

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2007-CA-001945-MR

NELSON GOOCH

APPELLANT

v. APPEAL FROM LINCOLN CIRCUIT COURT  
HONORABLE DAVID A. TAPP, JUDGE  
ACTION NO. 06-CR-00089

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: ACREE AND CAPERTON, JUDGES; ROSENBLUM,<sup>1</sup> SPECIAL JUDGE.

ACREE, JUDGE: The questions before us in this appeal stem from two aspects of the Lincoln Circuit Court's decision below. The first is whether the trial court properly denied the appellant's motion for directed verdict. The second is whether the admission of the appellant's prior findings of contempt and subsequent jail

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<sup>1</sup> Retired Judge Paul W. Rosenblum sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

sentences for failure to pay the same support obligation at issue in this case, without prior notice to the defense, was palpable error. Because we find that the trial court properly denied the appellant's motion for directed verdict and that the admission of the appellant's prior findings of contempt and jail sentences for failure to pay his child support obligation was not error, we affirm the judgment and sentence.

On January 3, 1987, the appellant's son was born to Doris Masterson. Following the birth of their child, Ms. Masterson contacted the Lincoln County Attorney's Office for the purpose of establishing the appellant's paternity and requiring him to pay child support. Suit was filed against the appellant resulting in an agreed order in which the appellant acknowledged that he was the father of the child and which required the appellant to pay child support in the amount of \$30.00 per week. Twenty-five dollars of the sum was to pay current support and five dollars was to be applied toward payment of the arrearage of \$1,300.20.

Over the course of the following two years, the appellant made sporadic payments, but substantially failed to meet his support obligation, resulting in a net increase in the arrearage until it reached \$1,706.94, and in the appellant being found in contempt. This sequence of events repeated itself over the course of subsequent years resulting in the appellant being sentenced to serve three separate six month jail terms, only one of which was served to completion. Over the years, as the appellant's support obligation went largely unpaid, the arrearage grew even greater. In addition, the appellant was ordered to contribute to his son's

medical expenses, which increased the support obligation and the rate at which the arrearage was accruing.

Eventually, an order was handed down by the circuit court allowing garnishment of the appellant's wages to satisfy his support obligation. On August 31, 1996, the appellant had \$35.00 withdrawn from his paycheck as a wage assignment. This was the last payment made by the appellant to date. In December of that same year, a bench warrant was issued for the appellant's arrest.

It took ten years for police to apprehend and arrest the appellant. During that time, the arrearage accrued until the child reached the age of majority. At the time of the hearing, the arrearage totaled \$29,566.14.

While the appellant apparently shirked his parental duties, the mother, Ms. Masterson, exceeded her own. Although not employed when she gave birth to their son, shortly thereafter she gained employment with Hitachi Automotive and has maintained that job for over 17 years. Because of Ms. Masterson's dedication and sacrifice, her son was able to graduate from high school and during the time of trial was enrolled at Eastern Kentucky University.

Following the appellant's arrest and indictment in 2006, and during the course of a short trial, the Commonwealth produced two witnesses. The first was Kathy Allen, the Lincoln County Attorney's child support administrator. A longtime employee of the county attorney's office, it was Ms. Allen whom Ms. Masterson had contacted initially about establishing paternity and support. Through Ms. Allen's testimony, the Commonwealth introduced certified records,

including the agreed order establishing the appellant's paternity and his initial support obligation of \$30 per week. Ms. Allen went on to testify that the appellant's payments were sporadic from the start and confirmed that no payment had been made since August 31, 1996.

When asked if she was aware of any reason why the appellant stopped working and discontinued his payments in August of 1996, Ms. Allen said she was aware of none, and noted that the responsibility lies with parents paying the child support to contact the county attorney's office if they are unable to meet their financial support obligation. Ms. Allen indicated, and the certified records verified, that prior to August of 1996, for a period of about three months, the appellant had been working, as evidenced by a court-ordered wage assignment. When payments ceased, Ms. Allen testified that it was the appellant's duty to notify the county attorney's office to indicate why he was not working and how he would make future payments. The appellant never contacted Ms. Allen. Finally, Ms. Allen testified that she personally was unaware of any reason the appellant's employment ceased, but noted that she received information from Social Security Disability and knew that the appellant had never received any disability benefits.

The Commonwealth's second witness was Ms. Masterson who testified that she had never received any direct payments from the appellant and that because she had worked to support their child since he was three years of age without relying on social services, she was owed \$29,566.14 in arrearage, less the amount that accrued during the child's first three years.

After the Commonwealth rested, the trial court denied the appellant's motion for a directed verdict. Subsequently, the defense indicated that it had no witnesses and the case was submitted to the jury. The jury returned a guilty verdict and recommended a sentence of five years, which the trial court accepted.

It is well established that a motion for a directed verdict made at the close of the plaintiff's case is not sufficient to preserve error unless renewed at the close of all the evidence. *Baker v. Commonwealth*, 973 S.W.2d 54, 55 (Ky. 1998), citing *Kimbrough v. Commonwealth*, 550 S.W.2d 525, 529 (Ky. 1977). Such a renewal gives the trial court the "opportunity to pass on the issue in light of all the evidence." *Baker*, 973 S.W.2d at 55. Thus, "a motion for a directed verdict made after the close of the Commonwealth's case-in-chief, but not renewed at the close of all evidence [generally] is insufficient to preserve an error based upon the insufficiency of the evidence." *Schoenbachler v. Commonwealth*, 95 S.W.3d 830, 836 (Ky. 2003).

After the trial court denied appellant's motion for directed verdict, appellant's counsel indicated he would not put on any evidence. The conversation of counsel for both sides and the court then shifted to proposed jury instructions without any renewal of the denied motion. However, since the defense did not offer any additional evidence subsequent to its motion for directed verdict, the motion made after the conclusion of the Commonwealth's case-in-chief was, in effect, a motion at the close of all the evidence and therefore was sufficient to

preserve the claim on appeal. Without additional evidence, there was nothing new for the trial court to consider in evaluating the motion.

The standard by which the trial court is to consider a motion for directed verdict is as follows:

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.

*Commonwealth v. Benham* 816 S.W.2d 186 (Ky. 1991).

Having been properly preserved, our standard of review of the denial of the appellant's motion for directed verdict was enunciated in *Commonwealth v. Sawhill* 660 S.W.2d 3 (Ky. 1983) and reaffirmed in *Benham*. Under these two cases, the test 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." *Id.* at 187, citing *Commonwealth v. Sawhill*, 660 S.W.2d at 4. It is not our prerogative to substitute our view of the evidence for that of the trial court. *Id.* Rather, it is to consider the decision of the trial judge in light of the proof presented. *Id.*

The crime of flagrant non-support has three elements. The Commonwealth must prove beyond a reasonable doubt that the appellant 1)

persistently failed to provide support, which 2) he could reasonably provide and 3) which he knew he had a duty to provide by virtue of a court or administrative order. *See* KRS 530.050(2).

The appellant argues that the evidence offered by the Commonwealth failed to prove the second element of flagrant non-support—that the appellant was in a position to reasonably provide the support payments—such that a jury could reasonably find guilt and therefore, the trial court improperly denied the appellant’s motion for directed verdict.

In support of this argument the appellant cites *Schoenbachler*, which held that “the Commonwealth bears the burden of proving, beyond a reasonable doubt, that the appellant could reasonably provide the Court-ordered support.” *Schoenbachler*, 95 S.W.3d at 836. We agree that the burden of proving each of the elements of flagrant non-support lies upon the Commonwealth. We believe, however, that the Commonwealth met this burden and that the trial court properly denied the appellant’s motion for directed verdict.

In his brief, the appellant expresses his views that there are preconceived notions of society and unfair presumptions of “all prosecutors, trial judges, and juries” with respect to “Dead-Beat Dads.” He also claims that so many unfair assumptions exist against defendants in non-support cases that the Commonwealth need only show that the payments were not made and the jury will find the defendant guilty. We believe, however, after reviewing the evidence from the trial court’s perspective, that the appellant’s critique of our trial system is

misplaced and that the trial court's decision to deny the motion for directed verdict was not based on preconceived notions regarding "Dead-Beat Dads," but on a fair assessment of the evidence.

To prove that the appellant could reasonably provide support for his son, the Commonwealth offered testimony from Ms. Allen proving that the appellant was working for a time and then stopped. Most notably, Ms. Allen indicated that the burden was on the appellant to notify her and indicate why he was not working and whether he would be able to make payments. The appellant failed to do so. Failing to meet the burden of notifying Ms. Allen created the reasonable presumption that the appellant had the ability to work.

Suspension of our common sense is not required by our jurisprudence. Ms. Allen's records indicated appellant was receiving no disability payments. This furthered the presumption that appellant was able-bodied enough to produce wages and therefore provide support. It is certainly a reasonable inference that if he had been injured, ill, or otherwise incapacitated, or even simply between jobs but making dedicated efforts to find new employment, he would have notified Ms. Allen to that effect in order to avoid being charged with the offense for which he has now been convicted.

The Commonwealth's evidence that appellant could reasonably provide support is, of course, circumstantial. However, even circumstantial evidence is sufficient to satisfy the Commonwealth's burden if that evidence will support a jury's reasonable inference. *Davis v. Commonwealth*, 147 S.W.3d 709,



729 (Ky. 2004), *citing Bussell v. Commonwealth*, 882 S.W.2d 111, 114 (Ky. 1994)(“Circumstantial evidence may form the basis for a conviction so long as the evidence is sufficient to convince a reasonable jury of guilt.”). Appellant’s failure to meet that circumstantial evidence with even his own testimony left the jury free to make the reasonable inference that appellant was able to provide support.

The totality of the evidence was enough for the trial court to properly conclude, without relying on any alleged preconceived notions, that it would “not be clearly unreasonable for a jury to find guilt,” based on the evidence taken as a whole. Therefore, the trial court acted properly in denying the appellant’s motion for directed verdict and allowing the evidence to be submitted to the jury.

The appellant admits that counsel for defense failed to preserve his second claim of error—that the appellant was denied a fair trial because the Commonwealth introduced the fact that the appellant had been held in contempt of court and had been given jail time on multiple occasions for failing to pay child support—following the protocol designated in KRE 103(a). Kentucky Rule of Evidence (KRE) 103(a) states that claim of “error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected and . . . , if the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context.” KRE 103(a). Therefore, our review of the trial court’s admission of the findings of contempt and previous jail

time is limited to whether the trial court's actions constituted palpable error under Kentucky Rule of Criminal Procedure (RCr) 10.26.

A palpable error is one that “affects the substantial rights of a party”. RCr 10.26. The appellant argues that the trial court erred in admitting evidence of other crimes, wrongs, or bad acts. KRE 404(b) prohibits the use of evidence of other crimes, wrongs, or bad acts solely to prove a propensity to commit a specific act. Such evidence, however, may be admissible if offered for another purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, or if it is so interwoven with other essential evidence that the two cannot be separated. *See* KRE 404(b). In addition, KRE 404(c) requires that the prosecution give notice to the defendant of its intention to present evidence of other crimes, wrongs, or acts. In determining the admissibility of other crimes and bad acts evidence, the evidence is analyzed using a three-tier inquiry addressing: (1) relevance, (2) probativeness, and (3) prejudice. *Matthews v. Commonwealth*, 163 S.W.3d 11, 19 (Ky. 2005).

The appellant argues that the admission into evidence of prior findings of contempt and ensuing prison sentences for failure to pay child support was palpable error. He claims that such items are inadmissible under KRE 404(b) because they are highly prejudicial and that they were improperly admitted under KRE 404(c) without notice from the Commonwealth. The Commonwealth contends that the evidence was properly admitted, given that it was offered for purposes other than proof of appellant's propensity. The Commonwealth further

contends that notice was not necessary because the appellant already had actual knowledge of the offered testimony and certified records and the parties involved were present at trial, therefore no prejudice inured to the appellant by not receiving formal written notice. We agree with the Commonwealth.

The evidence of the appellant's prior findings of contempt and jail sentences was not offered to show propensity or character, but to support the first and third elements of the offense; i.e., that he knew he had a duty of support, and that he persistently failed to provide it. Such evidence is relevant given that the offense of flagrant non-support is a culmination of a history of non-support violations. This evidence was not probative of a propensity or character to not pay child support, and the evidence was not introduced for this purpose. Rather, it was introduced to show that the appellant had persistently failed over the course of his child's life to pay his support obligation and that it was unimaginable that he could have been unaware of it. Since the evidence was not offered to prove propensity, but to satisfy the elements of the charged offense, KRE 404(b) does not apply to exclude the evidence and it was certainly not palpable error to admit it.

As to the notice requirement of KRE 404(c), the record indicates that the Commonwealth did not provide KRE 404(c) notice of the introduction of the prior findings of contempt and their ensuing jail terms. However, once again, because no objection was made regarding the lack of notice, our standard of review is the palpable error standard. RCr 10.26. Here, the lack of notice does not rise to the level of a manifest injustice that affected the substantial rights of the party

because the lack of notice did not prejudice the appellant's ability to have a fair trial. In the video record of the trial, it appears that counsel for the appellant was aware of the content and nature of the orders of contempt and subsequent jail sentences before they were offered by the Commonwealth. This is evidenced first by defense counsel's nodding approval when the Commonwealth showed them to her and second by her subsequent failure to object to their introduction. Therefore, we find that the appellant's failure to receive notice of the Commonwealth's intention to use evidence of prior findings of contempt and ensuing jail terms did not affect the substantial rights of the appellant and therefore was not palpable error.

Based on the foregoing, the judgment and sentence of the Lincoln Circuit Court are affirmed.

ROSENBLUM, SPECIAL JUDGE, CONCURS.

CAPERTON, JUDGE, CONCURS AND FILES SEPARATE  
OPINION.

CAPERTON, JUDGE, CONCURRING: I concur with the foregoing opinion except as to the notice requirement set forth in KRE 404(c) as to KRE 404(b) material. While the evidence may have dual character; i.e., proof of an element(s) of the offense and KRE 404(b) material, I believe the character is substantially that of the latter rather than the former. Regardless, if it is proof of an element(s) of the offense it is admissible, if not then the failure of trial counsel to

object imposed a RCr 10.26 analysis and no manifest injustice resulted, there being substantial evidence upon which the jury could have based its decision.

BRIEF FOR APPELLANT:

Gene Lewter  
Assistant Public Advocate  
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway  
Attorney General of Kentucky

Heather M. Fryman  
Assistant Attorney General  
Frankfort, Kentucky