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RENDERED: FEBRUARY 23, 2012
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2010-SC-000162-MR

ANTHONY McMAHAN APPELLANT

V.

ON APPEAL FROM TAYLOR CIRCUIT COURT
HONORABLE DAN KELLY, JUDGE
NO. 08-CR-00087

COMMONWEALTH OF KENTUCKY APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING, IN PART, AND VACATING, IN PART

Anthony McMahan appeals, as a matter of right,[1] his convictions and sentences for second-degree assault, fourth-degree assault, second-degree wanton endangerment, and driving under the influence. He contends the trial court erred by (1) not providing jury instructions for fourth-degree assault, (2) denying his motion for a directed verdict for the offense of second-degree assault, (3) declining to strike a juror for cause, and (4) imposing a $1,500 fine.

We affirm the convictions and the sentences except for the imposition of the $1,500 fine, which we vacate because McMahan was indigent.

I. FACTUAL AND PROCEDURAL HISTORY.

It was almost noon when McMahan's car crossed the center line of the highway and struck head-on an oncoming vehicle carrying four members of the

[1] Ky. Const. § 110(2)(b).

Schmitt family. The driver of the Schmitt vehicle sustained no injuries, one passenger received minor injuries, but the other two passengers were severely injured. McMahan also sustained injuries and was hospitalized. Testing at the hospital revealed that his blood-alcohol level was about two and a half times the legal limit.

The grand jury charged McMahan with three counts of first-degree assault, one count of first-degree wanton endangerment, and first-offense DUI. The circuit court jury convicted McMahan of two counts of second-degree assault, one count of fourth-degree assault, one count of second-degree wanton endangerment, and first-offense DUI. The trial court sentenced him to a total of 20 years' imprisonment and imposed a $1,500 fine.

II. ANALYSIS.

A. The Jury Instructions Were Proper.

The trial court instructed the jury on first and second-degree assault regarding the two seriously injured victims in the car wreck. McMahan tendered instructions for fourth-degree assault of those two victims, but the trial court declined to instruct the jury on fourth-degree assault. We find the trial court did not err in its ruling.

The Commonwealth contends this issue is not preserved because McMahan's tendered instructions incorrectly stated the elements of fourth-degree assault. Nowhere in our case law do we require tendered instructions to state the law correctly in order to preserve a jury-instruction issue for appellate review. By tendering even incorrect instructions, McMahan fairly and

adequately presented his position to the trial judge as required by Kentucky Rules of Criminal Procedure (RCr) 9.54(2).[2] The trial court knew McMahan sought to include fourth-degree assault in the jury instructions. So we hold that McMahan adequately preserved this issue for appeal.

A court must instruct a jury on all offenses that the evidence supports.[3] But "[a]n instruction on a lesser[-]included offense is appropriate if, and only if, on the given evidence a reasonable juror could entertain a reasonable doubt as to the defendant's guilt of the greater offense, but believe beyond a reasonable doubt that the defendant is guilty of the lesser offense."[4]

Fourth-degree assault differs from second-degree assault only in that it requires a lesser degree of culpability and a less serious injury to establish its commission. A person is guilty of second-degree assault when "[h]e **wantonly** causes **serious** physical injury to another person by means of a deadly weapon or a dangerous instrument."[5] A person is guilty of fourth-degree assault when "[w]ith **recklessness** he causes physical injury to another person by means of a deadly weapon or a dangerous instrument."[6] So fourth-degree assault is a

[2] RCr 9.54(2) states, "No party may assign as error the giving or the failure to give an instruction unless the party's position has been fairly and adequately presented to the trial judge by an offered instruction or by motion, or unless the party makes objection before the court instructs the jury, stating specifically the matter to which the party objects and the ground or grounds of the objection."

[3] *Clark v. Commonwealth*, 223 S.W.3d 90, 93 (Ky. 2007) (citation omitted).

[4] *Taylor v. Commonwealth*, 995 S.W.2d 355, 362 (Ky. 1999) (citations omitted).

[5] KRS 508.020(1)(c) (emphasis added).

[6] KRS 508.030(1)(b) (emphasis added).

lesser-included offense of second-degree assault.[7] And the trial court erred in refusing to give fourth-degree assault instructions only if, on the evidence, a reasonable juror could reasonably doubt McMahan is guilty of second-degree assault.

McMahan concedes that the victims sustained serious injuries and that his car qualifies as a dangerous instrument for purposes of second-degree assault. But he argues the evidence at trial supports the theory that he acted recklessly, as required under fourth-degree assault. A person acts recklessly when he fails to perceive a substantial and unjustifiable risk.[8] He acts wantonly when he is aware of and consciously disregards a substantial and unjustifiable risk.[9] The facts of the case established at trial compel the conclusion that McMahan was aware of and consciously disregarded the risk that he would injure others by driving drunk. So we find a reasonable juror could not entertain a reasonable doubt that McMahan wantonly caused a serious physical injury to the victims by striking them with his car.

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[7] The relevant part of KRS 505.020(2) states,

> A defendant may be convicted of an offense that is included in any offense with which he is formally charged. An offense is so included when:
>
> (c) It differs from the offense charged only in the respect that a lesser kind of culpability suffices to establish its commission; or
>
> (d) It differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property or public interest suffices to establish its commission.

[8] KRS 501.020(4).

[9] KRS 501.020(3).

Approximately thirty minutes after the accident, McMahan's blood-alcohol concentration was .201, which is about two and a half times the legal limit.[10] McMahan did not meaningfully controvert this test result at trial. The police detective on the case talked with McMahan two hours after the accident and concluded that he was intoxicated, based on a heavy odor of alcohol and McMahan's speech.[11] McMahan told the detective that he consumed two shots of whiskey and two or three Lorazepam pills that morning before the accident; and the night before the accident, he drank alcohol and took several Flurazepam pills.[12] McMahan also relayed to one hospital employee that he consumed four mixed drinks the morning of the accident and to another employee that he drank four shots of whiskey that morning. And McMahan's wife twice told the detective that he consumed three shots of alcohol before the accident.

[10] KRS 189A.010(1)(a) (the legal limit for a person 21 years of age or older is .08).

[11] On cross-examination, the detective stated McMahan was intoxicated but not drunk because he was alert and spoke coherently. And before the current DUI laws were in effect, the detective may not have charged McMahan with drunk driving. But the detective spoke with McMahan two hours after the accident. And the detective maintained that McMahan was intoxicated, impaired by the alcohol he had drunk, and should not have been driving. Our laws do not distinguish between drunkenness and intoxication. And the detective's testimony does not alter the conclusiveness of the blood alcohol test result.

[12] A doctor testified via video deposition that Lorazepam and Flurazepam are sleeping pills that someone with sleep apnea should not take and should not mix with alcohol, especially when driving.

The Commonwealth also introduced testimony from a driver who passed McMahan on the road a few minutes before the accident.[13] He testified that McMahan was traveling between seventy and eighty miles per hour. McMahan was not in control of his car; and he crossed the center line, forcing the driver into the emergency lane.

McMahan testified that at the time of the accident, he was taking a prescription medication, Mirapex, morning and night for restless leg syndrome. The Commonwealth introduced a video deposition of a doctor who testified that Mirapex can cause drowsiness. For this reason, the drug is not usually taken in the mornings. The doctor also testified that the medication should not be taken with alcohol, especially before driving, because both cause sleepiness.[14] So taking Mirapex was particularly dangerous for McMahan, who had severe sleep apnea.

McMahan's defense at trial was that he acted recklessly, not wantonly, by driving his vehicle the morning of the accident. He based this defense on the theory that he did not drink alcohol the morning of the accident. Rather, he fell asleep due to his severe sleep apnea or because he took his prescription medication. And he was unaware of any risk that his medical condition or medication could cause him suddenly to fall asleep. So he could not be found guilty of second-degree assault because he did not act wantonly. Alternatively, even if he did drink the morning of the accident, he argued he was not drunk

[13] After the driver arrived home, he heard about the accident and drove back to the scene. He recognized McMahan and his vehicle as the car he met on the road.

[14] The Mirapex label also contained a warning not to drink alcohol.

because he "had a tremendous, almost freak capacity for alcohol and his prescribed substances." So he thought he could drive safely after consuming alcohol and prescription drugs and was unaware of any risk that he could injure others.

In support of his theories, McMahan testified that he drank "pretty heavy" the night before the accident; but he went to bed at around 11:30 p.m.[15] And he claimed he did not drink between then and the time of the accident. McMahan's son and wife testified that they did not see him drink alcohol the morning of the accident, nor did he appear drunk. McMahan and his wife did not remember telling the detective or hospital employees otherwise. A hospital nurse testified that he was cooperative, alert, and oriented, because he could answer questions and state his name, location, and the date.[16]

Based on the evidence, a reasonable juror could not reasonably doubt that McMahan was aware of and consciously disregarded the risk that he could injure others by driving the morning of the accident. Regardless of whether McMahan knew he should not mix alcohol and his prescription medication or that sleep apnea could cause him to fall asleep suddenly, McMahan knew he should not drink and drive. Uncontroverted test results showed his blood alcohol content was .201. And the jury, in fact, convicted him of driving under the influence. No reasonable juror could find that McMahan was not drunk

[15] This was approximately twelve hours before the accident.

[16] He also received the highest score on the Glascow-Coma scale. The nurse testified that this basically means he was alert and oriented.

and could properly operate a vehicle while his blood alcohol content was two and a half times the legal limit.[17]

The Commonwealth did not have to prove McMahan knew that mixing his prescription drugs and alcohol could cause sleepiness or that severe sleep apnea can cause a person to suddenly fall asleep.[18] Drinking necessarily played a role in the accident. McMahan consciously disregarded a substantial and unjustifiable risk that he could injure others simply by driving while intoxicated. As McMahan contends, perhaps he disregarded this risk because he drank and took prescription pills in the past without incident. But we cannot say he was unaware of the risk that drinking and driving imposes. So we find the trial court properly refused to instruct the jury on fourth-degree assault.

B. The Trial Court Properly Denied a Directed Verdict for the Offense of Second-Degree Assault.

Regarding the serious physical injuries of two of the victims, the jury convicted McMahan of second-degree assault. As detailed above, the jury found that he wantonly caused a serious physical injury to the victims by means of a deadly instrument.[19] McMahan concedes his car was a dangerous instrument under the statute and that the victims sustained serious injuries.

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[17] As the prosecutor argued in his closing statement, a reasonable juror could not believe this level of intoxication arose from drinking alcohol approximately twelve hours before the accident.

[18] We also note that the evidence showed McMahan was not in control of his car leading up to the accident. This contradicts McMahan's claim that he suddenly fell asleep at the wheel because of his sleep apnea.

[19] KRS 508.020(1)(c).

But he argues the Commonwealth failed to prove he acted wantonly because he was unaware of any risk that he would injure others by driving the morning of the accident.

When ruling on a motion for a directed verdict of acquittal, the trial court must view the evidence in favor of the Commonwealth.[20] And questions of the credibility and weight of evidence are left to the jury.[21] A directed verdict must be denied if a reasonable juror could find the elements of the crime proven beyond a reasonable doubt.[22]

This issue is not preserved for appeal because McMahan did not renew his motion for a directed verdict at the close of all the evidence.[23] So we review the issue for palpable error.[24] If the trial court palpably erred in denying a directed verdict, relief may be granted if the error resulted in manifest injustice.[25] Manifest injustice is found only if the error seriously affected the "fairness, integrity or public reputation of [the proceeding]."[26]

We find the trial court did not err, palpably or otherwise, in denying a directed verdict for the offense of second-degree assault. Above, we held that a

[20] *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991).

[21] *Id.*

[22] *Id.*

[23] *Commonwealth v. Jones*, 283 S.W.3d 665, 669 (Ky. 2009) (citations omitted) ("[T]o preserve an error based upon the insufficiency of the evidence the defendant must move for a directed verdict at the close of the Commonwealth's proof and must renew his motion at the close of all evidence: at the end of the defense case (if there is one), or, if there is rebuttal evidence, as there was in this case, at the conclusion of rebuttal.").

[24] *Id.* at 668 (citation omitted).

[25] *Martin v. Commonwealth*, 207 S.W.3d 1, 3 (Ky. 2006).

[26] *Id.* at 4 (citations omitted).

reasonable juror could not reasonably doubt that McMahan was guilty of second-degree assault. So we necessarily find, for the reasons stated above, that a reasonable juror could find the elements of second-degree assault proven beyond a reasonable doubt.

C. The Trial Court did not Abuse its Discretion by Refusing to Strike a Juror for Cause.

The brother-in-law of the prosecutor's law partner was a prospective juror at trial. The trial court denied McMahan's motion to excuse the juror for cause. So McMahan used a peremptory challenge to excuse the juror. He claims he would have used that challenge on another individual who sat on the jury. On appeal, McMahan claims the trial court erred by not excusing the juror for cause because the juror was in a close familial relationship with the prosecutor.

A trial court must excuse a potential juror "[w]hen there is reasonable ground to believe that [he] cannot render a fair and impartial verdict on the evidence[.]"[27] "The court must weigh the probability of bias or prejudice based on the entirety of the juror's responses and demeanor."[28] And

> notwithstanding a prospective juror's responses during voir dire, whatever his or her protestations of lack of bias, the juror's close relationship, "be it familial, financial or situational, with any of the parties, counsel, victims or witnesses," is sufficient to require the court "to sustain a challenge for cause and excuse the juror."[29]

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[27] RCr 9.36(1).

[28] *Shane v. Commonwealth*, 243 S.W.3d 336, 338 (Ky. 2007).

[29] *Brown v. Commonwealth*, 313 S.W.3d 577, 596 (Ky. 2010) (citations omitted).

The standard of review for a trial court's decision regarding whether to strike a juror for cause is abuse of discretion.[30]

We find the trial court did not abuse its discretion in declining to strike the juror for cause. The juror was not in a close relationship with the prosecutor that would require the trial court to excuse him. We held in *Ward v. Commonwealth*[31] that the trial court did not abuse its discretion in refusing to excuse for cause two jurors related to the Commonwealth's Attorney. One juror was the prosecutor's ex-brother-in-law and the other juror was the attorney's distant cousin.[32] If being an ex-brother-in-law is not a close familial relationship for purposes of excusing a juror for cause, neither is being the brother-in-law of the prosecutor's law partner. So we do not presume that the prospective juror was prejudiced based solely on his connection to the prosecutor. It appears from the voir dire that the prosecutor and juror did not personally know each other.[33] And the juror was not personally involved in the prosecutor's law partnership. The juror also said he believed in the presumption of innocence and could decide the case objectively. Given the absence of a close relationship and the juror's responses and demeanor in voir

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[30] *Id.* (citation omitted).

[31] 695 S.W.2d 404 (Ky. 1985).

[32] *Id.* at 407.

[33] During voir dire, the prosecutor listed the names of his law partners and asked if any potential juror knew them. The juror approached the bench to alert the trial court, Commonwealth's Attorney, and McMahan's counsel of the connection between himself and the prosecutor's law partner. The prosecutor asked which partner was the juror's brother-in-law. And upon hearing the juror's response, the prosecutor said, "I did not know that."

dire, we find the trial court did not abuse its discretion in denying McMahan's motion to dismiss the juror for cause.

D. The Trial Court Erred by Imposing a Fine on McMahan Because he was Found Indigent.

McMahan argues the trial court erred when it imposed a $1,500 fine on him at sentencing. The jury recommended twelve months' imprisonment for both fourth-degree assault and second-degree wanton endangerment, thirty days' imprisonment for driving under the influence, and a $500 fine for each of McMahan's misdemeanor convictions. The trial court imposed the prison sentences and fines but waived court costs. Later, the trial court denied McMahan's motion to appeal the judgment *in forma pauperis*.

McMahan concedes this issue was not preserved for appellate review because he did not object to the fine at sentencing. But the improper imposition of a fine as part of a judgment is a jurisdictional sentencing issue.[34] So we will review the issue as though it were preserved.

Fines may be imposed on a defendant convicted of a misdemeanor, unless the defendant is indigent.[35] An indigent person is defined as a person "unable to provide for the payment of an attorney and all other necessary expenses of representation."[36] Court costs upon conviction are mandatory unless the defendant is a poor person.[37] "A 'poor person' means a person who

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[34] *Travis v. Commonwealth*, 327 S.W.3d 456, 459 (Ky. 2010).

[35] KRS 534.040(4).

[36] KRS 31.100(3)(a).

[37] KRS 23A.205(2).

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."[38]

By imposing the $1,500 fine and waiving court costs, the trial court contradictorily determined that McMahan was not indigent but was a poor person. It is impossible for a person to be unable to pay court costs without depriving himself of the necessities of life but be able to pay for an attorney and expenses of representation. We assume the trial court had already found that McMahan was indigent because he was represented by the Department of Public Advocacy.[39] And the trial court did not hold a hearing to reassess McMahan's indigent status. So we find the trial court erred in imposing the $1,500 fine and we vacate that portion of the sentence.

III. CONCLUSION.

For the foregoing reasons, we vacate the trial court's judgment imposing a $1,500 fine on McMahan; but we affirm the convictions and remaining sentences imposed. The case is remanded to the trial court for entry of judgment consistent with this opinion.

All sitting. All concur.

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[38] KRS 453.190(2).

[39] KRS 31.110.

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