[Cite as *State v. Catlin*, 2015-Ohio-986.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 14AP-555 (C.P.C. No. 13CR09-4734)
Jennifer Catlin,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on March 17, 2015

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

Todd W. Barstow, for appellant.

APPEAL from the Franklin County Court of Common Pleas

TYACK, J.

{¶ 1} Jennifer Catlin is appealing from her conviction on a single charge of non-support of dependents. She assigns two errors for our consideration:

> I. THE TRIAL COURT ERRED AND DEPRIVED APPELLANT OF DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE ONE SECTION TEN OF THE OHIO CONSTITUTION BY FINDING HER GUILTY OF NONSUPPORT OF DEPENDENTS AS THAT VERDICT WAS NOT SUPPORTED BY SUFFICIENT EVIDENCE AND WAS ALSO AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.
>
> II. APPELLANT INTRODUCED SUFFICIENT CREDIBLE EVIDENCE TO ESTABLISH THE AFFIRMATIVE DEFENSE

> SET FORTH IN R.C. 2919.21(D) BY A PREPONDERANCE OF THE EVIDENCE.

{¶ 2} Jennifer Catlin's daughter was placed in the custody of Jennifer's sister, Sherry Pickett, before the turn of the last century. In November 2001, the Franklin County Court of Common Pleas, Juvenile Division, ordered Jennifer to pay child support. Jennifer paid infrequently, which apparently resulted in a prior conviction for non-support as evidenced by a judgment entry which listed "Jennifer Catlin" as the criminal defendant who had been convicted. At the bench trial in the current case, Jennifer acknowledged that she was on probation as a result of previous court proceedings involving nonsupport.

{¶ 3} Sherry Pickett also testified at the bench trial about being in court with Jennifer for prior non-support proceedings. Sherry is Jennifer's sister and is the person awarded custody of the child.

{¶ 4} To the extent appellate counsel is arguing that the prior conviction for non-support was not proved at trial, we disagree.

{¶ 5} The issue of Jennifer's ability to pay and the applicability of the affirmative defense in R.C. 2919.21(D) to the proceedings is part of both assignments of error. R.C. 2919.21(D) reads:

> It is an affirmative defense to a charge of failure to provide adequate support under division (A) of this section or a charge of failure to provide support established by a court order under division (B) of this section that the accused was unable to provide adequate support or the established support but did provide the support that was within the accused's ability and means.

{¶ 6} Jennifer did not deny that she had not paid support since 2007. She claimed she had not been able to get a steady job for many years. She alleged that she did household chores at the residence where she and her sister lived with their children. Jennifer described odd jobs she had done for neighbors, some of which led to her being paid. None of the funds were forwarded to the child support enforcement agency or to Jennifer's probation officer.

{¶ 7} Jennifer did not claim that she had any medical or emotional problems which prevented her from working, only that she had been unable to find work.

{¶ 8} The trial court judge, sitting as trier of fact, found that the affirmative defense set forth in R.C. 2919.21(D) had not been proved. When Jennifer had money, she did not use any of it to pay child support. Jennifer's efforts to find a regular job were fairly minimal. Her claims to pursuing as many as 50 or 60 job openings over years of being unemployed did not convince the trial court judge that Jennifer was making her best efforts at finding employment.

{¶ 9} Based upon the foregoing, we overrule the two assignments of error. The judgment of the Franklin County Court of Common Pleas is, therefore, affirmed.

Judgment affirmed.

BROWN, P.J., concurs.
BRUNNER, J., concurs in part and dissents in part.

BRUNNER, J., concurring in part and dissenting in part.

{¶ 10} I respectfully concur in part and dissent in part from the majority's decision in this case. I agree with the majority that there was sufficient evidence to find that the state had proved beyond a reasonable doubt that defendant-appellant, Jennifer Catlin, was guilty of non-support of dependents, in violation of R.C. 2919.21, absent consideration of an affirmative defense. I dissent from the majority's decision, because I believe a detailed consideration of the evidentiary record shows that Catlin met her burden of proof pursuant to the first prong of an affirmative defense under R.C. 2919.21(D). I believe that Catlin proved by a preponderance of the evidence that she was unable to provide adequate or established support for her minor child and that the court's finding otherwise was against the manifest weight of the evidence. Because the court did not reach the second prong necessary for the proof of an affirmative defense, i.e., whether Catlin did provide support within her ability and means, this case should be remanded for a new trial on that issue.

{¶ 11} On September 9, 2013, Catlin was indicted for failing to pay child support for the period of March 1 to August 20, 2013, in violation of R.C. 2919.21. The record

indicates that she was previously indicted in 2011 and thereafter convicted of a fifth-degree felony violation of the same section, with the subject, subsequent indictment being a felony of the fourth degree. On April 23, 2014, Catlin waived jury and the trial court heard the case. At trial, there were two witnesses, Catlin and Sherry Pickett, Catlin's sister and the individual who has custody of Catlin's minor daughter, Sarah.

{¶ 12} Pickett testified she obtained temporary custody of Sarah in April 1998 and permanent custody in November 1998. Pickett further testified that she and her husband shared their home in Columbus, Ohio with Sarah, Catlin, and Catlin's minor son, who is not a part of this case, at times relevant to the indictment (March 1 to August 20, 2013). During this period of time, Pickett was not formally employed but was collecting disability; Pickett's husband worked at a tire store; and Catlin was also not formally employed. However, for several years, including the relevant time period, the entire family worked together in a newspaper advertising business known as "The Bag." (Apr. 23, 2014 Tr. 37.) This work apparently consisted of obtaining newspaper advertisements from the Dispatch Printing Company, assembling them into bagged advertising booklets, and distributing them door-to-door. This work, in which the entire family participated, including Catlin, brought in $500 to $1,200 monthly. Picket was the sole party to collect this money and did not pay Catlin for her role in the family business, nor did she share any of the revenues with Catlin. Pickett also testified that Catlin does all the laundry for everyone in the household and, three days per week, does all the dishes and cleans the kitchen. Pickett additionally noted that Catlin occasionally does odd jobs for neighbors and family members such as babysitting and yard work.

{¶ 13} Pickett also testified about Catlin's legal history and obligations. She testified that she obtained a child support order against Catlin in November 2001 for $182.92 per month to be paid in support of Sarah through the Franklin County Child Support Enforcement Agency ("child support agency"). She remembered, though not with any specificity, that the support order had been increased a number of times to take account of arrearages. She admitted that Catlin had paid support until September 2007, and that when Catlin worked she paid rent. She also recalled a case apparently before the Franklin County Common Pleas Court, Division of Domestic Relations, Juvenile Branch, wherein Catlin was required to serve jail time for non-payment of support. There also

appears in court records a prior felony conviction for non-payment of support, a fact the trial court relied on in reaching its findings. She testified that, to her knowledge, Catlin has not paid support since September 2007. After Pickett's testimony, the defense stipulated to the authenticity and admissibility of the prosecution's exhibits.[1]

{¶ 14} Catlin's testimony essentially confirmed Pickett's. She did admit that she occasionally made some money babysitting and that she never sent any of that to the child support agency. However, she explained that she is extremely impoverished and, without a job, is unable to make the required payments. She has no savings, stocks, bonds, or automobiles. She has never, in fact, had a savings account or an automobile. She has no real estate, jewelry, or legal claims against anyone.

{¶ 15} Catlin testified that she has a high school education, but nothing further, and that she has mostly been employed in the fast food industry. During the relevant period of March 1 to August 20, 2013, she was unemployed, except for her household jobs and her role in "The Bag," but filled out as many as 50 to 60 applications for jobs. She testified that she filled out applications at McDonald's, Wendy's, Burger King, Taco Bell, UDF, Tee Jaye's, Oakland Nursery, and various thrift stores. She was last formally employed in 2008, but no physical or mental disability prevents her from working. She has diabetes, which she controls through diet. However, she did testify about not being able to afford properly fitting dentures for her missing teeth.

{¶ 16} Following closing arguments, the trial court ruled from the bench. The court found that Catlin had failed to establish an affirmative defense under R.C. 2919.21(D) by a preponderance of the evidence and that, in the absence of an affirmative defense, she was guilty beyond a reasonable doubt.

{¶ 17} On June 16, 2014, the trial court in this appeal sentenced Catlin to 3 years of community control and 30 days in jail, with 9 days of jail-time credit. The trial court declined to stay the sentence pending appeal.[2]

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[1] The stipulated exhibits for the state consisted of the entry granting the Pickets custody of Sarah, the entry ordering payment of child support by Catlin for Sarah in the amount of $182.92 per month, the entry convicting Catlin of a fifth-degree felony non-support charge in case No. 11CR-6078, and an account record for March to August 2013 for Catlin showing no payments and an arrearage in excess of $18,000.00.

[2] There is a discrepancy between the trial court's entry and what it said on the record during the sentencing hearing. During the hearing, the trial court sentenced Catlin to 2 years of community control (not 3) and

{¶ 18} In a criminal case, the prosecution's burden is to prove, beyond a reasonable doubt, each element of the offense. R.C. 2901.05(A); *see also State v. Martin*, 21 Ohio St.3d 91 (1986), syllabus. The defendant may therefore defeat a criminal case by doing nothing and simply allowing the prosecution to fail to prove any element. A defendant may also choose to actively present evidence to show that one or more elements of the offense are unsatisfied or cannot be satisfied. Neither of these defense strategies is an affirmative defense. When evidence is offered to prove an affirmative defense, the defendant has the burden to prove by a preponderance of the evidence that, in a criminal law context, certain circumstances, if proved, mitigate the circumstances of the crime. R.C. 2901.05(A); *Martin* at 93. If the defendant proves an affirmative defense, whether or not the prosecution satisfies all the elements of the offense beyond a reasonable doubt, the defendant is not guilty of the crime. Though the prosecution often presents evidence to disprove the defendant's affirmative defense, there is no requirement that it do so, because proving the defense is the defendant's burden. *Id.*; *Patterson v. New York*, 432 U.S. 197, 210 (1977).

{¶ 19} In order for a defendant to stand convicted according to the principles of due process, the evidence must be such that a reasonable juror could have found every fact necessary for the conviction beyond a reasonable doubt. *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, ¶ 37. *See also Jackson v. Virginia*, 443 U.S. 307, 315 (1979). Here, the trial court had before it sufficient evidence to find that Catlin violated R.C. 2919.21. It found from the evidence that, having a prior felony conviction for a violation of R.C. 2919.21, Catlin had recklessly "fail[ed] to provide adequate support" to Sarah who was, at the relevant time, under age 18. R.C. 2919.21(A)(2), (G)(1); R.C. 2901.21(B). The trial court may also have found that Catlin, having a prior felony conviction for a violation of R.C. 2919.21, had recklessly "failed to provide support" "as established by a court order" to "another person whom, by court order or decree, the person is legally obligated to support." R.C. 2919.21(B), (G)(1); R.C. 2901.21(B).

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granted her an appellate appearance bond of $18,790 (the amount of the child support arrearage). However, "[t]hat a judge speaks as the court only through the journal of the court[,] is well settled." *State ex rel. Ruth v. Hoffman*, 82 Ohio App. 266, 268 (1st Dist.1947); *Fountain v. Pierce*, 123 Ohio St. 609 (1931), paragraph one of the syllabus.

{¶ 20} Under whichever set of elements the court found Catlin guilty, one common essential element was that she had a prior felony conviction. The trial court admitted into evidence a prior sentencing entry, and the defense stipulated to both its admissibility and authenticity. There was ample evidence, even Catlin's own admissions, from which to find that Catlin had a prior felony conviction and had not made the requisite payments to support Sarah as required by statute and previous court order. The evidence was also sufficient and strong to show that Catlin was aware that she had a prior felony conviction for failure to support, that Sarah was her daughter and was under age 18, there was a court order for support, and she had not been paying support. Because the evidence unequivocally demonstrates that Catlin was "aware that [these] circumstances probably exist[ed]," Catlin acted "knowingly" in failing to pay support. R.C. 2901.22(B). Because she acted knowingly, she also meets the "recklessness" mens rea of the offense. R.C. 2901.22(E); R.C. 2901.21(B). In short, a review of the evidence considered by the trial court would have convinced a reasonable juror beyond a reasonable doubt as to every element of Catlin's conviction. *Jackson* at 315, 319.

{¶ 21} However, Catlin offered evidence of an affirmative defense under R.C. 2919.21(D). This is where the trial court as the trier of fact lost its way. When an appellate court considers a judgment of a trial court on the basis that the verdict is against the manifest weight of the evidence, the appellate court sits as a "thirteenth juror" and reviews the factfinder's resolution of the conflicting testimony. *See, e.g., Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, ¶ 12-13, citing *State v. Thompkins*, 78 Ohio St.3d 380, 387 (1997). As the First District put it, "[t]he court, 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." *State v. Martin*, 20 Ohio App.3d 172 (1st Dist.1983), paragraph two of the syllabus.

{¶ 22} When a manifest-weight claim has been made, a court "reviews the entire record, weighs the evidence and all reasonable inferences, and considers the credibility of witnesses." *Thompkins* at 387. When reviewing the record for the failure to pay child support from March 1 to August 20, 2013, conflicts in the evidence must be resolved in

such a way so that the reviewing court must determine if "the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed." *Hancock* at ¶ 39, quoting *Martin* at 175, citing *Thompkins* at 387. According to *Hancock*, it is in this context, considering the entire record, that evidence bearing on the presence of an affirmative defense may be examined. *Id.* at ¶ 39; *see also State v. Jones*, 1st Dist. No. C-140241, 2015-Ohio-490, ¶ 9-11; *State v. Nachman*, 9th Dist. No. 13CA010511, 2014-Ohio-5480, ¶ 6 ("Whether a defendant has met his or her burden of an affirmative defense is reviewed under a manifest-weight-of-the-evidence standard.").

{¶ 23} In offering evidence to prove the statutory affirmative defense to non-support of dependents, Catlin bore the burden of proving by a preponderance of the evidence that she "was unable to provide adequate support or the established support," and that she "did provide the support that was within [her] ability and means." R.C. 2919.21(D). With respect to her ability to provide adequate or established support, Catlin testified that she has no savings, stocks, bonds, or automobiles and, in fact, that she has never had a savings account or an automobile. She further explained that she has no real estate, jewelry, or legal claims against anyone. She does not even have the means to obtain appropriate dentures. Moreover, though Catlin admittedly has neither a diagnosed physical or mental disorder that would prevent her from working, her testimony revealed several facts that support her claims of difficulties to obtain employment to meet her support requirements. First, Catlin has a felony conviction, her prior non-support conviction. Second, her education stopped at high school. Third, she has not held formal employment since 2008, creating a noticeable gap in her work history. Fourth, she has no private transportation and little or no money for public transportation, limiting potential jobs to a smaller geographic radius. Fifth, her dental problems affect her appearance with prospective employers, especially where she would be expected to work with the public. Yet, her experience is largely limited to low paying service jobs that deal with the public, such as the fast food industry. Finally, Catlin confirmed her difficulties finding a job when she testified, and no testimony or evidence was presented to dispute this testimony, that, during the relevant time period, she applied for a large number of jobs, including at McDonald's, Wendy's, Burger King, Taco Bell, UDF, Tee Jaye's, Oakland Nursery, and various thrift stores and was turned down by all of them. The evidence on these facts was

not in any way in conflict or disputed at the trial level. On this record, the evidence shows that Catlin proved that she had no realistic ability to provide monetary support for Sarah or meet the court ordered support amounts. The trial court lost its way in holding otherwise.

{¶ 24} The trial court, in ruling from the bench, discussed almost none of this law or evidence. Rather, in rejecting Catlin's defense, it stated:

> Counsel has referred the Court to 2919.21(D), which states it is an affirmative defense to a charge of failure to provide adequate support under Division (A) of this section or a charge of failure to provide support established by a court order under Division (B) of that section that the accused was unable to provide adequate support or the established support but did not [sic] provide the support that was within the accused's ability and means.
>
> There's been testimony that the Defendant applied for a number of jobs, and did not have -- has not been able to obtain employment. The Court takes that with somewhat, I guess, of a view that that's not been established as required by a preponderance of the evidence.
>
> The Court at this time will enter a finding of guilty against the Defendant for Felony of the Fourth Degree, Failure to Provide Support to her Dependent, and will enter a finding of guilty.

(Apr. 23, 2014 Tr. 80-81.) The trial court did not find that Catlin had established by a preponderance of the evidence that she could not obtain a job and, therefore, that she could not provide adequate or established support for Sarah. The trial court disregarded the weighty evidence in this regard, finding against its manifest weight. After making this finding, the trial court declined to further consider whether Catlin did provide support within her ability and means.

{¶ 25} The evidence showed that Catlin made no payments to the child support agency. However, she testified that she provided support in a number of in-kind ways that were not disputed at trial. In *Gartner v. Gartner*, 10th Dist. No. 83AP-847 (July 26, 1984) (and other precedent that considers in-kind support), this court recognized that child support is intended to help the child by giving resources to the person taking care of the child:

> The purpose of child support is for support of the child. Where the custodial parent does not provide that support and, instead, the child resides with the noncustodial parent who provides full support in kind, the custodial parent is not entitled to judgment for a support arrearage for such time as full support was provided by the noncustodial, rather than the custodial, parent.

In-kind support is considered in the statutory context of deviating from the child support schedule and worksheet when imposing or modifying child support. R.C. 3119.23(J). A trial court also may credit in-kind contributions toward satisfaction of child support obligations. *See, e.g., Rodriguez v. Frietze,* 4th Dist. No. 04CA14, 2004-Ohio-7121, ¶ 41-45. In the criminal non-support context, there is no dearth of cases that cite a lack of in-kind contributions in the context of affirming convictions for non-support violations under R.C. 2919.21. *State v. Coley*, 1st Dist. No. 950879 (June 19, 1996); *State v. Brown*, 5 Ohio App.3d 220, 222 (5th Dist.1982).

{¶ 26} The undisputed evidence in Catlin's case indicates that Catlin does provide some support for her child. The undisputed evidence presented at trial is that Catlin lived in the same house as Sarah during the relevant time and did a number of things a mother would do for her child. There was undisputed evidence that Catlin did all the dishes and cleaned the kitchen three nights per week, which presumably benefited Sarah. She also did everyone's laundry, which benefited Sarah. She also contributed to the family advertising business "The Bag." Though no profits from this were shared with her so that she could have deposited them to the child support agency for Sarah's benefit, the profits were used to support the entire household, including Sarah. While Pickett and her husband doubtless also took care of Sarah's needs, the evidence shows that Sarah lived with her mother. However, the trial court found only as to Catlin's ability to pay adequate or established child support. It never reached the second element, whether Catlin did provide support within her ability and means, in determining whether Catlin had met her burden in proving an affirmative defense. This makes a difference as to her conviction.

{¶ 27} For these reasons, I concur with the majority that, as to Count 1 of the indictment, the trial court's decision, absent consideration of the affirmative defense of R.C. 2919.21(D), was supported by sufficient evidence in finding Catlin guilty of non-

support of dependents. I would thereby overrule in part appellant's first assignment of error consistent with this decision.

{¶ 28} As for the remainder of appellant's assignments of errors, I dissent from the majority's decision. I would sustain those portions of appellant's first and second assignments of error to the extent that the trial court's finding was against the manifest weight of the evidence as to appellant's affirmative defense that appellant could not provide adequate or established support. Since the trial court did not reach a determination as to the second element of Catlin's affirmative defense, I would remand this case to the trial court with instructions that it hold a new trial on the issue of whether Catlin provided the support that was within her ability and means as is required by R.C. 2919.21(D) to prove an affirmative defense. If the court finds that she did provide the support that was within her ability and means pursuant to R.C. 2919.21(D), it is ordered to vacate her conviction. If the court finds that she did not, Catlin's conviction stands without the need for resentencing.