

Commonwealth Of Kentucky

Court of Appeals

NO. 1999-CA-001376-MR

DANNY CRAIG

APPELLANT

v. APPEAL FROM GREENUP CIRCUIT COURT
HONORABLE LEWIS D. NICHOLLS, JUDGE
ACTION NO. 98-CR-00179

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: DYCHE, JOHNSON AND PAISLEY,¹ JUDGES.

JOHNSON, JUDGE: Danny Craig has appealed from a final judgment and sentence of the Greenup Circuit Court entered on May 27, 1999, which pursuant to a jury verdict found Craig guilty of flagrant nonsupport,² and followed the jury's recommendation and sentenced Craig to 23 months' imprisonment. Having concluded that the trial court did not err in denying Craig's motions for a directed verdict of acquittal, we affirm.

¹ This opinion was prepared and concurred in prior to Judge Paisley's retirement effective December 1, 2003.

² Kentucky Revised Statutes (KRS) 530.050(2). Flagrant nonsupport is a Class D felony.

Danny Craig enlisted in the United States Army in 1982, and served four years on active duty. During the latter part of 1986, Craig began dating Kathy Thompson and shortly thereafter, they began living together. On August 1, 1988, the couple's child was born, Danny Ray Craig, II. During the early part of 1991, Craig was called up from active reserve status to serve in Operation Desert Storm in Iraq. After returning from Iraq, Craig and Thompson were married.³

The marriage lasted less than one year and a decree of dissolution of marriage was entered by the Greenup Circuit Court on December 23, 1992. As part of the decree, Craig was ordered to pay Thompson \$129.00 per month in child support.

Approximately one year later, on December 14, 1993, the trial court found that Craig had failed to make any child support payments between January 1993, and October 1993, and that he owed \$1,290.00 in arrearages. Craig was ordered to make his regular child support payments to Thompson of \$129.00 per month and to pay an additional \$64.50 per month in arrearages.

According to the trial testimony of Renee Mitchell, an employee of the Greenup Child Support Office, as of November 20, 1998, Craig had failed to make any child support payments and his arrearages had grown to \$4,677.29. On December 17, 1998, Craig was indicted by a Greenup County grand jury on one count

³ The exact date of the marriage is not clear from the record.

of flagrant nonsupport. Craig entered a plea of not guilty and the case proceeded to trial.

A jury trial was held on May 10, 1999. At the close of the Commonwealth's proof and at the close of all proof, Craig moved the trial court for a directed verdict of acquittal, which was denied. The jury found Craig guilty of flagrant nonsupport and recommended a sentence of 23 months' imprisonment. On May 27, 1999, after a pre-sentence investigation had been completed, the trial court followed the jury's recommendation and sentenced Craig to 23 months' imprisonment.⁴ This appeal followed.

Craig claims that the trial court erred by denying his motions for a directed verdict of acquittal. Specifically, Craig argues:

KRS 530.050 posits as a[n] essential element that the [d]efendant must be able to "reasonably provide" the support he is charged with not providing. It follows that in any [f]lagrant [n]on-support case, KRS 530.050(2)⁵ requires that the Commonwealth provide evidence that the [d]efendant can "reasonably provide" support. If the Commonwealth fails in its burden on that

⁴ Although Craig filed a timely notice of appeal, the record shows that pursuant to orders of this Court, Craig was given three extensions of time to file his brief and to supplement the record on appeal.

⁵ KRS 530.050(2) provides in part as follows:

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

issue, the [d]efendant is entitled to [a directed verdict].

In the case at bar as [Craig] pointed out in his directed verdict motion, the Commonwealth plainly failed to provide sufficient proof on this essential element of the offense charged.

We disagree with Craig's assertion that the Commonwealth failed to offer sufficient evidence to support a finding by the jury that Craig could have "reasonably provid[ed]" for his son's support.

In Commonwealth v. Benham,⁶ our Supreme Court explained the test for a trial court to follow when ruling on a motion for a directed verdict of acquittal:

On motion for 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.

The Court went on to state the appropriate standard for an appellate court to follow when reviewing a trial court's ruling on a motion for a directed verdict of acquittal:

On appellate review, the test of a directed verdict is, if under the evidence

⁶ Ky., 816 S.W.2d 186, 187 (1991).

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.

With these principles in mind, we turn to the evidence presented in the case sub judice.

Thompson, Craig's ex-wife, testified that prior to Craig's service in Operation Desert Storm, Craig was employed at his father's auto body repair shop and that Craig had also earned income on his own by repairing and reselling wrecked vehicles. Thompson stated that Craig had no trouble earning a living prior to serving in Iraq. Thompson further testified that after returning from Iraq, Craig did have trouble earning income, but she attributed this difficulty to Craig's heavy drinking. Specifically, Thompson stated:

Danny would work when Danny would work, and if it took a spell where he didn't, then he didn't, and a lot of times was because of his drinking. But, then, after he would sober up for awhile, then he would work good again. But, it just depended on whatever kind of mood or situation that he was in.

In addition, Craig testified that prior to his service in Operation Desert Storm, he and Thompson had no problems supporting themselves with gainful employment. Craig further testified that after the divorce, he was fired from several jobs due to "personality conflicts, drinking from time to time, [and] missing work[.]" Craig also stated that he was able to buy

Christmas and birthday presents for his son by doing yard work for his mother. Craig testified that he would be willing to "pick up pop cans" in order to earn money to meet his child support obligation. Craig stated that although he did work for his father "from time-to-time" after the divorce, he did not use any of these earnings to pay child support. Craig testified that he received \$95.00 per month in disability payments from the military, due to a knee injury that he suffered prior to his service in Iraq. Craig stated that \$25.00 per month went toward his rent at a low income housing facility. Craig also stated that he received food vouchers from the Veterans Administration and \$100.00 per month in food stamps. While Craig testified that he had approximately \$70.00 per month in disposable income from his disability payments, none of this money was ever paid to Thompson in the form of child support payments. However, Craig did use his disposable income to pay for telephone service and cable television. Finally, Craig testified that although he had worked at various places since the divorce, he had never contributed any of this income toward meeting his child support obligation.

Having "draw[n] all fair and reasonable inferences from the evidence in favor of the Commonwealth," we cannot conclude that it was "clearly unreasonable" for a jury to find that Craig could have "reasonably provid[ed]" support for his

son. There was substantial evidence introduced at trial which would support the jury's finding that Craig was capable of both earning an income and making his child support payments from the amounts he received in earnings and government benefits.

While Craig did introduce evidence in support of his claim that he had valid reasons for not working, including his alcoholism, post-traumatic stress disorder, and his periodic seizures, there was also evidence tending to show that Craig was not totally incapable of earning an income or paying at least some of his child support obligation. It was within the province of the jury to judge the credibility of the witnesses and to weigh the evidence presented. Accordingly, the trial court did not err by denying Craig's motions for a directed verdict of acquittal.

Finally, Craig argues that the jury's finding of guilt was "against the weight of the evidence." Craig claims that in reviewing the argument that his verdict was "against the weight of the evidence," this Court is free to substitute its evaluation of the credibility of the evidence for that of the fact-finder.⁷ However, in Kentucky, credibility and weight of the evidence issues are matters that are within the exclusive

⁷ In support of this argument, Craig cites Tibbs v. Florida, 457 U.S. 31, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982), where the United States Supreme Court noted that some jurisdictions recognize a distinction between reviewing a claim that a verdict was not supported by sufficient evidence and reviewing a claim that a verdict was against the weight of the evidence.

province of the jury.⁸ Accordingly, we will not reevaluate the credibility of the evidence presented in the instant case.

Based on the foregoing, the judgment of the Greenup Circuit Court is affirmed.

ALL CONCUR.

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⁸ Commonwealth v. Smith, Ky., 5 S.W.3d 126, 129 (1999).