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RENDERED: APRIL 2, 2015

NOT TO BE PUBLISHED

Supreme Court of Kentucky

2013-SC-000542-MR

FINAL
DATE 8-20-15 EMA Growth, P.

MARK ADAM CAVE

APPELLANT

V. ON APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE KIMBERLY N. BUNNELL, JUDGE
NO. 12-CR-00432

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

A jury convicted Mark Adam Cave of wanton murder, tampering with physical evidence, and fraudulent use of a credit card in an amount greater than \$500 but less than \$10,000. The jury recommended a total sentence of twenty-five years, which the court imposed. Cave argues that the trial court made ten errors. Having reviewed the record and the arguments of the parties, we affirm.

I. BACKGROUND.

At the time of her death, Sharon Cave Howard (Sharon) was receiving social security disability benefits. Those benefits were automatically deposited to an account that Sharon accessed with a "Direct Express" debit card. Several days prior to Sharon's death, her son, Cave, cancelled that debit card and had a new card issued with a new PIN. On June 6, 2011, Cave killed Sharon and

hid her body in a trash container. Following Sharon's death, the Social Security Administration continued to make deposits to Sharon's account and Cave continued to use the debit card.

On December 28, 2011, Sharon's daughter and Cave's sister, Tracy, filed a missing person's report, and Detective Boles of the Lexington Fayette County Police Department began an investigation. On January 2, 2012, a Lexington police officer arrested Cave and charged him with shoplifting at a WalMart. Detective Boles learned that Cave had Sharon's debit card, and he conducted several interviews of Cave on February 1, 2012. During the course of those interviews, Cave confessed to killing Sharon, although he stated he could not remember the details, and he led police to Sharon's body. The grand jury indicted Cave for murder and tampering with physical evidence and for fraudulent use of a credit card for charging more than \$100 to Sharon's debit card in Fayette County between June 7, 2011 and July 4, 2011.

At trial, the primary issue was whether Cave was suffering from extreme emotional disturbance (EED) at the time he killed Sharon. In support of his claim of EED, Cave presented a substantial amount of evidence regarding his and Sharon's ongoing and long-term use of illegal drugs, and of Sharon's long-term physical and psychological abuse of him, his siblings, and his father. After considering the evidence, the jury rejected the Commonwealth's argument that Cave intentionally killed his mother, finding instead that he did so wantonly. We set forth additional facts as necessary below.

II. STANDARD OF REVIEW.

The issues raised by Cave have varied standards of review; therefore, we set forth the appropriate standard as we address each issue.

III. ANALYSIS.

A. **The Trial Court Did Not Err When It Denied Cave's Motion For A Directed Verdict On The Issue of Whether He Acted Under EED.**

Kentucky Revised Statute (KRS) 507.030 provides that an act which might otherwise be classified as murder rises only to the level of first degree manslaughter if the perpetrator acted under extreme emotional disturbance (EED). EED is "a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be." KRS 507.020. To prove EED, the defendant must put on proof that he "suffered 'a temporary state of mind so enraged, inflamed, or disturbed as to overcome [his] judgment, and to cause [him] to act uncontrollably from [an] impelling force of the extreme emotional disturbance rather than from evil or malicious purposes.'" *Greene v. Commonwealth*, 197 S.W.3d 76, 81 (Ky. 2006) (quoting *McClellan v. Commonwealth*, 715 S.W.2d 464, 468–69 (Ky. 1986)). Once the defendant has done so, the burden shifts

to the Commonwealth to disprove [EED] beyond a reasonable doubt. But that does not mean that [the Commonwealth] has to affirmatively introduce proof of the non-existence of EED, if such proof is already present. The Commonwealth loses if no such proof is present, but where . . . the proof, when taken in a light most favorable to the Commonwealth, meets this burden, it is then a jury question.

Greene, 197 S.W.3d at 81.

As noted above, Cave presented a significant amount of evidence that Sharon had physically and psychologically abused him, his father, and his siblings. Cave also presented evidence that he suffered a great deal following the deaths of his infant son and father several years earlier, and that Sharon had significant psychological problems, which resulted in treatment at an inpatient psychiatric facility in 2009, 2010, and the spring of 2011. During her last admission for treatment, Sharon indicated that she was afraid of Cave and that she did not believe she would be safe if released from the facility.

Sharon and Cave, who had lived together off and on, were living together during the months preceding Sharon's death in an apartment Sharon rented and, after being evicted, in a friend's trailer. Both Sharon and Cave used and abused a number of drugs, including Sharon's prescription Klonopin and "bath salts."

Cave testified that, on June 3, 2011, fearing that Sharon would use her debit card to purchase illegal drugs, he cancelled the card and requested a new one with a different PIN. Cave admitted that he then spent a sleepless weekend fueled by bath salts and Sharon's Klonopin.

The afternoon of June 6, 2011, when Cave returned home from work, Sharon began berating him, calling him a "piece of shit," "a bad father," and "nothing." She told Cave that he deserved to suffer from his son's death and that he was responsible for the stroke his father suffered several years before his death. Cave testified that, in order to escape Sharon's abuse, he took more Klonopin and went to his room to sleep, telling Sharon that he did not care if

he woke up. Sharon continued to "rant and rave" and, at 3:00 a.m., began beating on Cave's bedroom door, "yelling more abuse." Cave testified that his memory of what followed was unclear; however, he remembered leaving the trailer and that Sharon followed him and hit him. He also remembered hitting her and trying to put her body in a dumpster, but he denied stabbing her and Cave could not remember putting Sharon's body in a different trash container.

The police arrested Cave on unrelated charges shortly after he killed Sharon. Cave spent the night in jail and, when he got out, he told his friend that Sharon had moved and, in early July, Cave moved to Florida. In Florida, Cave met Janice Jordan, an unemployed nurse. The two lived together in Florida until December 31, 2011, when they decided to move to Lexington, Kentucky. As noted above, the police arrested Cave and, as set forth below, Cave confessed to killing Sharon and led the police to the trash container where he had put Sharon's body.

Based on the evidence of a lifetime of abuse coupled with the abuse he suffered on June 6, 2011, Cave moved the trial court to direct the jury to find that he was acting under EED when he killed Sharon. The court denied Cave's motion, which he now argues was reversible error. The Commonwealth argues that Cave's attempts to cover up the crime, his theft of and use of Sharon's debit card, and the violent nature of the crime refuted his claims of EED.

On a motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purposes of ruling on the motion, the trial court 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 to such testimony. On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal.

Commonwealth v. Benham, 816 S.W.2d 186 at 187 (Ky. 1991).

Cave is correct that he presented evidence that would have supported a finding that he acted under EED when he killed Sharon. However, as noted by the Commonwealth and as admitted by Cave in his brief, "[t]he evidence that [Cave] threatened Sharon, hid her body, left town, and lied is just as consistent with EED as it is with straight intent." Furthermore, the evidence that Cave cancelled Sharon's debit card and ordered a replacement with a new PIN is as consistent with a plan to harm Sharon as it is with his claim that he was trying to keep Sharon from buying illegal drugs. Taking the evidence in the light most favorable to the Commonwealth, we cannot say that the trial court erred in denying Cave's motion for a directed verdict on his EED claim.

B. Instructing the Jury Regarding Wanton Murder Did Not Violate Cave's Right to Due Process.

This issue is preserved; therefore, we review the court's determination to instruct the jury on wanton murder *de novo*. See *Morrow v. Commonwealth*, 286 S.W.3d 206, 209 (Ky. 2009).

KRS 507.020(b) defines wanton murder as "wantonly engag[ing] in conduct which creates a grave risk of death to another person and thereby causes the death of another person." Cave argues that the trial court erred by instructing the jury on wanton murder because there was no evidence he

engaged in the requisite conduct. We note that, in his brief, Cave intertwines this argument with his arguments regarding EED. We specifically address Cave's EED arguments in other sections of this opinion; therefore, we do not address those arguments here. The Commonwealth argues that evidence Cave consumed a significant amount of Klonopin and bath salts during and after engaging in an argument with Sharon was sufficient to support a finding of wanton murder. We agree.

Trial courts "are bound to instruct juries on the whole law of the case." *Morrow*, 286 S.W.3d at 213. As noted by the Commonwealth, the evidence could have supported a finding that Cave acted intentionally in order to end his lifelong abusive relationship with Sharon and steal her social security benefits. Furthermore, as set forth above, the evidence could have supported a finding that Cave acted under EED. However, the evidence was also sufficient to support a jury instruction on wanton murder. Cave took more Klonopin than he had ever taken before as well as a significant amount of bath salts before and after engaging in a heated argument with Sharon, and he and Sharon had a long history of physical and psychological abuse. That evidence was sufficient to support a finding that Cave's actions created a grave risk of Sharon's death, and the court's instruction on wanton murder.

We note Cave's argument that he took the Klonopin and bath salts in order to escape Sharon's abuse either through sleep or his own death. However, that argument ignores evidence that Cave had abused Klonopin, bath salts, and other drugs for a significant amount of time and, if he had wanted to

escape Sharon, he simply could have left. It was not unreasonable for the jury to find that, by staying in the situation and taking copious amounts of Klonopin and bath salts, Cave created a grave risk that the argument would escalate and he would not be able to control himself. Therefore, we discern no error in the court's instruction on wanton murder.

C. The Commonwealth's Statement Regarding the Law of EED During Closing Argument Does Not Warrant Reversal.

Cave argues that the Commonwealth misstated the law during closing argument, thus misleading the jury into rejecting his claim that he acted under EED.¹ This issue is not preserved; therefore, we review it under the palpable error standard. RCr 10.26. An error is palpable if it caused a manifest injustice, *i.e.* an injustice that seriously affected the fairness of the proceedings. *Jones v. Commonwealth*, 382 S.W.3d 22, 29 (Ky. 2011). Furthermore, the party claiming palpable error must show that, absent the error, there is a probability the result would have been different. *Martin v. Commonwealth*, 207 S.W.3d 1, 3 (Ky. 2006), *as modified (May 23, 2006)*.

The jury instructions correctly defined EED as follows:

A temporary state of mind so enraged, inflamed, or disturbed as to overcome one's judgment, and to cause one to act uncontrollably from the impelling force of the extreme emotional disturbance rather than from evil or malicious purposes. It is not a mental disease in itself, and an enraged, inflamed, or disturbed emotional

¹ We note that Cave refers to the Commonwealth's opening statement in this section of his brief, as well as to the Commonwealth's closing argument. We are uncertain why Cave refers to the Commonwealth's opening statement in a section of his brief arguing that the Commonwealth's closing argument was defective. However, the language in the Commonwealth's opening statement to which Cave refers is similar to the language the Commonwealth used in closing argument. Therefore, we do not separately address what the Commonwealth said in opening statement.

state does not constitute an extreme emotional disturbance unless there is a reasonable explanation or excuse therefore, the reasonableness of which is to be determined from the viewpoint of a person in the Defendant's situation under circumstances as the Defendant believed them to be.

During her closing argument, the Commonwealth's attorney indicated that an example of EED could be when one spouse catches the other in bed with a neighbor. That discovery can lead to a disturbed emotional state that impels the wronged spouse to act uncontrollably and commit homicide. Cave argues that this example of EED was a misstatement of the law and so misled the jurors that they rejected his EED defense. We disagree for three reasons.

First, the Commonwealth's attorney stated in her closing argument that Cave's attorney used this as an example of EED in his *voir dire*; therefore, it is somewhat disingenuous for him to complain if the Commonwealth used it in closing argument. Second, while it may not be a complete listing of what can constitute EED, the example cited by the Commonwealth can rise to the level of EED; therefore, it is not a misstatement of the law. Third, the courts grant counsel a great deal of latitude during closing argument, reversing "only if the misconduct is 'flagrant' or if each of the following are satisfied: (1) proof of defendant's guilt is not overwhelming; (2) defense counsel objected; and (3) the trial court failed to cure the error with sufficient admonishment." *Padgett v. Commonwealth*, 312 S.W.3d 336, 350 (Ky. 2010). For the reasons set forth above, the Commonwealth's example of what can constitute EED was not a flagrant misstatement of the law. Proof of Cave's guilt, *i.e.* his confessions, was overwhelming; Cave did not object to the Commonwealth's argument; and he

did not ask nor receive an admonishment from the court. Thus, Cave failed to satisfy the *Padgett* criteria.

Cave also argues that the Commonwealth's statement that it was not required to prove why Cave killed Sharon was a misleading misstatement of the law regarding EED. Cave is incorrect. To obtain a conviction for intentional murder, the Commonwealth must prove two things, a defendant intended to kill the victim and did, in fact, kill the victim. The Commonwealth is not required to prove the defendant's motive for killing the victim. EED is a defense that, when asserted, requires the jury to find that the defendant was uncontrollably impelled to commit the act and thus unable to form the requisite intent. Assertion of EED does not require the jury to determine what the defendant's motive for killing the victim was nor does it add motive to the elements the Commonwealth must prove. Once a defendant presents evidence of EED, the Commonwealth, if it wishes to obtain a conviction for intentional murder, must prove the defendant was not acting under an uncontrollable impulsion. Motive may be a part of that proof, as it was here. However, motive is not a requisite element because the Commonwealth can meet its burden of negating EED by showing that the defendant's explanation or excuse for his actions was not reasonable under the circumstances. Therefore, the Commonwealth's statement that it was not required to prove motive was correct.

Based on the preceding we discern no error, palpable or otherwise, in the Commonwealth's closing argument.

D. Exclusion of Portions of Cave's Recorded Statement Did Not Violate the "Rule of Completeness" and Did Not Violate Cave's Right to Present a Defense.

Cave made four different recorded statements on February 1, 2012. The first was made at the police department to Detectives Bowles and Schnoover. The second was made while Detectives Bowles and Schnoover and Sgt. Richardson were driving Cave to the site where he disposed of Sharon's body. The third and fourth were both made at the police department, with the third being made to Detectives Bowles and Schnoover and the fourth being made to Cave's siblings. Prior to trial the Commonwealth filed a motion in *limine* seeking a ruling from the court that the preceding did, in fact, constitute four separate statements. Following a hearing, the court found that the statements are separate because they were made by Cave at four separate times, in different places, and to different people. Cave does not contest that ruling.

At trial, the Commonwealth sought to introduce three of Cave's statements, excluding the statement made in the police car. Cave objected to the exclusion of that statement based on "the rule of completeness." During the ride in the police car, Cave became quite upset, sobbing, asking for forgiveness, and vomiting. He argued that, to put the other three statements in context, and to show his extreme emotional disturbance, it was necessary to let the jury hear the police car interview. The court agreed that the Commonwealth could exclude the statement made in the police car, noting that the admitted statements were not rendered misleading by the exclusion.

On appeal, Cavè argues that exclusion of the statement made in the police car violated the rule of completeness and impeded his ability to present a defense. The standard of review on evidentiary issues is abuse of discretion. *Clark v. Commonwealth*, 223 S.W.3d 90, 95 (Ky. 2007). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). We address Cavè's arguments separately below.

1. The Exclusion of Cavè's Statement in the Police Car Did Not Violate the Rule of Completeness.

The rule of completeness comes from KRE 106, which provides that: "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it." To determine if exclusion of a statement or a portion of a statement is fair, the court must determine if "the meaning of the included portion is altered by the excluded portion." *Schrimsher v. Commonwealth*, 190 S.W.3d 318, 330-31 (Ky. 2006) (citations omitted).

Cavè argues that his demeanor in the police car - sobbing, expressing remorse, vomiting - was necessary to show that he was not faking when he cried during his other statements and when he cried at trial. This argument is flawed first because the determination is whether the excluded statement alters the meaning of the included statements, not whether it potentially alters the

jurors' assessment of Cave's demeanor at trial. Second, it is the meaning of the included statements that is at issue. In those statements, Cave confessed to killing his mother. Nothing in Cave's statement in the police car alters Cave's confession. In fact, the statement in the police car, if anything, bolsters Cave's admission that he killed his mother.

2. The Exclusion of the Police Car Statement Did Not Impede Cave's Ability to Present a Defense.

Cave argued that he should not be found guilty of murder because he acted under extreme emotional disturbance when he killed Sharon. According to Cave, the statement he gave in the police car was necessary to that defense. We disagree.

The defense of EED goes to the perpetrator's state of mind at the time of the crime. It does not go to the perpetrator's state of mind nearly eight months later. Certainly, the jury could have concluded that Cave's demeanor while he was in the police car showed that he suffered from significant remorse for his actions. However, Cave's remorse for his actions, no matter how heartfelt and sincere, does little to prove his mental state at the time he killed Sharon. Furthermore, Detective Bowles testified that Cave was upset during the ride in the police car, expressed remorse, and vomited. Therefore, Cave was able to put before the jury what he deemed to be the crucial elements of his statement in the police car, even if he could not do so in the manner he would have liked. Based on the preceding, the trial court did not abuse its discretion by excluding the statement Cave made in the police car.

E. Failure to Give an Instruction on Reckless Homicide Did Not Violate Cave's Right to Due Process.

Cave argues that the court should have given an instruction on reckless homicide. This issue is preserved and, because its resolution "turns on the trial court's determination as to whether to tender a jury instruction, we . . . engage in a *de novo* review." *Morrow v. Commonwealth*, 286 S.W.3d 206, 209 (Ky. 2009).

"A person is guilty of reckless homicide when, with recklessness he causes the death of another person." KRS 507.050.

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.

KRS 501.020(4).

Cave's argument appears to be that, after taking an overdose of Klonopin, he failed to recognize the substantial risk that he would cause Sharon's death. Based on his alleged drug induced failure to recognize that risk, Cave argues the court should have instructed the jury on reckless homicide. However, as the Commonwealth notes, KRS 501.020(3) provides, in pertinent part, that "[a] person who creates . . . a [substantial and unjustifiable] risk but is unaware thereof solely by reason of voluntary intoxication . . . acts wantonly with respect thereto." Thus, if Cave was unaware of the risk he would cause Sharon's death solely because of his drug

intake, as he argues, his behavior was wanton, not reckless; and the court did not err in refusing to instruct the jury on reckless homicide.

F. Cave's Conviction for Fraud.

The grand jury charged Cave with fraudulent use of a debit card to obtain money, goods, or services in excess of \$100 during the period between June 7, 2011, and July 4, 2011.² The indictment stated that this violation of KRS 434.650 amounted to a Class D felony; however, KRS 434.650 provides that theft by fraudulent use of a debit card has to be in excess of \$500 to be a Class D felony. The Commonwealth presented proof that Cave obtained money, goods, or services of more than \$500 during the relevant time period, and the jury convicted Cave of the Class D felony of theft of more than \$500 via fraudulent use of a debit card. Cave argues that the indictment was defective, and the trial court improperly permitted the Commonwealth to amend the indictment to conform to the proof. The Commonwealth argues the amendment was proper.

Initially, we note that Cave states in his brief that this issue was "preserved by defense objection and court ruling" and cites to the video record at 4:00 p.m. on June 28, 2013. On June 28, 2013, the court heard arguments on a motion to continue the sentencing hearing; there is no mention of the indictment, amending the indictment, or any objection to amending the

² The indictment refers to use of a credit card and what Cave actually used was Sharon's debit card. However, the statute under which Cave was charged treats credit and debit cards equally, and Cave does not object to the indictment's reference to a credit card. Because Sharon's card was a debit card, we use that term herein.

indictment. However, the Commonwealth concedes that Cave made "a generic objection" to its motion to amend; therefore, we address this issue.

Pursuant to RCr 6.16:

The court may permit an indictment, information, complaint or citation to be amended any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced. If justice requires, however, the court shall grant the defendant a continuance when such an amendment is permitted.

We review a trial court's determination to amend an indictment for abuse of the discretion granted to the court in RCr 6.16. *Baker v. Commonwealth*, 103 S.W.3d 90, 94 (Ky. 2003).

An indictment must contain "a plain, concise and definite statement of the essential facts constituting the specific offense with which the defendant is charged." RCr 6.10(2). "An indictment . . . shall not be deemed invalid . . . by reason of a defect or imperfection that does not tend to prejudice the substantial rights of the defendant on the merits." RCr 6.12. The indictment herein charged Cave with: (1) fraudulent use of a debit card; (2) during the period from June 7, 2011 through July 4, 2011; (3) resulting in the theft of more than \$100, which it designated as a Class D felony. Cave was convicted of: (1) fraudulent use of a debit card; (2) during the period from June 7, 2011 through July 4, 2011; (3) resulting in the theft of more than \$500, which amounted to a Class D felony.

The only difference between the indictment and the conviction was the amount of money involved. Cave argues that this change prejudiced him. We disagree. The indictment referred to more than \$100 and \$500 is more than

\$100. Therefore, we fail to see how Cave was misled by the indictment, particularly since the indictment referred to a Class D felony, the class of felony for which Cave was convicted.

Based on the preceding, the trial court did not abuse its discretion when it permitted the Commonwealth to amend the indictment to conform to the proof.

G. The Court's Order of Restitution.

On June 26, 2013, the Commonwealth moved the trial court for an order requiring Cave to pay restitution: to the Social Security Administration in the amount of \$8,520.16, which represents the losses that occurred from the day after Sharon's death until Cave's arrest for shoplifting; to the Crime Victim's Compensation Board (the Board) in the amount of \$1,439.80, which represents the amount the Board reimbursed Tracy for Sharon's memorial service; and to Care Cremation in the amount of \$1,800, which was the cost for cremation of Sharon's remains. Cave did not file any response to the Commonwealth's motion, and the trial court ordered Cave to pay a total of \$11,759 in restitution as part of the July 23, 2013 final judgment and sentence. The order of restitution does not state to whom restitution should be paid or in what specific amounts.³ After the court entered its final judgment and sentence,

³ Cave notes that there is a "Report of Court Ordered Restitution/Judgment" that was filed on July 2, 2013. That report appears to be a document generated by an investigator for the Social Security Administration and for the use of the Social Security Administration. It indicates the amount of restitution due and that the court ordered restitution on June 28, 2013. However, there is no June 28, 2013 order of restitution. It appears that the June 28, 2013 date was placed on the report because Cave's sentencing hearing was originally scheduled for June 28. However, the hearing

Cave did not file any objection to the restitution order, and he did not seek any additional findings from the trial court.

Cave now argues that the order of restitution should be vacated for three reasons: it violated his right to due process; it violated the applicable statutes and case law; and it violated his right to have a jury decide the amount of restitution. Because Cave did not preserve these arguments, we review them for palpable error and will only grant relief if we determine that Cave suffered a manifest injustice, *i.e.* an injustice that seriously affected the fairness of the proceedings. *Jones v. Commonwealth*, 382 S.W.3d 22, 29 (Ky. 2011); RCr 10.26.

1. The Trial Court's Sentencing Proceedings Did Not Violate Cave's Right to Due Process.

Cave's due process argument appears to be two-fold: first, he argues he did not receive reasonable notice of the amounts claimed or a reasonable opportunity to present evidence in rebuttal; second, he argues that any restitution to the Social Security Administration should exclude any amounts not traceable to Fayette County. As to the first argument, Cave is correct that "basic due process standards must be applied when restitution is assessed and imposed as one of the sentencing alternatives under KRS Chapter 532."

Jones, 382 S.W.3d at 31. Implicit in those standards is an adversarial hearing that includes the following protections:

was continued to July 19, 2013 and the report was not amended to reflect that new date or to reflect the date of the actual order of restitution, July 23, 2013.

- reasonable notice to the defendant in advance of the sentencing hearing of the amount of restitution claimed and of the nature of the expenses for which restitution is claimed; and
- a hearing before a disinterested and impartial judge that includes a reasonable opportunity for the defendant, with assistance of counsel, to examine the evidence or other information presented in support of an order of restitution; and
- a reasonable opportunity for the defendant with assistance of counsel to present evidence or other information to rebut the claim of restitution and the amount thereof; and
- the burden shall be upon the Commonwealth to establish the validity of the claim for restitution and the amount of restitution by a preponderance of the evidence, and findings with regard to the imposition of restitution must be supported by substantial evidence.

Id. at 32.

Applying the preceding standards, we determined Jones's due process rights had been violated. However, this case differs from *Jones*. In *Jones*, no mention of restitution was made prior to the sentencing hearing. During the sentencing hearing, the victim's mother testified the victim would incur \$600 a month in medical expenses for the rest of her life. Neither the victim's mother nor the Commonwealth offered any medical or documentary evidence to support this claim. Despite that, the court, apparently assuming the victim had a forty year remaining life expectancy, ordered Jones to pay \$288,000 in restitution. *Id.* at 25-6.

Unlike in *Jones*, the Commonwealth provided Cave with more than three weeks notice that it was seeking an order of restitution. Furthermore, the Commonwealth specified the amounts due and the entities it believed were entitled to restitution. Thus, Cave had reasonable notice of the amount and

nature of the restitution claimed. Furthermore, the court held a hearing, which afforded Cave, who was represented by counsel, the opportunity to challenge with evidence the restitution claimed. He, for whatever reasons, did not do so. He cannot now claim that his right to due process was violated when he did not avail himself of the process he had been afforded. As we noted in *Jones*, restitution may be clearly established from the evidence at trial or readily ascertainable from receipts, invoices, estimates, etc. In such cases, the issue of restitution may "be summarily resolved with minimal formality and with practical efficiency." *Id.* at 31. In light of Cave's failure to contest the Commonwealth's motion or its proof, we cannot find fault, and certainly we cannot find palpable error, in the court's determination to order restitution.

As to the second argument, Cave has offered no legal authority to support his contention that restitution to the Social Security Administration should be limited to amounts taken while he was in Fayette County. Therefore, we do not address it.

2. The Court's Order of Restitution Did Not Violate KRS 532.032 or 532.033.

Cave argues that the court's order of restitution "should be struck down for violation of KRS 532.032 and 532.033." KRS 532.032 provides in pertinent part that:

(1) Restitution to a named victim, if there is a named victim, shall be ordered in a manner consistent, insofar as possible, with the provisions of this section and KRS 439.563, 532.033, 533.020, and 533.030 in addition to any other part of the penalty for any offense under this chapter. The provisions of this section shall not be subject to suspension or nonimposition.

...

(5) Restitution payments ordered under this section shall be paid by the defendant to the clerk or a court-authorized program run by the county attorney or the Commonwealth's attorney of the county.

KRS 532.033 provides the restitution order shall specify the person or organization to be paid and for the circuit clerk to make disbursement accordingly. Furthermore, the order shall set a payment schedule, if the payment is not a lump sum, and provide that the court will monitor the payment of restitution.

Cave is correct that the order of restitution is deficient because it does not set forth the provisions required by KRS 532.032 and 532.033. However, the remedy for any such deficiencies, particularly when Cave did not ask the court to correct them, is to remand to the court with instructions for it to enter a proper order. It is not to "strike down" the order.

Cave also argues that the court's order of restitution as to the Board and for the cost of cremation is in violation of the statute. As support for his argument about restitution to the Board, Cave cites to KRS Chapter 346, which provides for compensation to crime victims by the Commonwealth. Cave argues that, pursuant to KRS Chapter 346, the Board should not have compensated Tracy for Sharon's memorial service because only those who are legally responsible for funeral expenses are entitled to compensation. *See* KRS 346(1)(d). According to Cave, a husband may be liable for his wife's funeral expenses but an adult child cannot be legally responsible for her parent's funeral expenses. This argument is flawed for at least four reasons. First,

legal liability and legal responsibility are not necessarily interchangeable terms. One may not have any legal liability to pay for something, *i.e.* a child may very well have no duty to pay for a parent's funeral expenses. However, if that child contracts with a funeral home to provide services, that child becomes legally responsible. Second, determining whether to make an award to a crime victim is within the purview of the Board. The only party who can challenge an action by the Board is the victim; therefore, Cave lacks standing to challenge the Board's actions. Third, the determination to award compensation to Tracy was not challenged and, even if it was inappropriately made, the Board's determination is now final. Fourth, as noted above in our discussion of due process, Cave had the opportunity to challenge the court's award of restitution and simply did not do so. He cannot do so now.

Cave argues that he should not be responsible for the expense related to Sharon's cremation because the coroner could have opted to donate Sharon's remains to one of the state medical schools rather than cremating them. *See* KRS 72.450. According to Cave, by choosing to have Sharon's remains cremated, the coroner saddled him with "an unconstitutional fine." This argument is faulty for at least three reasons. First, whether to have a body cremated or to donate a body is at the sole discretion of the coroner. Cave has not shown how the coroner's choice to have Sharon's remains cremated may have been an abuse of that discretion. Second, pursuant to KRS 311.300, the medical school has the option of taking or not taking a body that has been donated. Cave has not shown that either of the state's medical schools would

have taken Sharon's remains. Third, as we have noted previously, if Cave wanted to challenge this portion of the restitution order, he could have and should have done so before the trial court.

3. Cave Waived Any Right He May Have Had to a Jury Trial on the Issue of Restitution.

Finally, as to restitution, Cave argues that he was entitled to a jury trial on the issue. Again, we note that this issue is not preserved.

In support of his contention, Cave cites to *United States v. Bearden*, 274 F.3d 1031 (6th Cir. 2001) and *Commonwealth v. Bailey*, 721 S.W.2d 706 (Ky. 1986) for the proposition that restitution is a civil damage award, not a criminal penalty. *Bearden* is not applicable because the 6th Circuit Court of Appeals was interpreting the federal restitution statute, not KRS Chapter 532. While *Bailey* is not controlling because it addresses KRS 431.200, which deals with reparations to victims, not KRS Chapter 532, which deals with restitution, we recently applied *Bailey's* reasoning to KRS Chapter 532 in *Sevier v. Commonwealth*, 434 S.W.3d 443, 469 (Ky. 2014); therefore, we agree with Cave that restitution is a civil damage award, not a criminal penalty.

Cave is correct that Section 7 of the Kentucky Constitution and CR 38.01 guarantee the right to trial by jury in civil cases. However, Cave ignores CR 38.04, which states that the failure to demand a jury trial waives that right. Cave never demanded a jury trial on the issue of restitution; therefore, he waived any right he may have had to one. Because Cave did not seek a jury

trial on the issue of restitution, we are not addressing whether he would have been entitled to a jury trial had he done so.

Finally, we note that Cave's reliance on the mandatory jury trial provision in KRS 431.200 is misplaced. As we noted above, KRS 431.200 addresses reparations sought after sentence has been pronounced. It does not address restitution sought as part of sentencing. Therefore, it has no application herein.

H. Cave's Entitlement to Classification as a Victim of Domestic Violence.

During trial, Cave presented a substantial amount of evidence that Sharon had been physically and psychologically abusive to him, his father, his brother, and his sister. Prior to sentencing, Cave moved the court for a finding that he was victim of domestic violence and therefore eligible for parole after serving 20% of his sentence. At the July 19, 2013 sentencing hearing, Cave's counsel argued that he was entitled to that classification based on the evidence that was presented during trial. He did not initially ask for an evidentiary hearing. The court found that, based on evidence produced at trial, there was undisputed evidence of drug abuse and violence in the home. However, the court did not believe there was a connection between the domestic violence and the murder. Cave then asked for an evidentiary hearing, a motion the court denied because it could not believe there could be any additional evidence.

Cave now asks this Court to find that he was, as a matter of law, a victim of domestic violence or, lacking such a finding, to remand this matter to the trial court with instructions to hold an evidentiary hearing. Cave is correct

that there was overwhelming evidence that he was the victim of domestic violence. However, as the trial court found, there must be some connection between that domestic violence and the crime. *Commonwealth v. Vincent*, 70 S.W.3d 422, 425 (Ky. 2002) ("[A] prior history of domestic violence between a violent crime victim and the criminal defendant who perpetrated the violent offense does not, in and of itself, make the defendant eligible for the parole exemption of KRS 439.3401(5).") When determining if a defendant was a victim of domestic violence the trial court "may take into consideration all the circumstances of the case, including the credibility of the witness."

Commonwealth v. Anderson, 934 S.W.2d 276, 278 (Ky. 1996). If the court's finding is supported by "a preponderance of the evidence," we will not disturb it unless the court's determination was "clearly erroneous." *Id.* at 278-79.

Here, although there was evidence of significant and longstanding domestic violence by Sharon against Cave, there was also significant evidence that Cave and Sharon went on binges abusing numerous drugs. Furthermore, there was evidence that Cave had changed the PIN to Sharon's debit card several days before he killed her. That evidence was sufficient to support the trial court's finding that there was no connection between domestic violence and Sharon's murder. Furthermore, Cave has not indicated what additional evidence could or would be produced at an evidentiary hearing. Therefore, we discern no error in the trial court's finding that Cave was not a victim of domestic violence for the purpose of reducing his parole eligibility.

I. The Court's Imposition of Court Costs Was Not Error.

In its judgment, the trial court imposed court costs on Cave in the amount of \$151. Cave argues this assessment of costs was erroneous because the court did not first determine if Cave is a "poor person" as defined by KRS 453.190(2). This issue is unpreserved; however, "this Court has jurisdiction to cure . . . sentencing errors." *Travis v. Commonwealth*, 327 S.W.3d 456, 459 (Ky. 2010). "[A]n appellate court is not bound to affirm an illegal sentence just because the issue of the illegality was not presented to the trial court." *Jones v. Commonwealth*, 382 S.W.3d 22, 27 (Ky. 2011).

We recently addressed this issue in *Spicer v. Commonwealth*, 442 S.W.3d 26, 35 (Ky. 2014), holding;

The assessment of court costs in a judgment fixing sentencing is illegal *only* if it orders a person adjudged to be "poor" to pay costs. Thus, while an appellate court may reverse court costs on appeal to rectify an illegal sentence, we will not go so far as to remand a facially-valid sentence to determine if there was in fact error. If a trial judge was not asked at sentencing to determine the defendant's poverty status and did not otherwise presume the defendant to be an indigent or poor person before imposing court costs, then there is no error to correct on appeal. This is because there is no affront to justice when we affirm the assessment of court costs upon a defendant whose status was not determined. It is only when the defendant's poverty status has been established, and court costs assessed contrary to that status, that we have a genuine "sentencing error" to correct on appeal.

The trial court here, like the court in *Spicer*, did not make an assessment of Cave's financial status other than appointing a public defender and permitting him to proceed *in forma pauperis* on appeal. Determining that a defendant is "needy" so as to be entitled to a public defender is not the same as

determining that a defendant is "poor" so as to be exempt from the assessment of costs. *Id.* As with Spicer, Cave's representation by a public defender does not necessarily exempt him from court costs. Furthermore, as with Spicer, the trial court's assessment of costs "was not inconsistent with any facts in the record" and does not constitute error. *Id.* Therefore, we affirm the trial court's assessment of court costs.

IV. CONCLUSION.

For the foregoing reasons, we affirm Cave's conviction.

All sitting. All concur.

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