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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: OCTOBER 1, 2009
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL
DATE 10/22/09 Kelly Klaber D.C.

2008-SC-000548-MR

CALVIN D. MYERS — APPELLANT

V.

ON APPEAL FROM MONROE CIRCUIT COURT
HONORABLE EDDIE C. LOVELACE, JUDGE
NO. 07-CR-00057

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

The charges against Appellant arose from an investigation conducted by the United States Postal Service in early 2006. During this time, Appellant lived at 608 West 5th Street in Tompkinsville, Kentucky, with his mother, Mabel Deckard. She maintained P.O. Box 726 at the U.S. Post Office in Tompkinsville and Appellant was given access to that post office box. In March of 2006, Eddie Newberry, the U.S. Postmaster for Monroe County, became aware that a large amount of mail bearing the names of other persons was being delivered to and sent from both Appellant's home address and his mother's post office box. According to Ronnie Stinson, the mailman who routinely delivered mail to 608 West 5th Street and P.O. Box 726, the majority of such mail was card offers like those found in magazines. Additionally, during this time Newberry witnessed

Appellant going through the post office's dumpster. Appellant was also seen doing the same by Eddie Paul Murphy, a detective for the Commonwealth Attorney's Office.

Due to the suspicious nature of Appellant's actions, Newberry contacted the U.S. Postmaster Inspector's Office to request assistance in conducting an investigation. Jason Tatum, a U.S. Postal Inspector, was assigned to investigate whether Appellant was "dumpster diving" and stealing business mail order cards. Inspector Tatum's investigation led him to believe that Appellant was retrieving other people's discarded mail from the dumpster or post office lobby trash can and altering it with a different mailing address. In other words, these offer cards were being returned to the various companies under the correct names, but the addresses had been changed to either Appellant's home address or his mother's post office box.[1] Inspector Tatum then advised Postmaster Newberry to intercept and photocopy mail for the two addresses if the mail recipient/addressee was not known to receive mail there. All intercepted incoming mail was returned to the sender and all intercepted outgoing mail from Appellant was not delivered.

At the conclusion of the investigation, Appellant was taken into custody and read his Miranda rights. At first, Appellant denied all the charges. However, after a large stack of altered cards was shown to Appellant, he indicated that he had filled out "some of those," but not all. According to

[1] The order forms and offer cards were for such items as magazines, DVDs, calendars, and the like.

Appellant, he had trained two other individuals, James Burge and Darryl Cross, to also alter the cards. Since neither Burge nor Cross lived at or received mail at the above-mentioned addresses, they were not taken into custody. Inspector Tatum then showed Appellant the altered order cards, as well as a credit card application, for the indicted charges. After each were shown, Appellant allegedly conceded that "yes he had" filled out or altered the cards.

On August 22, 2007, Appellant was indicted by the Monroe County Grand Jury and charged with eight counts of theft of identity, six counts of second-degree forgery, one count of false statement as to identity or financial condition, and of being a second-degree persistent felony offender. During the course of the case proceedings, three counts of theft of identity, two counts of second-degree forgery, and the second-degree persistent felony offender count were dismissed. On January 10, 2009, Appellant was indicted for ten counts of being a first-degree persistent felony offender.

At trial, six pieces of intercepted mail were introduced as exhibits. These consisted primarily of altered orders and a credit card application for the following six individuals: Sarah J. Brandon, Vickie Pruitt, Tonya Anderson, Sheila Carter, Randy Williams, and William Edward Vibbert. Each testified that he or she did not complete the order cards or give anyone permission to do so. After a one-day trial, the jury returned a verdict finding Appellant guilty of five counts of theft of identity of another, three counts of second-degree forgery,

and one count of false statement as to identity or financial condition. Additionally, the jury found Appellant guilty of being a first-degree persistent felony offender and recommended PFO enhanced sentences of twenty years imprisonment on each of the nine counts, to run concurrently, for a total period of twenty years. Appellant now appeals the final judgment entered as a matter of right, Ky. Const. § 110(2)(b).

Appellant raises multiple issues on appeal: (1) the trial court erred in failing to include jury instructions for attempt as to all counts; (2) convictions for both theft of identity or false statement as to identity or financial condition, and second-degree forgery constituted double jeopardy; (3) the trial court erred in denying Appellant's motion for a directed verdict on the four counts of second-degree forgery; and (4) Appellant was entitled to a directed verdict on all counts due to lack of sufficient evidence.

Jury instructions for attempt as to all counts

Appellant argues that he was entitled to attempt instructions under KRS 506.100(1)(b) for all charges. According to Appellant, these instructions were necessary because the intended crimes were never completed due to the interception of the offer cards by law enforcement. Therefore, because Appellant received no actual pecuniary benefits, only a substantial step was taken.

Kentucky law requires instructions "applicable to every state of case covered by the indictment and deducible from or supported to any extent by

the testimony." Commonwealth v. Collins, 821 S.W.2d 488, 491 (Ky. 1991), (quoting Lee v. Commonwealth, 329 S.W.2d 57, 60 (Ky. 1959)). See also RCr 9.54(1). A defendant is entitled to an instruction on any lawful defense that he has, including the defense that he is guilty of a lesser included offense of the crime charged. Slaven v. Commonwealth, 962 S.W.2d 845, 856 (Ky. 1997). An instruction on a lesser included offense is required "if the evidence would permit the jury to rationally find the defendant not guilty of the primary offense, but guilty of the lesser offense." Commonwealth v. Wolford, 4 S.W.3d 534, 539 (Ky. 1999).

The problem with Appellant's argument is that the charged offenses do not require that their intended result be accomplished. The gist of all three offenses is guilty intent coupled with action towards the purpose or result. There is no language in KRS 516.030, KRS 514.060, and KRS 434.570, and Appellant points to none, which requires that the individual actually receive the goods sought. Forgery under KRS 516.030 is committed when a person, "with intent to defraud, deceive or injure another . . . falsely makes, completes or alters a written instrument which is or purports to be or which is calculated to become or to represent when completed" one of the enumerated writings listed in the following subsections. Theft of identity under KRS 514.160 is committed when a person "knowingly possesses or uses any current or former identifying information of the other person . . . with the intent to represent that he or she is the other person . . . ." Finally, a false statement as to identity or

financial condition under KRS 434.570 is committed when a person "makes or causes to be made, either directly or indirectly, any false statement in writing, knowing it to be false and with intent that it be relied on . . . for the purpose of procuring the issuance of a credit or debit card . . . ." As these statutes plainly indicate, actual pecuniary gain is not required, and Appellant was, therefore, not entitled to attempt instructions. See Hopper v. Evans, 456 U.S. 605, 611 (1982) ("[D]ue process requires that a lesser included offense instruction be given only when the evidence warrants such an instruction."). There was no error.

Double jeopardy

Appellant argues that the trial court abused its discretion by failing to dismiss the second-degree forgery counts as being barred by double jeopardy principles. Appellant was convicted of two separate crimes for each of four altered order cards or applications relating to the following four individuals: Vickie Pruitt, Tonya Anderson, Sheila Carter, and William Vibbert. Specifically, Appellant was convicted of theft of identity and second-degree forgery for signing and using Vickie Pruitt's name on "The Mystery Guild" enrollment form; theft of identity and second-degree forgery for signing and using Tonya Anderson's name on "The Good Cook" enrollment form; theft of identity and second-degree forgery for signing and using Sheila Carter's name to a "Kingsford Planners" order form; and false statement as to identity or financial situation and second-degree forgery for signing and using William Vibbert's

name on a credit card application. The crux of Appellant's complaint is that there is no "mutually exclusive fact in existence" between the forgery convictions and the convictions for either theft of identity or false statement as to identity or financial condition, other than saying that signing someone's name to a document and writing their name to the same document are different acts. See Clark v. Commonwealth, 267 S.W.3d 668, 677 (Ky. 2008) ("It is true that an overlap of proof does not, of its own accord, establish a double jeopardy violation. However, an inability to point to the requirement of at least one mutually exclusive fact in existence does." (citations omitted)).

A single act may be prosecuted and punished under different statutory provisions if each offense requires proof of a factual element that the other does not, even despite substantial overlap in the evidence used to prove the offenses. Blockburger v. United States, 284 U.S. 299, 304 (1932); Taylor v. Commonwealth, 995 S.W.2d 355, 358 (Ky. 1999). See also United States v. Felix, 503 U.S. 378, 386 (1992). The focus is on the proof necessary to prove the statutory elements of each offense, rather than on the actual evidence presented at trial. Polk v. Commonwealth, 679 S.W.2d 231, 233 (Ky. 1984).

We do not believe that Appellant received multiple punishments for the same offense, in violation of his double jeopardy rights. Each charged offense required proof of an additional factual element that the others did not. KRS 516.030(1) (forgery in the second degree) required the Commonwealth to prove that the written instrument falsely made by Appellant be one of the specifically

enumerated documents listed in subsection (a). No such requirement exists for either the charge of theft of identity or false statement as to identity or financial condition. KRS 514.160(1) (theft of identity) required the Commonwealth to show that Appellant knowingly possessed or used any "current or former identifying information of the other person . . . with the intent to represent that he or she is the other person . . ." for one of the purposes listed in the following subsections. Again, this specific intent requirement was not necessary for convictions under the other two charged offenses. Finally, KRS 434.570 (false statement as to identity or financial condition) makes explicit that the Commonwealth must show an additional element; namely, that Appellant made a false written statement to obtain a credit or debit card. Although the offenses can be committed based on the same transaction or event, the offenses have different elements and are, therefore, not the same, and conviction of each is not barred by double jeopardy.

The Commonwealth introduced evidence to prove each offense and sufficiently differentiated each count from the others. Moreover, the jury was separately instructed on each charged offense and ultimately concluded that Appellant was guilty of each. See Miller v. Commonwealth, 77 S.W.3d 566, 576 (Ky. 2002). We agree with the Commonwealth that, under the facts of this case, second-degree forgery, theft of identity and false statement as to identity or financial condition are separate offenses for which Appellant may be punished for committing. As such, we find no error.

Directed verdict on four counts of second-degree forgery

Appellant's next assignment of error is that the trial court erred in denying his motion for a directed verdict as to the four counts of second-degree forgery. According to Appellant, the Commonwealth failed to prove that the offer cards and credit card applications fell within the purview of KRS 516.030. Appellant contends that enrollment cards to "The Good Cook" and "Mystery Guild" book clubs, an order form for "Kingsford Planners" and a credit card application are not written instruments with legal effect.

This issue was not properly preserved for review. While Appellant's motion for a directed verdict listed many grounds as a basis for relief, it did not specify this particular ground. CR 50.01. See also Potts v. Commonwealth, 172 S.W.3d 345, 347-48 (Ky. 2005). We, therefore, decline to address it in this case.

Directed verdicts on all counts due to lack of evidence

Appellant lastly argues that he was entitled to a directed verdict as to all counts due to insufficiency of evidence. On a motion for a directed verdict, the trial judge must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. Commonwealth v. Benham, 816 S.W.2d 186 (Ky. 1991). The standard for appellate review of a denial of a motion for a directed verdict based on insufficient evidence is if, under the evidence as a whole, it would be clearly unreasonable for a jury to find the defendant guilty, he is entitled to a directed verdict of acquittal. Commonwealth v. Sawhill, 660

S.W.2d 3 (Ky. 1983).

We disagree with Appellant. While it is true that none of the victims in this case knew who filled out the order forms and applications in their names, there was sufficient circumstantial evidence for the jury to conclude that Appellant did so. See Dillingham v. Commonwealth, 995 S.W.2d 377, 380 (Ky. 1999). Each of the victims testified that he or she did not fill out the forms nor authorize anyone else to do so. The mail in question was intercepted after being delivered to or mailed from either 608 West 5th Street or P.O. Box 726. The only two individuals living at the home address were Appellant and his mother. Also, testimony was given that Appellant had access to the post office box. In addition, Detective Murphy testified that Appellant admitted to filling out the six specific offer cards and the credit application that were the source of these charges. While Inspector Tatum's testimony conflicted in some respects with that of Detective Murphy, it is ultimately for the jury to determine the credibility of witnesses. Jones v. Commonwealth, 281 S.W.2d 920, 922 (Ky. 1955). The jury was free to make a decision as to which witness to believe. Webb v. Commonwealth, 904 S.W.2d 226, 229 (Ky. 1995).

The Commonwealth introduced sufficient evidence as to all charges to overcome Appellant's motion for a directed verdict. Commonwealth v. Benham, 816 S.W.2d. at 187-88 ("[T]here must be evidence of substance, and the trial court is expressly authorized to direct a verdict for the defendant if the prosecution produces no more than a mere scintilla of evidence."). The

evidence showed that Appellant completed or altered multiple offer cards, order forms, and a credit card application using the names and identifying information of other persons. In addition, the evidence showed that Appellant forged signatures and provided false information with the intent and purpose to obtain property, defraud others, or obtain a credit card. As such, the trial court did not err in denying Appellant's motion for a directed verdict.

The judgment of the Monroe Circuit Court is hereby affirmed.

All sitting. All concur.

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