

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000992-MR

ROGER ALAN FAIRCHILD

APPELLANT

v. APPEAL FROM JESSAMINE CIRCUIT COURT
HONORABLE C. HUNTER DAUGHERTY, JUDGE
ACTION NO. 05-CR-00195

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: KELLER AND NICKELL, JUDGES; KNOPF, SENIOR JUDGE.¹

KNOPF, SENIOR JUDGE: Two issues are presented in this appeal from a judgment based upon a jury verdict convicting appellant Roger Allen Fairchild of first-degree cruelty to animals, menacing, disorderly conduct, and resisting arrest: 1) whether his constitutional right to due process was violated because he was not properly arraigned; and 2) whether he was entitled to a mistrial when a witness mentioned that Fairchild had been released from jail. Finding no reversal error in either contention, we affirm.

¹ Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to §110(5)(b) of the Kentucky Constitution and KRS 21.580.

Fairchild's contention with respect to irregularity in his arraignment is not only unpreserved but is based upon what is obviously an incomplete record. Although Fairchild insists that the record demonstrates that the trial court never read the indictment nor gave him an opportunity to plead to it, the video tape of his initial appearance commences with the trial judge asking Fairchild, "Do you understand your rights as I explained them earlier?" Clearly, there were previous proceedings in which Fairchild participated but which were not captured on the video recording. Support for that conclusion appears in two written documents which are of record: the court docket sheet and arraignment order for November 29, 2005, both of which are signed by the judge, and which specifically state that Fairchild was arraigned and pled not guilty to the charges. On this state of the record, we must assume the silent portion of the video supports the written record of the trial court.

Furthermore, Fairchild cannot demonstrate prejudice and, in that respect, his reliance upon *Hutson v. Commonwealth*, 171 S.W.3d 743 (Ky.App. 2005), is misplaced. This Court held in *Hutson* that an arraignment and the taking of a plea are essential requirements of a valid conviction in this Commonwealth but also clearly stated those requirements may be expressly or impliedly waived. Because he had not been properly arraigned, the defendant in *Hutson* was not aware until the persistent felony phase of his trial that he had been charged as a persistent felon. *Hutson* immediately objected stating that he had not been arraigned nor had he entered a plea to that charge. Here, even if we were to assume there was a defect in his arraignment, Fairchild was

clearly aware of and defended the charges against him without ever objecting to the arraignment procedure. Thus, Fairchild may not predicate error on the manner of his arraignment.

Next, Fairchild challenges the denial of his motion for a mistrial based upon a witness's reference to his having been in jail. In response to the Commonwealth's inquiry as to whether the witness had seen Fairchild since the day of the crime, he stated that he saw him one time after he first got out of jail. The trial court denied Fairchild's subsequent motion for a mistrial on the basis that the jury was already aware from other testimony that he had been arrested on the night of the offense. Thus, the jury would not have been unaware that Fairchild had been taken to jail. The trial court also noted that this situation is distinguishable from testimony concerning incarceration unrelated to the current offense. In essence, the witness in this case merely referenced the fact that Fairchild had been arrested, taken to jail, and then released, all matters which the jury could infer from police officers' testimony concerning the charge of resisting arrest. Fairchild is therefore unable to demonstrate prejudice from the isolated response.

As the Supreme Court of Kentucky noted in *Davis v. Commonwealth, Ky.*, 899 S.W.2d 487, 491 (1995), *overruled on other grounds in Merriweather v. Commonwealth, Ky.*, 99 S.W.3d 448 (2003), “it would be impossible as a practical matter to conduct a trial without the jury seeing some sign that the defendant [is] not entirely free to come and go as [he] please[s].” Clearly, the trial court expressed the same sentiment in denying Fairchild's motion for a mistrial in this case. We find no abuse of

discretion, particularly in light of the fact that police officers had previously testified in detail concerning the circumstances of Fairchild's arrest and transport to the detention center. We therefore find no basis for disturbing the trial judge's denial of the mistrial motion.

The judgment of the Jessamine Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Roy Alyette Durham II
Assistant Public Advocate
Department of Public Advocacy
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General

Todd D. Ferguson
Assistant Attorney General
Frankfort, Kentucky