

COURT OF APPEALS  
DELAWARE COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. William B. Hoffman, P.J.
Plaintiff-Appellee	:	Hon. Sheila G. Farmer, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	
SAMMY PARTEE	:	Case No. 07CAA05021
	:	
Defendant-Appellant	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Appeal from the Court of Common Pleas,  
Case No. O6CRI10478

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: January 8, 2008

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

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*Farmer, J.*

{¶1} On October 27, 2006, the Delaware County Grand Jury indicted appellant, Sammy Partee, on one count of nonsupport of dependants in violation of R.C. 2919.21(B). Said charge arose from appellant's noncompliance with a trial court order on child support issued on April 30, 1996. Appellant and his former wife, Peggy Partee, have two children, Micah born October 11, 1987 and Joshua born December 8, 1989.

{¶2} A jury trial commenced on February 27, 2007. The jury found appellant guilty as charged. By judgment entry of sentence filed April 3, 2007, the trial court sentenced appellant to five years of community control.

{¶3} Appellant filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶4} "THE TRIAL COURT ERRED BY OVERRULING APPELLANT'S MOTION FOR ACQUITTAL MADE AT THE CLOSE OF ALL EVIDENCE."

II

{¶5} "THE CONVICTION WAS AGAINST THE MANIFEST WEIGH (SIC) OF THE EVIDENCE."

III

{¶6} "THE TRIAL COURT ERRED BY PROHIBITING EVIDENCE OF THE COURT ORDER THAT TERMINATED CHILD SUPPORT RETROACTIVELY."

IV

{¶7} "THE APPELLANT WAS DENIED A FAIR TRIAL BY PROSECUTORIAL MISCONDUCT."

I, II

{¶8} In these assignments, appellant challenges the sufficiency and weight of the evidence. Both assignments challenge the determination that the evidence supported a finding that appellant violated R.C. 2919.21(B). We disagree.

{¶9} Crim.R. 29 governs motion for acquittal. Subsection (A) states the following:

{¶10} "The court on motion of a defendant or on its own motion, after the evidence on either side is closed, shall order the entry of a judgment of acquittal of one or more offenses charged in the indictment, information, or complaint, if the evidence is insufficient to sustain a conviction of such offense or offenses. The court may not reserve ruling on a motion for judgment of acquittal made at the close of the state's case."

{¶11} The standard to be employed by a trial court in determining a Crim.R. 29 motion is set out in *State v. Bridgeman* (1978), 55 Ohio St.2d 261, syllabus:

{¶12} "Pursuant to Crim.R. 29(A), a court shall not order an entry of judgment of acquittal if the evidence is such that reasonable minds can reach different conclusions as to whether each material element of a crime has been proved beyond a reasonable doubt."

{¶13} On review for manifest weight, a reviewing court is to examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine "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* (1983), 20 Ohio App.3d 172, 175.

See also, *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52. The granting of a new trial "should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." *Martin* at 175.

{¶14} Appellant was convicted of nonsupport of dependents in violation of R.C. 2919.21(B) which states, "No person shall abandon, or fail 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."

{¶15} Appellant claims between January 1, and June 30, 2006, the minor child lived with him, and appellant supported him. In the April 30, 1996 journal entry decree of divorce, State's Exhibit 2, appellant was ordered to pay child support in the amount of \$372.00 per month plus poundage, and any arrearages owed by appellant for past due child support were not waived. State's Exhibit 4 established appellant made no payments per the trial court's order during the time alleged in the indictment. T. at 42, 55. Joshua went to live with his father in 2004, and there was no change in the child support order. T. at 56-57.

{¶16} Appellant argues because he was supporting the child, he was not in violation of R.C. 2919.21(B); however, he was aware of his continuing duty to pay any arrearages, and he understood there was an arrearage dating back from the divorce. T. at 64, 71, 73. Appellant became aware of the termination of the child support order in July of 2006. T. at 74. Appellant admitted to not paying anything from January 1, to June 30, 2006. T. at 75.

{¶17} At the close of the state's case when appellant made his Crim.R. 29 motion for acquittal, we find sufficient evidence was presented via State's Exhibits 2 and 4 to meet the burden imposed by said rule.

{¶18} We find all of the evidence is sufficient to support a violation of R.C. 2919.21(B). During the time period from January 1, to June 30, 2006, appellant did not make any payments per the trial court's order. Although it is conceded the only payments due would have been arrearages, there was an arrearage total due, and the child support order had not been rescinded.

{¶19} Upon review, we find sufficient evidence to support the conviction, and no manifest miscarriage of justice.

{¶20} Assignments of Error I and II are denied.

### III

{¶21} Appellant claims the trial court erred in denying the admission of Defendant's Exhibit C. We disagree.

{¶22} The admission or exclusion of evidence lies in the trial court's sound discretion. *State v. Sage* (1987), 31 Ohio St.3d 173. In order to find an abuse of that discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217.

{¶23} Defense counsel made the following proffer:

{¶24} "Miss Clinger: Your Honor, for the record, I would proffer admission of what I have marked as defendant's Exhibit C, which would be the entry filed on June 21<sup>st</sup>, 2006 in the divorce case, which terminated the support obligation for Joshua, with

an effective date of December of '04, and would indicate in terms of Mr. Partee's defense, in terms of his understanding of what the orders were in effect as well as what the actual court order was in effect at the time period that he was indicted and I would offer in support of the admissibility of that evidence, Mr. Smith, when he was testifying on direct, indicated that they had prepared this entry to clear things up and opened up the door for being asked questions about that entry. I think that there was subsequent further testimony in regards to the entry also." T. at 97.

{¶25} Appellant testified he received a notice that his child support was terminated, but he did not receive it until July of 2006. T. at 71, 74. As proffered, the order was filed prior to July 2006, but was not received until after the date of the indictment.

{¶26} Although the exhibit was admissible, it was duplicative as to the testimonies of appellant and the caseworker. Because appellant knew he had a duty to obey the court order during the period of the indictment, we find it was harmless error to exclude the exhibit. We note harmless error is described as "[a]ny error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded." Crim.R. 52(A). Overcoming harmless error requires a showing of undue prejudice or a violation of a substantial right. We find neither in this case.

{¶27} Assignment of Error III is denied.

#### IV

{¶28} Appellant claims the prosecutor was guilty of prosecutorial misconduct. We disagree.

{¶29} The test for prosecutorial misconduct is whether the prosecutor's comments and remarks were improper and if so, whether those comments and remarks prejudicially affected the substantial rights of the accused. *State v. Lott* (1990), 51 Ohio St.3d 160, certiorari denied (1990), 112 L.Ed.2d 596. In reviewing allegations of prosecutorial misconduct, it is our duty to consider the complained of conduct in the contest of the entire trial. *Darden v. Wainwright* (1986), 477 U.S. 168.

{¶30} Appellant argues the prosecutor was overzealous in pursuing the indictment when in fact he had custody of the minor child and was supporting the child. We find this argument to be in error. Appellant was charged with violating a court order of child support which he freely admitted to disregarding. We find no error to substantiate this assignment.

{¶31} Assignment of Error IV is denied.

{¶32} The judgment of the Court of Common Pleas of Delaware County, Ohio is hereby affirmed.

By Farmer, J.

Hoffman, P.J. and

Delaney, J. concur.

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