[Cite as *State v. Speck*, 2015-Ohio-682.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101281

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

BRIAN SPECK

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-13-570804-A

BEFORE: McCormack, J., Celebrezze, A.J., and Stewart, J.

RELEASED AND JOURNALIZED: February 26, 2015

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TIM McCORMACK, J.:

{¶1} Defendant-appellant, Brian Speck, appeals from a judgment of the Cuyahoga Court of Common Pleas finding him guilty of criminal nonsupport and ordering him to pay the entire support arrearage of $30,753.56 as a condition of his community control sanctions. On appeal, Speck argues his conviction is not supported by sufficient evidence and is against the manifest weight of the evidence. He also contends the trial court erred by ordering him to pay the full amount of his support arrearage, rather than the arrearage accrued during the period specified in his indictment for criminal nonsupport. After a review of the record, we affirm his conviction of criminal nonsupport, but remand the matter to the trial court for a *nunc pro tunc* order to clarify the fact that the financial sanction of $30,735.56 was imposed as a condition of Speck's community control, not as restitution.

I.

{¶2} Catherine Speck and Brian Speck ("appellant") were married in 1991. They have two children. The marriage was terminated in 2004. Under the dissolution decree, appellant agreed to pay $400 per month for each child, totaling $800 of child support per month. Speck failed to pay his child support in accordance with the resolution decree.

{¶3} Frustrated with appellant's intermittent payments of child support, Catherine Speck filed a contempt motion in December 2007 in the domestic relations court. The court found appellant in contempt of court for failing to pay court-ordered support of $800 per month. He was also found to be in arrears of $8,585.20. The following month, in January 2008, Speck paid $2,216 toward his support arrearage and purged the contempt finding. He then filed a motion to modify his child support. The domestic relations court reduced the monthly support to $550. His arrearage was $8,273.80 at the time.

{¶4} Catherine Speck filed a second contempt motion in February 2009. However, she and appellant reached an agreement under which appellant admitted he was in arrears of $12,132.90 as of January 2009 and agreed to continue to pay $550 per month.

{¶5} The couple's older child turned 18 in February 2012, and current support for that child was terminated. The court ordered appellant to continue to pay current support for his younger child and also towards his arrearage, $28,050.04 as of October 2011.

{¶6} In January 2013, the state indicted appellant for failing to pay court-ordered child support, in violation of R.C. 2919.21(B), for the periods between (1) January 1, 2007, and December 31, 2008, and (2) July 1, 2010, and June 30, 2012. Under the statute, criminal nonsupport is a misdemeanor of the first degree but a felony of the fifth degree, as in appellant's case, if the offender has failed to provide support for a total accumulated period of 26 weeks out of 104 consecutive weeks.

{¶7} After a bench trial, the trial court found appellant guilty and sentenced him to five years of community control sanctions and ordered him to pay his entire arrearage of $30,735 as a condition of his community control. On appeal, appellant raises three assignments of error.

II.

{¶8} Under the first and second assignments of error, appellant claims his conviction of criminal nonsupport is not supported by sufficient evidence and is against the manifest weight of the evidence, respectively. We address them together.

{¶9} When assessing a sufficiency-of-evidence claim, a reviewing court examines the evidence admitted at trial and determines whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus. "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." *Id.*

{¶10} A manifest-weight claim, on the other hand, requires the appellate court to review 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 trier of fact 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. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997), citing *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983).

{¶11} Appellant's intermittent payment history was undisputed. In all, during the first indictment period (January 2007 to December 2008), he made nine payments during the 24-month period. In 2007, he made the payment for February and March and made a partial payment in June, for a total amount of $1,919. In 2008, he made six payments totaling $4,107; however, $2,216 of that amount was paid to purge his contempt.

{¶12} During the second indictment period (July 2010 to June 2012), appellant made only two payments: $8.92 in September 2010; nothing in 2011; and $1,000 in January 2012.

{¶13} At trial, Catherine Speck testified that after the divorce, she worked at a bank, but, with sporadic child support payments, struggled to provide for her children. She received many utilities shut-off notices and was behind on her rent on several occasions, sometimes three or four months behind on the rent. She testified that she depended on family and friends for help, and was fortunate enough to have a landlord who understood her predicament.

{¶14} Appellant did not dispute his payment history, but claimed an inability to pay. An inability to pay is an affirmative defense for a defendant charged with criminal nonsupport. R.C. 2919.21(D) states: "It is an affirmative defense to * * * a charge of failure to provide

support established by a court order * * * that the accused was unable to provide * * * the established support but did provide the support that was within the accused's ability and means."

{¶15} Appellant argues the evidence shows that he was unable to pay and couches his claim as both a sufficiency and manifest-weight challenge. However, as the Ohio Supreme Court recognized, a sufficiency-of- evidence challenge does not implicate affirmative defenses. *State v. Davis*, 8th Dist. Cuyahoga No. 100526, 2014-Ohio-2769, ¶19, citing *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, 840 N.E.2d 1032, ¶ 37. Therefore, we address appellant's affirmative defense of inability to pay only in our analysis of the manifest weight of the evidence. *Id.*, citing *State v. Bagley*, 3d Dist. Allen No. 1-13-31, 2014-Ohio-1787.

{¶16} In a recent decision, *State v. Wiley*, 8th Dist. Cuyahoga No. 99576, 2014-Ohio-27, this court explained what a defendant claiming an inability to pay must prove:

> To prevail on [the] affirmative defense, a defendant must prove, by a preponderance of the evidence, that he: (1) is unable to provide the court-ordered support and (2) provided such support as was within his ability and means. *See*, e.g., *State v. Carter*, 10th Dist. Franklin No. 07AP-141, 2007-Ohio-6502, ¶ 14, citing *State v. Brown*, 5 Ohio App.3d 220, 222, 451 N.E.2d 1232 (5th Dist.1982). "Both elements must be met in order to successfully assert the affirmative defense of inability to pay." *Id*. "Lack of means alone cannot excuse lack of effort." *State v. Williams*, 5th Dist. Delaware No. 06 CAA 04 0026, 2007-Ohio-63, ¶ 40, citing *Brown* at 222; *see also State v. Balfour*, 8th Dist. Cuyahoga No. 97547, 2012-Ohio-3453, ¶ 16.

Id. at ¶ 44.

{¶17} At the bench trial, appellant, 48 years old and a self-employed IT technician, testified to his employment history. He managed a convenience store for two years, installed cable for a year, and worked for a car dealership for three years. He then became certified in various IT programs. He subsequently started his own IT business repairing computers for small businesses, and also taught IT at Cuyahoga County Community College for several years.

{¶18} In 2007, appellant lost an important client due to the client's bankruptcy filing. He claimed the loss of the client reduced appellant's income significantly. In June 2008, he was in a car accident. He alleged the accident left him with reduced stamina and his ability to work full time was diminished as a result. He moved in with his girlfriend for a while but moved out because he was unable to pay his share of the mortgage. In September 2010, he moved into his mother's home to reduce his living expenses. In October 2011, he applied for Social Security disability benefits but his application was denied. His 2007, 2008, 2009, 2010, 2011, and 2012 tax returns show an annual income of $9,343, $2,501, $6,506, $4,252, $1,334, and $8,773, respectively.

{¶19} The trial court, as the trier of fact in this case, found appellant failed to show by a preponderance of evidence that (1) he was unable to provide the court-ordered support, and (2) did provide the support as was within his ability and means. Having reviewed the record, we are unable to conclude the trier of fact lost its way and created a manifest injustice in finding appellant guilty of criminal nonsupport. The trial testimony shows Speck had considerable skills. He was licensed in various computer programs, and was proficient enough to have taught courses in IT at a community college. Yet, by his own admission, he never sent resumes to potential employers. He claimed his IT business did not do well, but made no attempt to find additional work to supplement his income. Although he alleged he lacked stamina after the 2008 car accident, this claim was called into doubt by the denial of his Social Security disability benefits application. "Lack of means alone cannot excuse lack of efforts." *Williams*, *supra*. Appellant's testimony failed to show that he provided support to his children within his ability for gainful employment. His manifest-weight claim lacks merit.

{¶20} Under his sufficiency-of-evidence claim, appellant argues that the state did not present sufficient evidence to prove that he "recklessly" failed to provide support, citing *State v. Collins*, 89 Ohio St.3d 524, 733 N.E.2d 1118 (2000), to support his argument. Appellant's reliance on *Collins* is misplaced.

{¶21} In *Collins*, the defendant claimed the criminal nonsupport statute did not impose strict liability. He argued that, instead, the state must prove that he "recklessly" failed to pay his child support obligations. He claimed that because he had signed a wage assignment form to meet his support obligation and was unaware his employer did not transfer the funds to the child support agency, he did not "recklessly" fail to pay his support. The Supreme Court of Ohio agreed that where a criminal statute, such as R.C. 2919.21(B), does not specify a mental culpability element, the statute does not impose strict liability; in such a case, the state must demonstrate the defendant committed the offense "recklessly." However, the court concluded that where the defendant was aware of his obligation to pay, yet no payments reached the child support agency and there was no evidence of misdirected payments, there was sufficient evidence to establish, at a minimum, that the defendant "recklessly" failed to pay his child support.

{¶22} This is not a *Collins* case. Appellant argues his failure to pay child support was not "reckless" because he paid within his ability and means. This argument confuses the affirmative defense of inability to pay with the culpable mental state of "reckless."

{¶23} Rather, as we stated in *Davis*, 8th Dist. Cuyahoga No. 100526, 2014-Ohio-2769, a nonsupport defendant's recklessness can be inferred from the fact that the defendant knew he was obligated to pay child support but knowingly failed to do so. *Davis* at ¶ 20, citing *Collins*, 89 Ohio St.3d 524, 733 N.E.2d 1118. Here, appellant was very much aware of his support obligations, but knowingly failed to pay — whether he was able to pay goes to an affirmative

defense and not to the mental culpability element. Appellant's contention that the state did not present sufficient evidence to show he "recklessly" failed to pay child support lacks merit.

{¶24} The first and second assignments are without merit.

III

{¶25} At sentencing, the trial court imposed five years of community control, and ordered appellant to pay his entire arrearage of $30,753.56 as a condition of his community control. The court allowed appellant to pay his arrearage over the five-year period of time, and also indicated the community control would terminate upon a full payment.

{¶26} It is within the trial court's discretion to impose the entire amount of support arrearage to be paid as a condition of community control on a defendant found guilty of criminal nonsupport. *State v. Latimore*, 8th Dist. Cuyahoga No. 101321, 2015-Ohio-522. The trial court here exercised that discretion and imposed the entire accrued arrearage as a condition of community control.

{¶27} The trial court, however, inadvertently and incorrectly referred to the payment of $30,753.56 as "restitution" in its judgment entry. Therefore, we affirm the court's imposition of the financial sanction of $30,753.56 as a condition of appellant's community control, but remand the case to the trial court for the sole purpose of correcting its judgment entry by a *nunc pro tunc* entry to reflect the community control condition imposed at sentencing.

{¶28} Appellant's conviction of criminal nonsupport and his sentence are affirmed. Case remanded for a correction of the court's journal entry by a nunc pro tunc entry.

It is ordered that appellee recover of appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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TIM McCORMACK, JUDGE

FRANK D. CELEBREZZE, JR., A.J., and
MELODY J. STEWART, J., CONCUR