

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2009-CA-002168-MR

JAMES LAWRENCE KOWALSKI

APPELLANT

v. APPEAL FROM WARREN CIRCUIT COURT  
HONORABLE STEVE ALAN WILSON, JUDGE  
ACTION NO. 08-CR-00664

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: KELLER, NICKELL, AND STUMBO, JUDGES.

STUMBO, JUDGE: James Lawrence Kowalski appeals from a Judgment of the Warren Circuit Court reflecting a jury verdict of guilty on one count of flagrant nonsupport. Kowalski contends that the trial court erred when it failed to sustain his motion for a directed verdict by holding that the Commonwealth did not meet

its burden of proof on all elements of the offense. We must conclude that the circuit court properly determined that the Commonwealth presented sufficient evidence to meet its burden of proof, and accordingly affirm the Judgment on appeal.

In 1997, Kowalski and his then-wife, Sandra Firkins, were divorced by way of a decree of dissolution of marriage rendered in Warren Circuit Court. Sandra was designated as primary custodian of the parties' two minor children, and Kowalski was ordered to pay \$862 per month in child support based on his income at the time of dissolution.

Sometime thereafter, Kowalski failed to pay the child support obligation, and the Warren County grand jury indicted him in 2004 on the charge of flagrant nonsupport. Kowalski was not located for about two years, after which he was arrested in Texas on the outstanding nonsupport charge. He posted a \$25,000 bond which was applied to the arrearage, and the charge was dropped.

In 2007, the Warren County grand jury indicted Kowalski on one count of first-degree bail jumping. He was later located in Utah and arrested. Kowalski again posted a bond, which was applied to another arrearage, and the charge was dropped.

In 2008, the Warren County grand jury indicted Kowalski again on one count of flagrant nonsupport. The charge arose from Kowalski's alleged failure to pay child support between January and July of 2008. Though provided with counsel by the Department of Public Advocacy, Kowalski began filing *pro se*

motions to dismiss the charge on the basis that he was not gainfully employed and was unable to meet the child support obligation.

After Kowalski entered a plea of not guilty, the matter proceeded to a jury trial on September 23, 2009. At the trial, Kowalski defended by claiming that while he had training and certifications in the area of emergency responder environmental sales and operation, and had worked approximately 1100 hours with a group of investors and the United States Forestry Service between January and July of 2008, he was not paid for that work and was therefore unable to meet his child support obligation. After additional evidence was adduced that Kowalski was working with a startup corporation called Solace Tuit, Inc. and had filed a lawsuit against that corporation to recover back wages, Kowalski moved for a directed verdict. The motion was denied, and the matter went before the jury which found Kowalski guilty of flagrant nonsupport. He was sentenced to one year in prison, and this appeal followed.

Kowalski now argues that the trial court committed reversible error in overruling his motion for a directed verdict. He directs our attention to the flagrant nonsupport statute, KRS 530.050, and maintains that the Commonwealth's evidence was not sufficient to meet its burden of proof on each element of the offense. The focus of his claim of error is that the Commonwealth presented no evidence that he had the ability to earn an income sufficient to meet his child support obligation. That is to say, Kowalski argues that he was not reasonably able to meet the child support obligation, and that as such the Commonwealth failed to

prove that element of the offense. He notes that the Commonwealth produced the testimony of a child support case worker and Kowalski's ex-wife, neither of whom provided any evidence that Kowalski was reasonably able to provide the support ordered during the period of time covered by the indictment.

We have closely examined the record and the law, and find no error.

KRS 530.050(2) states that,

A person is guilty of flagrant nonsupport when he persistently fails to provide support which he can reasonably provide and which he knows he has a duty to provide by virtue of a court or administrative order to a minor or to a child adjudged mentally disabled, indigent spouse or indigent parent and the failure results in:

(a) An arrearage of not less than one thousand dollars (\$1,000); or

(b) Six (6) consecutive months without payment of support; or

(c) The dependent having been placed in destitute circumstances. For the purposes of this paragraph, it shall be prima facie evidence that a dependent has been placed in destitute circumstances if the dependent is a recipient of public assistance as defined in KRS 205.010.

The dispositive question, then, is whether the Commonwealth presented evidence sufficient to meet its burden of demonstrating that Kowalski was able to reasonably provide the child support he was ordered to pay. And because this matter is before us on the denial of Kowalski's motion for a directed verdict of acquittal, all reasonable inferences from the evidence must be drawn in favor of the Commonwealth and the ultimate question is whether the evidence was sufficient to

induce a reasonable juror to find guilt. *Commonwealth v. Benham*, 816 S.W.2d 186 (Ky. 1991).

We are not persuaded by Kowalski's contention that the Commonwealth failed to provide any proof that Kowalski was able to reasonably provide the child support at issue. Kowalski's ex-wife, Sandra Firkins, testified as to Kowalski's work experience, training and business acumen which had allowed him to generate income in the past. Additionally, she testified that she was not aware of any disability or other reason why Kowalski would not be able to work. Kowalski himself, through counsel, acknowledged that he had worked more than 1,000 hours without pay during the period in question while attempting to assist one or more startup businesses. Kowalski went on to testify that he had training and certifications in emergency responder environmental sales and operation, and that he had volunteered at a ski resort. Additional testimony was adduced that Kowalski was given a pickup truck by an investor in an ATV business Kowalski was working with, and that two other investors contributed at least \$30,000 to either Kowalski or the startup business.

The phrase "reasonably provide" as set out in KRS 530.050(2) does not require that one have cash on hand sufficient to pay the child support obligation. *Schoenbachler v. Commonwealth*, 95 S.W.3d 830 (Ky. 2003). Rather, it means that the individual has the capacity to earn an income or produce assets sufficient to meet the obligation. *Id.*

The burden of proving this element of KRS 530.050(2) lies with the Commonwealth. *Id.* Credible proof was presented that Kowalski had the work experience and training sufficient to reasonably provide the child support at issue. When drawing all fair and reasonable inferences from this evidence in favor of the Commonwealth, we cannot conclude that the Warren Circuit Court erred in overruling Kowalski's motion and renewed motion for a directed verdict of acquittal. *Benham, supra.* Accordingly, we find no error.

For the foregoing reasons, we affirm the Judgment of the Warren Circuit Court.

ALL CONCUR.

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