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RENDERED: SEPTEMBER 24, 2015
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2013-SC-000793-MR

MARTY LEE ROE — APPELLANT

V.

ON APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL, JR., JUDGE
NO. 12-CR-00037

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

A circuit court jury convicted Marty Roe of murdering Martha Post, tampering with physical evidence, and harassing communications, a misdemeanor charge. Roe was sentenced to life imprisonment. On appeal to this Court as a matter of right,[1] he raises a host of trial errors that allegedly rendered the judgment entered against him fundamentally unfair. We find no error at trial and affirm the judgment.

I. FACTUAL AND PROCEDURAL BACKGROUND

At the end of her workday, Martha Post, a dermatologist, left the building that housed her medical practice, Commonwealth Dermatology ("ComDerm"), as well as her husband's internal-medicine practice; stepped into her van; and started the engine. As she sat there, parked in the grass next to the building,

[1] Ky.Const. § 110(2)(b).

security cameras reveal that a man approached her van. After a brief exchange of words, the man fired three gunshots into the van and fled the scene. Post suffered gunshot wounds to the neck, left thigh, and chest. The chest wound was fatal.

Immediately after the shooting, as Post was succumbing to her injuries, her van rolled into a nearby parking lot, where it collided with a vehicle driven by Sandra Schroeder. Schroeder had noticed Post's van nearby and observed that she was engaging in conversation with a man standing by the driver's side window. She characterized the man as a "landscaper" because of his attire and the van's location on the grass. She could not identify that man, but investigators later determined that man was Marty Roe.

Roe was a long-time acquaintance of Post and her family. Roe and Post had met some four years before the murder when he was an assistant on a remodeling project at ComDerm. Roe was homeless at the time, and Post agreed to let him live in the basement of ComDerm, where he began working as the building's handyman the next few years. While living at ComDerm, Roe became familiar with Post's family, including her husband, Robert Truitt, an internal medicine physician, and their three daughters. Roe even attended family functions and holiday celebrations. But the amicable relationship between Roe and the Post-Truitt family derailed when Roe began expressing romantic feelings for Post.

About a year before the murder, Roe was fired and evicted from ComDerm. This occurred for a number of reasons, but primarily because of

his progressively erratic behavior and his obsession with Post. Even after his eviction, Roe believed that he would eventually achieve a romantic relationship with Post. He continued to send her gifts; repeatedly called her cell phone; and began leaving her increasingly bizarre messages, some of which contained violent or threatening undertones. About ten months before the murder, Post took recordings of messages she received from Roe to the county attorney's office and filed a criminal complaint against Roe for harassing communications because of the intrusive frequency and threatening nature of their contents. Contact between Roe and Post then ceased for about eight months.

After Post banished him from ComDerm, Roe bought a van and moved to Ohio. His first return trips back into Kentucky began shortly before the murder, around the time that Post began receiving repeated phone calls and messages from him again. Roe says he went to Kentucky to visit his daughters in attempt to give one of them his van. On the afternoon of Post's murder, Roe was spotted at a bar near the ComDerm facilities. Receipts show that in the days following the murder, Roe made a sojourn into east Tennessee, where he stayed for a while before returning to Ohio.

Law enforcement arrested Roe in Ohio. When searching his van, officers found a handgun wrapped in plastic lodged under the hood. A DNA analysis found Roe's DNA on the gun, along with one other partial profile of an unknown individual. A ballistic analysis of the shell casings confirmed that this gun was the same one used to kill Post.

Roe was charged with Post's murder, felony tampering with physical evidence, and misdemeanor harassing communications. At trial, he attempted to present an alternate-perpetrator theory of defense, suggesting that Post's husband, Truitt, played a role in his wife's death. The jury ultimately found Roe guilty on all three counts, sentencing him to life imprisonment for murder, five years for tampering with physical evidence, and ninety days for harassing communications, to run consecutively. Recognizing that a term of years' sentence may not run consecutively with a life sentence, the trial court ordered his sentences to run concurrently.[2]

II. ANALYSIS.

Roe's appeal presents seven allegations of error: (1) the trial court allowed improper and prejudicial opinion testimony from witnesses with no personal knowledge, (2) the trial court allowed prejudicial victim-impact evidence during the guilt phase of Roe's trial, (3) Roe's right to present a defense was violated when the trial court excluded evidence crucial to Roe's alternate-perpetrator theory, (4) a violation of *Batson v. Kentucky*[3] occurred during jury selection, (5) the trial court erred in sentencing Roe without the benefit of a PreSentence Investigation (PSI) Report, (6) cumulative error, and (7) the trial court inappropriately imposed court costs. We will address each of these issues in turn.

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[2] *See Yarnell v. Commonwealth*, 833 S.W.2d 834, 838 (Ky. 1992).

[3] 476 U.S. 79 (1986).

The issues presented are largely unpreserved below, and we will employ two separate standards of review. For non-constitutional issues preserved at trial, we will review the evidence for whether an error substantially sways the judgment.[4] The test is not "whether there was enough [evidence] to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence."[5] As for unpreserved issues, Kentucky Rules of Criminal Procedure (RCr) 10.26 authorizes us to reverse the trial court only upon a finding of "manifest injustice."[6] This occurs when "the error so seriously affected the fairness, integrity, or public reputation of the proceeding as to be 'shocking or jurisprudentially intolerable.'"[7]

A. The Trial Court did not Allow Improper Opinion Testimony.

During the Commonwealth's case-in-chief, members of Post's family and work associates were called to testify to their knowledge of the relationship between Roe and Post. The witnesses all testified that Roe had sent Post frequent and disturbing messages and that after learning of her death, they instantly "thought of" Roe. But Roe's counsel never objected to this specific evidence at trial and, as such, failed to preserve this issue for our review. Nevertheless, Roe asks us to review the testimony below for palpable error

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[4] *See Winstead v. Commonwealth*, 283 S.W.3d 678, 688-89 (Ky. 2009).

[5] *Id.* (quoting *Kotteakos v. United States*, 328 U.S. 750 (1946)).

[6] ("A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that a manifest injustice has resulted from the error.").

[7] *Commonwealth v. Jones*, 283 S.W.3d 665, 668 (Ky. 2009) (quoting *Martin v. Commonwealth*, 207 S.W.3d 1, 4 (Ky. 2006)).

under RCr 10.26. He primarily claims that the testimony was both irrelevant to his guilt and improper opinion testimony from lay witnesses who lacked personal knowledge. Roe does present a persuasive argument as to the relevance of this particular testimony, but because he failed to object at trial, we will not reverse absent a conclusion that the identification testimony rendered his trial manifestly unjust.

The Kentucky Rules of Evidence (KRE) state that evidence is relevant if it has "any tendency to make the existence of a fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[8] This standard is powerfully inclusionary and is met upon a showing of minimal probativeness.[9] As for opinion testimony from lay witnesses, such evidence is permitted so long as the opinions are rationally related to the witness's perceptions; helpful to an understanding of the testimony or determination of a fact in issue; and not based on scientific, technical, or specialized knowledge.[10]

This issue centers on the testimony of five witnesses: (1) Post's sister, Elizabeth Post; two of Post's daughters, (2) Caitlyn Truitt and (3) Erin Truitt; (4) her husband, Robert Truitt; and (5) former employee, Sara Smith. All five witnesses knew both Post and Roe, and each had an understanding of Roe's

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[8] KRE 401.

[9] *See* LAWSON, THE KENTUCKY EVIDENCE LAW HANDBOOK § 2.05(2)(b) (LexisNexis Matthew Bender) ("The inclusionary thrust of the law of evidence is powerful, unmistakable, and undeniable, one that strongly tilts outcomes toward admission of evidence rather than exclusion.").

[10] KRE 701.

romantic infatuation with Post. They testified to their knowledge of Roe's persistent contact with Post and were asked to describe their thoughts upon learning of Post's murder. Because Roe's counsel only preserved certain pieces of each witness's testimony, we will review excerpts of each witness's statements individually.

1. Elizabeth Post.

Elizabeth Post came to the crime scene the evening that Post was murdered and spoke with police as they were conducting their investigation. The Commonwealth called her to testify about her observations that night and her impressions hours after the shooting. Post had told Elizabeth about Roe's incessant communications, which Elizabeth termed "creepy and haunting." She testified that police asked her if she knew of anyone who would want to harm Post, and Roe instantly came to her mind. Elizabeth went on to say that Truitt arrived at the scene where he commented "well, he did it, he finally did it." Roe's counsel only objected to Elizabeth's characterization of the text messages Post received from Roe and, therefore, leaves any review of the rest of the testimony unpreserved.

We see no palpable error in the trial court's admitting Elizabeth's testimony. Because Elizabeth had been apprised of the situation by Post and had knowledge of Roe's messages, this testimony appears to be a classic use of her own impressions of the situation. Her identification of Roe as the only person she envisioned who would wish Post harm is similarly a mere reflection

of her state of mind at the crime scene based on her personal knowledge of Post and Roe. We cannot conclude this gives rise to palpable error.

As for Elizabeth's recitation of Truitt's statement at the crime scene, Roe is correct that this is hearsay. But we view this testimony as a classic example of present-sense impression: an exception to the hearsay rule for statements made while perceiving an event or condition, or immediately thereafter.[11] Truitt had just arrived at the location where his wife had been brutally murdered, and his statement was made as he was grappling with the situation. Although hearsay and accusatory in nature, the statement reflects Truitt's initial impression of the circumstances. The trial court did not err by admitting Elizabeth's testimony on this point.

2. Caitlyn Truitt.

Caitlyn Truitt, Post's daughter, testified to her thoughts and impressions when she learned of her mother's murder. At the time of the crime, Caitlyn lived out of state. Roe's counsel objected to testimony from Caitlyn that she had a "miasma" of fear for Roe and her characterization that Roe is a "bad guy." The trial court sustained both objections. The testimony continued, and Caitlyn informed the jury that her mother showed her numerous phone numbers that were labeled "Marty" to designate various attempts Roe made to contact Post. When asked about her reaction to the news of the murder, Caitlyn described her reaction as "at first it was just panic . . . and then my first thought when I heard she was dead is I thought of Marty." Caitlyn said

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[11] KRE 803(1).

her family feared Roe for over a year and that she feared for both her mother and father. Roe failed to preserve his objection to any of this testimony.

Similar to Elizabeth's testimony, Caitlyn corroborated the family's fear of Roe because of his relentless efforts to contact Post. Her immediate thought of Roe when learning of the murder is simply perception-based testimony derived from her own personal knowledge of the situation. It simply represents a mental response to new information, based on a pre-existing fear she had of Roe. Caitlyn did not offer improper opinion in the form of "I think Marty did it" but, instead, testified that his name immediately popped into her head. This is again does not render Roe's trial manifestly unjust, so there was no palpable error.

3. Erin Truitt.

Erin Truitt, Post's daughter, testified that Post played for her some of the voicemail messages Roe left for Post. She was also asked to describe her thoughts after learning of her mother's death. Erin first said she was shocked and then wished it was simply a stray bullet. Eventually, her thoughts focused on Roe. Roe's counsel did not object to this testimony that Erin thought of Roe in her initial impression of the crime.

We find no palpable error in allowing this testimony. The examination established that Erin was apprised of the communications between Roe and Post, and she corroborated the fear the family had of Roe. Moreover, allowing Erin to testify to her perceptions immediately after learning the news of the

murder was not a palpable error. There was no manifest injustice in declining to exclude this evidence.

4. Robert Truitt.

Continuing the theme, Robert Truitt, Post's husband, testified to his thoughts immediately after learning of the murder. He testified that "his worst fear was realized," that fear being that "Marty would eventually ambush her and kill her . . . ." He said he called Caitlyn after hearing the news and told her "that her mother had been killed, just like we were fearing." For reasons stated above regarding present-sense impression testimony, this was properly admitted at trial.

Perhaps the most contentious aspect of Truitt's testimony came when he was asked to explain why he asked police if Post had been shot. He responded, "Because that's what I thought Marty would do. I thought he was too cowardly to use any other method. He wasn't going to stab her. He wasn't going to strangle her. He was gonna shoot her." Roe's counsel objected to the statement and moved for a mistrial. The trial judge denied the mistrial, but sustained the objection and admonished the jury not to consider the comment. The trial judge's ruling here was not in error. Truitt's testimony here was not a present-sense impression; rather, it was an opinion based not on personal knowledge, but pure emotion. But a mistrial is available only for a "manifest necessity."[12] Here, we have no reason to doubt the jury's ability to follow the trial court's curative admonition, which was the proper recourse for Truitt's

[12] *Nunley v. Commonwealth*, 393 S.W.3d 9, 13 (Ky. 2014).

inadmissible testimony.[13] As such, the trial court did not err when it denied Roe's motion for mistrial at this juncture.

5. Sara Smith.

The last testimony Roe presents for review was the Commonwealth's cross-examination of Sara Smith, a physician and colleague of Post's, who was primarily a defense witness at trial. She confirmed that Truitt encouraged Post to take out more life insurance, and she corroborated that Truitt made statements about wanting violent retribution if the police did not kill Roe. On cross-examination, the Commonwealth asked Smith if there was any doubt in her mind who Truitt thought killed his wife. She responded in the negative. Finally, the Commonwealth asked her if the name Marty Roe went through her mind when she heard of the murder. She responded, "Yes, sir, it did." Roe's counsel failed to preserve these elements of the Commonwealth's cross-examination for our review.

Despite Smith's primary utility as a defense witness, Roe asks us to review inclusion of these two statements for palpable error. Like the witnesses discussed above, Roe presents a persuasive argument as to the relevancy of this questioning. But Roe failed to object to this at trial to preserve the issue. Because of the overwhelming evidence pointing to Roe's guilt, the trial court allowing the jury to hear this testimony did not result in a manifest injustice. There was no palpable error.

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[13] *See Johnson v. Commonwealth*, 105 S.W.3d 430, 441 (Ky. 2003) ("A jury is presumed to follow an admonition to disregard evidence and the admonition thus cures any error.").

B. The Commonwealth did not Introduce Victim-Impact Evidence During the Guilt Phase of Trial.

During the Commonwealth's presentation of evidence, Post's family members were routinely prodded about their emotional responses to the murder. Post's sister was asked if she cried when she learned of her death. Her daughters described their relationships with their mother and were asked if they missed her. Truitt was asked to describe "the impact of her death" on his life.

Roe argues that this testimony amounted to impermissible victim-impact evidence presented during the criminal-responsibility phase of a trial. He claims that the emotional appeal from this type of evidence unduly influenced the jury. This testimony was admitted without objection, so Roe did not preserve this issue for our review. Nevertheless, he requests palpable error review under RCr 10.26.

The prohibition of victim-impact evidence during the criminal-responsibility phase of trial is deeply rooted in both our precedent and Kentucky statutory law. Under Kentucky Revised Statutes (KRS) 532.055(2)(a)(7), the Commonwealth may introduce evidence, after a determination of guilt, relevant to the impact of the crime upon the victim, including any physical, psychological, or financial harm. We have cautioned against the use of this type of evidence when determining guilt because it is "generally intended to arouse sympathy for the families of the victims" and is

"largely irrelevant to the issue of guilt or innocence."[14] We recognize the need to insulate criminal defendants from the overwhelming empathy this evidence can induce; and, accordingly, the rule is intended to prevent emotional convictions.

But the test does not conclude there. Though victim-impact evidence is impermissible in determining guilt, the Commonwealth is "entitled to show the jury that the victim was not a mere statistic, but a living person . . . ."[15] Indeed, some amount of background evidence may be relevant to understanding the nature of the crime committed.[16] And the Commonwealth has broad discretion "to persuade the jurors the matter should not be dealt with lightly."[17] The line between relevant-background information and prejudicial-impact testimony is a narrow one; but we essentially distinguish the two forms of testimony by inquiring whether the witness was overly emotional, condemnatory, or accusatory in nature.[18]

After review of the testimony in this case, we cannot determine that admission of the statements reaches the level of palpable error. The characteristics unique to victim-impact information support our conclusion. The testimony Roe highlights tends to establish Post's role as a loving mother

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[14] *Bennett v. Commonwealth*, 978 S.W.3d 322, 324-26 (Ky. 1998).

[15] *Id. See also Bussell v. Commonwealth*, 882 S.W.2d 111, 113 (Ky. 1994) (no error in guilt phase when a relative merely calls attention to the fact that the victim was once a living person rather than a statistic).

[16] *See Bussell*, 882 S.W.2d at 113.

[17] *Lynem v. Commonwealth*, 565 S.W.2d 141 (Ky. 1978).

[18] *See Foley v. Commonwealth*, 953 S.W.2d 924, 937 (Ky. 1997).

and wife rather than any "physical, psychological, or financial" harm her untimely death caused her immediate family. Roe correctly points out that this evidence triggers empathy from the jury. But this is a tragic crime, and *any* background information is likely to stir up emotional testimony. Testimony does not become prejudicial victim-impact evidence simply because it elicits an emotional response from the witness. As such, there was no palpable error in this evidence as presented at trial.

C. The Trial Court did not Err by Excluding Roe's Proffered Evidence.

A critical aspect of Roe's defense was an alternate-perpetrator theory that Truitt played a role in orchestrating the events culminating in his wife's murder. It is undisputed that Post subsidized Truitt's unprofitable internal-medicine practice and that she intended eventually to cut off his funding.[19] Post had also recently upgraded her life insurance policy, making her husband the beneficiary of the $1.5 million proceeds. There were allegations of marital infidelity. Finally, and most importantly, Roe alleges that there were a number of potentially incriminating actions and statements Truitt made during the investigation of his wife's murder. We need not review each instance Roe provided in his brief. Our role is simply to determine whether the trial court erred by excluding Roe's proffered evidence.

At trial, Roe offered the testimony of two witnesses in support of this theory; and he also attempted to play to the jury an audio recording of Truitt's initial interview with police. The first witness, Suzie Castle, worked in Post's

[19] It is established from the evidence that Post had decided to quit subsidizing his practice; it was not clear that Dr. Truitt was aware of Post's decision.

office and intended to testify to the impending closure of Truitt's internal-medicine practice. The second witness, Craig Mayfield, was Post's information-technology director; and he was set to testify that in addition to knowing the financial strain Truitt's practice placed on Post, Truitt had asked him about the process of encrypting computer hard drives, which he considered an odd question.

The trial court excluded this evidence because it concluded that Roe failed to meet the evidentiary burden for presenting an alternate-perpetrator theory. Roe's counsel properly reserved this issue for our review, and Roe contends that excluding this evidence deprived him of his constitutional right to present a defense under the Due Process Clause.[20] We find that the trial court did not err when it excluded the evidence because Roe failed to meet his burden in establishing his theory.

Under *Beaty v. Commonwealth*, we held that a criminal defendant must establish that an alternate perpetrator had both the motive and opportunity to commit the crime before he or she may introduce evidence in support of the theory.[21] This defense requires qualification primarily to prevent introduction at trial of "unsupported" or "far-fetched" theories that mislead or confuse the

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[20] *See Harris v. Commonwealth*, 134 S.W.3d 603, 608 (Ky. 2004) (it offends due process to exclude fundamental elements of the defendant's defense, which may include the right to introduce an alternate-perpetrator theory).

[21] 125 S.W.3d 196 (Ky. 2003).

jury.[22] We afford considerable discretion to trial-court evidentiary determinations and will reverse only upon a finding of an abuse of discretion. So a trial court's ruling will be affirmed absent a showing the decision was arbitrary, unreasonable, unfair, or unsupported by legal principles.[23] Applying this test, we conclude that the trial judge did not abuse his discretion in refusing to admit evidence of Roe's alternate-perpetrator theory.

While Roe suggested plenty of evidence of Truitt's motive for murdering his wife, we are not persuaded that Truitt had adequate opportunity to act as Roe theorizes. We understand that Roe does not argue that Truitt actually pulled the trigger himself but, rather, he organized the murder as a contract killing. In making this claim, Roe relied on statements Truitt had made about possessing a gun the police did not know about and knowing how to contact a hit man. Neither statement establishes that Truitt had opportunity to commit the crime in Roe's place. Moreover, we are unclear precisely how Roe's theory explains who committed the crime in his stead.

The existence of another gun is immaterial to Truitt's culpability. A ballistics analysis confirmed that the weapon used to kill Post was the gun found in Roe's van. As for the "hit man" reference, the context surrounding the statement can more adequately be explained as an expression of Truitt's anger directed at Roe for murdering his wife. Just before making that reference,

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[22] *See id.* at 207 (". . . [a] trial court may infringe upon this right when the defense theory is 'unsupported,' 'speculat[ive],' and 'far-fetched' and could thereby confuse or mislead the jury.").

[23] *See Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

Truitt expressed how he had hoped that Roe committed "suicide by cop." In fact, Truitt's whereabouts and activities were all accounted for that afternoon. It is undisputed that he went home early and locked himself out of the house. He spent the afternoon miles away with neighbors, texting Post to come home to let him in the house. Whatever the cause for Truitt's admittedly strange statements and behavior, any opportunity he had to commit the crime remains speculative at this juncture; and nothing in the theory points to a different perpetrator than Roe. Accordingly, we cannot conclude that the trial court unreasonably refused to allow Roe's alternate perpetrator evidence.

D. There was no *Batson* Violation.

Roe next claims that the trial court erred in denying his *Batson* challenge. During jury selection, defense counsel asked prospective jurors if it was worse for an innocent man to go to prison or a guilty man to go free. Juror 4554, an African-American, responded that it would be worse for an innocent person to go to jail because it would represent an unjust deprivation of liberty. Immediately after, Juror 4061, a white juror, provided a similar answer. The Commonwealth struck Juror 4554 with a preemptory strike but did not strike Juror 4061. The trial court questioned the Commonwealth on the strike but ultimately determined that the strike was not improper. Roe properly preserved this issue for our review.

Under *Batson*, the Supreme Court held that the Equal Protection Clause of the Fourteenth Amendment forbids prosecutors from challenging potential

jurors solely on account of their race.[24] To establish a prima facie case for purposeful racial discrimination, the *defendant* must first show that he is a member of a cognizable racial group and that the prosecutor has exercised peremptory challenges to remove from the venire members of the *defendant's* race.[25] Second, the defendant may rely on the fact that peremptory challenges are a jury selection process that permits discrimination from those who are of a mind to discriminate.[26] Finally, the defendant must show that these facts and other circumstances raise the inference that the prosecutor engaged in racial discrimination in striking potential jury members on account of their race.[27] If the defendant successfully raises this inference, the burden shifts to the Commonwealth to provide an adequate race-neutral explanation for striking the challenged jurors.

In this case, we need not look beyond the first prong of the *Batson* analysis. Roe is an elderly white man asserting a *Batson* violation because the Commonwealth struck a black juror over a white juror. While Roe, like any human being, is a member of a cognizable racial group (in his case, Caucasian), the Commonwealth did not engage in peremptory strikes to remove members of *his* race from the venire. So he cannot possibly raise an inference to the trial judge that the prosecutor engaged in purposeful racial discrimination contrary to his constitutional right to a fair trial. Because we

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[24] *See* 476 U.S. 79, 89 (1986)

[25] *Id.* at 96 (emphasis added).

[26] *Id.*

[27] *Id.*

hold that Roe has no standing to assert a *Batson* claim in this instance to begin with, we will not reverse the trial judge's determination that there was no *Batson* error at trial.

E. Roe Waived his PSI Report Rights.

Following Roe's conviction, the trial judge ordered a Pre-Sentence Investigation Report. When an officer arrived at Roe's jail cell to obtain a DNA sample, thumbprints, and to conduct the PSI interview, Roe made clear to the officer that he would not cooperate. The officer reported to the trial court that Roe was verbally aggressive and that his physical demeanor matched his verbal aggressiveness. So a detailed PSI report was not fully completed. Despite Roe's noncompliance, the trial court's final judgment reflects that the trial court reviewed the written PSI report and afforded Roe the opportunity to review and correct factual inaccuracies in it. The trial court deemed as waived any further objection by Roe to any incompleteness of the contents of the PSI report.

Presentence investigation is a statutory right provided to criminal defendants. KRS 532.050 provides, in relevant part, that:

> No court shall impose sentence for conviction of a felony, other than a capital offense, without first ordering a presentence investigation after conviction and giving due consideration to a written report of the investigation. The presentence investigation report *shall not be waived*; however, the completion of the presentence investigation report may be delayed until after the sentencing upon the written request of the defendant if the defendant is in custody.[28]

[28] KRS 532.050(1).

The statute further imposes a duty on the trial court to advise defendants or counsel on the contents and conclusions in the PSI report, along with an opportunity to dispute the contents.[29] It, therefore, appears that a trial court has a categorical statutory duty to order a PSI report for all convicted felons and consider the findings before sentencing, unless the defendant petitions for the report post-sentencing in writing. Upon first glance, the statute also suggests that Roe cannot completely waive his rights to a PSI report, contrary to the trial court's determination. But this directly contradicts RCr 11.02(1), which states that "the defendant may waive his presentence investigation report."

Both parties failed to recognize the longstanding constitutional tension between KRS 532.050 and the exceptionally strong separation of powers mandate under the Kentucky Constitution.[30] This prohibition includes legislative attempts to "invade the rule[-]making prerogative of the Supreme Court by legislatively prescribing rules of practice and procedure."[31] We have previously held this precise statute unconstitutional but supported its general principles nevertheless as a gesture of comity to the General Assembly.[32] In so

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[29] *Id.* at 532.050(6).

[30] Ky.Const. § 28 ("No person or collection of persons, being of one of those departments, shall exercise any power properly belonging to either of the others, except in the instances hereinafter expressly directed or permitted.")

[31] *Commonwealth v. Reneer*, 734 S.W.2d 794, 796 (Ky. 1987).

[32] *Id.* at 798.

doing, we declared that this Court has the power to preempt the statute by the promulgation of different procedural rules at any time we deem necessary.[33]

Roe argues that despite his aggressive behavior toward the officer attempting to conduct his pre-sentencing interview, the statute does not allow him to waive completely his rights to review of a PSI Report before sentencing, absent a writing. We think otherwise. Recognizing the delicate balance between the desire to honor legislative choices and our own inherent constitutional authority to promulgate rules of court procedure, we have adequately preempted this issue and charged trial judges with the discretion to allow defendants to waive their rights to a PSI Report.[34] Thus, the remaining issue is whether Roe's behavior constitutes a valid waiver of his statutory right.

The appropriate waiver standard applied to this type of right is unclear. In *Alcorn v. Commonwealth*, the defendant urged us to accept an "understanding" standard for waiver of presentencing rights.[35] Having concluded the waiver in that case was "understandingly made," we declined to address the question and establish a standard. Roe's counsel in the sentencing hearing suggested the appropriate standard is if the waiver was "knowing, voluntary, and intelligent," not dissimilar from the standard used for

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[33] *Id.*

[34] *See Hulett v. Commonwealth*, 834 S.W.2d 688, 692 (Ky.App. 1992) (refusing to conclude the trial judge erred by allowing a defendant to waive his PSI Report because of the competing authorities). *See also Alcorn v. Commonwealth*, 557 S.W.2d 624 (Ky. 1977).

[35] *Alcorn*, 557 S.W.2d at 627.

federal constitutional rights articulated in *Miranda v. Arizona*.[36] Though we have avoided setting a standard for waiver of PSI-report rights, we have recognized that statutory rights may be subject to a knowing and voluntary waiver.[37]

In examining the facts of the present case, we see no need to depart from the statutory-rights standard directly above. The officer reported to Roe's cell to conduct the PSI interview, as Roe had been told to expect. Roe had been informed after his conviction that this would occur. Absent a determination that Roe was mentally incapable of understanding the officer, we cannot conclude that the trial court's determination that Roe's behavior represented a manifest intention to waive his right to the report was not unknowing or involuntary. We endorse the Commonwealth's assertion that a court may not impose its will over a defendant, and the trial court has no affirmative duty to reschedule final sentencing to comport to Roe's deliberately noncompliant behavior. The trial court appropriately recognized that Roe is not eligible for probation because of the violent and depraved nature of the crime he committed, so there is no harm in delaying the report. As the statute allows, Roe's PSI report can be completed promptly after sentencing; and he faced no manifest injustice when the trial court proceeded to finally sentence Roe.

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[36] 384 U.S. 436, 444 (1966).

[37] *See Humana, Inc. v. Blose*, 247 S.W.3d 892, 896 (Ky. 2008). This was a civil employment law case involving waiver of a statutory right for an employee to sue an employer for a civil rights violation. Writing for the Court, Justice Scott elaborated that there was "no reason why the same principle [of knowing and voluntary waiver] should not apply to the statutory right of an employee" in a similar fashion to constitutional violations. *Id.*

F. There was no Cumulative Error.

Roe asserts that should we find no error that warrants reversal on its own, we should conclude that the cumulative effect of minor errors renders his trial unfair, mandating a new trial. Because we do not recognize any significant errors at trial, we cannot find cumulative error.[38]

G. The Trial Court did not Err in Ordering Court Costs.

As a final issue presented to us on appeal, both Roe and the Commonwealth agree that the trial court erroneously imposed court costs. The trial court's sentencing order mandated that Roe pay court costs of $155. KRS 23A.205 states that court costs may not be waived unless the court finds that the defendant is a "poor person" under KRS 453.190(2). A *poor person* is defined as a person "who is unable to pay the costs and fees of the proceeding which he is involved without depriving himself or his dependents of the necessities of life, including food, shelter, or clothing."[39]

Both sides concede that Roe is indeed a "poor person" under the terms of the statute, and they both recommend that the court costs be vacated. But this issue has not been preserved for our review. In *Spicer v. Commonwealth*, we clarified that "[i]f a trial judge is not asked at sentencing to determine the defendant's poverty status and did not otherwise presume the defendant to be . . . [a] poor person before imposing court costs, then there is no error to

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[38] *See Brown v. Commonwealth*, 313 S.W.3d 577, 631 (Ky. 2010) (". . . we have declined to hold that the absence of prejudice plus the absence of prejudice somehow adds up to prejudice.").

[39] KRS 453.190.

correct on appeal."[40] A sentencing error only occurs when a defendant's poverty status is clearly established and the trial judge imposes costs contrary to that finding. In the present case, Roe never objected to the imposition of court costs nor did he petition the trial court to evaluate his poverty status. We cannot say the trial court committed a sentencing error when he was never apprised of Roe's inability to pay. So we will not vacate the court costs imposed during sentencing.

III. CONCLUSION.

For the foregoing reasons, we affirm the judgment of the trial court.

All sitting. All concur.

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[40] 442 S.W.3d 26, 35 (Ky. 2014).