

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-002123-MR

VINCENT B. DOBBINS

APPELLANT

V. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE REBECCA M. OVERSTREET, JUDGE
ACTION NOS. 99-CR-00715 AND 99-CR-00810

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION AFFIRMING

* * * * *

BEFORE: GUDGEL, Chief Judge; BARBER and KNOPF, Judges.

GUDGEL, CHIEF JUDGE: This is an appeal from a judgment entered by the Fayette Circuit Court, which sentenced appellant to ten years' imprisonment after a jury found him guilty of flagrant nonsupport and of being a second-degree persistent felony offender (PFO II). We affirm.

Appellant and Lisa Dawson signed an agreed judgment in 1981, pursuant to which appellant was to pay \$15 per week for the support of their infant child. Dawson filed a criminal complaint in April 1999, charging appellant with flagrant nonsupport for having failed to pay child support since August 1989, resulting in a total arrearage of approximately \$12,400. Appellant thereafter was indicted on one felony count of flagrant

nonsupport, as well as one count of being a PFO II. See KRS 530.050 and KRS 532.080. The Commonwealth then filed a pretrial notice stating an intent to introduce evidence of other crimes or wrongs during its case-in-chief. More specifically, it intended to introduce evidence that on three prior occasions appellant was convicted by the Fayette District Court and served time in jail for misdemeanor nonsupport. The Commonwealth alleged that this information showed appellant's knowledge and absence of mistake with respect to his child support obligation, as well as his motive, intent, and plan to not honor that obligation. KRE 404(b) (1). Over appellant's objection, the court permitted the Commonwealth to introduce such evidence.

The Commonwealth adduced evidence to show that appellant was convicted and served time in jail for nonsupport in 1989, 1991, and 1992, and that he failed to make any child support payments between 1994 and 1999.¹ Although appellant was incarcerated in the county jail and the state penitentiary at various times between 1994 and 1999, he was not incarcerated for some 608 days during that five-year period. Further, a parole officer testified that appellant was employed at a restaurant for approximately three months in 1996, and an unemployment services officer testified that state records indicated appellant earned \$582 through employment at a seafood store that year. Another parole officer stated that appellant indicated in 1988 that he was employed through a temporary work placement agency.

¹The 1994-1999 period was chosen because appellant had already been convicted and served time for the prior time period.

After the court denied appellant's motion for a directed verdict at the close of the Commonwealth's case, appellant testified that he was denied employment several times because of his felony convictions, that asthma and a hernia limited his ability to work, and that he supported himself through criminal activities which resulted in repeated periods of incarceration. Appellant admitted that he had knowledge of his child support obligation, that he had made no payments through the Domestic Relations Office, and that he had been incarcerated three times for not paying child support. However, appellant denied that he had ever been employed or told his parole officer that he was employed through a temporary job placement agency, and he claimed that he had insufficient funds to make support payments, especially while incarcerated. Appellant did not seek a directed verdict at the close of all the evidence.

The jury found appellant guilty of flagrant nonsupport and of being a PFO II, and recommended that he be sentenced to five years' imprisonment for flagrant nonsupport, enhanced to ten years based on the PFO II conviction. The trial court sentenced appellant to ten years' imprisonment consistent with the jury's recommendation. This appeal followed.

First, appellant contends that the trial court erred by denying his motion for a directed verdict. However, we note that although defense counsel orally moved for a directed verdict at the close of the Commonwealth's case, the issue was not preserved for review since he did not renew the motion at the close of all the evidence. As was recently reaffirmed by the supreme court in Baker v. Commonwealth, Ky., 973 S.W.2d 54, 55 (1998), a

defendant's motion for a directed verdict must be renewed at the close of all the evidence, "thus allowing the trial court the opportunity to pass on the issue in light of all the evidence."

Moreover, in any event it is clear that the trial court properly denied the motion for a directed verdict. As stated in Commonwealth v. Benham, Ky., 816 S.W.2d 186, 187 (1991), on a criminal defendant's 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.

See also Estep v. Commonwealth, Ky., 957 S.W.2d 191, 193 (1997); Commonwealth v. Sawhill, Ky., 660 S.W.2d 3 (1983). A court must be mindful of the rule that the "[c]redibility and weight of the evidence are matters within the exclusive province of the jury." Commonwealth v. Smith, Ky., 5 S.W.3d 126, 129 (1999) (citations omitted). The standard on appellate review of a trial court's denial of a motion for a directed verdict is that a defendant is not entitled to a directed verdict of acquittal if, under the evidence as a whole, it was not clearly unreasonable for the jury to find the defendant guilty. Fugate v. Commonwealth, Ky., 993 S.W.2d 931, 940 (1999); Benham, 816 S.W.2d at 187.

Relying on his extended periods of incarceration, his inability to secure employment, and his medical problems, appellant argues that the Commonwealth failed to establish that

he was "reasonably" able to provide the required child support. See KRS 530.050. However, the evidence shows that appellant was not incarcerated during a ten-month period in 1997-1998, that he obtained employment for short periods of time, and that his repeated incarcerations resulted from criminal activity which, albeit illegally, did provide him with some access to funds.

An incarcerated person's limited access to income or assets does not exempt that person from his or her obligation to pay some child support. See Commonwealth ex rel. Marshall v. Marshall, Ky. App., 15 S.W.3d 396 (2000). Appellant admitted below that he neither paid any child support between 1994 and 1999, nor sought a modification of his obligation based on his alleged inability to pay. Whether appellant exercised sufficient efforts to obtain employment or was physically capable of generating some income was essentially a question for the jury. Viewing the evidence as a whole and in the light most favorable to the Commonwealth, there was clearly sufficient evidence "to induce a reasonable juror to believe beyond a reasonable doubt" that appellant was guilty of flagrant nonsupport. Benham, 816 S.W.2d at 187. Hence, he was not entitled to a directed verdict.

Appellant also contends that the trial court erred by admitting evidence of his three prior misdemeanor convictions for nonsupport. He argues that this evidence was not admissible under KRE 404(b) to show intent, and that its prejudicial effect outweighed its probative value.

In reviewing a challenge to the admission of evidence, the appellate standard of review generally is whether the trial court abused its discretion. See, e.g., Estep v. Commonwealth,

Ky., 957 S.W.2d 191, 194 (1997); Partin v. Commonwealth, Ky., 918 S.W.2d 219, 222 (1996); Skimmerhorn v. Commonwealth, Ky. App., 998 S.W.2d 771, 775 (1998). Typically, evidence of crimes other than those charged is not admissible to show that a defendant has a criminal predisposition. KRE 404(b); Daniel v. Commonwealth, Ky., 905 S.W.2d 76, 78 (1995). Exceptions to this general rule exist as to evidence of other crimes or wrongs offered to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." KRE 404(b)(1). "To be admissible under any of these exceptions, the acts must be relevant for some purpose other than to prove criminal predisposition; sufficiently probative to warrant introduction; and the probative value must outweigh the potential for undue prejudice to the accused." Chumbler v. Commonwealth, Ky., 905 S.W.2d 488, 494 (1995). Moreover, "[t]he test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." Commonwealth v. English, Ky., 993 S.W.2d 941, 945 (1999).

Here, the Commonwealth asserts that evidence of appellant's prior convictions was admissible under KRE 404(b)(1) to show knowledge and intent. Not only did all three of those convictions concern the same child involved herein, but they also showed appellant's common plan or scheme to pay no child support. Appellant's employment status was similar throughout the period covered by the convictions, and evidence of his behavior leading to those convictions was consistent with, and relevant to show, his intent to continue to not pay child support despite his obvious knowledge of his obligation to do so. As we believe the

prejudicial effect of admitting evidence of the prior convictions did not outweigh its probative value, the trial court did not abuse its discretion by admitting the evidence in question.

The court's judgment is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Gene Lewter
Lexington, KY

BRIEF FOR APPELLEE:

A.B. Chandler III
Attorney General

Michael G. Wilson
Assistant Attorney General
Frankfort, KY