

RENDERED: MAY 20, 2011; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2010-CA-000675-MR

CARLOS GILESTRA

APPELLANT

v.

APPEAL FROM BULLITT CIRCUIT COURT  
HONORABLE RODNEY BURRESS, JUDGE  
ACTION NOS. 07-CR-00123 AND 08-CR-00059

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: TAYLOR, CHIEF JUDGE; MOORE AND WINE, JUDGES.

TAYLOR, CHIEF JUDGE: Carlos Gilestra brings this appeal from a March 9, 2010, final judgment and sentence of imprisonment entered in the Bullitt Circuit Court upon a jury verdict finding appellant guilty of fraudulent use of a credit card over \$100, theft by unlawful taking over \$300, and with being a persistent felony

offender in the second degree. The circuit court sentenced appellant to a total of sixteen years' imprisonment. For the reasons stated, we affirm.

Appellant was indicted by a Bullitt County Grand Jury upon fraudulent use of a credit card over \$100 and theft by unlawful taking over \$300. The former charge stemmed from appellant's misuse of a credit card given to him by his employer. The credit card was to be used by appellant for business-related expenses; however, appellant utilized the credit card without authorization for personal expenses in the amount of \$20,000. The theft charge resulted from appellant stealing his employer's motor vehicle. Thereafter, appellant was also indicted upon the charge of being a persistent felony offender in the second degree. Following a jury trial, appellant was found guilty of fraudulent use of a credit card and theft by unlawful taking. Appellant was also adjudicated a persistent felony offender in the second degree. The jury initially recommended a sentence of twenty years' imprisonment. Prior to imposition of final sentencing, appellant filed a motion seeking to have the sentencing phase of trial set aside. The trial court granted the motion and ordered a psychiatric evaluation of appellant. Appellant was subsequently adjudicated competent. Pursuant to an agreement between appellant and the Commonwealth, appellant was ultimately sentenced to sixteen years' imprisonment. This appeal follows.

Appellant's first argument raised on appeal is that "[t]he evidence was insufficient to support the conviction for unauthorized use of a credit card."

Appellant essentially asserts that he was entitled to a directed verdict of acquittal

upon the charge of fraudulent use of a credit card over \$100. Appellant claims that the only witness to testify for the Commonwealth gave inconsistent testimony and did not establish the *mens rea* necessary to support the conviction.

The Commonwealth urges this Court not to review the alleged error as it is unpreserved. The Commonwealth states that appellant moved for a directed verdict at the close of the Commonwealth's case only upon the theft by unlawful taking charge and not upon the fraudulent use of a credit card. In fact, the Commonwealth points out that defense counsel specifically stated: "I believe that there's probably sufficient proof that that court would not entertain the defense motion [for directed verdict] for count one [fraudulent use of a credit card over \$100]. Therefore, I'll waive that."

Upon review of the record, we express grave doubt upon whether the directed verdict was properly preserved for our review. However, even if it were properly preserved, we conclude that the trial court correctly denied appellant's motion for directed verdict for the following reasons.

Upon appellate review of a motion for directed verdict, the standard is whether under the evidence as a whole it was clearly unreasonable for the jury to have found defendant guilty beyond a reasonable doubt. Kentucky Rules of Civil Procedure 50.01; *Com. v. Sawhill*, 660 S.W.2d 3 (Ky. 1983). If so, he was entitled to a directed verdict. *Id.*

Kentucky Revised Statutes (KRS) 434.650 defines the offense of fraudulent use of a credit card and provides, in relevant part, as follows:

(1) A person who, with intent to defraud the issuer, a participating party, a person, or organization providing money, goods, services, or anything else of value, or any other person:

. . . .

(b) Obtains money, goods, services, or anything else of value by representing without consent of the cardholder that he is the holder of a specified card or by representing that he is the holder of a card and such card has not in fact been issued[.] . . .

In the case sub judice, the Commonwealth presented the testimony of Tina Sage, the business manager for appellant's employer. Sage testified that appellant was hired in August or September of 2006 and was issued a company credit card for business-related expenses. Sage stated that the company's credit card usage policy was explained to appellant at the time the card was issued. Appellant was specifically informed that personal charges were not allowed, and, on September 11, 2006, appellant executed a document acknowledging the company's policy on credit card usage. A few months later, in December 2006, Sage noticed appellant charged personal items upon the company issued credit card in violation of company policy. Sage notified appellant of the violation whereupon he responded that the personal charges were incurred by accident. Appellant authorized Sage to withhold funds from his paycheck to cover the unauthorized personal charges on the credit card. After being warned not to charge personal expenses, Sage testified that appellant again charged personal items to the company's card. Consequently, appellant was terminated from employment on or about March 14, 2007;

nevertheless, he continued to make unauthorized charges on the credit card after his employment had ended until the credit card was cancelled on or about March 22, 2007. Sage further testified that appellant made approximately \$20,000 in unauthorized personal charges on the credit card.

From the evidence presented, the jury could have reasonably found defendant guilty of fraudulent use of a credit card over \$100 under KRS 434.650. The Commonwealth presented Sage's testimony that appellant intentionally defrauded various entities by obtaining personal goods or services by representing, without consent of his employer, that he was authorized to utilize the credit card. While appellant asserts that Sage's testimony was inconsistent, the weight and credibility of a witnesses' testimony are solely within the province of the jury. *Potts v. Com.*, 172 S.W.3d 345 (Ky. 2005). Simply put, the Commonwealth submitted sufficient evidence from which a jury could reasonably find appellant guilty of fraudulent use of a credit card. Thus, we conclude the trial court properly denied appellant's motion for directed verdict.

Appellant next contends that the trial court erred by admitting a previous criminal conviction into evidence during the penalty phase of trial, thus resulting in a harsher recommended sentence of imprisonment by the jury.

The record reveals that the jury recommended a sentence of twenty years' imprisonment during the penalty phase of trial. However, prior to final sentencing, appellant filed a motion to set aside the sentencing penalty phase of the trial, and the trial court granted the motion. Before a second penalty phase of trial took

place, appellant and the Commonwealth reached a sentencing agreement, and appellant was ultimately sentenced in accordance with the agreement for a total of sixteen years' imprisonment. Thus, the sentence of imprisonment recommended by the jury was of no consequence. As the trial court set aside the penalty phase of appellant's trial and sentenced appellant consistent with his agreement with the Commonwealth, we believe appellant's above contention of error is rendered moot.

For the foregoing reasons, the final judgment and sentence of imprisonment of the Bullitt Circuit Court is affirmed.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT  
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ORAL ARGUMENT FOR  
APPELLEE:

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