IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: DECEMBER 15, 2016
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2015-SC-000138-MR

DAVID PHILPOT — APPELLANT

V.

ON APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE THOMAS L. JENSEN, JUDGE
CASE NO. 14-CR-00107

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

The Appellant, David Philpot, was convicted of felony theft by unlawful taking, along with several misdemeanors, and of being a first-degree persistent felony offender (PFO). He was sentenced to twenty years in prison. On appeal, he claims that (1) failing to grant his motion for a directed verdict on the theft charge was error, (2) introducing the identities of victims of his past crimes during the penalty phase was palpable error, (3) failing to have the jury recommend a sentence on the basic theft conviction before determining his PFO status and resulting enhanced sentence was palpable error, and (4) imposing misdemeanor fines and a partial public-defender representation fee was palpable error. We reverse the imposition of the fines and fee but otherwise affirm Philpot's convictions and sentence.

I. Background

On November 6, 2013, police received a call about an intoxicated man at a gas station. By the time Deputy Mike Amherst responded to the call, the man had left. Deputy Amherst searched the surrounding area and eventually spotted the man, later identified to be Philpot, near a restaurant. Philpot ran behind the restaurant attempting to flee from Deputy Amherst but was tackled and restrained by an employee of the restaurant.

According to Deputy Amherst, Philpot was "amped up" and yelling. He initially provided a fake name and birth date, and he would not cooperate. He also repeatedly reached into his pockets and waistband. Deputy Amherst handcuffed Philpot due to his unruly behavior. When the deputy patted him down, he found Philpot's social-security card and identification, a glass pipe, and car keys. The car keys appeared to be new, and a Hertz rental car tag was attached to them.

Philpot then managed to slip a hand out of the cuffs, pushed the deputy in the chest, and ran off. Deputy Amherst chased after him on foot and tackled him to the ground. The deputy employed his Taser to subdue Philpot and re-handcuffed him.

Philpot remained agitated, however, and admitted that he had been on methamphetamine for seven days without sleeping. When asked about the car keys, Philpot gave several conflicting statements. First, he claimed that a friend had dropped him off at the gas station, but then he stated that he had actually driven there himself. Ultimately, he told the officer that he and a friend had found an unlocked rental car in the Hertz lot with the keys (which had been

found in his pocket) in the vehicle and had driven off with the car. He added that they eventually left the car at a barn on East Highway 80. According to Deputy Amherst, police later found the car parked in a barn on East Highway 80.

Police contacted Hertz and confirmed that the car belonged to them. It had been rented on November 1 by Lloyd Dollar, who returned it on November 4 (two days prior to Philpot's arrest). Dollar confirmed that when he returned the rental car, he parked it in the Hertz lot and placed the keys in the business's after-hours drop-box. Only the Hertz's owners could unlock the drop-box. (Because no one could explain how the keys could have been taken from the drop-box and ending up in Philpot's possession, at least one of the investigating officers suspected someone at Hertz had been involved.) According to the owners, the rental car, a 2013 Chevrolet Cruze, was undamaged and in good condition and had a book value of $14,000.

Philpot was charged with theft by unlawful taking of property valued at more than $10,000. He was also charged with second-degree fleeing or evading police, resisting arrest, menacing, disorderly conduct, public intoxication, giving police a false name, third-degree assault, possession of drug paraphernalia, third-degree escape, and being a first-degree persistent felony offender. The Commonwealth ultimately moved to have the menacing, giving-a-false-name, and disorderly conduct charges dismissed; and after a one-day trial, the jury acquitted Philpot of third-degree assault and third-degree escape. The jury found him guilty of the lesser felony theft by unlawful taking of property valued at more than $500 but less than $10,000, as well as the

misdemeanor offenses of second-degree fleeing or evading police, resisting arrest, public intoxication, and possession of drug paraphernalia.

In the penalty phase, the jury found Philpot guilty of being a first-degree PFO and recommended a five-year prison sentence for the theft conviction, PFO-enhanced to twenty years. (It recommended concurrent sentences for the misdemeanors.) The trial court sentenced him according to the jury's recommendations, including imposing fines for the misdemeanor convictions totaling $1,750 as well as a $250 partial fee for his public-defender representation.

Philpot now appeals to this Court as a matter of right. *See* Ky. Const. § 110(2)(b).

II. Analysis

A. Sufficient evidence supported the conviction for theft by unlawful taking.

Philpot's first claim is that the trial court erred in denying his motion for a directed verdict on the theft charge.

When ruling on a motion for a directed verdict, a trial court "must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth." *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991). It must "assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given such testimony." *Id.* A directed verdict should not be granted "[i]f the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty." *Id.* And only if "under the evidence as a whole, it

would be clearly unreasonable for a jury to find guilt," will a defendant be entitled to a directed verdict of acquittal on appeal. *Id.*

KRS 514.030, in relevant part, provides that "a person is guilty of theft by unlawful taking or disposition when he unlawfully ... [t]akes or exercises control over movable property of another with intent to deprive him thereof." KRS 514.030(1)(a). Philpot maintains that there was no proof that he had the necessary "intent to deprive" Hertz of the rental car when he took it from their parking lot. "Deprive," in the context of Chapter 514, is defined as either "[t]o withhold property of another permanently or for so extended a period as to appropriate a major portion of its economic value or with intent to restore only upon payment of reward or other compensation," KRS 514.010(1)(a), or "[t]o dispose of the property so as to make it unlikely that the owner will recover it," KRS 514.010(1)(b).

According to Philpot, the evidence showed only that he and his friend discovered the car with the keys in it and merely took it joyriding before abandoning it. There was no evidence, he argues, demonstrating that he ever intended to keep the car or to pawn, sell, scrap, or otherwise dispose of it. Thus, he contends, the evidence was insufficient to support finding that he took the rental car intending to deprive Hertz of it, and accordingly, he was entitled to a directed verdict.

Philpot is correct that there is no direct evidence showing what his intent actually was when he took the rental car. But intent may (and often must) be proved through circumstantial evidence in the absence of direct proof. Indeed, "[i]ntent can be inferred from the actions of an accused and the surrounding

circumstances. The jury has wide latitude in inferring intent from the evidence." *Anastasi v. Commonwealth*, 754 S.W.2d 860, 862 (Ky. 1988).

Here, there was sufficient circumstantial evidence that Philpot (apparently along with his friend) took the rental car from the Hertz lot without permission and with the intent to deprive Hertz of the car. First, the simple act of driving off with the car without permission itself is evidence of such intent. This is the most reasonable inference to be drawn from that opportunistic act—few would infer from such conduct an intention only to temporarily "borrow" the rental car.

And the evidence of his having "hidden" the car inside a barn several miles away is also circumstantial evidence suggesting an intent to deprive by making the stolen vehicle difficult to discover. We acknowledge that Philpot takes issue with this characterization of what, he claims, was instead mere abandonment of the car upon ceasing his temporary use of it—arguing, "[t]here was no credible evidence that [he] hid the vehicle." This is based on his impression of the record as demonstrating that the car was found parked beside, rather than inside, the barn. Unfortunately for him, the record demonstrates the opposite: Deputy Amherst testified that police discovered the vehicle parked inside the barn, not beside it. Based on this testimony, it would indeed be reasonable to infer that he parked the stolen vehicle inside the barn to hide it from view and prevent its discovery.

Additionally, the fact that he had kept the car's keys in his possession refutes the notion that he only intended to temporarily drive it around before abandoning it on East Highway 80 for Hertz to retrieve. To the contrary, that

fact implies that he had not intended to abandon the vehicle when he parked it. His continuing possession of the keys suggests an ongoing intent to indefinitely deprive Hertz of the car that was only cut off by the happenstance of his run-in with Deputy Amherst.

We need not belabor the point further because the aforementioned evidence was easily sufficient to allow a reasonable jury to find beyond a reasonable doubt that Philpot took the rental car with the intent to deprive its owners of it. Philpot's arguments to the contrary are unconvincing and ignore the requirement that "all fair and reasonable inferences from the evidence" must be drawn in favor of the Commonwealth when ruling on a directed-verdict motion. *Benham*, 816 S.W.2d at 187. Weighing the evidence is for the jury, not the court. In fulfilling that responsibility, the jury found against Philpot. Under the evidence as a whole, it was reasonable to do so. The trial court was correct to deny the motion for a directed verdict.

B. Introducing Philpot's prior victims' identities during the penalty phase was not palpable error.

During the trial's penalty phase, the Commonwealth introduced evidence of Philpot's three prior convictions through a probation-and-parole officer. That evidence included testimony from the officer, who read to the jury the indictments from the prior cases. This included reading the names of each of the victims in those cases.[1] Copies of the final judgments in those cases were

[1] Knox Circuit case no. 03-CR-00129 involved receiving stolen property valued at $300 or more; the victim was Tincher Williams Chevrolet. Laurel Circuit case no. 08-CR-00201 involved second-degree criminal possession of a forged instrument; the victim was Paula Philpot. Finally, Laurel Circuit case no. 08-CR-00203 involved theft by unlawful taking valued at $300 or more, and the victim was Legacy Nissan.

also introduced into evidence, two of which included an order of restitution payable to the victim.[2]

Philpot admits that he did not object to the admission of this information, but argues that it was palpable error under Criminal Rule 10.26. To demonstrate palpable error resulting in "manifest injustice" warranting reversal, *see* CR 10.26, "the required showing is probability of a different result or error so fundamental as to threaten a defendant's entitlement to due process of law." *Martin v. Commonwealth*, 207 S.W.3d 1, 3 (Ky. 2006).

There is no disputing that it was error to admit Philpot's past victims' identities. Kentucky's truth-in-sentencing statute, KRS 532.055, permits the Commonwealth to offer evidence of "[t]he nature of prior offenses for which [the defendant] was convicted" during the penalty phase. KRS 532.055(2)(a)2. That does not include the underlying facts or circumstances of the crime but is instead "limited to conveying to the jury the elements of the crimes previously committed." *Mullikan v. Commonwealth*, 341 S.W.3d 99, 109 (Ky. 2011). As this Court has suggested since *Mullikan*, this should be accomplished "either by a reading of the instruction of such crime from an acceptable form book or directly from the Kentucky Revised Statute itself." *Id.* We added that "[s]aid recitation ... is best left to the judge." *Id.* And relevant here, we emphasized that "[t]he trial court should avoid identifiers, such as naming of victims, which

[2] In 03-CR-00129, Philpot was ordered to pay Tincher Williams Chevrolet $500 in restitution. In 08-CR-00201, he was ordered to pay Paula Philpot $1,080 in restitution.

might trigger memories of jurors who may—especially in rural areas—have prior knowledge about the crimes." *Id.*

This Court has repeatedly reiterated the rule laid down in *Mullikan* regarding the permissible scope of truth-in-sentencing evidence of prior convictions and the proper method for introducing it. And in *Webb v. Commonwealth*, 387 S.W.3d 319 (Ky. 2012), this Court found palpable error in the admission of detailed prior-conviction evidence, which included victims' identities. *See id.* at 330.

But the error in *Webb* is readily distinguishable from the error here. In *Webb*, the Commonwealth introduced details of the defendant's prior crimes and read the names of eight of his prior victims, five of which were police officers. This Court found that Webb was substantially prejudiced by this evidence primarily because all of the victims in that case had also been law-enforcement or correctional officers. That substantial prejudice constituted palpable error requiring remand for a new penalty phase. Admitting the victim's identities from Philpot's past crimes did not entail nearly the degree of prejudice that attended the admission of the police officers' identities in *Webb*.

Similarly, the improper past-crimes evidence here is distinguishable in degree from that admitted in the more recent palpable-error case, *Stansbury v. Commonwealth*, 454 S.W.3d 293 (Ky. 2015). In that case, the identities of two local victims of the defendant's past crimes were admitted along with evidence of three previous charges of first-degree wanton endangerment that were later dismissed. Relying on *Webb* and *Blane v. Commonwealth*, 364 S.W.3d 140, 152 (Ky. 2012) (holding introducing evidence of dismissed charges was palpable

error), this Court determined that admitting the past victims' names and the dismissed wanton-endangerment charges resulted in manifest injustice. *Stansbury*, 454 S.W.3d at 304–05. In reaching that conclusion, the Court was particularly concerned by the discrepancy between the seriousness of the dismissed charges of first-degree wanton endangerment and that of his actual convictions—third-degree burglary, third-degree criminal mischief, third-degree assault, and third-degree arson. *Id.* at 305.

In Philpot's case, however, no impermissible evidence of prior dismissed charges was introduced like in *Stansbury*. Instead, we have only the improperly admitted victims' names to consider. And again, considering the differences in circumstances, the introduction of Philpot's victims' identities does not raise the same degree of worry as it did in *Webb*.

With all that in mind, we cannot say that the penalty-phase error here resulted in manifest injustice. We discern no probability of the jury reaching a different result absent the error. *Martin*, 207 S.W.3d at 3. Nor do we regard the error as having been so fundamental as to have compromised the essential fairness of the trial and Philpot's entitlement to due process of law. *Id.* Admitting this evidence was erroneous, but not palpably so.

C. The out-of-order penalty-phase process was not palpable error.

Philpot claims that his trial's penalty-phase procedures were erroneous. Specifically, he complains about the jury having been allowed to find him guilty of being a first-degree persistent felony offender and recommend an enhanced sentence of twenty years on his theft conviction before it was directed to recommend an unenhanced sentence on the basic theft conviction.

Philpot is correct that ever since this Court's decision in *Reneer v. Commonwealth*, 734 S.W.2d 794 (Ky. 1987), the penalty phase and persistent-felony-offender phase may be combined into one because "the same evidence that is pertinent toward fixing the penalty is also pertinent for consideration in the enhancement of the sentence." *Id.* at 798. In holding as such, we were clear that the best practice in such a bifurcated hearing is to instruct the jury to "(1) fix a penalty on the basic charge in the indictment; (2) determine then whether the defendant is guilty as a persistent felony offender, and if so; (3) fix the enhanced penalty as a persistent felony offender." *Id.* And Philpot is correct that this Court has consistently reaffirmed these procedures since *Reneer*. *See, e.g., Sanders v. Commonwealth*, 301 S.W.3d 497, 500 n.1 (Ky. 2010) (stating that "[o]n remand, the trial court should instruct the jury in accordance with the procedure outlined in *Reneer*"); *Owens v. Commonwealth*, 329 S.W.3d 307, 319 (Ky. 2011) ("strongly encourag[ing] trial courts to follow the *Reneer* procedure").

It is clear that the trial court did not follow the correct procedures set forth in *Reneer*. It was only after the jury had found Philpot's PFO status and recommended the PFO-enhanced twenty-year sentence under the trial court's original instructions that they were belatedly instructed to recommend an unenhanced sentence on the basic theft conviction. This was out of order.

But, as Philpot admits, he did not raise a timely objection to these out-of-order procedures. So he is entitled to relief only if they amounted to palpable error under Criminal Rule 10.26.

This Court has previously held that the failure to follow the *Reneer* procedures does not amount to palpable error. *See, e.g., Owens*, 329 S.W.3d at 320; *see also Miller v. Commonwealth*, 383 S.W.3d 690, 704 (Ky. 2009) (suggesting that such errors are "procedural matter[s] which we need not address in the absence of a contemporaneous objection" (quoting *Montgomery v. Commonwealth*, 819 S.W.2d 713, 721 (Ky. 1991)). And Philpot has not demonstrated that the failure to follow the *Reneer* best practices here resulted in manifest injustice. That being said, we once again reiterate our directive that trial courts stick to the *Reneer* process. Although the failure to do so here was not palpable error, our holding should not be understood as foreclosing the possibility that such errors may be found to amount to palpable error under different circumstances.

D. The trial court erred in imposing the partial public-defender fee and misdemeanor fines.

Last, Philpot claims that the misdemeanor fines and partial public-defender fees ordered by the trial court were illegal because he is indigent.

Indigent or poor defendants, who cannot afford to hire an attorney, are entitled to legal representation provided by the Department of Public Advocacy. KRS 31.110 (entitling a "needy person" to representation); KRS 31.100(5) ("'Needy person' or 'indigent person' means: (a) A person ... who, at the time his or her need is determined, is unable to provide for the payment of an attorney and all other necessary expenses of representation ...."). An indigent person may, however, be ordered to pay a portion of the fee for his public-defender representation that the trial court determines he is able to pay. KRS 31.211(1).

And the fines typically available to punish those convicted of misdemeanors are not available if the trial court determines the convicted misdemeanant is indigent. KRS 534.040(4).

He did not, however, ask the trial court at sentencing to determine his poverty status and ability to pay. "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." *Spicer v. Commonwealth*, 442 S.W.3d 26, 35 (Ky. 2014) (emphasis added). This same rule applies to fees and fines. *See Trigg v. Commonwealth*, 460 S.W.3d 322, 332–33 (Ky. 2015). There is only a recognizable sentencing error to correct on appeal if "the imposition of a fine upon an indigent or 'needy' person is apparent on the face of the judgment or is in obvious conflict with facts established in the record (such as plainly having been found indigent at all stages of the trial proceedings)." *Id.* at 333.

Philpot contends that this procedural bar does not apply here because the record makes clear that the trial court did, in fact, believe that he was a poor person. He is correct.

At the arraignment, the trial court found that Philpot qualified for DPA representation under KRS Chapter 31 after considering his affidavit of indigency and request for counsel. Philpot was represented by DPA throughout his trial and sentencing. And following sentencing, the trial court granted his request to appeal *in forma pauperis*. *See* KRS 31.211(c) ("A person who, after conviction, is sentenced while being represented by a public defender shall continue to be presumed a needy person ... unless the court finds good cause

after a hearing to determine that the defendant should not continue to be considered an indigent person.").

So it is clear that the trial court considered Philpot, at the least, to be a needy person throughout his proceedings. Imposing the misdemeanor fines, which "shall not be imposed upon any person determined by the court to be indigent pursuant to KRS Chapter 31," KRS 524.040(4), was thus clearly erroneous.

That alone, however, would not necessarily bar imposing a partial public-defender fee. This is because KRS 31.211(1) by its terms contemplates needy people who are able to pay for some of their legal representation. Being "needy" under the statute means just that the person cannot afford to pay all of the costs and fees related to their representation. *See* KRS 31.100(5). It does not mean that they cannot pay any of them.

But the record here shows more. Most significantly, in sentencing Philpot, the trial court also waived court costs—"due to the defendant's indigency"—while simultaneously ordering payment of the fines and fee. This is important because the payment of court costs is "mandatory ... unless the court finds that the defendant is a poor person as defined by KRS 453.190(2) and that he or she is unable to pay court costs and will be unable to pay the court costs in the foreseeable future." KRS 23A.205. Under KRS 453.190(2), a "poor person" is "a person who is unable to pay the costs and fees of the proceeding in which he is involved without depriving himself or his dependents of the necessities of life, including food, shelter, or clothing."

So implicit in the trial court's waiver of court costs is its determination that there was no "reasonable basis for believing that the defendant can or will soon be able to pay" them. *Maynes v. Commonwealth*, 361 S.W.3d 922, 930 (Ky. 2012). And we need not rely exclusively on that implicit finding—in its subsequent order granting Philpot *in forma pauperis* status for appeal, the court expressly found that "the Defendant is a pauper *within the meaning of KRS 453.190* and KRS 31.110(2)(b)." (Emphasis added.) This finding "evinces the most serious form of financial hardship contemplated in our judicial-fee framework." *Sevier v. Commonwealth*, 434 S.W.3d 443, 471 (Ky. 2014).

The waiver of court costs and finding that Philpot was a poor person under KRS 453.190 thus precluded the assessment of a partial public-defender fee, which required finding a lesser degree of financial hardship than that. *Id.*; *see also Maynes*, 361 S.W.3d at 928. If the trial court did not believe Philpot was able to pay court costs without depriving himself of life's necessities, it cannot at the same time have believed that Philpot could pay the DPA fee without resulting in the same deprivation. And this logic extends to the misdemeanor fines as well, although the indigency finding under KRS Chapter 13 alone precluded imposing them. The trial court clearly erred in ordering Philpot to pay the partial public-defender fee and the misdemeanor fines.

III. Conclusion

For the reasons stated above, the judgment of the Laurel Circuit Court is reversed to the extent that it ordered payment of a partial public-defender fee and fines for Philpot's misdemeanor convictions but is otherwise affirmed, and

this matter is remanded for entry of a new final judgment consistent with this opinion.

All sitting. All concur.

COUNSEL FOR APPELLANT:

Shannon Renee Dupree
Assistant Public Advocate
Department of Public Advocacy
5 Mill Creek Park, Section 100
Frankfort, Kentucky 40601

COUNSEL FOR APPELLEE:

Andy Beshear
Attorney General

Courtney J. Hightower
Assistant Attorney General
Office of Criminal Appeals
Office of the Attorney General
1024 Capital Center Drive
Frankfort, Kentucky 40601