

Commonwealth Of Kentucky

Court of Appeals

NO. 2001-CA-000883-MR

LARRY BARBOUR

APPELLANT

v. APPEAL FROM LARUE CIRCUIT COURT
HONORABLE LARRY D. RAIKES, JUDGE
ACTION NO. 00-CR-00040

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: BAKER, COMBS, and SCHRODER, Judges.

COMBS, JUDGE. The appellant, Larry Barbour, was convicted of
flagrant nonsupport¹ and of being a persistent felony offender in
the second degree (PFO II). The jury recommended a sentence of

¹ Kentucky Revised Statute (KRS) 530.050(2) provides that
"[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 and the failure results in:

- (a) An arrearage of not less than one thousand dollars (\$1,000); or
- (b) Six (6) consecutive months without payment of support; or
- (c) The dependent having been placed in destitute circumstances.
For the purposes of this paragraph, it shall be prima facie
evidence that a dependent has been placed in destitute
circumstances if the dependent is a recipient of public
assistance as defined in KRS 205.010."

five years on the charge of flagrant non-support -- enhanced to ten years because of the PFO II conviction. The trial court imposed judgment in accordance with the jury's verdict. Barbour now appeals.

In 1994, Barbour was ordered to pay \$392 per month for the support of his minor children. The support payments were deducted from his wages. However, after the wage assignment ended, he made no other support payments for a period of four and one-half years. As a result, a flagrant nonsupport warrant was issued against him in 1999. Since he was employed at that time, another wage assignment was entered in May 1999. Payments were again made for a period of approximately two months. The evidence introduced at trial indicated that Barbour was able to secure regular employment and that he made his child support payments during much of the time that he worked. However, because Barbour did not maintain steady employment, his support arrearage totalled \$24,358.08 by the time of his trial.

Barbour contends that the trial court erred when it permitted Larue County Sheriff Edlin to testify with respect to Barbour's employment experience and his apparent ability to provide court-ordered support for his children. Barbour argues that the testimony offered by Edlin was inadmissible pursuant to the requirements of Kentucky Rule of Evidence (KRE) 602. That rule provides in pertinent part as follows:

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.

KRE 602 must be construed in conjunction with the provisions of KRE 701, which limit a lay witness's testimony to those opinions or inferences that are rationally based on the perception of the witness and are helpful to a clear understanding of the witness's testimony or the determination of a fact in issue. See Mills v. Commonwealth, Ky., 996 S.W.2d 473 (1999).

Barbour argues that Sheriff Edlin lacked personal knowledge of the matter about which he testified and that insufficient evidence was introduced by the Commonwealth to support a finding that he had acquired such knowledge. He describes as mere speculation Sheriff Edlin's testimony indicating that "he knew Barbour, that he didn't know of any handicaps, that he didn't know of any disabilities, [and] that he had never talked to Barbour about it." (Emphasis original.) Sheriff Edlin presented "subjective belief or unsupported speculation" according to Barbour. Brief at 5. We disagree.

In this case, Sheriff Edlin testified as a lay witness. He gave limited testimony indicating that he was familiar with Barbour's prior work experience. He also described his perception, based upon his personal observation and interaction with Barbour, that Barbour had an apparent

ability to work and to provide the necessary support for his children.

After reviewing the challenged testimony, we conclude that it was comprised of opinions and inferences that were rationally based upon Sheriff Edlin's own perceptions. Moreover, we conclude that the testimony was helpful to the jury in evaluating whether Barbour could reasonably provide the required support -- a critical fact in issue.

Because defense counsel had objected to any reference to Barbour's past criminal history, foundational questions relating to the nature and context of the relationship between Sheriff Edlin and Barbour were necessarily circumspect. Nevertheless, that foundation was sufficient. Defense counsel very deftly cross-examined Sheriff Edlin. A trial court's ruling on an evidentiary matter will not be disturbed in the absence of an abuse of discretion. Partin V. Commonwealth, Ky., 918 S.W.2d 219 (1996). The trial court did not abuse its discretion by admitting the testimony at issue.

In a similar vein, Barbour also complains that Sheriff Edlin's testimony was incompetent because he was not an expert on economic conditions in Larue County: ". . . there was no evidence to support a finding that he [Sheriff Edlin] knew anything about public administration or human resources management." Brief at 7. However, Sheriff Edlin testified as a

lay witness in this case and not as an economic expert whose testimony would have been subject to the more specialized rules concerning expert opinion testimony embodied in KRE 702. The Commonwealth had no burden to present expert testimony as to Barbour's ability to provide support for his minor children in the context of the economic milieu of Larue County. See Schoenbachler v. Commonwealth, 95 S.W.3d 830 (2003). In light of the limited purpose for which it was offered, Sheriff Edlin's testimony was properly admissible and sufficient to enable the jury to find that Barbour was able to provide the required child support.

Next, Barbour contends that the trial court erred by denying his motions for a directed verdict. We disagree. We review Barbour's argument under the standard set forth in Commonwealth v. Benham, Ky., 816 S.W.2d 186, 187 (1991):

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 reserve to the jury questions as to the credibility and weight to be given to such testimony.

On appellate review, the test of a directed verdict is whether under the evidence as a whole, it would be clearly unreasonable

for a jury to find guilt. Only then is a defendant entitled to a directed verdict of acquittal. Sawhill v. Commonwealth, Ky., 660 S.W.2d 3 (1993).

With respect to the flagrant nonsupport charge, the Commonwealth sought to prove that Barbour was a young, able-bodied man capable of earning a wage. The evidence presented at trial could have induced the jury to believe that Barbour was capable of providing support for his minor children but that he simply chose not to do so. As there is nothing patently unreasonable about the verdict reached in this case, we find no error in the trial court's refusal to direct a verdict of acquittal on this count.

Finally, Barbour contends that the court erred by failing to dismiss the PFO II charge since the indictment for nonsupport included a period of time that pre-dated his prior conviction. As Barbour correctly observes, KRS 532.080 requires that all prior felony convictions used as a basis for enhancing a present felony conviction must have been obtained prior to the date of the commission of the present felony.

Barbour was convicted in Larue Circuit Court of first-degree possession of a controlled substance and possession of drug paraphernalia on November 11, 1998. In this proceeding, the jury returned a verdict finding Barbour guilty of flagrant nonsupport during the period from November 1, 1994, through

April 30, 2000. A portion of this period does pre-date the prior felony conviction obtained in November 1998. However, the trial court carefully instructed the jury: (1) that Barbour could only be found guilty of being a PFO II if and only if it believed from the evidence that Barbour had persistently failed to provide support which he could have reasonably provided for his minor children during the period between November 19, 1998, and April 30, 2000 (a period following his prior conviction); (2) that Barbour knew that he had a duty to provide such support by virtue of a court order; (3) that Barbour's failure to provide the required support resulted in an arrearage of not less than one thousand dollars; and (4) that Barbour had been convicted of a felony in November 1998.

The trial court carefully instructed the jury and limited its findings to a period following his prior felony conviction - even though some of the arrearage had accrued at a previous point. Barbour's sentence was correctly enhanced because his PFO conviction was premised on that portion of the non-support felony committed after his 1998 conviction for possession of a controlled substance. Thus, the Commonwealth complied with the requirement of KRS 532.080 that another felony must have pre-dated the current felony charged. See Bray v. Commonwealth, Ky., 703 S.W.2d 478 (1986). Barbour's punishment

for this recent, additional felony was properly enhanced as contemplated by the statute.

The judgment of the Larue Circuit Court is affirmed.

ALL CONCUR.

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