[Cite as *State v. Kirkland*, 2013-Ohio-5912.]

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

State of Ohio — Court of Appeals No. L-12-1033

Appellee — Trial Court No. CR0201102148

v.

John Kirkland — **DECISION AND JUDGMENT**

Appellant — Decided: December 30, 2013

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and Melissa Meister, Evy Jarrett, and Patricia C. Hays, Assistant Prosecuting Attorneys, for appellee.

Tim A. Dugan, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Defendant-appellant, John Kirkland, appeals the January 19, 2012 judgment entry of the Lucas County Court of Common Pleas which, following a jury trial

convicting him of nonsupport of dependents, sentenced appellant to five years of community control, restitution, and additional sanctions. For the reasons that follow, we affirm.

{¶ 2} On July 28, 2011, appellant was indicted on two counts of nonsupport of a minor, R.C. 2919.21(B) and (G)(1), fifth degree felonies. The first count alleged that appellant, between June 18, 2008, and July 28, 2011, failed to provide support for 26 of 104 consecutive weeks. The second count alleged nonpayment from November 26, 2008, through July 28, 2011, and that appellant had a prior nonsupport conviction (on November 25, 2008). Appellant entered not guilty pleas to the charges.

{¶ 3} A jury trial commenced on October 17, 2011. The child's mother testified that in 1993, she contacted the Lucas County Child Support Enforcement Agency ("LCCSEA") and, after establishing paternity, had the agency order appellant to pay child support. The mother testified regarding her history of trouble receiving the support which included attempted enforcement in Michigan, where appellant resided. In 2008, as stipulated by the parties, appellant was convicted of misdemeanor failure to provide child support. The mother stated that the child graduated high school in June 2011.

{¶ 4} Marcia Cousino, records custodian from LCCSEA, testified regarding the record keeping/tracking of child support payments. Cousino stated that she reviewed appellant's child support payment history. Several exhibits documenting payments made by appellant and arrearages were admitted into evidence. Cousino testified that for

approximately half of 2008, 2009, and 2010, appellant's child support obligation was $229 per month plus the processing fee. In January 2011, the amount was modified to $184.58 per month.

{¶ 5} Cousino next testified regarding appellant's payment history. From June through December 2008, appellant paid $6,330. In 2009, appellant paid $1,403, and in 2010, he paid $1,785. In 2011, appellant paid $500. Exhibits detailing the payments and arrearages were admitted into evidence.

{¶ 6} Appellant's daughter testified regarding the time she spent at appellant's home including entire spring breaks and either half or the whole summer. She would also visit during various holiday seasons. The daughter also testified that appellant paid for her clothing, gas, cell phone, spending money, and various other items.

{¶ 7} At the close of the state's case and again following the close of all the evidence, appellant moved for acquittal under Crim.R. 29. The motions were denied.

{¶ 8} Following the close of the evidence and jury deliberations, appellant was acquitted of count one of the indictment and convicted of count two. On October 28, 2011, appellant filed a "renewed" motion for acquittal arguing that insufficient evidence supported his conviction for failing to pay child support in violation of a court order. Specifically, appellant argued that because the administrative order was never adopted by a court, it could not form the basis of a conviction under R.C. 2919.21(B) and (G)(1). In response, the state asserted that the state of Michigan adopted the order and that, under R.C. 2919.21(B), out-of-state orders may form the basis of the charge. The trial court

denied the motion agreeing with the state that the administrative order, once registered in Michigan, was automatically adopted by the Michigan court.

{¶ 9} On January 19, 2012, appellant was sentenced to five years of community control, ordered to pay restitution of $25,931.54, ordered to seek and maintain employment, ordered to execute a wage withholding agreement at each place of employment, and pay the costs of prosecution. This appeal followed.

{¶ 10} Appellant raises three assignments of error for our review:

1) Appellant's conviction was not supported by legally sufficient evidence.

2) The trial court violated appellant's right to due process when it incorrectly instructed the jury on the elements of Nonsupport of Dependents.

3) The trial court abused its discretion in admitting State's Exhibits 7 and 13 into evidence.

{¶ 11} Appellant's first assignment of error argues that his conviction for nonsupport of dependents was legally insufficient. We note that sufficiency of the evidence is a "test of adequacy" and a question of law. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). "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. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus.

{¶ 12} Appellant was convicted of violating R.C. 2919.21(B) and (G)(1) which provide:

> (B) 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.
>
> * * *
>
> (G)(1) Except as otherwise provided in this division, whoever violates division (A) or (B) of this section is guilty of nonsupport of dependents, a misdemeanor of the first degree. If the offender previously has been convicted of or pleaded guilty to a violation of division (A)(2) or (B) of this section or if the offender has failed to provide support under division (A)(2) or (B) of this section for a total accumulated period of twenty-six weeks out of one hundred four consecutive weeks, whether or not the twenty-six weeks were consecutive, then a violation of division (A)(2) or (B) of this section is a felony of the fifth degree. If the offender previously has been convicted of or pleaded guilty to a felony violation of this section, a violation of division (A)(2) or (B) of this section is a felony of the fourth degree.

{¶ 13} Appellant contends that because the order was signed only by the person seeking to register it, not by a Michigan official, the state failed to prove that appellant was under a court order to pay child support. The order at issue was admitted at trial as

state's exhibit No. 7. The first page of the exhibit is the proof of service to appellant. The next page is a form document titled "Notice of Registration of Out of State Support Order" from the State of Michigan, 22nd Judicial Circuit, Washtenaw County. The form provides, in part:

> 5. A copy of the registered support order and other related documents are attached to this notice.
>
> 6. The attached order will automatically become an ORDER OF THIS COURT and will be enforceable in this state as if the order was issued in this state and you will not be permitted any further opportunity to challenge it.
>
> 7. If you wish to contest the validity or enforcement of the of this registered order, you must petition the Court within 20 days from the date of this notice was served on you by completing the Request for Hearing at the bottom of this notice and sending it to the court address above.

{¶ 14} It is undisputed that appellant never contested the validity of the order. In fact, a 2008 Michigan court found him in contempt of the order. His driver's license was subsequently suspended and was reinstated by a Michigan court in October 2009. Upon review we conclude that appellant's obligation to pay was supported by a valid Michigan court order.

{¶ 15} Appellant next argues that insufficient evidence supported the jury's finding that appellant knowingly failed to pay child support. Appellant contends that

because he paid over $6,000 in 2008, he did not knowingly fail to pay his order of support. Conversely, the state argues that the $6,000 was applied to the over $25,000 in arrearages not to ongoing support obligations.

{¶ 16} Reviewing the record, appellant was convicted of count two in the indictment which contained the time period from November 26, 2008, through July 28, 2011. As stipulated by the parties, appellant was convicted on November 25, 2008, for nonsupport, in violation of R.C. 2919.21(B) and (G)(1). Viewing the evidence in a light most favorable to the state, sufficient evidence was presented demonstrating the amount of arrearages, the amounts paid, and the amounts owed.

{¶ 17} Accordingly, we find that sufficient evidence supports the jury's finding that appellant failed to pay child support during the relevant dates and that he had a prior nonsupport conviction. Appellant's first assignment of error is not well-taken.

{¶ 18} In his second assignment of error, appellant contends that the court violated his due process rights when it incorrectly instructed the jury on nonsupport of dependents. We note that a determination as to which jury instructions are proper is a matter left to the sound discretion of the trial court. *State v. Guster*, 66 Ohio St.2d 266, 271, 421 N.E.2d 157 (1981).

{¶ 19} The instruction at issue provided:

> In the second count in the indictment John Kirkland is charged with nonsupport of dependents. Before you can find John Kirkland guilty of the

offense of nonsupport of dependents you must find beyond a reasonable doubt that on or between the 26th day of November, 2008, and the 28th day of July, 2011, and in Lucas County, Ohio, John Kirkland did knowingly abandon or fail to provide support as established by an administrative order of the Lucas County Child Support Enforcement Agency to another person, whom by an administrative order John Kirkland is legally obligated to support and that John Kirkland has previously been convicted of or pleaded guilty to nonsupport of dependants.

{¶ 20} The jury instructions that were given were agreed upon by the parties. Following the reading of the instructions, defense counsel indicated that he objected to the use of the "administrative order" language. The court noted:

> I believe earlier when we were talking about jury instructions we were off the record and previously when the jury instructions were prepared I had in the jury instructions that – one moment. I was going to instruct the jury that John Kirkland abandoned or failed to provide support as established by a court order and it was as to both counts, and it was brought to my attention by the Defendant that he raised the issue of an administrative order and not a court order and so I changed the jury instructions to conform with the Defendant's request and, therefore, took out the language regarding court order and placed instead administrative

order of the Lucas County Child Support Enforcement Agency, as the Defendant requested. So your objection will be overruled and so noted * * *.

{¶ 21} Based on our discussion regarding appellant's first assignment of error, we cannot say that the court abused its discretion when it overruled appellant's objection. Further, appellant's counsel requested the instruction. A party may not take advantage of an error which he invited or induced. *State v. Bey*, 85 Ohio St.3d 487, 492-493, 709 N.E.2d 484 (1999). Appellant's second assignment of error is not well-taken.

{¶ 22} In appellant's third and final assignment of error, he argues that the trial court abused its discretion when it admitted state's exhibit Nos. 7 and 13 into evidence. Appellant submits that, as to Exhibit 7, the trial court initially excluded the document but then, after closing arguments were presented, reconsidered and admitted the document over objection. Appellant contends that he was prejudiced because appellant's defense was predicated on the exclusion of the document. The trial court's determination of the admissibility or exclusion of evidence is generally a matter of discretion that will not be overturned on appeal absent a showing that the trial court abused its discretion. *State v. Robb,* 88 Ohio St.3d 59, 68, 723 N.E.2d 1019 (2000)

{¶ 23} Exhibit 7 is the Michigan order adopting the order of the LCCSEA and was discussed in detail above. Initially, the court determined that the admission of the document would be prejudicial because it contained payment history which predated the indictment period. Following closing arguments, the court reconsidered its ruling and

admitted the exhibit, over objection, noting: "Well, it's a certified copy from Ann Arbor – from Washtenaw County Clerk of Courts in Ann Arbor, Michigan so it is a self-authenticating document and so there would not have been Cross Examination regarding this document * * *."

{¶ 24} Evid.R. 901 provides that authentication or identification of a piece of evidence is a condition precedent to the admissibility of that evidence. Evid.R. 902 lists certain items that are self-authenticating so as to negate the need for any extrinsic evidence in support of the item's admissibility. This list includes certified court records. Evid.R. 902(4). The record was certified by the Washtenaw County Clerk.

{¶ 25} Moreover, a similar document had been admitted at the time exhibit No. 7 was excluded by the court. State's exhibit No. 9, also from Washtenaw County, was a contempt order, predating the indictment by one month, which was admitted to show that a portion of the amounts paid were to purge appellant's contempt and reinstate his driver's license.

{¶ 26} Appellant next argues that the trial court erred by admitting state's exhibit No. 13 into evidence. This exhibit consisted of the docket sheet from the prior case convicting him of nonsupport. Appellant contends that the conviction was stipulated to and that the sheet, which also included information regarding subsequent probation violations, was prejudicial. The state counters that the statute required it to prove a prior conviction and that knowingly was an element of the offense. Thus, the information was permissible as proof of the element.

{¶ 27} Based on the foregoing, we cannot find that the trial court abused its discretion in admitting either state's exhibit Nos. 7 or 13. Appellant makes a final cumulative error argument. Because we find that there were not multiple instances of error, there can be no cumulative error. *See State v. Hemsley*, 6th Dist. Williams No. WM-02-010, 2003-Ohio-5192, ¶ 32. Appellant's third assignment of error is not well-taken.

{¶ 28} On consideration whereof, we find that appellant was not prejudiced or prevented from having a fair trial and the judgment of the Lucas County Court of Common Pleas 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, P.J. _____
JUDGE

Thomas J. Osowik, J. _____
CONCUR.
JUDGE