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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001030-MR

LYNDA WINNANS

APPELLANT

v. APPEAL FROM MARSHALL CIRCUIT COURT
HONORABLE DENNIS R. FOUST, JUDGE
ACTION NO. 02-CR-00084

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
VACATING AND REMANDING

** ** * * * * *

BEFORE: TACKETT AND SCHRODER, JUDGES; EMBERTON, SENIOR JUDGE.¹

SCHRODER, JUDGE: Lynda Winnans appeals her conviction for theft by deception (over \$300)² with a four-year sentence, for failing to pay off a lien on a truck she sold when she promised to pay

¹ Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

² KRS 514.040.

the lien out of the proceeds received at the time of sale. We believe the trial court erred in not allowing the avowal testimony and that the error was reversible. Therefore, we vacate the conviction and remand for a new trial.

Brian Lovett agreed to buy Lynda Winnans's (Winnans) 2000 Chevrolet truck for \$18,000.00. On December 7, 2001, the two met at the Marshall County Courthouse to transfer title. Lovett tendered a cashier's check for \$18,000.00 to Winnans, but the clerk informed them that there was an outstanding lien in favor of Americredit. Upon Winnans's promise to pay off the lien from the cashier's check, the parties completed the transfer to Lovett, subject to Americredit's lien. A year later the lien still was not released so Winnans was indicted and tried for theft by deception (over \$300). She was found guilty by a jury on April 21, 2003, and subsequently sentenced to four years.

On appeal, Winnans argues that the trial court erred in denying her motion for a directed verdict. The Commonwealth counters that the issue was not preserved. The preservation issue was recently decided by our Supreme Court in the case of Schoenbachler v. Commonwealth, Ky., 95 S.W.3d 830, 833 (2003), wherein the Court was asked whether the trial court's failure to grant a directed verdict of acquittal constituted palpable error under RCr 10.26. The Court decided that, "if the trial court

did, in fact, err by failing to direct a verdict of acquittal, that failure would undoubtedly have affected Appellant's substantial rights." Id. at 837. The Court then reviewed "the sufficiency of the evidence, and the failure to grant a directed verdict," under the palpable error rule of RCr 10.26. Likewise, we review the sufficiency of the evidence and the failure to grant a directed verdict of acquittal under the palpable error rule.

"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." Id. at 837, citing Commonwealth v. Benham, Ky., 816 S.W.2d 186, 187 (1991). Theft by deception, KRS 514.040, requires (for purposes here) "the person obtains property . . . of another by deception with intent to deprive the person thereof. A person deceives when the person intentionally: (a) Creates or reinforces a false impression, including false impressions as to . . . intention, or other state of mind; . . ." The issue before the jury became whether Winnans intended to pay off the truck lien when she promised Lovett that she would pay off the lien out of the proceeds of the cashier's check if he would give it to her.

At trial, Lovett testified that prior to the purchase, he had asked Winnans why she was selling the truck and she told

him she needed to, that she was in financial trouble and needed the money. At the courthouse, when the clerk told them they needed a lien release, she said that is what the check is for. Numerous times Lovett called her to ask about the release and she would assure him that she would take care of it or that it would take ten or so days. The lien was never paid and the truck was repossessed.

Winnans testified on her own behalf. She stated that she told the county clerk that she would pay the lien out of the check and have the creditor send the lien release directly. She stated the lien was approximately \$16,554.00 and that she obtained a cashier's check from her bank and mailed it to Americredit but they claimed they never received it. When asked for her cashier's check receipt or carbon copy, she said it was lost in a house fire. She allowed Americredit to take a default judgment against her and has never recovered the check or the funds even though some fifteen months have passed since it was lost.

By avowal, Winnans testified that her bank told her she had to wait a year before a stop payment could be made and another time that the bank could not stop payment on a cashier's check. The grounds for the Commonwealth's objection were hearsay but whenever counsel approached the bench, the trial

judge's microphone was turned off so the record does not give the basis for his ruling at the bench.

Jennifer Keel testified for the Commonwealth as an expert witness on banking. She was the assistant vice-president of the Bank of Benton and was a supervisor of cashier's checks. Her testimony was basically that all banks had to follow the Uniform Commercial Code rules or guidelines for certified checks, and under these rules, if a check is reported lost or stolen; there are two ways to have it reissued. The first way is to post a rather expensive indemnity bond and a check could be reissued immediately. The second way is to wait ninety days and sign an affidavit that the check was lost or stolen, and the bank can then reissue the check. If the carbon or the receipt is lost by the customer, the bank can easily look in its books to see which cashier's checks are outstanding and figure it out.

As to the sufficiency of the evidence, we can see where, under the evidence as a whole, the jury could find guilt. Winnans was in financial trouble so she had to sell the truck. She promised to pay the lien out of the cashier's check. The creditor (Americredit) never received the money and in the creditor's suit for the money, she allowed a default judgment to be taken against her. She also did not appear to take reasonable steps to look for her "lost" check. Fifteen months after the check was supposedly lost, she went to trial without

any leads on the money nor serious attempts to have the check reissued. As the Court recognized in Schoenbachler, 95 S.W.3d at 837, quoting Benham, 816 S.W.2d at 187:

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 reserv[e] to the jury questions as to the credibility and weight to be given to such testimony.

We believe the trial court did not err in not granting a directed verdict of acquittal nor in submitting the case to the jury.

The next argument of Winnans is that the trial court erred in not allowing her avowal testimony. The objection was to what the bank employees supposedly told her when she went looking for the cashier's check. The basis of the objection was that it was hearsay. Winnans countered that she was trying to admit the statements not to prove the truth of the statements (in fact she was willing to stipulate the statements were untrue) but to show Winnans's intentions, her good faith efforts to get the lost money for Lovett, and to show she does not have the money. The avowal testimony directly contradicts the expert witness's testimony on banking procedures. The issue is not the

truth of these statements but the credibility of the accused (a jury issue). Did someone really tell her that, could she rely on those statements, and did she act accordingly? Professor Lawson³ describes this as the classic nonhearsay use of an out-of-court statement, not to prove the truth of the statements, but to explain the "hearer's state of mind." The mere making of the statement may be relevant to prove Winnans's state of mind which could explain why she did little to find the "alleged lost check." See Crowe v. Commonwealth, Ky., 38 S.W.3d 379, 382 (2001); Moseley v. Commonwealth, Ky., 960 S.W.2d 460, 461-462 (1997). The Commonwealth tried to show Winnans's inaction was evidence of the intent to deprive Lovett of his money, while Winnans tried to show her inaction was due to her belief (although mistaken) that nothing could be done. We agree with Winnans that the trial court committed reversible error in excluding the avowal testimony as it was a nonhearsay use of out-of-court statements which would be relevant to her intent.⁴

Winnans's final argument is that the trial court erred in allowing Lovett to testify (during the penalty stage of trial) of the effects this crime had upon him. This issue would be moot if we had not ordered a new trial. In the event Winnans

³ Robert G. Lawson, The Kentucky Evidence Law Handbook, § 8.05 [3] p. 558 (4th ed. 2003).

⁴ We would surmise that on retrial, one side will have more complete evidence as to where the missing money is, as that evidence would tend to make or break the case.

is again convicted, KRS 532.055 (2)7. does permit a victim to testify as to the impact the crime had on the victim if the crime is one enumerated in KRS 421.500. Theft by deception is not enumerated.

For the foregoing reasons, the judgment of the Marshall Circuit Court is vacated and the matter remanded for a new trial.

ALL CONCUR.

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