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RENDERED: AUGUST 29, 2013
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2012-SC-000153-MR

JASON OLIVER — APPELLANT

V.

ON APPEAL FROM JESSAMINE CIRCUIT COURT
HONORABLE C. HUNTER DAUGHERTY, JUDGE
NO. 10-CR-00304

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

James Oliver appeals as a matter of right from a Judgment of the Jessamine Circuit Court convicting him of assault in the first degree and robbery in the first degree. The jury recommended a thirty-five year prison sentence, and the trial court sentenced him accordingly. Oliver raises five issues on appeal: (1) the trial court abused its discretion when it allowed a police officer to testify as an expert; (2) evidence of Oliver's child support arrearages was erroneously admitted; (3) Oliver's double jeopardy rights were violated when he was convicted of first-degree robbery and first-degree assault; (4) the trial court erred when it denied Oliver's motion for a directed verdict on the robbery charge; and (5) the trial court erred when it assessed court costs against Oliver. We affirm Oliver's convictions, reverse the imposition of court costs, and remand to the trial court solely for further findings on that issue.

RELEVANT FACTS

On September 16, 2010, cab driver James Boggess gave Jason Oliver a ride from Lexington to Oliver's mother's home in Nicholasville. After they arrived, Oliver, without warning and seemingly unprovoked, stabbed Boggess repeatedly through the driver's-side window and attempted to take cash from him before fleeing the scene on foot. A police officer responding to an unrelated call in the neighborhood came to Boggess's aid. Soon after, another officer arrived and apprehended Oliver.

Oliver was charged with first-degree assault and first-degree robbery. According to Oliver's trial testimony, the attack occurred after Boggess and Oliver engaged in a heated discussion concerning a drug transaction. Oliver asserted that he stabbed Boggess in self-defense after Boggess attempted to strangle him. A Jessamine County jury found Oliver guilty of both charges and recommended a sentence of twenty years for first-degree assault and fifteen years for first-degree robbery, with the sentences to run consecutively. As noted, the trial court sentenced him accordingly and this appeal followed.

ANALYSIS

I. Detective's Blood Spatter Testimony Was Properly Admitted.

Oliver's first claim on appeal is that the trial court erred in qualifying the lead detective in the case as an expert in blood spatter analysis and crime scene reconstruction. The Commonwealth sought to prove that Boggess was stabbed while still seated inside the van in order to discredit Oliver's self-

defense claim.[1] To that end, Detective Mike Elder of the Nicholasville Police Department was called to testify about his involvement in the case, which included photographing and investigating the scene. Much of Elder's testimony focused on his investigation of the van. At trial, Elder explained that he observed blood on the interior of the driver's-side door and on the driver's seatbelt. When the Commonwealth asked Elder what would cause the blood to "roll down" the underside of the seatbelt, defense counsel objected, stating that the question called for speculation and Elder was "no expert on that." In the ensuing bench conference, the trial court directed the Commonwealth to lay a proper foundation for Elder's training as it related to blood pattern recognition.

Elder testified to having received training over the course of his nineteen-year career (fifteen years as a detective including twelve years as a lead detective) in the investigation of bloody crime scenes, which enabled him to identify distinct blood patterns, such as smears, droplets, and spatters. Finding the foundation sufficiently established, the trial court allowed Elder to relay his observations to the jury. He described seeing a large amount of blood on the door, on the backside of the steering column, and on the steering wheel. He noted that there was some additional "cast-off," which is produced by blood being slung, found on the passenger-side door and window. According to

[1] According to Oliver, Boggess slapped him and stabbed him in the hand after the two argued over a debt. Oliver testified that Boggess then exited the vehicle and tackled him to the ground where Boggess attempted to choke him, and that Oliver stabbed Boggess in self defense. Therefore, Oliver's self-defense claim could only be substantiated if there was proof that Boggess was stabbed outside the van.

Elder, the blood patterns were indicative of "action" happening inside the vehicle.

Elder's direct examination resumed the following day. The Commonwealth asked Elder if he had formed an opinion based on the totality of his investigation and his training as to whether Boggess was attacked inside the van. Defense counsel objected to the inquiry and asked for a *Daubert* hearing[2] in order to establish Elder's credentials in crime scene reconstruction. At the bench, Elder testified to having eighty hours of formal crime scene investigation training wherein he learned how to classify blood patterns based on the effect of various physical forces on the blood. He explained that this training included not only blood pattern recognition, but also general instruction on crime scene analysis. In addition to the eighty hours of crime scene investigation training, Elder also received specialized homicide investigation training. He explained that many aspects of his training focused on identifying the location of a crime. Based on this foundation, the trial court allowed the Commonwealth to ask Elder if he had an opinion as to the location of the crime. Elder testified that he believed that Boggess was attacked inside the van.

Oliver now claims that the trial court erred in qualifying Elder as an expert in blood spatter recognition and crime scene reconstruction. He

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[2] *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) (holding that a preliminary assessment of a proffered expert's testimony must be made to consider whether reasoning or methodology underlying testimony is scientifically valid and whether that reasoning or methodology properly can be applied to facts in issue).

contends that the trial court abused its discretion under Kentucky Rule of Evidence ("KRE") 702 by admitting Elder's testimony without establishing the proper qualifications. We disagree.

Before we begin our analysis, we must first address the Commonwealth's contention that this issue is only partially preserved for our review. The Commonwealth complains that Oliver's objection to foundation concerning Elder's blood pattern testimony was insufficient to preserve the issue of his expert qualifications. Having reviewed the record, it is clear that the essence of the trial court's ruling on the Commonwealth's foundation went directly to Elder's expert qualifications.[3] Therefore, to the extent that Oliver objected to Elder's blood pattern recognition qualifications, the issue is preserved. However, Oliver's main contention on appeal (*i.e.* that Elder's opinion as to where the crime occurred was improperly offered) arises from the trial court's determination that Elder was qualified to testify concerning crime scene reconstruction and investigation.[4]

Under KRE 702, an expert may testify concerning "scientific, technical, or other specialized knowledge" if that testimony "will assist the trier of fact to

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[3] *See Dixon v. Commonwealth*, 149 S.W.3d 426 (Ky. 2004) (police officer's testimony concerning drug trafficking notations was properly characterized as expert testimony because the officer had "no personal knowledge as to the meaning of the notations and the average juror would not be expected to have acquired such knowledge.").

[4] Apart from referencing the testimony, Oliver's argument fails to address with specificity the trial court's ruling on Elder's blood pattern recognition qualifications from the first day of his direct examination. Oliver does not challenge the trial court's decision to forego a *Daubert* hearing concerning Elder's blood pattern recognition qualification, nor did he pursue a *Daubert* hearing during trial. *C.f. Dixon*, 149 S.W.3d at 431.

understand the evidence or to determine a fact in issue." Generally, a witness qualified as an expert by "knowledge, skill, experience, training, or education" may testify in the form of an opinion. *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 577 (Ky. 2000). A police officer may testify under KRE 702 based on his or her training and experience when the knowledge required is neither complex nor extensive. *Duncan v. Commonwealth*, 322 S.W.3d 81, 97 (Ky. 2010). A trial court has wide latitude in determining how to test an expert's qualifications, and we will disturb a trial court's ruling only when there has been an abuse of discretion. *Goodyear Tire and Rubber Co.*, 11 S.W.3d at 577; *Dixon*, 149 S.W.3d at 430.

The essence of Elder's testimony which Oliver now challenges, precisely, *where* the crime occurred, is similar to an inquiry addressed by this Court in *Allgeier v. Commonwealth*, 915 S.W.2d 745 (Ky. 1996). In *Allgeier*, two officers testified in a burglary trial that gouge marks on the back door of a home did not necessarily indicate a forced entry. 915 S.W.2d at 746-747. This Court affirmed the trial court's qualification of the officers, concluding that the officers' extensive training and experience in burglary investigations rendered them qualified to offer their opinion on the matter. *Id.* at 747. The Court in *Allgeier* distinguished this kind of testimony from the "more extensive and complex knowledge required for testimony by traditional experts, such as accident reconstructionists and forensic pathologists." *Id. Dixon v. Commonwealth* is also instructive. 149 S.W.3d 426. In *Dixon*, we determined that a narcotics investigator was qualified to opine that notations on a slip of

paper referenced drug transactions. *Id.* at 430. We reached a similar conclusion in *Duncan v. Commonwealth* after the trial court permitted an officer to offer his opinion that witnesses often estimate a suspect's height inaccurately. 322 S.W.3d at 97. *See also Evans v. Commonwealth*, 116 S.W.3d 503 (Ky.App. 2003) (officer's testimony concerning common drug trafficking procedures was properly admitted).

An officer with limited formal training in a particular discipline can be qualified to offer expert testimony when his or her training is augmented by substantial experience. *Bush v. Commonwealth*, 839 S.W.2d 550, 555 (Ky. 1992) (an officer was qualified to testify as an accident reconstructionist based on a thirteen year career despite having only relatively limited formal training in that discipline). Furthermore, offering an opinion as to the location of a crime is not, in this Court's estimation, so far outside the realm of ordinary detective expertise as to run afoul of KRE 702.[5] An experienced lead detective who is skilled in the field of crime scene investigation is similar to a narcotics officer who is skilled in the field of drug investigations. *See Sargent v. Commonwealth*, 813 S.W.2d 801, 803 (Ky. 1991).

Certainly, crime scene reconstruction analysis requires a more specialized level of knowledge than simply offering a lay opinion or an observation based on common sense. *See Bush*, 839 S.W.2d at 555. For example, it does not take an expert to identify the mere presence of blood

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[5] *But see c.f. Dyer v. Commonwealth*, 816 S.W.2d 647 (1991) (trial court erred in admitting an investigating officer's opinion that defendant fit the psychological profile of a pedophile based on personal belongings found in the defendant's home).

around a dead body, nor does it require any expertise to observe that the blood is fresh or dried. *Thompson v. Commonwealth*, 147 S.W.3d 22, 38 (Ky. 2004) (sheriff's opinion that blood at a crime scene appeared "fresh" did not invoke KRE 702 because that testimony was based on mere observations). In this case, Elder possessed the requisite expertise to offer his opinion as to *where* the crime occurred. Over the course of his lengthy career, Elder had received formal training where he was taught to identify blood patterns and carefully investigate crime scenes. Although Elder admitted to having only a vague familiarity with the advanced calculations used to determine the velocity and angle that blood evidence traveled, his testimony *was not* based on those sophisticated calculations. Considering both his formal crime scene investigation training as well as his nineteen years of investigative experience, Elder was qualified to offer his opinion concerning the location of the attack on Boggess. In sum, the trial court did not abuse its discretion under KRE 702.

II. Evidence of Child Support Arrearages Was Properly Admitted.

During its cross-examination of Oliver, the Commonwealth asked him if he owed money to anyone. When Oliver volunteered that he currently owed child support, the Commonwealth asked if it was true that he owed $31,000 in arrearages. Oliver now alleges that the trial court erred to his substantial prejudice when it allowed this evidence to be introduced. While Oliver concedes that the fact that he had outstanding child support obligations was indeed relevant to the Commonwealth's case (as a motive for robbery), he challenges the introduction of the exact amount. Finding this issue

unpreserved, we review for palpable error under Kentucky Rule of Criminal Procedure "(RCr") 10.26.[6] Under that standard, appellate relief may not be granted unless a clear error at trial affected the appellant's substantial rights and resulted in manifest injustice. *Commonwealth v. Jones*, 283 S.W.3d 665 (Ky. 2009); RCr 10.26.

Under KRE 404(b), a trial court has the discretion to admit evidence of prior crimes, wrongs, or bad acts if it is relevant and the potential for prejudice does not outweigh the probative value of such evidence. *Parker v. Commonwealth*, 952 S.W.3d 209, 213 (Ky. 1997). To determine if there was an abuse of discretion, we must undertake a two-fold analysis to first decide whether the evidence of Oliver's arrearages was admissible, and second, whether the extent of the evidence admitted was unduly prejudicial. *Brown v. Commonwealth*, 983 S.W.2d 513, 516 (Ky. 1999).

As our case law indicates, and as Oliver concedes, evidence of his unpaid child support was admissible pursuant to KRE 404(b) to demonstrate his alleged motive to rob Boggess. *See Meredith v. Commonwealth*, 164 S.W.3d 500, 506 (Ky. 2005); *Tucker v. Commonwealth*, 916 S.W.2d 181 (Ky. 1996) (*overruled on other grounds by Lanham v. Commonwealth*, 171 S.W.3d 14 (Ky. 2005)). Therefore, the question we must address is whether the assertion that

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[6] Defense counsel did not object to the Commonwealth's follow-up inquiry regarding Oliver's child support obligations. Later, when the Commonwealth inquired whether Oliver owed any fines or restitution, defense counsel objected to the relevancy of the "line of question." During the bench conference, Oliver's counsel admitted that he did not object to the Commonwealth's reference to the arrearages, stating, "I let it go for a while. I didn't object when he asked about child support." *See* RCr 9.22.

Oliver owed $31,000 in child support substantially prejudiced him and constituted manifest injustice. We find that it did not.

A trial judge must exercise discretion in determining the extent to which evidence of a prior offense may be admitted without prejudicing the defendant. *Funk v. Commonwealth*, 842 S.W.2d 476 (1992). The admission of excessive evidence may create undue prejudice and warrant reversal, as was the case in *Brown v. Commonwealth*. 983 S.W.2d 513. The Court in *Brown* reversed a defendant's murder conviction after the trial court improperly allowed the admission of excessive evidence of the defendant's flagrant non-support indictment. *Id.* at 516. That evidence included not only the indictment itself revealing the amount owed, but also the testimony of witnesses who described the methods for calculating the alleged arrearages as well as other testimonies based on the County Attorney's documents revealing that the defendant had not paid those obligations. *Id.*

The limited evidence proffered by the Commonwealth in this case concerning Oliver's child support arrearages is distinguishable from the extensive evidence submitted in *Brown*. 983 S.W.2d at 516. Aside from the singular challenged reference in the present case, the Commonwealth did not admit any further evidence of Oliver's outstanding child support obligations. No witnesses were called to testify to the Oliver's arrearages. *See Meredith v. Commonwealth*, 164 S.W.3d at 506 (testimony limited to statements that a defendant needed money to pay child support obligations was admissible to demonstrate motive for robbery under KRE 404(b)). In fact, the precise amount

of arrearages was revealed only after Oliver stated that he owed past child support.

Finally, any challenge to the Commonwealth's failure to provide pretrial notice of its intention to admit this evidence pursuant to KRE 404(c) is unpreserved.[7] *See Mayo v. Commonwealth*, 322 S.W.3d 41, 51 (Ky. 2010). Oliver contends that had he received KRE 404(c) notice, he would have been prepared to call his mother to testify to rebut the evidence of flagrant non-support. However, there was no specific reference to Oliver being charged or convicted of flagrant nonsupport under KRS 530.050(2). The Commonwealth never sought to introduce evidence of an indictment for flagrant nonsupport, nor did it ask Oliver if he was ever convicted of flagrant nonsupport. *But see c.f. Brown*, 983 S.W.2d at 516. Moreover, the record does not indicate that the Commonwealth necessarily intended to introduce this evidence in the first instance, as Oliver himself made the initial reference to the arrearages. In light of our decision in *Brown v. Commonwealth*, an isolated reference to the amount owed cannot be considered "excessive evidence." *See id. (citing Funk*, 842 S.W.2d at 481). The introduction of this evidence did not violate KRE 404(b), and certainly did not create manifest injustice.

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[7] KRE 404(c) provides: "In a criminal case, if the prosecution intends to introduce evidence pursuant to subdivision (b) of this rule as a part of its case in chief, it shall give reasonable pretrial notice to the defendant of its intention to offer such evidence. Upon failure of the prosecution to give such notice the court may exclude the evidence offered under subdivision (b) or for good cause shown may excuse the failure to give such notice and grant the defendant a continuance or such other remedy as is necessary to avoid unfair prejudice caused by such failure."

III. Oliver's Convictions Did Not Violate Double Jeopardy.

Prior to trial, Oliver moved to dismiss the first-degree assault charge on the basis that the charge violated the Double Jeopardy Clause of the Fifth Amendment. After hearing arguments on the matter, the trial court overruled the motion. The jury was instructed on both first-degree assault and first-degree robbery, ultimately convicting Oliver of both charges. Oliver now alleges that the trial court erred when it allowed the jury to convict him of two separate Class B felonies for the same act.

The Fifth Amendment of the United States Constitution and Section 13 of the Kentucky Constitution protect a defendant against multiple prosecutions for the same offense. This Court adopted the rule adduced in the seminal case *Blockburger v. United States*, 284 U.S. 299 (1932), as incorporated in KRS 505.020, as the test to resolve double jeopardy disputes:

> The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.

Blockburger, 284 U.S. at 304; *Burge*, 947 S.W.2d at 809-11.[8]

The essence of Oliver's claim is that serious physical injury, an element of the assault charge, is a "natural consequence" of the crime of first-degree robbery. Oliver alleges that the "elements of the crime of assault are swallowed

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[8] "Double jeopardy does not occur when person is charged with two crimes arising from the same course of conduct, as long as each statute 'requires proof of an additional fact which the other does not.'" *Commonwealth v. Burge*, 947 S.W.2d 805, 809 (Ky. 1996) (*citing Blockburger*, 284 U.S. at 304).

by the elements of the crime of robbery," thus constituting an impermissible multiple prosecution for the same act.

Turning to the applicable statutes pursuant to the *Blockburger* test, KRS 515.020(a) defines robbery in the first degree as follows:

> (1) A person is guilty of robbery in the first degree when, in the course of committing theft, he uses or threatens the immediate use of physical force upon another person with intent to accomplish the theft and when he:
> in the crime; or
>
> (a) Causes physical injury to any person who is not a participant
> (b) Is armed with a deadly weapon; or
>
> (c) Uses or threatens the immediate use of a dangerous instrument upon any person who is not a participant in the crime.

To compare, KRS 508.010 defines assault in the first degree as follows:

> (1) A person is guilty of assault in the first degree when:
>
> (a) He intentionally causes serious physical injury to another person by means of a deadly weapon or a dangerous instrument; or
>
> (b) Under circumstances manifesting extreme indifference to the value of human life he wantonly engages in conduct which creates a grave risk of death to another and thereby causes serious physical injury to another person.

In the present case, double jeopardy did not preclude Oliver's convictions of both offenses. First-degree assault requires serious physical injury, but first-degree robbery does not; first-degree robbery requires a finding that the actor committed or attempt to commit a theft of the victim, while first-degree

assault contains no such requirement. As Oliver notes, and this Court recognizes, serious physical injury is indeed likely to result from the use of a deadly weapon or dangerous instrument during the commission of a crime. *See Dixon v. Commonwealth*, 263 S.W.3d 583, 590 (Ky. 2008). However, the *Blockburger* test "focuses on the proof necessary to prove the *statutory elements* of each offense, rather than on the actual evidence to be presented at trial." *Illinois v. Vitale*, 447 U.S. 410, 416 (1980); *Polk v. Commonwealth*, 679 S.W.2d 231, 233 (Ky. 1984) (emphasis supplied).[9]

Oliver concedes that the jury instructions contained the distinctive elements of each offense.[10] Since a conviction for each offense required proof of facts not required in order to prove the other, the *Blockburger* test is satisfied. *See Taylor v. Commonwealth*, 995 S.W.2d 355 (Ky. 1999); *Fields v. Commonwealth*, 219 S.W.3d 742 (Ky. 2007). Oliver's convictions for both offenses do not violate either KRS 505.020 or the Double Jeopardy Clauses of the Kentucky or the United States Constitutions.

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[9] In a similar vein, Oliver contends that this issue should be resolved by applying the kidnapping exemption analysis. Under KRS 509.050, a person may not be convicted of kidnapping if the interference with the victim's liberty was incidental to the commission of a separate offense. Oliver's claim is premised on the assertion that the Commonwealth's theory of the case was that the assault of Boggess (*i.e.* the stabbing) was incidental to the robbery. This argument is unavailing, as the pertinent *Blockburger* inquiry is not what evidence was *actually* submitted to the jury, but what proof was *statutorily* required to secure a conviction. *Vitale*, 447 U.S. at 416.

[10] The jurors were instructed to find Oliver guilty of assault in the first degree if they believed beyond a reasonable doubt that he "intentionally caused a serious physical injury to James Boggess by cutting him with a knife." As for the robbery in the first degree charge, the jurors were instructed to find Oliver guilty only if they believed beyond a reasonable doubt that "he committed or attempted to commit a theft from James Boggess," and "that in the course of so doing and with the intent to accomplish the theft, he used or threatened the immediate use of physical force upon James Boggess with a knife."

IV. The Trial Court Properly Denied the Motion For a Directed Verdict.

At the close of the Commonwealth's case in chief, Oliver moved for a directed verdict on the first-degree robbery charge. Relying on the fact that Boggess never testified to being explicitly threatened with robbery, and that no money was actually taken from Boggess, Oliver maintained that the proof necessary to support the robbery charge was insufficient. The Commonwealth responded that Oliver reached for the money during the attack, and in the alternative, stabbed Boggess to avoid paying the $40 cab fare. The trial court denied the motion then and again when Oliver renewed the motion at the close of his case. Oliver now challenges the denial of his directed verdict motion.

On a motion for directed verdict, a trial court must draw all fair and reasonable inferences in favor of the Commonwealth, and if the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a verdict for acquittal should not be directed. *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991). On appeal, a reviewing court must determine if under the evidence as a whole, it would be clearly unreasonable for the jury to find guilt. *Id.* Only then is the defendant entitled to a directed verdict of acquittal, and a trial court's denial of a motion for directed verdict is erroneous. *Id.*

The bulk of the evidence supporting the first-degree robbery charge was presented in the form of Boggess's testimony. According to Boggess, Oliver was a regular customer who was charged a discounted flat fee of $40 for cab services. He explained that on the night of the attack, Oliver exited the van

without paying and began to walk away. When Oliver was approximately ten feet away from the van, Boggess rolled down the window and said, "Hey Jason, did you need change for something?" Oliver patted his pockets and replied, "Yeah man, my bad, for a hundred." Boggess then reached into his right pant pocket and retrieved a wad of cash secured by a rubber band. This is when Boggess alleged that Oliver began to stab him through the open driver's side window, first in the neck and then in the stomach. Oliver stopped the attack to reach for the money in Boggess's right hand. Boggess testified that when he tossed the cash into the passenger seat, Oliver ran away.

In drawing all fair and reasonable inferences in a light most favorable to the Commonwealth, the trial court was entitled to accept all of Boggess's testimony as true. *Banks v. Commonwealth*, 313 S.W.3d 567, 570 (Ky. 2010). Given Boggess's account of the events, it would not be clearly unreasonable for a jury to believe beyond a reasonable doubt that Oliver stabbed Boggess to either avoid paying the fare or to rob him of the cash. First, Boggess's account of the sequence of events supports the theory that Oliver indeed intended to commit a robbery. Following an uneventful cab ride, Boggess was attacked *after* alerting Oliver to the fact that he had not yet paid the fare. Boggess further testified that Oliver stabbed him and *then* reached for the cash, retreating only after Boggess tossed the money out of his grasp. Boggess's account of the crime permitted the jury to reasonably infer that avoiding payment of the fare or taking Boggess's money was the impetus for the attack. *See Quisenberry v. Commonwealth*, 336 S.W.3d 19, 36 (Ky. 2011)

(circumstantial evidence including the defendant's activities before and after a robbery permitted reasonable inferences sufficient to prove defendant's guilt). Furthermore, the Commonwealth submitted evidence of Oliver's financial troubles, which allowed a jury to infer that he had a clear motive to rob Boggess. *See Winstead v. Commonwealth*, 327 S.W.3d 386, 398 (Ky. 2010) (holding that entirely circumstantial evidence may be strong enough to allow a jury to reasonably infer a defendant's guilt).

Whether the jury believed that Oliver wanted to take Boggess's cash, or that the attack was an attempt to simply avoid paying the fare, there was sufficient evidence to support the inference of guilt under either theory. *See Campbell v. Commonwealth*, 564 S.W.2d 528, 530 (Ky.1978); *Acosta v. Commonwealth*, 391 S.W.3d 809, 817 (Ky. 2013). The Commonwealth produced evidence of substance that amounted to more than a "mere scintilla." *Commonwealth v. Sawhill*, 660 S.W.2d 3, 5 (Ky. 1983); *see also Smith v. Commonwealth*, 361 S.W.3d 908, 920 (Ky. 2012). Plainly, the trial court did not err in denying Oliver's motion for a directed verdict on the first-degree robbery charge.

V. The Trial Court Erred in Assessing Court Costs Without Factual Findings.

Finally, Oliver alleges that the trial court erred when it ordered him to pay $100 in court costs and $25 in court facilities fees. Oliver argues that the trial court improperly assessed court costs because he is an indigent defendant

who was appointed a public defender to represent him on appeal, and that his lengthy sentence has rendered him unable to pay the ordered costs.[11]

As held by this Court in *Maynes v. Commonwealth*, 361 S.W.3d 922 (Ky. 2012), a trial court may impose court costs on an indigent defendant if "there is substantial reason to believe that the defendant, although in need of counsel, has the ability to contribute financially to his defense or pay court costs." If the trial court determines that the defendant is a "poor person" as defined by KRS 453.190(2)[12] who does not have the ability to "pay presently or in the foreseeable future," court costs may be waived. 361 S.W.3d at 930.

The court assessed $100 in court costs and $25 in court facilities fees against Oliver in the February 27, 2012 sentencing order. Although the trial court had the authority to waive the court costs given certain statutory findings, the record is devoid of any findings concerning Oliver's ability to pay. *See Smith v. Commonwealth*, 361 S.W.3d at 921. Accordingly, we reverse the imposition of court costs and remand to the trial court for a determination of whether Oliver is (1) a poor person as defined by KRS 453.190(2) and (2) unable to pay court costs now, or in the foreseeable future.

CONCLUSION

For the foregoing reasons, Oliver's convictions for first-degree robbery and first-degree assault are affirmed. We reverse the trial court's order

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[11] Although Oliver was appointed a public defender to pursue his appeal, he was represented by private counsel during his trial.

[12] KRS 453.190(2) defines "poor person" as 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."

requiring Oliver to pay court costs, and remand for a determination of whether he is a "poor person" under KRS 453.190, and whether he will be unable to pay court costs now or in the foreseeable future.

All sitting. All concur.

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