

Commonwealth of Kentucky
Court of Appeals

NO. 2008-CA-000307-MR

LIZBETH TUNEY

APPELLANT

v. APPEAL FROM NICHOLAS CIRCUIT COURT
HONORABLE ROBERT W. MCGINNIS, JUDGE
ACTION NO. 07-CR-00033

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, TAYLOR, AND WINE, JUDGES.

WINE, JUDGE: Lizbeth Tuney directly appeals from a judgment of the Nicholas Circuit Court convicting her of theft of identity and being a second-degree persistent felony offender. As a result of those convictions, Tuney was sentenced to serve four years, enhanced to eight years. Having considered the record and the briefs of the parties, we affirm for the reasons set out below.

Factual and Procedural History

Sarah Esterhay, a neighbor of Tuney, allowed Tuney to use her name and USAA Mastercard to establish an account with eBay in June of 2004.

Esterhay testified that transaction-related payments and/or phone calls initially went to her home until she asked Tuney to remove her address and phone number from the eBay account. In August of 2004, when Tuney apparently neglected to make payments on the account as agreed, Esterhay withdrew permission for Tuney to use the credit card, and cancelled the card three months later. Esterhay testified that, after she withdrew her consent to allow Tuney to use that particular Mastercard, she never again gave Tuney authority to use her credit nor did she provide Tuney with specific personal information that would give Tuney the ability to make use of Esterhay's credit. Esterhay asserts that Tuney had the "opportunity" to obtain her social security number and other information from either another credit application she had seen or when she was watching Esterhay's home while Esterhay was on vacation.

In January of 2005, Tuney successfully applied for Pay-Pal buyer credit (financed by G.E. Money Bank and used in connection with the eBay site) using Esterhay's name and social security number. The mailing address for that account was a post office box which Tuney had obtained in August of 2004. Although records relating to that P.O. Box include Esterhay's name and phone number, Esterhay received no mail there, and the Commonwealth further asserts that Esterhay had no knowledge of the box. The credit limit on the Pay-Pal

account was \$1,200, and by the end of February of 2005, the balance due was \$1,195.44.

Esterhay testified she learned of the Pay-Pal account when she obtained a credit report in April of 2005, and discovered it listed there. At some point when Tuney failed to make payments on that account (either directly to G.E. Money Bank or to Esterhay), Esterhay began making those payments herself. Esterhay later filed a fraud claim with G.E. Money Bank. During the investigation that followed, Esterhay admitted that she had allowed Tuney to open an account in her name, although it is not clear whether she was referring to the initial account opened using Esterhay's Mastercard, or to the subsequent G.E. Money Bank account opened in early 2005. Regardless, because Esterhay admitted having knowledge of the latter account, made payments on that account, and made the fraud claim only *after* Tuney had stopped making payments, Esterhay's fraud claim was denied.

Esterhay subsequently filed a complaint with the Nicholas County Attorney's Office which resulted in an investigation by the Kentucky State Police. Detective Clint Graves testified at trial that Esterhay "knew Tuney would be doing eBay/Pay-Pal buyer credit," and further that she "knew Tuney would be using the credit for buying and selling on eBay and would be using Pay-Pal buyer credit." For reasons that are unclear, Graves concluded that Esterhay had given two different "stories" to him and G.E. Money Bank. Criminal charges were filed

against Tuney, and G.E. Money Bank re-opened their fraud claim, ultimately deciding in favor of Esterhay and refunding all payments made on that account.

Tuney was indicted and charged with theft of identity and also as a first-degree persistent felony offender. In August of 2007, Tuney stood trial on the charge of theft of identity. Tuney made a motion for a directed verdict at the close of the case for the Commonwealth, and again at the close of the case for the defense. Both motions were denied by the trial court, and Tuney was convicted. This appeal followed.

Analysis

First, we do not agree with the Commonwealth's challenge that Tuney failed to preserve the issue of consent when trial counsel made a motion for a directed verdict.¹

The issue before this Court then becomes whether the trial court improperly denied Tuney's motions for a directed verdict. Those motions were based on the assertion that the evidence presented by the Commonwealth was insufficient as a matter of law to demonstrate that Tuney applied for a line of credit with Pay-Pal (financed by G.E. Money Bank) in Esterhay's name but without her consent.

The standard of review on appeal of a motion for a directed verdict in a criminal case is whether it would not be clearly unreasonable for a jury to find a

¹ While appellant's reply brief contains a passage transcribed from the record and cited, the recording itself is inaudible. For purposes of this Opinion, the Court will presume the transcribed passage to be accurate.

defendant guilty under the evidence as a whole. *Commonwealth v. Sawhill*, 660 S.W.2d 3, 5 (Ky. 1983). When ruling on a directed verdict motion, a trial court must assume that all the evidence for the Commonwealth is true, and draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991). However, the Commonwealth is required to present evidence “of substance,” and not more than a mere scintilla of evidence from the Commonwealth requires that the trial court grant the motion. *Sawhill* at 5.

In the case *sub judice*, all parties agree that Esterhay initially gave her permission for Tuney to open the first (eBay) account using Esterhay’s Mastercard. However, Tuney asserts that the evidence presented by the Commonwealth showing that Esterhay withdrew her consent and never gave Tuney permission to open the second (G.E. Money Bank/Pay-Pal) account, is not “of substance,” and therefore fails the *Sawhill* test.

The Commonwealth provided more than a scintilla of evidence that Esterhay did not give her consent for the second (G.E. Money Bank) account. Esterhay not only cancelled the original credit card used by Tuney, but later filed a fraud claim after the second account was opened, then pursued the matter with the Nicholas County Attorney’s Office when that claim was denied. Assuming the evidence introduced by the Commonwealth to be true, Esterhay never provided her social security number to Tuney. The assertion that Esterhay admitted she gave consent and assisted in opening the first account does not contradict that evidence.

The credibility of Esterhay's testimony is not before this Court, but rather was an issue for the jury. *Brown v. Commonwealth*, 789 S.W.2d 748 (Ky. 1990).

Further, the evidence presented showing that Tuney changed the billing address and subsequently failed to make payments is circumstantial evidence from which, the court may conclude, a jury may make reasonable inferences of guilty. *Dillingham v. Commonwealth*, 995 S.W.2d 377 (Ky. 1999). If the totality of the evidence is such that the trial judge concludes that reasonable minds might fairly find guilt beyond a reasonable doubt, then the evidence is sufficient and the case should be submitted to the jury. *Sawhill* at 4, *citing Hodges v. Commonwealth*, 473 S.W.2d 811 (Ky. 1971). In view of the undisputed facts, as well as the circumstantial evidence relied on by the Commonwealth, the trial judge could certainly conclude that reasonable minds might fairly find Tuney guilty of theft of identity beyond a reasonable doubt. For the aforementioned reasons, we affirm the judgment of the Nicholas Circuit Court.

ALL CONCUR.

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