

Commonwealth of Kentucky
Court of Appeals

NO. 2013-CA-001666-MR

BRADLEY CORDLE

APPELLANT

v. APPEAL FROM GREENUP CIRCUIT COURT
HONORABLE ROBERT B. CONLEY, JUDGE
ACTION NO. 12-CR-00160

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING IN PART,
REVERSING IN PART, AND REMANDING

** ** * * * * *

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

ACREE, CHIEF JUDGE: Bradley A. Cordle appeals from the September 11, 2013 judgment entered by the Greenup Circuit Court after being convicted by a jury on August 12, 2013, of fleeing or evading police, assault in the fourth degree, and being a persistent felony offender in the second degree. After review, we affirm in part, reverse in part, and remand.

On May 22, 2012, Cordle and another individual, Latiessa Adams, visited the home of an acquaintance, Larry Lemaster. Adams and Lemaster both testified that Cordle was intoxicated when he arrived at Lemaster's home. At some point, Cordle and Lemaster got into a fight after Lemaster accused Cordle of damaging his scooter. After Lemaster asked Cordle to leave, Cordle pushed Lemaster to the ground and kicked him in the ribs. Cordle also threw a cup of coffee at Lemaster. Cordle left Lemaster's home, taking the keys to Lemaster's 2012 Ford Escape with him.

The police arrived after Lemaster called 911. Sergeant David Smith arrived at Lemaster's home and observed the Ford Escape backing out of the driveway. Sgt. Smith turned on his police lights and shouted to the driver of the Ford Escape to stop the vehicle. As Smith approached the driver's side door, the driver of the Ford Escape drove away through Lemaster's backyard into an alley. Smith reported the missing vehicle in the National Crime Information Center database, and a "Be On the Lookout" alert was issued.

A few hours later, Sgt. Randy Goodall of the Lawrence County Sheriff's office in Lawrence, Ohio, received a complaint about an individual going from door to door looking for gasoline. When he arrived in the area, he recognized the Ford Escape as the Kentucky vehicle reported missing by Smith. Cordle was standing next to the vehicle. Goodall testified that he could smell the odor of alcohol on Cordle. Goodall placed Cordle under arrest.

Following a jury trial, Cordle was found not guilty of theft, and guilty of fleeing or evading, unauthorized use of a motor vehicle, fourth-degree assault, and being a persistent felony offender. He was sentenced to a prison term of ten years.

On appeal, Cordle argues that the verdict should be set aside and the matter remanded for a new trial for several reasons. First, Cordle argues that the trial court erred by failing to instruct the jury on the lesser-included offense of second-degree fleeing and evading. The difference between first-degree and second-degree fleeing and evading is that the former requires that one of four aggravating factors exist that the latter offense does not. *Compare* KRS 520.095 with KRS 520.100; *see also* *Crain v. Commonwealth*, 257 S.W.3d 924, 928 (Ky. 2008). A court is required to instruct the jury on all offenses that are supported by the evidence, but does not need to give an instruction on a lesser-included offense if there is no evidentiary foundation for the instruction. *Commonwealth v. Swift*, 237 S.W.3d 193, 195 (Ky. 2007).

We review the trial court's rulings with respect to lesser-included offense jury instructions for an abuse of discretion. *Ratliff v. Commonwealth*, 194 S.W.3d 258, 274 (Ky.2006). "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).

In this case, the aggravating factor for the first-degree fleeing or evading offense was driving under the influence of alcohol. Cordle claims that he

was entitled to a second-degree instruction because the jury could have reasonably believed his driving ability was not impaired by alcohol at the time he fled from Lemaster's property. Cordle argues that the Commonwealth failed to introduce evidence to establish that his driving was impaired. Cordle conflates being under the influence of alcohol with being impaired by alcohol. First-degree fleeing or evading only requires proof the defendant was driving under the influence of alcohol, not proof of driving impairment. *See* KRS 520.095 and KRS 189A.010.

Here, all the evidence indicates Cordle was under the influence of alcohol at the time he fled, including the testimony of Adams and Lemaster. Moreover, Cordle requested and received an intoxication instruction as part of his defense, demonstrating his defense theory relied, at least in part, on evidence that he was under the influence of alcohol when he committed the acts. Accordingly, we hold that the trial court did not abuse its discretion by declining Cordle's request for a second-degree fleeing or evading instruction, as there was no evidentiary foundation upon which the jury could conclude he was not under the influence of alcohol.

Cordle next argues the trial court's instruction on fleeing or evading in the first degree was incorrect. The instruction required the jury to find "[t]hat he was operating the motor vehicle while under the influence of alcohol or any other substance or combination of substances *which may impair one's driving ability.*" (emphasis added). Cordle claims that the "may impair" language was incorrect because it did not require the jury to find that Cordle was actually impaired by

alcohol while driving. We disagree. As discussed above, fleeing or evading in the first degree does not require a finding that Cordle be actually impaired by alcohol while driving. Therefore, we find no error in the trial court's instruction.

Lastly, Cordle argues that the trial court erroneously ordered him to pay court costs and fines. On September 11, 2013, the trial court ordered Cordle to pay court costs and a fine in the amount of \$281. Cordle argues he is unable to pay court costs and a fine because he is a "poor person" within the definition of KRS 453.190. Although this issue was not preserved for review, sentencing is jurisdictional and errors may be raised on appeal for the first time. *Travis v. Commonwealth*, 327 S.W.3d 456, 459 (Ky. 2010).

KRS 534.040(4) provides that fines shall not be imposed upon a person determined to be indigent pursuant to KRS Chapter 31. In addition, KRS 23A.205(2) provides that a defendant found to be a "poor person" within KRS 453.190(2) is not responsible to pay court costs. *See also Edwards v. Van De Rostyne*, 245 S.W.3d 797, 802 (Ky. App. 2008). While Cordle is correct that indigent persons can be absolved of court costs, the record never demonstrates that he was determined to be indigent. Now, Cordle contends he is indigent because he will be serving a long prison sentence. However, mere incarceration does not necessarily render one indigent under KRS 453.190. *Van De Rostyne*, 245 S.W.3d at 802 (Ky. App. 2008) (to determine an inmate's indigence, the trial court must "consider the value of all . . . an inmate receives by virtue of his incarceration").

Because Cordle was never declared a poor person, he was therefore never immunized from court costs and fees. In fact, the trial court levied both costs and fees against Cordle in accordance with an AOC-465.2 form on September 11, 2013 – the same day the court affirmed the jury’s verdict. While the judgment is silent as to Cordle’s responsibility for court costs and fees, the AOC-465.2 form clearly indicates the trial court’s intention to levy those costs.

After Cordle filed his notice of appeal to this court, the trial court entered an order dated September 23, 2013, finding Cordle to be indigent within the definitions of both KRS 453.190 and KRS 31.110(2)(b). We read the trial court’s subsequent determination of Cordle’s indigence only to relate to the costs for his appeal, not his trial. Therefore, we affirm Cordle’s obligation to pay the fees levied by the trial court.

While we affirm the trial court’s levy of fees and costs, we must absolve Cordle of his responsibility to pay a fine. The trial court assigned Cordle a public defender from the Kentucky Department of Public Advocacy. From that assignment we may infer the trial court determined Cordle a needy person. *See Roberts v. Commonwealth*, 410 S.W.3d 606, 611 (Ky. 2013)(“Because Appellant was provided court-appointed counsel pursuant to KRS 31.110(2)(b), and was granted the right to appeal *in forma pauperis* pursuant to KRS 453.190, we may assume the trial court determined that he was an indigent person.”). Cordle’s indigence therefore immunizes him from having to pay a fine. KRS 534.040(4)

(“Fines required by this section shall not be imposed upon any person determined by the court to be indigent pursuant to KRS Chapter 31.”).

The circuit court failed to delineate the precise amount of costs and fines in its order – it merely referred to their collective total as being \$281. Because our decision holds Cordle responsible only for costs, not fines, we must remand this matter to the circuit court to specify the precise amount of costs and fines. After doing so, the circuit court must then subtract the amount of fines from the \$281 total.

For the foregoing reasons, the judgment of the Greenup Circuit Court is affirmed in part, reversed in part, and remanded to the circuit court for further proceedings consistent with the instructions in this opinion.

ALL CONCUR.

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