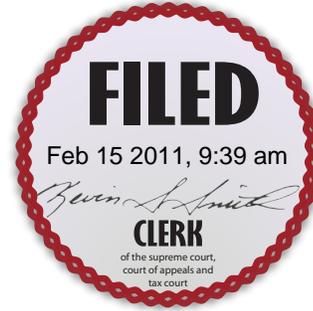


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

DAVID A. ALLEN,)

Appellant-Defendant,)

vs.)

No. 49A02-1007-CR-745

STATE OF INDIANA,)

Appellee-Plaintiff.)

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Robert R. Altice, Jr., Judge
Amy J. Barbar, Magistrate
Cause No. 49G02-0904-FC-36885

February 15, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

David Allen appeals his conviction following a bench trial for welfare fraud as a class C felony.¹

We affirm.

ISSUES

1. Whether the evidence was sufficient to support Allen's conviction for welfare fraud.
2. Whether the trial court abused its discretion in admitting evidence.

FACTS

In 2003, Allen applied for disability insurance benefits through the Social Security Administration (the "SSA").² In October of 2004, the Marion County Department of Child Services ("DCS") removed two of Allen's children, C.A. and D.A., from his custody. One month later, DCS removed a third child, K.A., from Allen's care. DCS never returned the children to Allen's care. Following a termination hearing at which Allen was present and in which he participated, the juvenile court terminated Allen's parental rights as to all three children on April 4, 2007. As of October of 2008, the children had been adopted.

¹ Ind. Code § 35-43-5-7.

² It is unclear from the record when Allen began receiving benefits, but he did so at some point prior to April of 2007.

On June 26, 2007, Allen applied for auxiliary benefits on behalf of the children and to be the representative payee of those benefits. From July of 2007 until March of 2009, the SSA paid Allen auxiliary benefits on behalf of the three children in the amount of \$9,911.00.

Subsequently, the SSA became aware that Allen's parental rights had been terminated; therefore, the SSA determined that the children were not entitled to auxiliary benefits based on Allen's disability.

On April 1, 2009, the State charged Allen with Count I, welfare fraud as a class C felony; and Count II, theft as a class D felony. As to Count I, the State charged that Allen had knowingly or intentionally obtained public relief or assistance by "means of concealing information, to wit: by reporting to the [SSA] as Representative Payee for his children . . . that his children were in his care and custody and lived with him" between June 26, 2007 and March of 2009. (App. 24).

The trial court held a bench trial on April 28, 2010. Thomas Thowe, a claims representative with the SSA, testified that when "a person applies for benefits, there is an application for auxillary [sic] benefits [for children of the disabled parent] and there's also a representative payee application" to receive payment of the auxiliary benefits on behalf of the children. (Tr. 25). According to Thowe, a claims representative interviews the applicant; "record[s] the[] responses in the computer"; "print[s] out the application"; and then has the applicant review and attest to the information. (Tr. 25).

The State then sought to admit into evidence State’s Exhibit 2, an SSA document entitled Application Summary for Child’s Insurance Benefits—Life Claim (the “Application”) and State’s Exhibit 3, an SSA document entitled Request to be Selected as Payee (the “Payee Request”). Thowe testified that they were true and accurate copies of Allen’s application for auxiliary benefits on behalf of the children and his request that the children’s benefits be paid to him as their representative payee. Thowe, however, testified that he had not conducted Allen’s interview.

Allen objected to the admission of the documents because they lacked his signature. In response, the State elicited testimony from Thowe that the documents did not bear signatures because the SSA utilizes “a process called attestation, where the individual attests verbally to the application.” (Tr. 27).

Allen again objected to the documents’ admission, arguing that Thowe did not have personal knowledge of the matter as he was not the claims representative who interviewed Allen. Finding that the State “established a business record’s exception,” the trial court admitted the documents into evidence over Allen’s objection. (Tr. 29).

The Application, dated June 26, 2007, contained Allen’s social security number and address. It provided that Allen was applying for auxiliary benefits on behalf of the children and read:

I know that anyone who makes or causes to be made a false statement or presentation of material fact in an application or for use in determining a right to payment under the Social Security Act commits a crime punishable under federal law by fine, imprisonment or both. I affirm that all information I have given in connection with this claim is true.

(Ex. Vol. at 8). The Application further set forth:

You declared under penalty of perjury that you examined all the information on this form and it is true and correct to the best of your knowledge. You were told that you could be liable under law for providing false information.

(Ex. Vol. at 9). Under the section entitled “Reporting Responsibilities for Child’s Insurance Benefits,” the Application directed that any change in the child’s residence or custody must be reported to the SSA. (Ex. Vol. at 11-12).

The Payee Request, also dated June 26, 2007, listed Allen as the payee applicant and stated that the children live with Allen and that Allen “take[s] care of” the children.

(Ex. Vol. at 15). It further read as follows:

I know that anyone who makes or causes to be made a false statement or representation of material fact relating to a payment under the Social Security Act commits a crime punishable under Federal law by fine, imprisonment or both. I affirm that all information I have given in this document is true.

(Ex. Vol. at 17). It also provided, in part, as follows:

You must notify the Social Security Administration promptly if any of the following events occur and promptly return any payment to which the claimant is not entitled:

.....

the claimant leaves your custody or care or otherwise CHANGES ADDRESS[.]

(Ex. Vol. at 18).

Thowe testified that in applying for benefits on behalf of a dependent child, the applicant is asked whether the child resides with the applicant and that the SSA requires

that the child reside with the person receiving disability insurance benefits in order to obtain auxiliary benefits. According to Thowe, “Social Security did pay the children’s benefits to Mr. Allen because [the SSA] believed he had custody of the children.” (Tr. 32).

Allen testified that he had applied for benefits on behalf of the children; received and cashed the children’s benefit checks; and that the children were not living with him when he applied for their benefits. He also testified that when he applied for benefits on behalf of the children, the claims representative informed him that he would have to notify SSA if the children did not live with him. He further testified that he informed the claims representative that the children ““stay with [him]”” and that he answered in the affirmative when she asked, ““Well, Mr. Allen, your kids are staying with you?”” (Tr. 57). Allen acknowledged that he knew his parental rights had been terminated as of April 4, 2007.

On rebuttal, the State moved to admit into evidence a verification form completed and signed by Allen on March 4, 2009, at the request of the SSA. Allen certified that the children had lived with him from August 1, 2007 through July 31, 2008, and that he had received \$3,814.00 from the SSA and spent it for the children’s care and support during that time. The trial court admitted the form into evidence over Allen’s objection that the verification form had not been made available until the day of trial. Allen admitted to completing and signing the form.

The trial court found Allen guilty as charged and held a sentencing hearing on June 11, 2010. For purposes of sentencing, the trial court merged Count II with Count I and sentenced Allen to a suspended sentence of two years. The trial court also ordered restitution in the amount of \$1,000.00 and entered a civil judgment against Allen in the amount of \$8,911.00.

Additional facts will be provided as necessary.

DECISION

Allen asserts that the evidence is insufficient to support his conviction for welfare fraud. We disagree.

When reviewing the sufficiency of the evidence to support a conviction, appellate courts must consider only the probative evidence and reasonable inferences supporting the verdict. It is the fact-finder's role, not that of appellate courts, to assess witness credibility and weigh the evidence to determine whether it is sufficient to support a conviction. To preserve this structure, when appellate courts are confronted with conflicting evidence, they must consider it most favorably to the trial court's ruling. Appellate courts affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. It is therefore not necessary that the evidence overcome every reasonable hypothesis of innocence. The evidence is sufficient if an inference may reasonably be drawn from it to support the verdict.

Drane v. State, 867 N.E.2d 144, 146-47 (Ind. 2007) (quotations and citations omitted).

Indiana Code section 35-43-5-7 provides, in pertinent part, that a person who receives public relief or assistance in the amount of \$2,500.00 or more by knowingly or intentionally "conceal[ing] information for the purpose of receiving public relief or assistance to which he is not entitled," commits welfare fraud as a class C felony. "A

person engages in conduct ‘knowingly’ if, when he engages in the conduct, he is aware of a high probability that he is doing so.” I.C. § 35-41-2-2(b). “Knowledge, like intent, is a mental state of the actor; therefore, the trier of fact must resort to reasonable inferences based on the examination of the surrounding circumstances to reasonably infer its existence.” *Slone v. State*, 912 N.E.2d 875, 880 (Ind. Ct. App. 2009), *trans. denied*.

Here, the record shows that DCS removed Allen’s children from his care in 2004. Despite initial attempts at reunification, DCS never returned the children to Allen’s care. Following a termination hearing at which Allen was present and in which he participated, the juvenile court terminated Allen’s parental rights as to all three children in April of 2007.

By his own admission, Allen subsequently applied for auxiliary benefits on behalf of the three children and cashed the children’s benefit checks. Although Allen testified that at the time of the application, he informed the claims representative that “the kids were with CPS,” he did not inform her that his parental rights had been terminated. (Tr. 56).

Without objection, the trial court admitted into evidence several checks from the United States Treasury made payable to Allen for the benefit of the children and endorsed by Allen. The checks, dated from July 2, 2007 through March 3, 2009, totaled more than \$2,500.00.

Here, the State presented sufficient evidence that Allen concealed information for the purpose of obtaining auxiliary benefits on behalf of the children and did in fact obtain

benefits in excess of \$2,500.00. Allen is asking this Court to reweigh the evidence, which we will not do.

2. Admission of Evidence

Allen asserts that the trial court abused its discretion in admitting the Application and Payee Request into evidence. Specifically, he argues that the admission of the documents violated his Sixth Amendment right to confrontation because “the SSA employee who spoke with Allen on June 26, 2007 did not testify at trial.” Allen’s Br. at 19.

A “primary interest” secured by the Confrontation Clause is the right of cross-examination. A criminal defendant’s Sixth Amendment right to confront witnesses is nevertheless subject to reasonable limitations placed at the discretion of the trial court. Violations of the right of cross-examination do not require reversal if the State can show beyond a reasonable doubt that the error did not contribute to the verdict.

Koenig v. State, 933 N.E.2d 1271, 1273 (Ind. 2010) (internal citations omitted).

Whether a federal constitution error is harmless depends on several factors, including

the importance of the witness’ testimony in the prosecution’s case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted and, of course, the overall strength of the prosecution’s case.

Id. (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986)). “[A]n otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the

whole record, that the constitutional error was harmless beyond a reasonable doubt.”
Koenig, 933 N.E.2d at 1273.

In this case, we do not decide whether the trial court improperly admitted the SSA’s documents because we conclude any error to be harmless beyond a reasonable doubt. The record is clear that Allen knew that his children had been removed from his care and custody in 2004; and that his parental rights had been terminated, and failed to inform SSA of the same, when he submitted applications for the children’s auxiliary benefits and to be their representative payee in 2007. Accordingly, any error in admitting the evidence must be disregarded as harmless beyond a reasonable doubt.

Affirmed.

NAJAM, J., and BAILEY, J., concur.