[Cite as *State v. Ferguson*, 2012-Ohio-6231.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
		No. 12AP-282
v.	:	(C.P.C. No. 10CR-06-3828)
Peter J. Ferguson,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on December 31, 2012

Ron O'Brien, Prosecuting Attorney, and *Laura R. Swisher*, for appellee.

Siewert & Gjostein Co. LPA, and *Thomas A. Gjostein*, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶ 1} Defendant-appellant, Peter J. Ferguson, appeals from a judgment of the Franklin County Court of Common Pleas convicting him of nonsupport of dependents, a violation of R.C. 2919.21, a felony of the fifth degree. For the following reasons, we affirm.

I. FACTS AND PROCEDURAL HISTORY

{¶ 2} Appellant was ordered to pay a total monthly obligation of $216.85 for the support of his minor child, De'Jhona Ferguson, effective April 24, 2002. Appellant was indicted for failure to provide adequate support as ordered by the Franklin County Court

of Common Pleas, Division of Domestic Relations, Juvenile Branch, for the timeframe from June 21, 2008 to June 21, 2010.

{¶ 3} The mother of the minor child, Carmenika Westbrook, testified on behalf of the prosecution. Westbrook testified that she has had custody of and has lived with De'Jhona since the child's birth. According to Westbrook, appellant was ordered to pay child support to Franklin County Child Support Enforcement Agency ("FCSEA"), which would then forward the support onto her. Westbrook testified that she received very little monies from appellant through FCSEA during the timeframe of June 21, 2008 through June 21, 2010.

{¶ 4} Linda Meeks, FCSEA client affairs officer and keeper of the records, testified as to the prosecution's exhibit No. 2, which showed the account summary for appellant's child support case. This evidence showed that the total monthly amount appellant was ordered to pay to FCSEA in this case was $216.85. The evidence further showed that, for the time period at issue, there was only one payment of $150 made on February 11, 2009. Meeks testified to the total balance, or arrearage due.

{¶ 5} In his defense, appellant called De'Jhona and his fiancé Dilisa Malone. De'Jhona testified that she lives with her mother, grandmother, two sisters, and brother. According to De'Jhona she has a good relationship with her father and called herself "a daddy's girl." (Tr. 52.) De'Jhona explained to the jury that she cooks and plays games with her dad, among other activities, and that he bought her clothes, games, and other items. De'Jhona also testified that her father took good care of her and would always pay for things when asked.

{¶ 6} Malone testified that De'Jhona comes to the house she shares with appellant twice per month on the weekends and that appellant spent approximately $200 monthly on De'Jhona for clothes and other items. Malone also testified that at the time of the trial, appellant was not working, but that he had worked construction "off and on" from June 2008 through June 2010. (Tr. 60.)

{¶ 7} Appellant testified on his own behalf and testified he was very active in the community as a mentor and coach, and worked with troubled youth. Appellant admitted that he did not make child support payments directly to FCSEA. Appellant testified that he did not make payments to FCSEA as ordered, because he was concerned

that the money would not actually be spent on De'Jhona. According to appellant, it was his belief that the money would be used specifically for De'Jhona if he gave her the money directly or bought her needed items. Appellant did not provide receipts for any of the support given to De'Jhona.

{¶ 8} Upon the evidence presented, the jury returned a verdict of guilty. Appellant was sentenced to five years of community control and found to owe an arrearage of $8,857.80 in child support.

II. ASSIGNMENT OF ERROR

{¶ 9} This appeal followed and appellant brings a sole assignment of error as:

> APPELLANT'S CONVICTION WAS NOT SUPPORTED BY THE SUFFICIENCY OF THE EVIDENCE AND IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION AND ARTICLE I, SECTIONS 1 & 16 OF THE OHIO CONSTITUTION AND THE CONVICTION WAS ALSO AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

III. DISCUSSION

{¶ 10} Appellant challenges in his assignment of error both the sufficiency of the evidence as well as the manifest weight of the evidence.

{¶ 11} In determining whether the evidence is legally sufficient to support a verdict, " 'the relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.' " *State v. Robinson*, 124 Ohio St.3d 76, 2009-Ohio-5937, ¶ 34, quoting *State v. Jenks*, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus. A reviewing court will not disturb a verdict unless, after viewing the evidence in a light most favorable to the prosecution, it is apparent that reasonable minds could not reach the conclusion reached by the trier of fact. *State v. Treesh*, 90 Ohio St.3d 460, 484 (2001).

{¶ 12} In a sufficiency inquiry, reviewing courts do not assess whether the prosecution's evidence is to be believed, but whether, if believed, the evidence supports the conviction. *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, ¶ 79-80 (evaluation of witness credibility not proper on review for sufficiency of evidence); *State*

v. Bankston, 10th Dist. No. 08AP-668, 2009-Ohio-754, ¶ 4 (noting that "in a sufficiency of the evidence review, an appellate court does not engage in a determination of witness credibility; rather, it essentially assumes the state's witnesses testified truthfully and determines if that testimony satisfies each element of the crime").

{¶ 13} The relevant portion of R.C. 2919.21 prohibits one from failing to provide support as established by a court order. In accordance therewith, the jury was instructed as follows:

> Before you can find the defendant guilty of nonsupport of dependents, you must find beyond a reasonable doubt that from on or about June 21, 2008 to June 21st, 2010, in Franklin County, Ohio, the defendant did recklessly fail to provide support as established by a court order to another person, to wit: De'Jhona Ferguson, who by court order or decree the defendant was legally obligated to support. If you find that the defendant recklessly failed to provide support as established by a court order to another person, you must then render a verdict as to whether or not the defendant failed to provide such support for a total accumulated period of 26 weeks out of 104 consecutive weeks.
>
> A person acts recklessly when with heedless indifference to the consequences, the person perversely disregards a known risk that the conduct is likely to cause a certain result or is likely to be of a certain nature. A person is reckless with respect to circumstances when with heedless indifference to the consequences, that person perversely disregards a known risk that such circumstance[s] are likely to exist.
>
> Any payment of money by the person responsible for the support payment under a support order to the person entitled to receive the support payments that is not made to the child support enforcement agency in accordance with the applicable support order shall be deemed to be a gift.

(Tr. 107-08.)

{¶ 14} Appellant asserts on appeal that his purchasing of items for, and payment of money directly to, De'Jhona meets his child support obligations. We disagree. The evidence here clearly establishes that appellant failed to support his child through the child support agency by making court ordered payments in the amounts specified. Unless made to satisfy another obligation, the payment of monies and buying of items or

providing financial assistance directly to the child instead of the child support enforcement agency is by law deemed a gift and not child support. R.C. 3121.45 (any payment by the person responsible for payment under a support order to the person entitled to receive support payments not made to the child support agency shall not be considered payment of support and shall be deemed a gift); *Ruark v. Smith*, 10th Dist. No. 04AP-1018, 2005-Ohio-3370, ¶ 10, citing R.C. 3121.45; *In re Harris*, 2d Dist. No. 2005CA27, 2006-Ohio-3746, ¶ 27. Therefore, we find that the evidence presented was sufficient to sustain appellant's conviction on the charge of nonsupport of dependents.

{¶ 15} Appellant's assignment of error also challenges whether his conviction is against the manifest weight of the evidence. As opposed to the concept of sufficiency of the evidence, "[t]he weight of the evidence concerns the inclination of the greater amount of credible evidence offered in a trial to support one side of the issue rather than the other." *State v. Brindley*, 10th Dist. No. 01AP-926, 2002-Ohio-2425, ¶ 35.

{¶ 16} In order for a court of appeals to reverse the judgment of a trial court on the basis that the verdict is against the manifest weight of the evidence, the appellate court must disagree with the fact finder's resolution of the conflicting testimony. *State v. Thompkins*, 78 Ohio St.3d 380, 387 (1997). The appellate court, in reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses, and determines whether, in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction. *Id.*, citing *State v. Martin*, 20 Ohio App.3d 172, 175 (1st Dist.1983).

{¶ 17} Here, there is very little conflicting evidence in the record. Appellant admits to not making child support payments through FCSEA as ordered. The jury was free to believe the prosecution's testimony, and we conclude this is not a case in which the jury clearly lost its way such that reversal on manifest weight grounds is required.

{¶ 18} Because we conclude appellant's conviction is supported by sufficient evidence and is not against the manifest weight of the evidence, we overrule appellant's single assignment of error.

IV. CONCLUSION

{¶ 19} Having overruled appellant's assignment of error in its entirety, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BROWN, P.J., and DORRIAN, J., concur.