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NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-000746-MR

WILLIAM R. GORDON

APPELLANT

v. APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE CRAIG Z. CLYMER, JUDGE
ACTION NO. 04-CR-00142

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: BARBER AND McANULTY, JUDGES; POTTER, SENIOR JUDGE.¹

McANULTY, JUDGE: William R. Gordon appeals his conviction in the McCracken Circuit Court for the offense of flagrant non-support. Gordon was sentenced to two and a half years imprisonment, probated for five years or until restitution was paid in full. He challenges his conviction on appeal on the

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

ground that the Commonwealth failed to prove that he could reasonably pay the child support ordered. We affirm.

Gordon argued the Commonwealth had not established the element of the offense that he reasonably could provide child support in moving for a directed verdict following the Commonwealth's proof. The trial court noted that in ruling on a motion for directed verdict it was to draw all reasonable inferences in favor of the Commonwealth. The court found that the jurors could infer that Gordon had the ability to pay the amount the court had ordered him to pay. At the close of the evidence, the court again denied Gordon's motion for directed verdict of acquittal.

Appellate review of a trial court's denial of a motion for directed verdict is limited to a determination of whether the jury's verdict was palpably or flagrantly contrary to the evidence presented at trial. Stringer v. Wal-Mart Stores, Inc., 151 S.W.3d 781 (Ky. 2004). The standard may be summarized as follows:

Upon review of the evidence supporting a judgment entered upon a jury verdict, the role of an appellate court is limited to determining whether the trial court erred in failing to grant the motion for directed verdict. All evidence which favors the prevailing party must be taken as true and the reviewing court is not at liberty to determine credibility or the weight which should be given to the evidence, these being functions reserved to the trier of fact.

The prevailing party is entitled to all reasonable inferences which may be drawn from the evidence. *Upon completion of such an evidentiary review, the appellate court must determine whether the verdict rendered is "'palpably or flagrantly' against the evidence so as 'to indicate that it was reached as a result of passion or prejudice.'"* If the reviewing court concludes that such is the case, it is at liberty to reverse the judgment on the grounds that the trial court erred in failing to [grant] the motion for directed verdict. Otherwise, the judgment must be affirmed.

[Emphasis in original.] *Id.* at 787; citing Lewis v. Bledsoe Surface Mining Co., 798 S.W.2d 459, 461-62 (Ky. 1990).

Generally, a trial judge cannot enter a directed verdict unless there is a complete absence of proof on a material issue or if there are no disputed facts on which reasonable minds could differ. Bierman v. Klapheke, 967 S.W.2d 16 (Ky. 1998). We agree with the court below that the Commonwealth introduced sufficient proof of the element of ability to reasonably provide child support so as to avoid a directed verdict. We further do not believe the jury's verdict was palpably or flagrantly contrary to the evidence at trial.

In the Commonwealth's case-in-chief, Gordon's ex-wife testified to the amount of support Gordon agreed to pay at the time of their divorce in 1998, and indeed did pay for a time. She testified that his payments stopped shortly after the divorce was entered, and the only times she received the amounts

owed were when she went to court. She testified that Gordon never asserted to her that he could not pay this amount due to medical disability or employment problems. She stated that he never mentioned anything to her about getting his child support obligation modified. In addition, she testified that Gordon informed her more than once that he would not pay her any money once they were no longer married.

Next, a representative from the Child Support Division of the McCracken County Attorney's Office, Temple Bradley, testified to Gordon's monthly child support obligation and the amount of child support arrearage he owed. She testified that Gordon did not contact the county attorney's office in order to request a modification until January 2005; however, he had been notified on September 23, 2003, that charges had been brought against him. The office had no record that Gordon ever called the office to allege that he could not pay the amounts owed.

Ms. Bradley testified that Gordon appeared at hearings in 1998, 1999 and 2000, accompanied by a lawyer, concerning his child support obligation. She testified that at one point in 2001, they had obtained a wage assignment from an employer of Gordon's, but that only lasted for a short period and Gordon failed to notify the office of any change in employment as was required. She testified to the method of modifying child

support payments and stated that it was not necessary to hire a lawyer.

Gordon insists that the Commonwealth's evidence only showed that he was aware of what he owed, but not his ability to pay. Drawing all fair and reasonable inferences from the evidence in favor of the Commonwealth, we believe that it could be reasonably inferred from the Commonwealth's case-in-chief the child support order was for an amount which Gordon could pay, as he agreed to it and did pay it sporadically. Further, it was reasonable to infer in the Commonwealth's favor that Gordon retained the ability to provide child support when he did not assert to his ex-wife or to the agency concerned with collection that he was unable to pay for any reason. In addition, from the statements his ex-wife alleged Gordon made, one could infer that it was his attitude rather than any inability to pay that halted the child support payments. We agree that the Commonwealth introduced sufficient evidence in its case-in chief to withstand a motion for directed verdict.

Gordon also believes that he should have been granted the directed verdict at the close of all the evidence because he provided evidence that he had been ill and unable to work since 2002. We believe the court properly denied the motion. In addition to the evidence about his illness, there was testimony from Gordon and the defense witnesses to show that Gordon had a

source of some income from selling vehicles. He admitted that he was not totally incapacitated by his illness and could perform some work activities, albeit for shorter periods of time. The Commonwealth also questioned why Gordon had not applied for disability benefits to provide for his children as well as himself. There was additional evidence from which a jury could consider whether Gordon could reasonably provide the support he was ordered to pay, and so a directed verdict was not warranted. Furthermore, we conclude that the jury's verdict in this case was not palpably or flagrantly contrary to the evidence produced at trial.

We affirm the orders of the trial court. For the foregoing reasons, appellant's conviction for flagrant nonsupport is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Donald H. Morehead
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

George G. Seelig
Assistant Attorney General
Frankfort, Kentucky