RENDERED: DECEMBER 16, 2016; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000902-MR & 2015-CA-000903-MR

JAMES DANIELS — APPELLANT

v.

APPEALS FROM BELL CIRCUIT COURT
HON. ROBERT V. COSTANZO, JUDGE
INDICTMENT NOS. 13-CR-00209 & 14-CR-00047

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING IN PART,
REVERSING IN PART, AND REMANDING

** ** ** ** **

BEFORE: KRAMER, CHIEF JUDGE; ACREE AND D. LAMBERT, JUDGES.

KRAMER, CHIEF JUDGE: James Daniels has appealed from the Bell Circuit Court's Judgment and Sentence Pursuant to Jury Verdict entered June 3, 2015. This court affirms the circuit court in part, reverses in part, and remands.

I. Background

On or about June 17, 2013 at 7:22 p.m., Trooper Brigmon of the Kentucky State Police observed James Daniels driving in an erratic manner on KY 190 in Bell County, Kentucky. Trooper Brigmon testified that Daniels was crossing as well as driving on the center line. After observing this, the trooper activated his lights and stopped Daniels' vehicle. Aside from Daniels, the vehicle also contained a female passenger. Upon asking Daniels for his license and registration, Trooper Brigmon noticed a strong odor of alcohol and noticed a beer can under the back of the driver's seat. The trooper also noted that Daniels had slurred speech, red bloodshot eyes, and pinpoint pupils. While Daniels appeared to show signs of alcohol intoxication, the trooper testified that pinpoint pupils indicated that the subject may have been under the influence of pain medication.

Trooper Brigmon then asked Daniels to perform several field sobriety tests, all of which were failed. As the trooper explained this to Daniels, he noticed that Daniels seemed to be moving a white object inside his mouth. Trooper Brigmon then asked Daniels what the object was and to open his mouth. Daniels then swallowed the object and told the trooper that the object was Lorcet, a hydrocodone pill. Trooper Brigmon considered the white object to have been potential evidence in a case involving impaired driving and told Daniels that he was under arrest. As the trooper began to handcuff him, Daniels saw an opportunity and started to run away. After Trooper Brigmon warned him several times to stop, without success, the trooper finally used his Taser to subdue Daniels.

Over defense objection, Trooper Brigmon testified that when he asked Daniels why he ran, Daniels told him, "that he was going to jail anyway, and that he was going to take a chance," and that "when he runs from the police, he gets away more times than he is caught." Daniels himself testified about his fleeing attempt, saying that, "I know it was wrong, and I shouldn't have done it, but I took off running." Trooper Brigmon then asked Daniels to take tests of blood or urine at Pineville Community Hospital, but Daniels refused both. The trooper did not use the Intoxilyzer at the jail on Daniels, as he suspected drug intoxication, which the Intoxilyzer would not detect.

A defense witness, Parole Officer David Short, testified that he administered a drug test to Daniels approximately 13 hours after his arrest, on June 18, 2013. The resulting laboratory report indicated that Daniels had marijuana, suboxone, and methamphetamine in his system. Officer Short testified that methamphetamine comes in various forms, from hard crystal, liquid, or powder, while suboxone is usually in a strip. Daniels admitted to taking marijuana and suboxone earlier in the week, though not on the day immediately prior to his arrest. He vehemently denied taking methamphetamines. Daniels also denied drinking at the time of his arrest, testifying that the beer can under his seat belonged to his female passenger. He denied having anything in his mouth at the time of his arrest, and also denied that Trooper Brigmon offered him any sort of blood or urine test at the hospital. He acknowledged in his testimony that he is a convicted felon on parole.

The jury found Daniels guilty of Operating a Motor Vehicle While Under the Influence, First Offense (With Aggravating Circumstances); Fleeing or Evading Police in the Second Degree; Tampering with Physical Evidence; and being a Persistent Felony Offender in the Second Degree. For his misdemeanors, Daniels was sentenced to 30 days for Operating a Motor Vehicle While Under the Influence, and 90 days for Fleeing and Evading. As a Class D felony, Tampering with Physical Evidence was elevated by the Persistent Felony Offender charge to 10 years in prison, to be served concurrently with the misdemeanor charges. This appeal followed.

II. Analysis

Daniels brings five issues before this court stemming from his jury trial, as follows: Daniels suffered undue prejudice from trial testimony regarding his history of fleeing from police; Daniels was denied a unanimous verdict by improper penalty phase instructions; Daniels was improperly assessed fines and fees despite being indigent; Daniels was unduly prejudiced by the Commonwealth's improper guilt phase closing argument; and Daniels was unduly prejudiced by Commonwealth's improper felony penalty phase closing argument. Of these five issues, only the first one was preserved.

The first issue is that Daniels was unduly prejudiced by the introduction of Daniels' statements after his attempt to flee, that "when he runs from the police, he gets away more times than he is caught." This issue was preserved by a contemporaneous objection, which was promptly overruled by the

trial judge without further explanation. Appellant's argument is that the admission was in error under KRE[1] 404(b) and KRE 403 and should result in a new trial.

KRE 404(b) is an exclusionary rule, designed to prevent evidence of other crimes or prior bad acts from being admitted against a defendant. With some listed exceptions, the language of the rule states that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." There is no doubt that the testimony was improper, as it was "a thinly-veiled reference to Appellant's criminal history and was not offered for another purpose." *Wiley v. Commonwealth*, 348 S.W.3d 570, 581 (Ky. 2010). "Allowing a witness to make suggestive references to the defendant's prior crimes, wrongs, or bad acts circumvents KRE 404(b)'s prohibition of evidence of other crimes." *Id. (*citing *Matthews v. Commonwealth*, 163 S.W.3d 11, 17 (Ky. 2005)).

While the trial court was in error regarding Trooper Brigmon's testimony, we find the error ultimately to have been harmless. "[E]videntiary errors are evaluated under the non-constitutional 'substantial influence' standard, wherein we determine whether the error had 'substantial influence' upon Appellant's trial such that it 'substantially swayed' his conviction." *Id*. (citing *Winstead v. Commonwealth*, 283 S.W.3d 678, 688-89 (Ky. 2009)). The error allowing Daniels' out of court statements regarding his tendency to run from police did not have substantial impact on the outcome of the case, because of the weight

[1] Kentucky Rules of Evidence.

of the other admissible evidence. The worst that could be derived from the erroneous testimony is that Daniels (a) has a criminal history, and (b) has run from police on other occasions, implying that he may have fled this time as well. Daniels admitted that he is a felon on parole, and also admitted in his own testimony that he fled on this occasion. "A non-constitutional evidentiary error may be deemed harmless … if the reviewing court can say with fair assurance that the judgment was not substantially swayed by the error." *Winstead*, 283 S.W.3d at 688-89 (citing *Kotteakos v. United States*, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946)). Therefore, we find that the testimony offered by Trooper Brigmon to be harmless error, as it could only have had very minimal impact compared to the weight of other evidence.

KRE 403 allows a court to weigh relevant evidence, excluding evidence where, *inter alia*, "probative value is substantially outweighed by the danger of undue prejudice." A court has substantial discretion in performing this balancing test; *see Doneghy v. Commonwealth*, 410 S.W.3d 95, 109 (Ky. 2013). KRE 403 gives a high level of deference to the trial court, as "[t]he trial judge has a better vantage point to both detect and assess the concerns in [KRE 403] and to balance them against probative value as he hears and sees the witnesses, the performances of the lawyers, and the reactions of the jury." *Id.* (Internal quotations and citations omitted). Using our analysis from KRE 404(b), we decline to find error under KRE 403 as well, as there is no indication that Daniels

was prejudiced by the errant testimony, let alone prejudiced sufficiently to overcome the substantial discretion afforded to the trial court under this rule.

In the second issue on appeal, Daniels states that his right to a unanimous verdict was denied by an improper penalty phase jury instruction for Operating a Motor Vehicle While Under the Influence. Specifically, the instruction contains superfluous language, offering six possible options for finding an aggravated penalty, including those unsupported by evidence in the record. It appears that the instruction copies the entire list of aggravating circumstances from KRS[2] 189A.010(11). Daniels concedes no juror could be misled by superfluous language setting out the first four aggravators as they are unsupported by the record: driving in excess of 30 miles per hour above the speed limit, driving the wrong way on the road, causing an accident resulting in death or serious injury, or having a measurable blood alcohol concentration higher than 0.18.[3] The appellant, however, believes that the last two named aggravators could have split the jury and deprived him of a unanimous verdict. Those two aggravators are: refusal to submit to any tests of blood, breath, or urine requested by an officer having reasonable grounds; and operating a vehicle transporting a passenger under the age of twelve years old.

[2] Kentucky Revised Statutes.
[3] The instruction seems to have used an outdated version of KRS 189A.010, as the aggravator based on elevated blood alcohol content was reduced from 0.18 to 0.15 by the Kentucky Legislature about three years prior to this incident. 2010 Ky. Acts, ch. 149, § 17, eff. 7-15-10.

This purported error was not preserved. However the appellant asks for palpable error review under RCr[4] 10.26, while also citing *Martin v. Commonwealth*, 456 S.W.3d 1 (Ky. 2015), which held that "all unanimous-verdict violations constitute palpable error resulting in manifest injustice." *Id*. at 9-10. While the Kentucky Supreme Court has issued a very strong statement in *Martin* on the issue of unanimous verdict violations, and while it is also true that superfluous language in a jury instruction is erroneous and presumed prejudicial, *see Harp v. Commonwealth,* 266 S.W.3d 813, 818 (Ky. 2008), *see also Commonwealth v. Whitmore*, 92 S.W. 3d 76, 81 (Ky. 2002), it does not necessarily follow that there is a unanimity violation resulting from the superfluous language:

> [T]he error resulting only from superfluous language does not present a pure unanimity problem. On the contrary, such flawed instructions only implicate unanimity if it is reasonably likely that some members of the jury actually followed the erroneously inserted theory in reaching their verdict. If that can be shown, then a unanimous verdict has been denied and the verdict must be overruled. However, if there is no reasonable possibility that the jury actually relied on the erroneous theory—in particular, where there is no evidence of the theory that could mislead the jury—then there is no unanimity problem. Though such a case presents an error in the instructions, namely, the inclusion of surplus language, the error is simply harmless because there is no reason to think the jury was misled.

Travis v. Commonwealth, 327 S.W.3d 456, 463 (Ky. 2010). The Kentucky Supreme Court used this same reasoning in *Mason v. Commonwealth*, 331 S.W.3d 610 (Ky. 2011). *Mason* is particularly applicable here, because the trial court in

[4] Kentucky Rules of Criminal Procedure.

that case gave a penalty phase instruction regarding all of the statutory methods by which the accused could be given Persistent Felony Offender status. *Id*. at 626. This bears resemblance to the error in this case, in which the trial court gave a penalty phase instruction with a complete list of all the statutory aggravators for Operating a Motor Vehicle While Under the Influence. In analyzing *Mason*, the Kentucky Supreme Court held that the erroneous instruction failed to constitute palpable error, as "there was no real possibility that jurors followed one of the theories presented by the surplus language and, as a result, no real possibility that a unanimous verdict was denied." *Id*. at 624 (quoting *Travis*, 327 S.W.3d at 463).

In this case, Daniels points to testimony that there was another person in the vehicle he was driving, his female passenger. He invites us to consider that some of the jury may have believed that she was "a passenger under the age of twelve years," and thus her presence may have been considered an aggravating factor, while others on the jury may have considered "refusing to submit to any tests of one's blood, breath, or urine" as the appropriate aggravator. This would create a unanimity problem and require reversal. The problem with this theory is that there is absolutely nothing in the record to suggest that Daniels' female passenger was under age twelve. In fact, the only contexts in which she appears in this case are those where Daniels attempted to assign blame for the alcohol smell in his car or ownership of the beer can under his seat – matters which, if anything, ought to suggest that the passenger is *much older* than age twelve. Daniels' alternative scenario is therefore incredibly unlikely and would require that a juror

imagine evidence into the record that is not there. In short, asking us to presume that some of the jury believed the female passenger was under age twelve is simply not reasonable. "[I]f there is no reasonable possibility that the jury actually relied on the erroneous theory—in particular, where there is no evidence of the theory that could mislead the jury—then there is no unanimity problem." *Travis*, 327 S.W.3d at 463. That leaves failure to submit to blood, breath, or urine testing as the sole remaining aggravator. There is evidence in the record regarding this particular aggravator, namely the testimony of Trooper Brigmon. Therefore, we find that the erroneous superfluous language in the instruction does not constitute palpable error, as there was no unanimity violation.

Daniels' third issue on appeal is that the trial court in its final judgment imposed a fine of $200 and a DUI service fee in the amount of $375, which he claims as error due to his indigence. While this error was not preserved, the Kentucky Supreme Court has stated as follows: "[t]he indigent defendant is obligated to challenge the imposition of a fine that is contrary to KRS 534.040(4), and failure to do so will foreclose appellate review *unless the error is apparent on the face of the judgment, or his indigency at the time of sentencing is otherwise plainly established in the record*." *Trigg v. Commonwealth*, 460 S.W.3d 322, 333 (Ky. 2015) (emphasis added). For reasons stated below, we believe that Daniels' indigency was plainly established in the record, and so review is appropriate here.

Travis v. Commonwealth, 327 S.W.3d 456, 459 (Ky. 2010), takes a relatively bright line approach toward imposing fines and costs upon the indigent,

in that when the offender is clearly indigent, it constitutes clear error to impose fines and court costs. In this respect, *Travis* follows the Kentucky Supreme Court's position in *Simpson v. Commonwealth*, 889 S.W.2d 781 (Ky. 1994): "[W]e observe that at sentencing . . . the appellant was represented by an assistant public advocate. Thus, we may assume that the trial judge had already determined that the appellant was indigent. For this reason, imposition of any fine was inappropriate, and accordingly, we vacate such portions of the sentence[.]" *Simpson*, 889 S.W.2d at 784.

Approximately 15 months after *Travis*, however, the Kentucky Supreme Court backed slightly away from this stance, at least regarding court costs, stating:

> [A] person may qualify as "needy" under KRS 31.110 because he cannot afford the services of an attorney yet not be "poor" under KRS 23A.205 as it has existed since 2002 unless he is also unable to pay court costs without "depriving himself or his dependents of the necessities of life, including food, shelter or clothing." Finally, the KRS 23A.205 directive to consider not only the defendant's present ability to pay court costs but also his ability "in the foreseeable future" cannot be overlooked.

Maynes v. Commonwealth, 361 S.W.3d 922, 929 (Ky. 2012). A follow up case before this court, *Butler v. Commonwealth*, 367 S.W.3d 609 (Ky. App. 2012) interpreted *Maynes* as requiring more fact-based analysis and distinguished its result from *Maynes* on that basis. The *Butler* court pointed out that the *Maynes* appellant had his freedom and thus the ability to work, and the assigned court costs to the appellant amounted to a modest $130, which he had six months to pay.

Butler, 367 S.W.3d at 616. In contrast, the *Butler* appellant was facing a sentence of seven and one-half years in prison, the amount in question for costs and fees was $1,130, and the trial court ordered the appellant to pay it immediately upon being released from custody. *Id*. Finally, the *Butler* court also quoted *Maynes*, for the proposition that "[w]ithout some reasonable basis for believing that the defendant can or will soon be able to pay, the imposition of court costs is indeed improper." *Id*. (quoting *Maynes*, 361 S.W.3d at 930).

Assessing the appropriateness of the "DUI service fee" of $375 is a more difficult question than that of ordinary court costs and fines. Dispensing with court costs under KRS 24A.175 and KRS 23A.205 requires a showing that the defendant is a "poor person" as defined in KRS 453.190(2) and that "he or she is unable to pay court costs and will be unable to pay the court costs in the foreseeable future." This is the same test alluded to in *Maynes*, *supra*. Unlike costs, however, felony and misdemeanor fines use identical language in KRS 534.030(4) and 534.040(4) providing a clear legislative mandate: "Fines required by this section shall not be imposed upon any person determined by the court to be indigent pursuant to KRS Chapter 31." This is more like the bright line approach favored by *Travis* and *Simpson*.

The DUI service fee, however, is distinctly different, due to its origin in KRS 189A.050. Unlike KRS 24A.175 (court costs for criminal cases in District Court), KRS 23A.205 (court costs for criminal cases in Circuit Court), KRS 534.030 (fines for felonies), and KRS 534.040 (fines for misdemeanors and

violations), there is *no* provision in KRS 189A.050 for waiving or otherwise dispensing with the fee for anyone. There is no reference whatsoever to KRS 453.190, KRS Chapter 31 or any other statute regarding waiver for the poor, needy, or indigent. The statute flatly states that the fee "shall be imposed in all cases," and then refers to KRS 534.020 regarding method of imposition and KRS 534.060 regarding remedies for subsequent nonpayment.

The only case specifically discussing the DUI service fee is *Beane v. Commonwealth*, 736 S.W.2d 317 (Ky. 1987). In that brief opinion, the court defines the service fee as a "fine" rather than a "court cost," as the creating statute explicitly incorporates portions of KRS 534 and that chapter is entitled "Fines." *Id*. at 318. The court also stated that any remedy sought for indigence must be in the context of KRS 534.060: "His indigence, if such is present, is clearly a factor which may be considered under KRS 534.060 if it is later shown to be a factor in his *subsequent* nonpayment." *Id*. KRS 534.060(3), in turn, states that:

> If the default in payment of a fine is determined to be excusable under the standards set forth in subsection (2) of this section, the court may enter an order allowing the defendant additional time for payment, reducing the amount of each installment, or modifying the manner of payment in any other way.

From the evidence in the record, it is clear that Daniels is indigent. He signed an affidavit of indigency, stating that he is unemployed, with a monthly income of zero, and possesses nothing in the nature of real property or bank accounts. From the earliest stages of the case, the Bell District Court entered an

order finding Daniels indigent pursuant to KRS Chapter 31 and assessed him a partial fee of $50 for his representation by appointed counsel, who represented him throughout the proceedings. Daniels was also granted leave by his trial judge to file his appeal *in forma pauperis* and proceed with appointed counsel. His indigence is therefore apparent on the face of the record, enabling him to appeal the fine pursuant to *Trigg*. The facts of Daniels' indigency bear more similarity to *Travis* and *Butler* than to the circumstances in *Maynes*, in that there is little prospect that would enable Daniels to pay costs in the foreseeable future. In addition, KRS 534.030(4) and KRS 534.040(4) clearly state that fines for felonies and misdemeanors, respectively, shall not be imposed upon any person determined to be indigent pursuant to KRS Chapter 31. As stated previously, Daniels was found to be indigent pursuant to KRS Chapter 31 by Bell District Court. Accordingly, the portion of the judgment and sentence assigning a fine of $200 is vacated and remanded. However, pursuant to *Beane*, we may not vacate or otherwise dispense with the DUI service fee of $375. According to the trial court's judgment and sentence, that fee is due within 124 days of release. Any inability to pay due to indigence will have to be considered by a court upon subsequent nonpayment, in accordance with KRS 534.060.

The final two issues on appeal state that Daniels was unduly prejudiced by the Commonwealth's improper guilt phase closing argument and that Daniels was unduly prejudiced by Commonwealth's improper felony penalty phase closing argument. Neither error was preserved. Daniels requests review

under RCr 10.26. The law regarding potential error in closing arguments is succinctly summarized in *Padgett v. Commonwealth*, 312 S.W.3d 336 (Ky. 2010):

> Counsel has wide latitude during closing arguments. The longstanding rule is that counsel may comment on the evidence and make all legitimate inferences that can be reasonably drawn therefrom. This Court recently explained the appropriate standard of review for prosecutorial misconduct during closing arguments, stating that reversal is required 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. Additionally, this Court must always consider these closing arguments as a whole.

Id. at 350 (internal citations and quotations omitted). Because neither alleged error in the Commonwealth's closing argument was preserved, our analysis must therefore focus on whether each constituted "flagrant misconduct." To determine if misconduct is "flagrant," the Kentucky Supreme Court has instructed us to consider: "(1) whether the remarks tended to mislead the jury or to prejudice the accused; (2) whether they were isolated or extensive; (3) whether they were deliberately or accidentally placed before the jury; and (4) the strength of the evidence against the accused." *Hannah v. Commonwealth*, 306 S.W.3d 509, 518 (Ky. 2010) *superseded on other grounds by statute*, KRS 503.055 and 503.050 (internal citations and quotations omitted).

The allegedly improper comment in the guilt phase was in reference to defense counsel, when the prosecutor stated as follows:

> I understand and you will hear me say this a number of times, job of the defense is very different from the job of the Commonwealth. We take all the evidence and try to lead you to a decision, the right decision, based on the evidence. Part of what a defense lawyer does is they throw things out hoping that just one of you will get tripped up on something other than fact.

Daniels asserts that the comment was an improper attack on defense counsel, suggesting either that defense attorneys are governed by a lower ethical standard, which was held to be error in *Ordway v. Commonwealth*, 391 S.W.3d 762, 796 (Ky. 2013), or else that it was abusive of opposing counsel, as discussed in *Caudill v. Commonwealth*, 374 S.W.3d 301, 309 (Ky. 2012).

We actually believe that the prosecutor's statement does not rise to the level of misconduct at all, but is actually a "comment on tactics," explicitly permitted under *Slaughter v. Commonwealth*, 744 S.W.2d 407, 412 (Ky. 1987). In addition, the comments at issue here were relatively mild. By way of comparison, the prosecutor's conduct that was at issue in *Slaughter* was described in this manner: "He criticized the defense counsel for presenting a 'great octopus' defense. He accused counsel of pulling a 'scam,' and he questioned the sharpness of counsel." *Id*. Despite the somewhat bruising treatment of the defense, the Kentucky Supreme Court stated that "[g]reat leeway is allowed to *both* counsel in a closing argument," and that such remarks were "well within the proper bounds of a closing argument and certainly did not affect the outcome of the trial." *Id*. (emphasis in original). Therefore, we decline to find error regarding the prosecutor's guilt phase closing argument.

Finally, Daniels alleges that the prosecutor made an improper comment in the felony penalty phase closing argument:

> I just want to say one more sentence and I know you all weren't here but I saw a jury on Tuesday, not only that did the right thing, but that showed in its verdict and in its sentence what it thought of that conduct to the same today. Whatever you, how you view that conduct in today's case and I'll respect whatever that is.

Daniels argues that this is an improper attempt to shame the jury, or possibly to put community pressure on the jury's decision, referring to *Cantrell v. Commonwealth*, 288 S.W.3d 291, 299 (Ky. 2009). However, it is essential to point out that, "I saw a jury on Tuesday…" was in reference to the fact that most of the same people sitting on this particular jury were also in that Tuesday jury. The prosecutor commented during voir dire that she had seen most of these people earlier, and this is the context for the "I saw a jury" comment. Understood in the proper context, the prosecutor was exhorting the jury to do as good a job now as they did then, and then followed up that statement by indicating that she would respect the jury's decision in any event. There was no genuine attempt at "shaming" or "community pressure," especially when the follow up comment to the jury regarding the verdict consisted of "I'll respect whatever that is." We decline to find error regarding the felony penalty closing phase argument.

III. Conclusion

For the foregoing reasons, the court affirms the Bell Circuit Court Order entered June 3, 2015 in part, reversing solely on the issue of the $200 fine

for the indigent Appellant and remands for amending the judgment in a manner consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Molly Mattingly
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Andy Beshear
Attorney General

Leilani K. M. Martin
Assistant Attorney General
Frankfort, Kentucky