

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WOOD COUNTY

State of Ohio

Court of Appeals No. WD-10-064

Appellee

Trial Court No. 10-CRB-00059

v.

Jose Ortiz

DECISION AND JUDGMENT

Appellant

Decided: September 23, 2011

* * * * *

Alan W. Penamon, Wood County Special Prosecutor, for appellee.

Richard W. Schmidt, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Defendant-appellant, Jose Ortiz, appeals the July 2, 2010 judgment of the Bowling Green Municipal Court which, following a jury trial convicting him of failure to provide child support, sentenced appellant to 180 days in jail and a \$1,000 fine. For the reasons set forth herein, we affirm.

{¶ 2} On January 8, 2010, a complaint was filed charging appellant with failure to provide child support as ordered by the Wood County Juvenile Court, in violation of R.C. 2919.21(B) and (M)(1), from the period of January 1, 2009, through November 30, 2009. Appellant requested a jury trial and asserted the affirmative defense, under R.C. 2919.21(D), that he was unable to pay the established support but that he provided the support that was within his ability and means.

{¶ 3} The jury trial commenced on June 22, 2010, and the following evidence was presented. Susan Stein, a case manager at Wood County Child Support Enforcement Agency, testified that she oversees the Support Enforcement Tracking System. Stein stated that from January through November 2009, despite a monthly support order, appellant made no payments.

{¶ 4} The mother of the minor child testified that from January through November 30, 2009, she received no child support payments. During the state's rebuttal, the mother testified that her daughter did not want to see appellant because he is mean to her and his girlfriend. Appellant's counsel objected to the testimony and the objection was sustained. The mother further stated that appellant was angry with the child and that appellant stated that he would have helped out with school expenses had she visited more often.

{¶ 5} Appellant acknowledged that he did not pay child support during the charged period. Appellant then testified regarding his work and injury history. Appellant testified that in 2007, he installed swimming pools until he was run over by a vehicle. Appellant stated that he was hospitalized for approximately one month with a broken

wrist and a collapsed lung. Appellant had no medical insurance so he was unable to obtain follow-up medical care.

{¶ 6} Appellant testified that in September 2008, he was able to return to work. Appellant stated that he worked at an apple orchard for approximately three months but that his hand and arms were bothering him. Appellant stated that he then enrolled in truck driving school but that due to a prior eye injury, a detached retina, he was unable to get his Ohio Department of Transportation card.

{¶ 7} Appellant testified that he tried to obtain employment through the Bureau of Rehabilitation and The Source, in Toledo, Ohio, but he was not successful. Appellant also stated that a prior felony conviction, when he was 18, impeded his employment.

{¶ 8} In May 2009, appellant stated that he injured his knee and was referred to an orthopedic surgeon. The pro bono surgery was scheduled for July 3, 2009; however, appellant was jailed at the time for failure to pay child support. The surgery was performed in September 2009. Appellant was not able to complete physical therapy due to his girlfriend's serious illness and hospitalization. Appellant stated that in November 2009, he began to see a specialist for tingling and numbness in his arms and hands due to the 2007 auto accident.

{¶ 9} To aid in his defense, appellant subpoenaed medical records; the custodians of the records did not receive notice in time to appear and testify. A letter from a treating physician was admitted into evidence. The court denied admission of medical records' summaries absent expert testimony.

{¶ 10} During cross-examination, appellant admitted that he had two felony convictions and that one was for forgery. Appellant also admitted that after his 2007 accident, he quit one of his jobs after three months. Appellant testified that he applied for social security disability benefits but was denied.

{¶ 11} Appellant raises five assignments of error for our review:

{¶ 12} "1. The trial court's improper admission of hearsay and inflammatory statements denied appellant his right to a fair trial.

{¶ 13} "2. Prosecutorial misconduct during cross-examination of appellant and closing argument deprived appellant of his right to a fair trial.

{¶ 14} "3. The court's improper jury instructions violated appellant's right to a fair trial.

{¶ 15} "4. Trial counsel provided ineffective assistance in violation of appellant's Sixth Amendment rights.

{¶ 16} "5. The decision of the trier of fact against appellant was against the manifest weight of the evidence presented at trial pursuant to Ohio law and the U.S. Constitution."

{¶ 17} In appellant's first assignment of error he contends that the trial court's improper admission of certain hearsay and inflammatory statements denied appellant's right to a fair trial. The statements were made during the mother's testimony. First, the mother testified that the child did not want to see appellant because he was mean. Appellant's counsel objected to this as hearsay and speculative; the objection was sustained.

{¶ 18} Appellant next contends that the mother's statement that appellant called his child a "f**king brat" and that if she saw appellant more he would help with school necessities, was inflammatory. The mother further stated that she was "disappointed" with appellant. No objection was made to the testimony.

{¶ 19} We first note that the trial court sustained the first objection and instructed the jury to disregard the mother's response. A jury is presumed to follow the court's instructions, including curative instructions. *State v. Garner* (1995), 74 Ohio St.3d 49, 59. The record reveals no evidence that the jury failed to follow the trial court's instructions.

{¶ 20} As to the remaining testimony, if there was error in its admission it did not rise to the level of plain error, under Crim.R. 52(B), which "is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *State v. Long* (1978), 53 Ohio St.2d 91, paragraph three of the syllabus.

Appellant's first assignment of error is not well-taken.

{¶ 21} Appellant's second assignment of error contends that multiple comments made by the state were inflammatory and prejudicial and rose to the level of prosecutorial misconduct. "The test for prosecutorial misconduct is whether the remarks were improper and, if so, whether they prejudicially affected substantial rights of the accused." *State v. Eley* (1996), 77 Ohio St.3d 174, 187, overruled on other grounds; *State v. Lott* (1990), 51 Ohio St.3d 160, 165.

{¶ 22} We have reviewed the portions of the transcript referenced by appellant. The first statement took place during closing argument where the prosecutor is entitled to a certain amount of leeway. *State v. Smith* (1984), 14 Ohio St.3d 13. Appellant's counsel objected and the objection was overruled. We find no error.

{¶ 23} Appellant further contends that the state's questioning during the cross-examination of appellant was in error. The questioning related to appellant's affirmative defense of inability to pay and was not in error. Appellant's second assignment of error is not well-taken.

{¶ 24} In his third assignment of error appellant argues that the trial court's improper affirmative defense jury instruction violated appellant's right to a fair trial. The court instructed the jury as follows:

{¶ 25} "Affirmative defense. The defense claim he was unable to provide support and provided such support as within the Defendant's ability to means affirmative defense verdict."

{¶ 26} It appears that appellant is arguing that because the transcript language is not verbatim to the wording of the statute or the form jury instructions, the instruction was in error. The state contends that there was merely a transcription error. The relevant portion of the statute, R.C. 2919.21(D), provides:

{¶ 27} "(D) 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."

{¶ 28} Ohio Jury Instructions provide the following: "The defendant claims that (he) (she) was unable to provide adequate support, and provided such support as was within the defendant's ability and means." 5 Ohio Jury Instructions (2008), Section 519.21(B), at 34. This instruction mirrors the proposed instruction filed by appellant's counsel.

{¶ 29} In addition, the trial transcript reveals that the written jury instructions were given to the jurors during their deliberations. Upon review, we find that even assuming that the court misstated the instruction, the written instructions were provided to the jury and there is no claim that those were erroneous. Appellant's third assignment of error is not well-taken.

{¶ 30} In his fourth assignment of error, appellant argues that his trial counsel provided ineffective assistance. Appellant argues that his counsel failed to make proper objections and failed to fully question him regarding his affirmative defense. To prevail on a claim of ineffective assistance of counsel, a defendant must prove two elements: "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense." *Strickland v. Washington* (1984), 466 U.S. 668, 687. When considering a claim of ineffective assistance of

counsel, the court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689.

{¶ 31} Reviewing the trial transcript, appellant's counsel made several objections during the course of the trial; many were sustained. The fact that different counsel may have made additional objections does not, alone, rise to the level of ineffective assistance. See *State v. Phillips* (1995), 74 Ohio St.3d 72 (Debatable trial tactics generally do not constitute ineffective assistance of counsel.). Further, as to appellant's affirmative defense, counsel questioned him at length regarding his work and injury history. Appellant's fourth assignment of error is not well-taken.

{¶ 32} Appellant's fifth and final assignment of error argues that the jury's guilty verdict was against the manifest weight of the evidence. In an appeal of a criminal case where it is claimed that a verdict is against the manifest weight of the evidence, an appellate court acts as a "thirteenth juror," reweighs the evidence, and may disagree with a factfinder's conclusions on conflicting testimony. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387; *State v. Lee*, 6th Dist. No. L-06-1384, 2008-Ohio-253, ¶ 12. "The 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." *Thompkins* at 387, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175. Reversals on this ground are granted "only in the exceptional case in which the evidence weighs heavily against the conviction." *Id.*

{¶ 33} We have carefully reviewed the evidence presented in this case and find that it does not weigh heavily against appellant's conviction. Appellant admitted that he did not pay the child support order during the relevant period. Appellant did present evidence of his inability to work at various points but there was also testimony presented that he quit one of his jobs. Further, appellant paid nothing during the charged period; even a payment of a few dollars a month would have shown an attempt to abide by the order. Accordingly, we find that the jury did not lose its way and appellant's fifth assignment of error is not well-taken.

{¶ 34} On consideration whereof, we find that appellant was not prejudiced or prevented from having a fair trial and the judgment of the Bowling Green Municipal Court is affirmed. Pursuant to App.R. 24, appellant is ordered to pay the costs of this appeal.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, J.

JUDGE

Thomas J. Osowik, P.J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.