the seat next to her, to be admitted into evidence.

The general rule regarding the admissibility of crime scene photographs is that photographs do not become inadmissible simply because they are gruesome. Lawson at 11.05[5][b] (citing *Clark v. Hauck Mfg. Co.*, 910 S.W.2d 247, 249 (Ky. 1995). Furthermore, if the photographs' probative value is outweighed by their prejudicial effect then their admission becomes less likely. In *Clark v. Commonwealth*, 833 S.W.2d 793, 796 (Ky. 1991), this Court found it erroneous to admit gruesome photographs when the victim's body had been materially altered, or the pictures rose to the level in which the only purpose they would serve is appall or arouse the passions of the jury. The factor that distinguishes cases where the photographs shall not be admitted from the much greater number favoring admission over exclusion is the "marginal pertinence of the evidence to the disputed issues of the case" in relation to the high risk of inflammatory potential. Lawson at 11.05[5][c].

Appellant argues that the photographs were repetitive in nature and were unnecessary to prove a point in controversy. Appellant did not dispute that he was under the influence at the time of the accident, nor that he caused the accident which led to Asher's death. Appellant is of the opinion that the photographs served no other purpose than to inflame the jury, and thus prevented him from receiving a fair trial. We agree that the photograph with Asher's brain lying on the seat beside her was erroneously admitted, given that it was highly inflammatory in nature.

However, we find that the trial court did not abuse its discretion admitting the other three photographs given that they served a purpose other

than to inflame the passions of the jury. While the other photographs could be described as graphic in nature, a photograph of a deceased victim's body does not become inadmissible simply because it is gruesome and the crime is heinous. *See Funk v. Commonwealth*, 842 S.W.2d 476, 479 (Ky. 1992).

We find that the picture of the brain lying on the seat beside the victim would do nothing but appall and arouse the passions of the jury. However, two of the other pictures were of Asher's dead body in the car and the morgue, and the other photograph was simply of the bumper of the car that struck her during the accident leading to her death. These three photographs allowed the prosecution to give the jury a visual of the case they were trying to prove, and it is well established that the "prosecution is permitted to prove its case by competent evidence of its own choosing, and that the defendant may not stipulate away parts of the case that he does not want the jury to see." *Page v. Commonwealth*, 149 S.W.3d 416, 420 (Ky. 2004).

For these reasons, this Court finds that the "trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles" *Goodyear*, 11 S.W.3d at 581, as to the photograph of Asher's brain lying on the seat. Thus, the trial court did abuse its discretion, and erroneously admitted that photograph.

While the trial court erred in admitting the photograph, the error was harmless and, as such, does not require reversal. RCr 9.24. A non-constitutional evidentiary error such as this one is harmless if the reviewing court can say with fair assurance that the judgment was not substantially

swayed by the error. *Winstead,* 283 S.W.3d at 678. Given the totality of the circumstances and the overwhelming evidence presented in support of Appellant's guilt, the erroneous admission of the photograph was, in fact, harmless.

C. Inaccurate Parole Eligibility and Prejudicial Sentencing Information

Appellant next argues that inaccurate information presented during the sentencing phase resulted in a manifest injustice. Specifically, Appellant alleges that he is entitled to a new sentencing phase given that the jury was presented inaccurate and prejudicial information about his parole eligibility and past criminal record in violation of KRS 532.055 and KRS 439.340(3)(a). Appellant concedes this issue is unpreserved, and thus, we review for palpable error. RCr 10.26; KRE 103(e). Under the palpable error standard, an unpreserved error may be noticed on appeal only if the error is "palpable" and "affects the substantial rights of a party," and even then relief is appropriate only "upon a determination that manifest injustice has resulted from the error." RCr 10.26. "[W]hat a palpable error analysis 'boils down to' is whether the reviewing court believes there is a 'substantial possibility' that the result in the case would have been different without the error." *Brewer v. Commonwealth*, 206 S.W.3d 343, 349 (Ky. 2006) (citations omitted).

1. Parole Eligibility Information

Probation and Parole Officer Kristen Dickerson testified for the Commonwealth during the penalty phase, and explained that the penalty range for second-degree manslaughter is five-to-ten years, and the penalty for first-

degree wanton endangerment is one-to-five years. Dickerson then went on to tell the jury that the parole eligibility for first-degree wanton endangerment is 15% of time served.

Appellant argues that the information that Dickerson gave the jury regarding parole eligibility for first-degree wanton endangerment was incomplete and, thus, inaccurate and misleading. Under KRS 439.340(3)(a):

> A nonviolent offender convicted of a Class D felony with an aggregate sentence of (1) to (5) years who is confined to a state penal institution or county jail shall have his or her case reviewed by the Parole Board after serving fifteen percent (15%) or two (2) months of the original sentence, whichever is longer.

Dickerson told the jury that he would be eligible for parole after serving 15% of his sentence for wanton endangerment. However, Appellant points out that she failed to inform them that his parole eligibility would be 15% only if the aggregate sentence was one to five years. Appellant claims that the jury did not know that once it sentenced him to ten years for second-degree manslaughter and five years for each wanton endangerment count, that his parole eligibility would be 20% of time served, not 15%.

The use of incorrect, or false, testimony by the prosecution is a violation of due process when the testimony is material. *Robinson v. Commonwealth*, 181 S.W.3d 30, 38 (Ky. 2008) (*citing Napue v. Illinois*, 360 U.S. 264 (1959)). This is true irrespective of the good faith or bad faith of the prosecutor. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). When the prosecution knows or should have known that the testimony is false, the test for materiality is whether

"there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *United States v. Agurs*, 427 U.S. 97, 103 (1976).

Obviously, the Commonwealth's witness offered incorrect testimony when she testified that Appellant would be parole eligible after 15% of time served. The question remains whether the testimony influenced the jury to render a sentence greater than what it might otherwise have given absent the incorrect testimony. The Commonwealth relied almost solely on Dickerson's testimony to persuade the jury to recommend the maximum sentence. The jury was not given complete information regarding parole eligibility; here, there is a "substantial possibility" that had the jury been presented with correct information regarding parole eligibility that Appellant would have gotten a lesser sentence. *Brewer*, 206 S.W.3d at 349. Therefore, this Court finds that the errors were in fact palpable.

2. KRS 532.055

Appellant further argues that the Commonwealth impermissibly exceeded the scope of KRS 532.055[5] when it told the jury about his prior

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[5] KRS 532.055(2) provides in part:

> Upon return of a verdict of guilty or guilty but mentally ill against a defendant, the court shall conduct a sentencing hearing before the jury, if such case was tried before a jury. In the hearing the jury will determine the punishment to be imposed within the range provided elsewhere by law. The jury shall recommend whether the sentences shall be served concurrently or consecutively.
>
> (a) Evidence may be offered by the Commonwealth relevant to sentencing including:
>
> 1. Minimum parole eligibility, prior convictions of the defendant, both felony and misdemeanor;

convictions. Appellant complains of numerous instances where Dickerson's testimony and the Commonwealth's exhibits shared information with the jury regarding his prior convictions and dismissed charges that was erroneous and prejudicial, including: 1) regarding Commonwealth's Exhibit 1, Dickerson testified that Appellant was convicted of second-degree assault, but the final judgment entered into evidence showed that he was actually convicted of the amended charge of assault under extreme emotional disturbance;[6] 2) Exhibit 4 showed that a charge of reckless driving had been dismissed;[7] 3) Commonwealth's Exhibit 7 reported that not only had he been charged with alcohol intoxication and disorderly conduct, but also that a charge of terroristic threatening had been dismissed;[8] 4) regarding Exhibit 8, Dickerson erroneously testified that Appellant had been convicted of no insurance

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2. The nature of prior offenses for which he was convicted;

3. The date of the commission, date of sentencing, and date of release from confinement or supervision from all prior offenses;

4. The maximum expiration of sentence as determined by the division of probation and parole for all such current and prior offenses;

5. The defendant's status if on probation, parole, post incarceration supervision, conditional discharge, or any other form of legal release . . . .

[6]Commonwealth's Exhibit 1 is Final Judgment in Caldwell Indictment NO 99-CR-027 in which Appellant plead guilty to Assault Under Extreme Emotional Disturbance as amended from Second-Degree Assault.

[7] Commonwealth's Exhibit 4 is the Caldwell County district court docket sheet on File No. 08-T-488 charging Appellant with first offense DUI, and a dismissed charge of reckless driving.

[8] Commonwealth's Exhibit 7 is a docket sheet concerning Caldwell County district court File No. 10-M-247.

subsequent offense and that the charges of possession of an open alcohol container and driving without a license in his possession had been dismissed;[9] 5) Commonwealth's Exhibit 9 showed a charge of first-degree wanton endangerment which was amended to second-degree wanton endangerment and a dismissed alcohol intoxication charge;[10] 6) Commonwealth's Exhibit 11[11] indicated that Appellant was charged with facilitation to attempt first-degree arson, when he was actually convicted of facilitation to attempt second-degree arson; and 7) Exhibit 3 also contained the citation for fleeing and alcohol intoxication, after the Commonwealth and the defense agreed that all citations would be pulled from the record.

KRS 532.055(2)(a) provides, in relevant part, that in the sentencing stage of felony cases, "[e]vidence may be offered by the Commonwealth relevant to sentencing including: 1. Minimum parole eligibility, prior convictions of the defendant, both felony and misdemeanor; [and] 2. The nature of prior offenses for which he was convicted . . . ." *Webb v. Commonwealth*, 387 S.W.3d 319, 329-330 (Ky. 2012); *see also Newman v. Commonwealth,* 366 S.W.3d 435, 445–46 (Ky. 2012); *Mullikan v. Commonwealth,* 341 S.W.3d 99, 107–08 (Ky. 2011).

In defining what evidence is permissible in describing the "nature of prior offenses" we recently held that:

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[9] This is in reference to Commonwealth's Exhibit 8, docket sheet for Caldwell District Court file no. 01-T-00422.

[10] Commonwealth's Exhibit 9

[11] Caldwell County Indictment No. 05-CR-35.

> [E]vidence of prior convictions is limited to conveying to the jury the elements of the crimes previously committed. We suggest this be done either by a reading of the instruction of such crime from an acceptable form book or directly from the Kentucky Revised Statute itself. Said recitation for the jury's benefit, we feel, is best left to the judge. The description of the elements of the prior offense may need to be customized to fit the particulars of the crime, i.e., the burglary was of a building as opposed to a dwelling.

Webb, 387 S.W.3d at 330 (*quoting Mullikan,* 341 S.W.3d at 109)). Permissible evidence includes only evidence of prior "convictions," and does not include evidence of prior charges later dismissed or amended. This jury was presented with information that it should have never been privy to, and thus this Court must conclude that there is a reasonable likelihood that the jury was influenced by this information.

Taking into consideration the erroneous testimony regarding parole eligibility and the violations of the limits of 532.055, in the aggregate, this Court finds that there is a "substantial possibility" that without these errors Appellant's sentence would have been different. *Brewer,* 206 S.W.3d at 349. Especially in light of the fact that this Court has previously vacated a sentence for going beyond the bounds of KRS 532.055, and with the erroneous information provided by the testifying probation and parole officer, there is a "substantial possibility" that a "manifest injustice" did occur. For this reason, this Court vacates Appellant's sentence and remands this case for a new sentencing phase in accordance with this opinion.

D. $500 Fine

Appellant also argues that the fine levied against him must be vacated. Specifically, Appellant alleges – and the Commonwealth agrees - that a $500

fine imposed by the trial court as a penalty for his DUI conviction should be vacated given that fines cannot be imposed upon indigent persons. While Appellant concedes that this issue is unpreserved, he is correct in his assertion that this issue may be presented for the first time on appeal. *Wright v. Commonwealth,* 391 S.W.3d 743, 750 (Ky. 2012) (*citing Travis v. Commonwealth,* 327 S.W.3d 456, 459 (Ky. 2010)).

In its final judgment, the trial court imposed a $500 fine on Appellant as a penalty for his DUI conviction. However, at Appellant's arraignment, the trial court found him to be an "indigent person" under KRS 31.100(3) and appointed the Department of Public Advocacy to aid him in his defense. Despite this finding, the trial court nevertheless included fines totaling $500 in Appellant's sentence pursuant to KRS 534.040(2). Under KRS 534.040(4), however, "[f]ines required by this section shall not be imposed upon any person determined by the court to be indigent pursuant to KRS Chapter 31." *Wright,* 391 S.W.3d at 750. Because the trial court found Appellant to be indigent under KRS Chapter 31, it erred when it included fines in its sentencing order.

III. CONCLUSION

For the aforementioned reasons we affirm Appellant's convictions, but vacate Appellant's sentence and fine and remand this matter to the trial court for a new sentencing phase consistent with this opinion.

All sitting. Minton, C.J., Abramson, Cunningham, Noble, Scott, and Venters, JJ., concur. Keller, J., concurs in result only.

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