

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2003-CA-000589-MR

LARRY VINSON

APPELLANT

v. APPEAL FROM HARDIN CIRCUIT COURT  
HONORABLE KELLY MARK EASTON, JUDGE  
ACTION NO. 01-CR-00197

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

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BEFORE: EMBERTON, CHIEF JUDGE; SCHRODER AND TACKETT, JUDGES.  
SCHRODER, JUDGE. This is an appeal from a judgment in which  
appellant was convicted of complicity to divert charitable  
gaming funds, \$300 or more. Appellant raises several  
allegations of error, none of which we deem to be worthy of  
reversal. Hence, we affirm.

In 2000 Frank Berntt was president of Safe Harbor  
Charity ("Safe Harbor"), a non-profit corporation licensed to do  
charitable gaming under KRS Chapter 238. In the spring of 2000,

Berntt was approached by Nancy Bennett, the facility manager of Knox Bingo Hall (the "hall"), about playing bingo at the facility. Berntt thereafter met with appellant, Larry Vinson, owner of the hall, regarding the possibility of renting the facility. According to Berntt, Vinson told him that he needed to hire a manager who was knowledgeable in operating bingo sessions in order to be successful. Vinson thereupon recommended that Berntt hire Betty Greenwell and pay her \$100 for each 10% profit she brought in, up to a maximum of \$1,000. Vinson assured Berntt that Greenwell was very familiar with bingo, knew pull tab sellers, and could run the bingo session for Safe Harbor. Vinson purportedly told Berntt that paying a manager to run the bingo was how it was done everywhere. Consequently, Berntt signed a contract with Vinson to hold Safe Harbor's bingo sessions there.

On July 1, 2000, Safe Harbor held its first Bingo session at Knox, with Betty Greenwell running the session. Berntt testified that he took \$5,000 from his personal checking account and donated it to Safe Harbor to get the bingo game started, make change, and pay for prizes. During the sessions, Vinson was in his office observing the session from his two-way mirror. According to Berntt, during the session, Vinson kept calling Greenwell and she seemed to get upset after each call. Finally, Greenwell asked Berntt to tell Vinson not to call her

anymore because she knew how to run a bingo session. After the second session, Greenwell tried to take all the money into Vinson's office. However, Berntt would not let her and instead took the money into Vinson's office himself. Vinson would not give Berntt the receipts so Berntt testified that he had to write down the information and numbers from the receipts necessary for Safe Harbor's accounting. Vinson counted the money and told Berntt that Safe Harbor had made 74.2% that evening. Vinson then stated that Berntt owed Greenwell \$742. Berntt then paid Greenwell out of the cash which Safe Harbor had earned that evening. Berntt testified that when he counted the money from the bingo the next day, he realized Safe Harbor earned only \$179 in the first session and actually lost \$1,487 in the second session, for a total loss of \$1,308.

Pursuant to an investigation by the Kentucky Department of Charitable Gaming into Safe Harbor's bingo activities at Knox Bingo Hall, Vinson was indicted for complicity to divert charitable gaming funds, \$300 or more. The charge stemmed from arranging for Greenwell to be paid to manage Safe Harbor's bingo activities in violation of KRS 238.540(4) and KRS 238.995. A jury trial was held on October 23-24, 2001, in which Vinson was found guilty of the charged offense and was sentenced to two years' imprisonment, probated for five years. This appeal by Vinson followed.

Vinson's first argument is that the trial court should have entered a directed verdict in his favor because there was no evidence that Greenwell was paid out of charitable gaming funds. Vinson insists, rather, that the evidence established that she was paid by Berntt with solely personal funds, therefore, no charitable funds were ever diverted.

Vinson points to the testimony of Berntt that he bankrolled the bingo with \$5,000 in personal funds and that he was never reimbursed by Safe Harbor. Terry Alley, Safe Harbor's assistant treasurer, confirmed that Berntt was never reimbursed by Safe Harbor and that Greenwell was not paid by way of a check from Safe Harbor as other expenses of the bingo (hall lease, equipment rental, pull-tabs cards, and concessions) had been. Alley testified that Berntt told him that he paid Greenwell out of his personal funds and that there was no record that she had been paid out of Safe Harbor funds. On direct, Berntt stated that he paid Greenwell out of the cash earned from the bingo after Vinson had counted up the money and computed what was owed to her. However, on cross-examination, when the question was posed, "So the charity didn't actually lose money that night, it was your money that was lost?", Berntt replied, "It was my money that was lost, not the charity's; we didn't have that kind of money in our account."

On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then is the defendant entitled to a directed verdict of acquittal. Commonwealth v. Benham, Ky., 816 S.W.2d 186 (1991). KRS 238.995(4) makes it a Class D felony for any person to "knowingly divert[] charitable gaming funds from legitimate purpose or lawful expenses allowed under this chapter to his financial benefit or the financial benefit of another person . . . if the amount involved is three hundred dollars (\$300) or more." KRS 238.540(4) provides in pertinent part:

Charitable gaming shall be conducted and administered solely by officers, members, and bona fide employees of the licensed charitable organization. Volunteer personnel, who may or may not be members of the licensed charitable organization, may be utilized if each volunteer is readily identifiable as a volunteer. No person engaged in the conduct and administration of charitable gaming shall receive any compensation for services related to the charitable gaming activities, including tipping. No net receipts derived from charitable gaming shall inure to the private benefit or financial gain of any individual. Any effort or attempt to disguise any other type of compensation or private inurement shall be considered an unauthorized diversion of funds and shall be actionable under KRS 238.995.

Berntt testified that he paid Greenwell out of the cash earned from the bingo at the end of the night. Although

Berntt bankrolled the bingo and there was evidence that the charity did not make a profit on the night, the purpose of the bingo was to benefit the charity if profits had been earned. The fact that Berntt was not paid back by Safe Harbor and testified that the charity did not lose anything is not determinative. Berntt clearly considered the funds a donation to Safe Harbor by not seeking reimbursement from the charity.

Further, pursuant to the statutory scheme of KRS Chapter 238, only charitable organizations as defined in KRS 238.505(3), and not individuals, can lawfully conduct gaming operations in Kentucky. Hence, the funds paid to Greenwell could not lawfully have belonged to Berntt since individuals cannot conduct charitable gaming operations. In addition, KRS 238.540(4), the statute underlying the offense at issue, clearly prohibits a person engaging in the conduct and administration of charitable gaming from receiving compensation for their "services related to charitable gaming activities," regardless of where the funds came from. Accordingly, the court properly denied Vinson's motion for directed verdict.

Vinson next argues that the prosecutor improperly advised the jury during closing argument that the grand jury indictment of Vinson equated to a finding of culpability. Vinson claims that his counsel objected to these remarks but, due to mechanical failure or human error, there is no audio

record of the bench conference. We would note that throughout the videotape of the trial, the bench conferences were inaudible. However, it is the duty of the Commonwealth to insure that an adequate narrative statement is provided pursuant to CR 75.13 in order to "afford appellant a full and fair review of his trial on appeal . . ." Cardine v. Commonwealth, Ky., 623 S.W.2d 895, 896 (1981). As it does appear that Vinson's counsel made an objection to the prosecutor's mention of the grand jury proceedings, we will review the argument.

In viewing the trial, we see that the prosecutor only mentioned the grand jury proceedings for the purpose of explaining why Berntt had likewise not been indicted. The prosecutor did not state or even suggest that the grand jury indictment of Vinson amounted to a finding of culpability. Hence, this argument is completely without merit.

Vinson also claims that during closing argument, the prosecutor improperly commented on the fact that he did not testify at trial in violation of his Fifth Amendment right not to incriminate himself. In viewing the Commonwealth's closing argument, we again see that the prosecution made no such remark. The prosecution did bring out the fact that the defense did not call Gary Walters, who worked for Vinson and was present prior to or at the time Greenwell was paid, as a witness. We see nothing improper about commenting on the absence of this

evidence. See Maxi v. Commonwealth, Ky., 82 S.W.3d 860 (2002). In any event, this issue does not appear to have been preserved because no objection was made by the defense when the prosecutor made this allegedly improper remark. RCr 9.22.

Vinson next claims that the prosecution violated the rule of separation when one of the Assistant Attorneys General on the case spoke to a witness purportedly during the trial. At the beginning of trial, Vinson moved to invoke the rule of separation which the trial court granted. Subsequently, during the Commonwealth's case in chief, the prosecution asked witness Nancy Bennett, an employee of Vinson's at the bingo hall, if she was aware of any other reprimands or cease and desist orders against Vinson. Bennett replied that "earlier" the attorney from the Charitable Gaming Division of the Attorney General's office had told her that he had other indictments against him. It is undisputed that Bennett was referring to attorney Leah Cooper who was present at the Commonwealth's table during the trial and was apparently second chair on the case. "When prosecutorial misconduct is claimed, the relevant inquiry on appeal should always center around the overall fairness of the trial, not the culpability of the prosecutor." Maxie, 82 S.W.3d at 866.

First, it was not clear from Bennett's testimony that Cooper had spoken with Bennett during the trial. Bennett stated

only that Cooper had spoken with her "earlier". Secondly, there was no evidence that Cooper relayed the testimony of another witness to Bennett. Finally, even if Cooper did violate the rule of separation, we do not see how Vinson was prejudiced thereby at trial. There was no indication that Bennett's testimony was in any way affected by the information she learned from Cooper. She stated that she already knew Vinson was in some kind of trouble because of some alarming papers she had seen. Bennett's testimony was, in general, not damaging to Vinson's case. In fact, Bennett testified that Vinson was meticulous in trying to abide by the gaming laws/regulations. Thus, we cannot say that the alleged prosecutorial misconduct affected the fairness of Vinson's trial.

Another assignment of error proffered by Vinson is that his equal protection rights were violated when he was prosecuted and Berntt was not. However, Vinson does not point to where in the record this issue was preserved for appellate review as required by CR 76.12(4)(c)(v), and, from our review of the record, we do not see that the issue was raised before the trial court. Accordingly, this issue is precluded from our review. See McDonald v. Commonwealth, Ky., 554 S.W.2d 84 (1977).

Vinson's remaining argument is that the trial court erred in instructing the jury on complicity to commit the

offense of diverting charitable gaming funds. Vinson maintains there was no evidence of any conversations or agreements between Greenwell and Vinson regarding payment for managing the bingo.

The offense of complicity is defined as follows in KRS 502.020:

(1) A person is guilty of an offense committed by another person when, with the intention of promoting or facilitating the commission of the offense, he:

(a) Solicits, commands, or engages in a conspiracy with such other person to commit the offense; or

(b) Aids, counsels, or attempts to aid such person in planning or committing the offense; or

(c) Having a legal duty to prevent the commission of the offense, fails to make a proper effort to do so.

Although there was no direct evidence of an agreement between Vinson and Greenwell for her to get paid for managing the bingo, there certainly was ample circumstantial evidence thereof. See Graves v. Commonwealth, Ky., 17 S.W.3d 858 (2000), cert. denied, 531 U.S. 982, 121 S. Ct. 435, 148 L. Ed. 2d 442 (2000). The evidence established that Vinson told Berntt that he needed to hire a bingo manager in order to conduct a successful bingo. There was evidence that Vinson procured and recommended Greenwell as a bingo manager for Berntt's charity and told Berntt the amount he would have to pay her. At the end of the evening of the bingo, Vinson counted the money and told

Berntt that he owed Greenwell \$742. Berntt thereupon paid Greenwell that amount out of the bingo earnings. We believe that the above was sufficient evidence to support the instruction and conviction for complicity to divert charitable gaming funds in this case.

For the reasons stated above, the judgment of the Hardin Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Fred R. Radolovich  
Louisville, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler, III  
Attorney General of Kentucky

Courtney J. Hightower  
Assistant Attorney General  
Frankfort, Kentucky