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Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001359-MR

PHILLIP R. BOONE APPELLANT

v.

APPEAL FROM MASON CIRCUIT COURT
HONORABLE STOCKTON B. WOOD, JUDGE
ACTION NO. 10-CR-00118

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING IN PART, REVERSING IN PART
AND REMANDING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; CLAYTON AND DIXON, JUDGES.

ACREE, CHIEF JUDGE: Appellant Phillip Boone appeals the Mason Circuit Court's July 11, 2011 Judgment and Sentence by which he was convicted of first-degree sexual abuse and sentenced to two years' imprisonment. On appeal, Boone raises numerous trial issues which he claims resulted in error and mandate a new

trial. Following a careful review, we affirm in part, reverse in part, and remand for additional proceedings consistent with this opinion.

I. **Facts and Procedure**

On October 17, 2009, Boone's fifteen-year-old victim spent the night at the home of her friend. The victim's mother approved the overnight stay with the friend's mother. The victim's mother requested that her daughter not be permitted to leave the house with her friend unsupervised; the friend's mother acknowledged that the victim's mother wanted her daughter to be safe while staying the night at her friend's home. Boone, the friend's mother's fiancé, also lived in the residence. Boone had resided there since approximately October 2007.[1]

On the evening of October 17th, the victim, the friend, the friend's mother, and Boone watched movies in the living room. Boone and the friend's mother sat on the couch; the victim and her friend lay on a mattress on the floor directly in front of the television. A coffee table separated the couch from the mattress.

After the first movie ended, the victim's friend announced she had a headache; she took medication, retired to her bedroom, and went to sleep. The friend's mother started a second movie. However, she quickly fell asleep on the couch.

[1] While Boone did not own the house – the residence was in fact owned by his fiancée's mother – Boone had resided there for over two years prior to the incident.

According to testimony from the victim at trial, during the second movie, Boone, who was not wearing shoes, touched her with his foot. Boone then leaned toward her as if he was about to kiss her; she backed away. Boone apologized and stated "it wasn't the way it looked." A short time later, Boone asked the victim to come into the kitchen. She complied. There, Boone grabbed her, "stuck his tongue down [her] throat," and squeezed her breast causing pain. She pushed Boone away. She testified that she interpreted Boone's tense body language as an expression of anger. Boone withdrew to his bedroom, and the victim returned to the living room.

She then sent a text message to her mother: "I am scared Mommy." She also woke up her friend and described the incident with Boone. The victim's friend testified that the victim was crying when she told the story. The victim and her friend talked for fifteen to twenty minutes, and ultimately called the friend's neighbor, who the victim's friend described as a "second mom." After relating the evening's events, the neighbor told the victim's friend to wake up her mother, and told the victim to call her mother. The girls complied.

Boone testified in his defense and denied touching the victim. Boone explained he entered the kitchen once during the second movie to get a drink, but said the victim did not accompany him there. According to Boone, after the second movie ended, the victim declared she did not want to watch another. Boone turned off the DVD player, kissed the victim's friend's mother on the

forehead, and went to bed. Boone testified he drank two or three beers, but was not drunk.

After speaking to the victim, the victim's mother called the police. Police Officer Justine Merrill accompanied the victim's mother to the residence. The victim, her friend, and her friend's mother were awake when the police arrived; Boone was asleep, but was later wakened. Officer Merrill described the victim and her friend as upset, stressed, and crying. While speaking with Boone, Officer Merrill smelled alcohol; Officer Merrill testified Boone acknowledged he had been drinking. Officer Merrill subsequently charged Boone with third-degree sexual abuse which was later amended to first-degree sexual abuse.

A jury found Boone guilty of first-degree sexual abuse and sentenced him to two years' imprisonment pursuant to a judgment and sentence order entered July 11, 2011. From that order, Boone appeals.

As additional facts become relevant, they will be discussed.

II. <u>Issues on Appeal</u>

Before this Court, Boone raises these four claims of error: (1) the circuit court erred in denying his motion for a directed verdict because there was insufficient evidence that Boone was a person in a position of authority or position of special trust over the victim; (2) his right to an unanimous verdict was violated when the circuit court issued jury instructions on theories unsupported by the evidence; (3) the circuit court failed to instruct the jury on two lesser-included

offenses; and (4) the circuit court erroneously ordered Boone, an indigent person, to pay court costs.

III. Standard of Review

A variety of review standards apply to the issues raised. We will set out the applicable review standard within the framework of our analysis.

IV. Analysis

A. Directed Verdict

To convict Boone of first-degree sexual abuse, the Commonwealth was required to prove that he: (1) "[b]eing a person in a position of authority or position of special trust, as defined by KRS[2] 532.045"; (2) subjected a minor who was less than 18 years old; (3) with whom he came into contact as a result of that position; (4) to sexual contact. KRS 510.110(1)(d).[3] Boone's first claim of error – that he was entitled to a directed verdict – focuses solely on this first element.

[2] Kentucky Revised Statutes.

[3] This statute states, in pertinent part, as follows:

> (1) A person is guilty of sexual abuse in the first degree when:
> . . . .
>
> (d) Being a person in a position of authority or position of special trust, as defined in KRS 532.045, he or she, regardless of his or her age, subjects a minor who is less than eighteen (18) years old, with whom he or she comes into contact as a result of that position, to sexual contact . . . .

Boone's directed verdict motion was grounded on the premise that no reasonable juror could differ with the proposition that Boone was not a person in a position of authority or special trust as defined by KRS 532.045(1). When Boone first made his motion for directed verdict, at the close of the Commonwealth's case, the trial court responded from the bench as follows:

> I'm not going to grant the motion for a directed verdict. I'm not quite positive my decision would be the same had this been brought up prior to trial. If I dismiss it at this point, then it basically – the case goes away. If I would be wrong, the Commonwealth would have no remedy . . . . Once the jury has been impaneled and I dismiss it, the case goes away. . . . Under the specific circumstances of this case, my ruling is, it is sufficient to go to a jury and I am not making a finding of fact because the jury still has to find that it falls within the statute. . . . In the case where the minor is invited over, the mother has a conversation with the other child's mother, that the defendant in this case actually was a resident of the household and therefore had some position of authority over the child because the child is now in his household in a position of trust overnight and the circumstance is such that her contact with him resulted from the situation where she is in the household under that protective guise of being in the household under their care and protection overnight.

Again, at the close of all evidence, Boone renewed his motion for a directed verdict. Again, it was denied.

The trial judge made it clear he was not ruling, as a matter of law under the statute, that everyone in a home where a minor child spends the night is a person in a position of authority or special trust. His ruling was simply, based on the

evidence adduced, that reasonable jurors could differ as to whether Boone was such a person.

A motion for a directed verdict tests the sufficiency of the evidence. *See Mitchell v. Commonwealth*, 231 S.W.3d 809, 811 fn. 2 (Ky. App. 2007); *Leslie County v. Hart*, 232 Ky. 24, 22 S.W.2d 278, 279 (1929). "On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal." *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991). "All evidence which favors the prevailing party must be taken as true and the reviewing court is not at liberty to determine credibility or the weight which should be given to the evidence, these being functions reserved to the trier of fact." *Lewis v. Bledsoe Surface Min. Co.*, 798 S.W.2d 459, 461 (Ky. 1990) (citations omitted). Furthermore, "[t]he prevailing party is entitled to all reasonable inferences which may be drawn from the evidence." *Id.*

Boone asserts it was "clearly unreasonable" for the jury to find him guilty of first-degree sexual abuse because the Commonwealth exhibited no evidence that Boone was a person in a position of authority or special trust. As a result, Boone argues, the Commonwealth failed to prove every element of the offense, specifically this first element, beyond a reasonable doubt, necessitating a directed verdict in Boone's favor.

The core of Boone's argument centers on the definitions of a person in a position of authority or in a position of special trust. In fact, this statute bears

both on Boone's argument he was entitled to a directed verdict and on his second argument that the verdict was not unanimous. Our discussion of the statute is, therefore, sufficiently thorough in this section to address both arguments. We begin by considering the current version of the statute.

The current iteration of KRS 532.045 defines the relevant terms as follows:

> (a) "Position of authority" means but is not limited to the position occupied by a biological parent, adoptive parent, stepparent, foster parent, relative, household member, adult youth leader, recreational staff, or volunteer who is an adult, adult athletic manager, adult coach, teacher, classified school employee, certified school employee, counselor, staff, or volunteer for either a residential treatment facility, a holding facility as defined in KRS 600.020, or a detention facility as defined in KRS 520.010(4), staff or volunteer with a youth services organization, religious leader, health-care provider, or employer;
>
> (b) "Position of special trust" means a position occupied by a person in a position of authority who by reason of that position is able to exercise undue influence over the minor[.]

KRS 532.045(1)(a) - (b).

The arrangement of these definitions in the current version of the statute practically invites the reader to conclude they are mutually exclusive. However, it is clear from the statutory evolution they are not.

First, we note this specific statute addresses "Persons prohibited from probation, parole or conditional release." The definitions therein are made relevant elements of criminal acts by incorporation in KRS 510.110(1)(d), defining the

crime of which Boone was convicted. It is noteworthy that prior to its 1994 amendment[4] the statute read, in pertinent part, as follows:

> (1) Notwithstanding other provisions of applicable law, probation shall not be granted to, nor shall the execution or imposition of sentence be suspended for, nor shall a finding bringing the defendant within the provision of this section be stricken for any of the following persons:
>
> . . . .
>
>> (i) A person who occupies a position of special trust and commits an act of substantial sexual conduct. "Position of special trust" means that position occupied by a person in a position of authority who by reason of that position is able to exercise undue influence over the minor. Position of authority includes, but is not limited to, the position occupied by a biological parent, adoptive parent, stepparent, foster parent, relative, household member, adult youth leader, recreational director who is an adult, adult athletic manager, adult coach, teacher, counselor, religious leader, doctor, or employer.

KRS 532.045(1)(i)(1984).

The original legislative intent was that probation and other privileges would be denied to a specific category of offender; to wit, any "person who occupies a *position of special trust* and commits an act of substantial sexual conduct." (Emphasis added). It defined this category of offender by using a term that itself needed defining – "position of special trust." The legislature then defined that

[4] By enactment of 1994 Kentucky Laws Ch. 94 (H.B. 96) § 3, eff. 7-15-94, these definitions were moved from the end (the ninth subsection, following subsection (h)) of KRS 532.045(1) to its beginning. In the process, the definitions were separated.

term as a position one would hold if he or she were "in a *position of authority* who by reason of that position is able to exercise undue influence over the minor." (Emphasis added). Again, the legislature used a yet-to-be-defined term to define "position of special trust" – and that term was "position of authority." So the legislature had to define that term within a term, this time by offering a long, but still nonexclusive, list of examples: parents, relatives, household members, youth leaders, etc.

Furthermore, notwithstanding the separation of the terms and reversal of their sequence in the current version of the statute, our Supreme Court recognizes that the term "position of authority" remains nested in the definition of "position of special trust." *Stinson v. Commonwealth*, 396 S.W.3d 900, 904 (Ky. 2013) (quoting KRS 532.045(1)(b)). In *Stinson*, the Court explained that a critical element of the crime addressed by KRS 510.010(1)(d) was the "'trustful' position" the defendant held; then, emphasizing its "important[ce]," highlighted a key phrase in KRS 532.045(1)(b) which the Court believed demonstrated the legislature's intention to protect minors from persons "'who by reason of that [trustful] position is able to exercise *undue influence over the minor*.' (Emphasis added.)" *Id.*; *see also Owsley v. Commonwealth*, 743 S.W.2d 408, 410 (Ky. App. 1988) (noting the legislature identified in KRS 532.045 "persons who have an advantageous position of authority or influence over minors in their care").

The first conclusion we reach with regard to the statute is that whether a defendant is a person in a position of authority or special trust is a question of fact

for the jury. Second, as the statute indicates, the jury "is not limited to" the list of persons contained in KRS 532.045(1)(a). Third, the definitions of "position of authority" and "position of special trust" are not mutually exclusive at all. A person occupying a position of special trust is one who, given all the relevant circumstances of the relationship, is in a position to exercise authority over a minor. The position need not be an official one, imbued with legal or other authority, or have a label attached to it. It is enough that a jury make an objective determination, based on all the evidence of the relationship, that the defendant is a person in a "trustful position of power over the minor[.]" *Stinson*, 396 S.W.3d at 904.

Despite Boone's position to the contrary, it is not his mere status as an adult that categorizes him as a person in a position of authority or special trust. The evidence in the case showed more than that and was sufficient to support a factual finding that Boone fit the definitions of KRS 532.045(1)(a) and (b). For example, he had been a household member for two years and during that time, and thereafter, was engaged to the mother of the victim's friend. On these points, there are similarities between this case and *Stinson*. In both, the victim's mother allowed her daughter to spend the night in the home of another; in both cases the defendant was an adult member of that other household. *Id.* at 902. Furthermore, Boone, testifying in his own defense, agreed with counsel's statement that his role in the home was to "mak[e] sure everything was okay."

Boone also asserts he was a mere acquaintance lacking a meaningful relationship with the victim, and not a relationship based on authority or special trust. We see nothing in KRS 532.045(1)(a) and (b) that would require a finding of a personal, intimate, or "meaningful" relationship. Similarly, the statute requires no regularity, frequency, or duration of contact between the perpetrator and the victim, and we see no reason to impose one upon it.

Having thoroughly reviewed the record and the verdict in this case, and having considered Boone's arguments, we are convinced that the jury properly determined Boone was in a trustful position of power over the victim.

In sum, we find it was not "clearly unreasonable" under the evidence as a whole for the jury to find guilt because there was sufficient evidence from which the jury could conclude Boone occupied a position of authority and special trust in relation to the victim, and came into contact with the victim as a result of that position. The circuit court did not err when it denied Boone's motion for a directed verdict; on this issue, we affirm.

B. Unanimous Verdict

Boone next asserts he was denied his right to a unanimous verdict because the combined jury instruction presented alternate theories of liability (*i.e.,* a person in a "position of authority" or a "position of special trust"), permitting the jury to convict him on a theory not supported by the evidence. We are not persuaded.

The jury instruction read as follows:

> You will find [Boone] guilty of First-Degree Sexual Abuse under this instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:
>
> A. That in this county on or about October 18, 2009 and before the finding of the indictment herein, he subjected [the victim] to sexual contact;
>
> AND
>
> B. That at the time of such contact, [the victim] was less than 18 years of age;
>
> AND
>
> C. That the time of such occurrence, the defendant was in a position of authority or a position of special trust;
>
> AND
>
> D. That the defendant came into contact with [the victim] as a result of his position of authority and/or special trust.

Section 7 of the Kentucky Constitution ensures "a defendant cannot be convicted of a criminal offense except by a unanimous verdict." *Miller v. Commonwealth*, 283 S.W.3d 690, 695 (Ky. 2009) (citing Ky. Const. § 7; *Cannon v. Commonwealth*, 291 Ky. 50, 163 S.W.2d 15 (1942)). A defendant's right to a unanimous verdict is violated when "the jury is presented with alternate theories of guilt in the instructions, one of which is totally unsupported by the evidence." *Burnett v. Commonwealth*, 31 S.W.3d 878, 882 (Ky. 2000) (citation omitted).

In the previous section, we explained that the definitions of "position of authority" and "position of special trust" are not mutually exclusive; rather, one defines the other. Therefore, the jury was not presented with alternate theories of guilt. Boone's unanimity argument necessarily fails.

C. Jury Instructions on Lesser Offenses

Boone also claims the circuit court committed reversible error when it declined to instruct the jury on two lesser offenses: harassment with physical contact, and third-degree sexual abuse. "Alleged errors regarding jury instructions are considered questions of law that we examine under a *de novo* standard of review." *Hamilton v. CSX Transp., Inc.,* 208 S.W.3d 272, 275 (Ky. App. 2006) (citation omitted).

We first dispose of Boone's argument regarding the lesser offense of third-degree sexual abuse. The Commonwealth does not take issue with Boone's characterization of third-degree sexual abuse as a lesser offense of first-degree sexual abuse. The parties also agree that a circuit court need only instruct the jury on a lesser offense if: (1) the defendant requests an instruction, and (2) the lesser offense is supported by the evidence. *Bartley v. Commonwealth*, 400 S.W.3d 714, 731 (Ky. 2013) (the circuit court need only instruct the jury on a lesser offense if so requested and if justified by the evidence).

Here, Boone initially requested a jury instruction on the lesser offense of third-degree sexual abuse. Following subsequent discussions with his attorney, however, Boone altered his position. Boone's attorney informed the circuit judge:

"your honor, I discussed this with [Boone] and he would rather not have the lesser, and just keep it as sex abuse first – all or nothing." Based on Boone's representation, the circuit court declined to issue a third-degree sexual abuse instruction.

Boone has "waived his right to claim on appeal" that he was entitled to a third-degree sexual abuse instruction. *Quisenberry v. Commonwealth*, 336 S.W.3d 19, 37 (Ky. 2011). A defendant may not voluntarily waive a jury instruction for a lesser offense, to which he may be entitled, and then seek reversal on appeal claiming the circuit court committed error when it heeded the defendant's wishes. To do so would bestow a double benefit. A defendant who elected to waive a lesser-offense jury instruction would receive the benefit of that waiver, *i.e.*, a possible verdict of acquittal, but also preserve the right to later challenge the jury's verdict on the ground that the circuit court failed to issue the precise jury instruction the defendant abandoned. It is not our function to reverse a judgment against a defendant when the defendant himself invited the alleged error; we decline to do so today. *Id.* at 37 ("Generally, a party is estopped from asserting an invited error on appeal."); *see also Mullins v. Commonwealth*, 350 S.W.3d 434, 439 (Ky. 2011) (holding the defendant forfeited his right to claim on appeal that he was entitled to a lesser-offense instruction when his trial counsel "made several emphatic representations to the trial court that his client did not want any lesser-included offense instructions").

We also find meritless Boone's argument that no waiver occurred when he informed the circuit court that he did not want a third-degree sexual abuse instruction. In support of his position, Boone cites *Smith v. Commonwealth*, 737 S.W.2d 683, 688 (Ky. 1987), and *Commonwealth v. Collins*, 821 S.W.2d 488, 491 (Ky. 1991). These cases stand for the proposition that it is not erroneous for the circuit court, if warranted by the evidence, to tender an instruction on a lesser-included offense over a defendant's objection. However, neither *Smith* nor *Collins* compels the circuit court to issue a lesser-offense instruction in the face of an objection by a defendant. *See generally Perkins v. Commonwealth*, 237 S.W.3d 215, 224 (Ky. App. 2007). Our Supreme Court continues to adhere to the long-standing principle that the circuit court need only instruct the jury on a lesser offense if so requested by the defendant. *Bartley*, 400 S.W.3d at 731. "It is not an error, however, palpable or otherwise, for the trial court not to instruct on a lesser included offense that has not been requested." *Id.*

Boone further claims the circuit court erred by not issuing an instruction on the lesser offense of harassment with physical contact. Boone maintains the jury "could have reasonably doubted that any sexual contact occurred but believed that physical contact did occur" when Boone touched the victim with his foot. (Appellant's Brief at 18). To support his argument, Boone recites the axiom that "[a] defendant is entitled to a lesser-included instruction if the jury could have reasonable doubt as to the willfulness required by the greater offense, but reasonably find that he is guilty of the lesser offense." (Appellant's

Brief at 16)(citations omitted). This is true. *Johnson v. Commonwealth*, 327 S.W.3d 501, 508 (Ky. 2010). Of course, as explained, it is also a well-known tenet of our jurisprudence that the trial court is only required to instruct the jury on those defenses or theories supported by the evidence at trial. *Houston v. Commonwealth*, 975 S.W.2d 925, 929 (Ky. 1998) ("Although a trial judge has a duty to prepare and give instructions on the whole law of the case, including any lesser included offenses which are supported by the evidence, that duty does not require an instruction on a theory with no evidentiary foundation."); *Martin*, 571 S.W.2d at 615. Stated differently, the circuit court need not instruct on a defense or theory absent an evidentiary foundation. *See Johnson*, 327 S.W.3d at 508, fn. 17 ("[T]he right to instructions on lesser-included offenses [applies] only where there is evidence to warrant such instructions."). Here, the circuit court did not err by failing to issue a harassment instruction because the evidence did not support such an instruction.

"A person is guilty of harassment when, with intent to intimidate, harass, annoy, or alarm another person, he . . . [s]trikes, shoves, kicks, or otherwise subjects him to physical contact[.]" KRS 525.070(1)(a). To be liable for the offense of harassment, the defendant must initiate the physical contact "with the intent to harass, annoy, or alarm another person." *Id.*, 1974 Kentucky Crime Commission/LRC Commentary (explaining "[i]t should be noted, however, that the accused must act with the intent to harass, annoy or alarm another person" to be found guilty under KRS 525.070(1)(a)); 10 Leslie W. Abramson, *Kentucky*

Practice, Substantive Criminal Law, § 9:8 (2nd ed. 2000) (explaining "a defendant must act with the intent to harass, annoy or alarm another person"). The record is void of any evidence that Boone touched his victim with his foot intending to harass, annoy, or alarm her. The victim's testimony reveals she regarded Boone's foot caress as sexual in nature. Boone denied touching the victim in any manner, including with his foot. The juxtaposition of the parties' opposing positions leads us to believe a reasonable jury could not have found Boone guilty of harassment with physical contact. *See, e.g., Billings v. Commonwealth*, 843 S.W.2d 890, 894 (Ky. 1992) (finding "no basis in the record for the proposition that a reasonable juror could have found Billings innocent of sodomy but guilty of sexual abuse in the first degree" because the "overwhelming import of the prosecution's evidence in the present case was that the defendant had subjected the complaining witness to oral sexual contact" and the "entire import of the defense evidence was that the events alleged had not in fact occurred").

D. Court Costs

Finally, Boone argues the circuit court committed reversible error when it imposed on him, an indigent person,[5] court costs. Court costs are a form of punishment and are therefore a "part of the sentence imposed in a criminal case." *Travis v. Commonwealth*, 327 S.W.3d 456, 459 (Ky. 2010). "Sentencing is jurisdictional[.]" *Cummings v. Commonwealth*, 226 S.W.3d 62, 66 (Ky. 2007). It

[5] Boone's indigent status is not disputed.

is not subject to waiver, and "may be raised for the first time on appeal." *Id.*; *Wellman v. Commonwealth*, 694 S.W.2d 696, 698 (Ky. 1985).

An indigent or needy person is one unable to pay attorney's fees. KRS 31.110. A poor person is one unable to pay court costs. KRS 23A.205. These two classifications are not mutually exclusive; while an indigent person may not be able to pay attorney's fees, he or she may, in fact, be able to pay court costs. *Maynes v. Commonwealth*, 361 S.W.3d 922, 929 (Ky. 2012) (explaining 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"). A person is only "poor," as contemplated by KRS 23A.205, if he lacks the ability "to pay court costs without 'depriving himself or his dependents of the necessities of life, including food, shelter or clothing.'" *Id.* (quoting KRS 453.190(2)).

In keeping with the relevant statutory definitions and the DPA[6] Act, which "[f]rom its inception . . . has allowed for imposition of costs against those DPA-represented defendants who can afford to pay[,]" our Supreme Court has directed that, before imposing court costs on an indigent defendant, the trial court shall ascertain whether that defendant is also a "poor person" unable to pay the ordered court costs, currently "or within the foreseeable future[,] without depriving himself and his dependents of the basic necessities of life." *Maynes*, 361 S.W.3d at 929, 933; *Smith v. Commonwealth*, 361 S.W.3d 908, 921 (Ky. 2012) ("Courts may now impose court costs on an indigent defendant, 'unless the court finds that

[6] Department of Public Advocacy

the defendant is a poor person as defined by KRS 453.190(2)[.]'" (citation omitted)); KRS 23A.205.

Here, prior to imposing court courts on Boone, the circuit court issued no finding whether Boone was a "poor person" as defined by KRS 453.190(2), and did not inquire into Boone's ability pay court costs in the foreseeable future.[7] KRS 23A.205(2). Such failures constitute reversible error. While we find it unlikely that Boone is indeed a "poor person" unable to pay court costs, especially in light of his relatively short prison sentence and the modest amount of costs ordered ($153), we concede this is a question of fact to be determined by the circuit court. *See Smith*, 361 S.W.3d at 921. For that reason, we reverse the portion of the circuit court's July 11, 2011 Judgment and Sentence requiring Boone to pay court costs, and remand for additional proceedings. On remand, we direct the circuit court to ascertain whether Boone is a "poor person" unable to pay the ordered court costs, currently "or within the foreseeable future[,] without depriving himself and his dependents of the basic necessities of life." *Maynes*, 361 S.W.3d at 933; *Smith*, 361 S.W.3d at 921; KRS 23A.205.

V. <u>Conclusion</u>

The Mason Circuit Court's July 11, 2011 Judgment and Sentence is reversed, only insofar as the circuit court required Boone to pay court costs, and remanded for additional proceedings to ascertain whether Boone: (1) is a "poor person" as contemplated by KRS 453.190(2) and KRS 23A.205(2); and (2) can or

[7] We are cognizant that *Maynes* was decided well after the circuit court entered its July 11, 2011 Judgment and Sentence.

can soon pay the court costs ordered. In all other respects, the circuit court's judgment and sentence is affirmed.

ALL CONCUR.

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