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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000504-MR

GABRIELLA SIMONE ALLEN

APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE JUDITH E. MCDONALD-BURKMAN, JUDGE
ACTION NO. 08-CR-001927

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION AFFIRMING

** ** * ** * ** *

BEFORE: VANMETER, ACTING CHIEF JUDGE; STUMBO AND TAYLOR,
JUDGES.

VANMETER, ACTING CHIEF JUDGE: Gabriella Simone Allen appeals from
the Jefferson Circuit Court's judgment sentencing her to three and one-half years
imprisonment, probated for five years. We affirm.

On December 2006, while under oath, Gabriella Simone Allen signed
a criminal complaint alleging Curtis Weaver forged her signature as co-signor on

loan documents in order to purchase a 2002 Ford F-150 truck from Oxmoor Toyota (Toyota) in Louisville, Kentucky. Later that month, Allen submitted an affidavit, as well as a copy of the criminal complaint, to Toyota alleging Weaver had forged her signature as co-signor on his loan documents. After a review of Allen's claims, Toyota forgave a \$7,487.84 debt incurred by Allen when Weaver defaulted on his loan.

Ultimately, following a March 2008 altercation between Allen and Weaver, Allen was charged with perjury in the first degree, theft by deception over \$300, and terroristic threatening in the third degree. The perjury charge resulted from Allen's filing of the 2006 criminal complaint against Weaver, while her interactions with Toyota formed the basis of the theft by deception charge.

At Allen's jury trial, Allen sought permission to cross-examine Weaver in regards to the specific nature of his prior convictions. The trial court sustained the Commonwealth's objection to admission of the evidence. At the close of the Commonwealth's case-in-chief, Allen moved for a directed verdict, which the trial court denied. After the trial, Allen moved for a new trial and/or a directed judgment of acquittal claiming the Commonwealth failed to prove the elements of each charge, which the trial court denied. This appeal followed.

Allen's first allegation of error is that the trial court erred by excluding evidence concerning the specific nature of Weaver's prior convictions. We disagree.

Our review of a ruling on the admissibility of evidence is whether the trial court abused its discretion. *Anderson v. Commonwealth*, 231 S.W.3d 117, 119 (Ky. 2007). An abuse of discretion occurs when the “trial judge’s decision was arbitrary, unreasonable, unfair or unsupported by sound legal principles.” *Id.* (quoting *Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000)).

KRE¹ 609 provides, in pertinent part:

(a) . . . For the purpose of reflecting upon the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record if denied by the witness, but only if the crime was punishable by death or imprisonment for one (1) year or more under the law under which the witness was convicted. *The identity of the crime upon which conviction was based may not be disclosed upon cross-examination unless the witness has denied the existence of the conviction.*

KRE 609(a) (emphasis added). In other words, the nature of prior convictions is inadmissible, unless the witness denies the existence of those convictions. In this case, Weaver did not deny the existence of his prior convictions during cross-examination by Allen. Thus, under KRE 609 the specific nature of Weaver’s prior convictions is not admissible.

Allen argues KRE 609 is not controlling and the specific nature of Weaver’s prior convictions is admissible under KRE 608, which provides, in part:

Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness’ credibility, *other than conviction of a crime as provided*

¹ Kentucky Rules of Evidence.

in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness: (1) concerning the witness' character for truthfulness or untruthfulness[.]

KRE 608(b) (emphasis added). However, KRE 608 is inapplicable to this case because it concerns specific instances of conduct other than criminal convictions. The language of KRE 608 clearly precludes its application to criminal convictions, leaving the admissibility of such evidence to be governed by KRE 609. Here, Allen sought to introduce the specific nature of Weaver's prior convictions, not specific instances of conduct. Therefore, KRE 609 is the appropriate rule, rather than KRE 608.

Allen also argues the specific nature of Weaver's prior convictions is admissible under KRE 404. However, Allen cites no Kentucky authority which allows a defendant to offer evidence of a Commonwealth witness's prior convictions through KRE 404. Rather, KRE 404 is seen as a source of admission for substantive character evidence that tends to prove or disprove the underlying offense. Weaver's prior convictions are relevant to his credibility, but are not useful to prove or disprove the elements of the crimes of perjury in the first degree and theft by deception over \$300 for which Allen was charged. Accordingly, the trial court did not abuse its discretion in excluding evidence of the specific nature of Weaver's convictions.

Allen's second allegation of error is that the trial court erred by denying her motion for a directed verdict because the Commonwealth did not

present sufficient evidence that Allen obtained any property to sustain a guilty verdict for theft by deception over \$300. We disagree.

Upon consideration of a motion for a directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony.

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) (citations omitted).

Allen was found guilty of KRS² 514.040, which states, in pertinent part:

(1) A person is guilty of theft by deception when the person obtains property or services of another by deception with intent to deprive the person thereof. A person deceives when the person intentionally:

(a) Creates or reinforces a false impression, including false impressions as to law, value, intention, or other state of mind[.]

KRS 514.040(1)(a).

In *Palmer v. Commonwealth*, 479 S.W.2d 613 (Ky. 1972), the court stated, “in order for one to be convicted of obtaining property by false pretenses it

² Kentucky Revised Statutes.

must be shown that something was obtained to which the defendant would not otherwise be entitled.” *Id.* at 614-15. In this case, the Commonwealth presented testimony of a witness to Allen signing documents at Toyota on the day Weaver purchased his truck. The Commonwealth also presented evidence that Allen owed \$7,487.84 to Toyota on a loan in default. Further evidence was shown that Allen had this debt discharged by submitting an affidavit to Toyota claiming her signature on the loan documents was forged. Based on this evidence, a jury could have reasonably concluded Allen obtained property in the value of \$7,487.84 when her debt to Toyota was discharged. Accordingly, the trial court did not err by denying Allen’s motion for a directed verdict on the charge of theft by deception over \$300.

Finally, Allen’s third allegation of error is that the trial court abused its discretion by not granting her motion for a new trial and/or directed judgment of acquittal on the charges of perjury in the first degree and theft by deception over \$300. We disagree.

The decision to grant a new trial is within the discretion of the trial court. *Foley v. Commonwealth*, 55 S.W.3d 809, 814 (Ky. 2000). Our review is limited to “whether there has been an abuse of that discretion.” *Id.* On appellate review, the test for a directed judgment of acquittal is, whether under the evidence as a whole, it would be unreasonable for the jury to find guilt. *See Benham*, 816 S.W. at 187.

As previously discussed, sufficient evidence was presented to support a guilty verdict against Allen on the charge of theft by deception over \$300. Furthermore, the Commonwealth presented evidence that Allen knowingly made statements under oath in a criminal complaint for the attorney general's office. A witness testified Allen was at Toyota and signing some sort of document on the day Weaver purchased the truck. Thus, sufficient evidence was also presented to support a guilty verdict against Allen on the charge of perjury in the first degree. Accordingly, the trial court did not abuse its discretion by denying Allen's motion for a new trial and/or a directed judgment of acquittal.

The judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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