[Cite as *State v. Pettway*, 2016-Ohio-5422.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 104335

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

MICHAEL PETTWAY

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-14-587282-A

BEFORE: Celebrezze, J., Blackmon, P.J., and Laster Mays, J.

RELEASED AND JOURNALIZED: August 18, 2016

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FRANK D. CELEBREZZE, JR., J.:

{¶1} Defendant-appellant, Michael Pettway ("appellant"), brings this appeal challenging his convictions for nonsupport of dependents. Specifically, appellant argues that his convictions are not supported by sufficient evidence and are against the manifest weight of the evidence. After a thorough review of the record and law, this court affirms.

I. Factual and Procedural History

{¶2} Appellant's son was born in September 2000. Approximately eight months later, the child moved to Georgia to live with his maternal grandparents. In 2001, a juvenile court in Clayton County, Georgia granted custody of appellant's son to the maternal grandmother. On November 9, 2005, appellant was ordered to pay child support for his son to the maternal grandfather in the amount of $79.88 per month.

{¶3} Appellant failed to make the child support payments. As a result of his failure to comply with the child support order, appellant's driver's license was suspended in 2010. As of September 2011, appellant owed child support arrears in the amount of $5,649.38. In 2012, the Cuyahoga County Office of Child Support Services ("OCSS") filed a motion to show cause. In 2013, the trial court found appellant to be in contempt for failing to comply with the child support order. The trial court determined that appellant owed child support arrears in the amount of $7,167.29 in 2013. At the time of appellant's 2015 trial, appellant owed child support arrears in the amount of $9,250.34.

{¶4} In CR-14-587282-A, the Cuyahoga County Grand Jury returned a three-count indictment charging appellant with nonsupport of dependents, fifth-degree felonies in violation of R.C. 2919.21(B). Count 1 pertained to October 1, 2006 through September 30, 2008. Count 2 pertained to October 1, 2008 through September 30, 2010. Count 3 pertained to October 1, 2010 through September 30, 2012. Appellant pled not guilty to the charges and the matter proceeded to trial.

{¶5} A jury trial commenced on July 28, 2015. At the close of trial, the jury found appellant guilty of all three nonsupport counts. The trial court ordered a presentence investigation report and set the matter for sentencing. The trial court sentenced appellant to community control sanctions for a period of five years, and ordered appellant to pay child support arrears in the amount of $9,330.42.

{¶6} Appellant filed the instant appeal assigning two errors for review:

I. The state failed to present sufficient evidence to sustain a conviction.

II. Appellant's convictions are against the manifest weight of the evidence.

II. Law and Analysis

A. Sufficiency

{¶7} In his first assignment of error, appellant argues that the state failed to present sufficient evidence to support his convictions.

{¶8} Crim.R. 29 mandates that the trial court issue a judgment of acquittal where the prosecution's evidence is insufficient to sustain a conviction for the offense. Crim.R. 29(A) and sufficiency of evidence review require the same analysis. *State v.*

Taylor, 8th Dist. Cuyahoga No. 100315, 2014-Ohio-3134, _ 21, citing *Cleveland v. Pate*, 8th Dist. Cuyahoga No. 99321, 2013-Ohio-5571; *State v. Mitchell*, 8th Dist. Cuyahoga No. 95095, 2011-Ohio-1241.

{¶9} A challenge to the sufficiency of the evidence supporting a conviction requires the court to determine whether the prosecution has met its burden of production at trial. *State v. Givan*, 8th Dist. Cuyahoga No. 94609, 2011-Ohio-100, _ 13, citing *State v. Thompkins*, 78 Ohio St.3d 380, 678 N.E.2d 541 (1997). On review for sufficiency, courts are to assess not whether the prosecution's evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction. *Givan* at _ 13.

{¶10} In the instant matter, appellant was convicted of nonsupport of dependents, in violation of R.C. 2919.21(B), which provides that "[n]o 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." Although the statute does not specify a degree of intent, the Ohio Supreme Court has interpreted the statute to require proof of recklessness. *State v. Collins*, 89 Ohio St.3d 524, 529-530, 733 N.E.2d 1118 (2000). R.C. 2901.22(C) provides:

> [a] person acts recklessly when, with heedless indifference to the consequences, the person disregards a substantial and unjustifiable risk that the person's conduct is likely to cause a certain result or is likely to be of a certain nature. A person is reckless with respect to circumstances when, with heedless indifference to the consequences, the person disregards a

substantial and unjustifiable risk that such circumstances are likely to exist. Accordingly, the state was required to prove that appellant had a legal obligation to support the child and that appellant breached that obligation.

{¶11} At trial, the state presented the testimony of the child's maternal grandmother and Cuyahoga County Child Support Enforcement Agency ("CSEA") caseworker, Paulina Raspovic ("Raspovic").

{¶12} First, the child's maternal grandmother testified that her adopted daughter, Theresa Mathews, is the mother of appellant's child. She testified that the child, who was 14 years old at the time of trial, has lived with her since he was eight months old. She testified that she met appellant in 1999, and that he was working as an electrician at the time. She testified that there was a child support order for appellant's son and that she has never received any payments from appellant under the child support order. She testified that she has never received any support from appellant outside of the child support system. She testified that she was unaware of any disabilities that appellant had. She testified that appellant's child is entering the ninth grade and that he participates in the school's basketball and football programs. She testified that she pays approximately $500 per year for the child's sports-related expenses. She testified that she pays approximately $300 per year for the child's clothing and food. She testified that the state of Georgia pays for the child's medical care. She testified that the child's yearly expenses are roughly $1,300. She testified that it would be helpful financially if appellant provided assistance for his child.

{¶13} Second, Raspovic testified that she is a support enforcement officer in CSEA's enforcement division. She testified that there were two orders under which appellant was required to pay child support for his son. Under the first order, appellant was required to pay child support to the child's mother in the amount of $374.75 per month. She testified that this order became effective on March 16, 2001, and was terminated on July 2, 2002. She testified that the case has not been closed because there is an outstanding arrears balance of $2,836.28.

{¶14} The nonsupport charges in the instant matter arose from appellant's second child support order. Raspovic testified that under the second order, appellant was required to pay child support for his son in the amount of $79.88 per month. She testified that the second order became effective on November 9, 2005. She testified that the child's maternal grandfather was the obligee of the second child support order. She testified that a genetic test was conducted in 2006 and that the test concluded that appellant could not be excluded as the child's biological father. The genetic test determined that the probability of paternity was 99.99 percent. She testified that in 2012, the Cuyahoga County Domestic Relations Court denied appellant's motion to terminate child support, and granted CSEA's motion to show cause. She testified that as of September 30, 2011, the domestic relations court determined the arrears to be $5,649.38. She testified that the domestic relations court found appellant to be in contempt in 2012 for failing to meet his obligations under the child support order. She testified that appellant was sentenced to 30 days in jail or "not less than 200 hours of

community service" and that he was given the opportunity to purge his contempt by paying $500 within 30 days of the contempt finding. She testified that appellant failed to make the purge payment.

{¶15} Raspovic testified that in 2013, the domestic relations court denied appellant's motions to terminate child support and to determine arrearage, and that the court granted OCSS's motion to show cause. She testified that the domestic relations court found appellant to be in contempt in 2013 for failing to meet his obligations under the child support order. She testified that the domestic relations court determined the arrears to be $7,167.29 as of April 30, 2013. She testified that appellant was sentenced to 60 days in jail or "200 hours of community service" and that he was given the opportunity to purge his contempt by paying $500 within 30 days of the contempt finding. She testified that appellant failed to make the purge payment.

{¶16} Raspovic testified that between October 1, 2006 and September 30, 2008, appellant was ordered to pay $79.88 per month. She testified that appellant did not make a single payment during this time period. She testified that between October 1, 2008 and September 30, 2010, appellant was ordered to pay $79.88 per month. She testified that appellant did not make a single payment during this time period. She testified that between October 1, 2010 and September 30, 2012, appellant was ordered to pay $79.88 per month. She testified that appellant did not make a single payment during this time period. She testified that as of June 30, 2015, appellant owed child support arrears in the amount of $9,250.34.

{¶17} Raspovic testified that CSEA was not aware of any disabilities that appellant had. She testified that appellant had a verifiable job at one point, but that he did not have verifiable employment in recent months. She testified that appellant's driver's license was suspended in 2005 for failing to comply with the first child support order. She testified that appellant's driver's license was reinstated in 2006, and remained active from 2006 to 2010. She testified that appellant's driver's license was suspended again in 2010 as a result of his failure to comply with the second child support order.

{¶18} Appellant claims that he was not able to find gainful employment because CSEA suspended his driver's license. Furthermore, although he concedes that it is not a defense to the nonsupport charges, appellant points out that he does not see his son for whom he is ordered to pay child support.

{¶19} At trial, appellant testified that he lives in an apartment in Cleveland, Ohio above his mother's beauty shop. He testified that his mother pays his rent and that she supports him financially. He testified that he fully relies on his mother financially. He testified that he is an electrician, but that he was unemployed at the time because CSEA suspended his driver's license in 2005. He testified that finding employment as an electrician is "really a hardship" because all of the applications inquire about the applicant's driver's license. Aside from the issue with his driver's license, he attributed his lack of employment to the economy.

{¶20} Appellant testified that he voluntarily went to CSEA and established a child support order under which he paid the child's mother $487. He testified that he made

payments to the child's mother until he learned that she no longer had the child. He testified that he attempted to enforce his parental rights and obtain custody of his son. He testified that he was not aware that his child had been with the maternal grandparents since 2001, and that he believed that his child was with the mother in Cleveland, Ohio. He testified that in December 2001, he learned that the child was no longer with the mother, and that he requested that the child support order under which the mother was the obligee be terminated. He testified that the child support order under which the child's mother was the obligee was terminated in 2011. He testified that he received a summons from the domestic relations court for a DNA test in 2006. He testified that he was unaware that he had been ordered to pay $79.88 per month in child support at that time. He testified that he appeared at the trial court's contempt proceedings.

{¶21} Appellant testified that in 2003 or 2004, he learned that the maternal grandparents were taking care of his son. He testified that the maternal grandfather contacted him and asked him to contribute financially to support his son. He testified that he refused to provide financial assistance to the maternal grandfather and instead instructed him to "go through the system" and provide documentation confirming that the child was in his custody. He testified that the maternal grandfather provided him with a custody order, but that the order listed the maternal grandmother — rather than the maternal grandfather — as having custody of the child. He suggested that he did not pay the maternal grandparents under the child support order because "[t]hey did not have [his] consent to take [his] child." He testified that he was "never going to pay another man * *

* [to] take care of [his] child and [he] refuse[s] to do that."

{¶22} Viewing this evidence in a light most favorable to the state, we find that the record demonstrates, and a rational trier of fact could conclude beyond a reasonable doubt, that appellant committed the offenses of nonsupport of dependents. Specifically, given Raspovic's extensive testimony, we conclude that the record contains sufficient evidence to show that appellant had a legal obligation to support his child and that appellant breached that obligation. Accordingly, appellant's convictions are supported by sufficient evidence.

{¶23} Appellant's first assignment of error is overruled.

B. Manifest Weight

{¶24} In his second assignment of error, appellant argues that his nonsupport convictions are against the manifest weight of the evidence.

{¶25} In *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, the Ohio Supreme Court addressed the standard of review for a criminal manifest weight challenge, as follows:

> The criminal manifest-weight-of-the-evidence standard was explained in *State v. Thompkins* (1997), 78 Ohio St.3d 380, 678 N.E.2d 541. In *Thompkins*, the court distinguished between sufficiency of the evidence and manifest weight of the evidence, finding that these concepts differ both qualitatively and quantitatively. *Id*. at 386. The court held that sufficiency of the evidence is a test of adequacy as to whether the evidence is legally sufficient to support a verdict as a matter of law, but weight of the evidence addresses the evidence's effect of inducing belief. *Id*. at 386-387. In other words, a reviewing court asks whose evidence is more persuasive — the state's or the defendant's? We went on to hold that although there may be sufficient evidence to support a judgment, it could nevertheless be against the manifest weight of the evidence. *Id*. at 387.

> "When a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a 'thirteenth juror' and disagrees with the factfinder's resolution of the conflicting testimony." *Id*. at 387, citing *Tibbs v. Florida* (1982), 457 U.S. 31, 42, 102 S.Ct. 2211, 72 L.Ed.2d 652.

Id. at _ 25.

{¶26} An appellate court may not merely substitute its view for that of the jury, but must find that "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. Accordingly, reversal on manifest weight grounds is reserved for "the exceptional case in which the evidence weighs heavily against the conviction." *Id*.

{¶27} In the instant matter, appellant argues that his nonsupport convictions are against the manifest weight of the evidence because the evidence demonstrates that he made child support payments through CSEA when his son was in the mother's custody. Appellant's argument is misplaced.

{¶28} As previously noted, there were two orders under which appellant was required to pay child support for his son: (1) he was required to pay $374.75 per month to the child's mother from March 16, 2001 through July 2, 2002; and (2) he was required to pay $79.88 per month to the maternal grandparents from October 1, 2006 through September 30, 2012. The nonsupport charges in the instant matter relate to appellant's failure to comply with the second child support order. Thus, any child support payments that appellant made to the child's mother are irrelevant to the nonsupport charges in the

instant matter and have no bearing on the jury's verdict.

{¶29} Furthermore, in support of his manifest weight challenge, appellant contends that he was unable to find employment because CSEA suspended his driver's license. Appellant appears to be arguing that without employment, he was unable to meet his obligations under the child support order. This argument relates to the affirmative defense set forth in R.C. 2919.21(D), which provides that:

> [i]t is an affirmative defense to a charge of failure to provide adequate support under division (A) 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.

{¶30} In *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, 5 Ohio B. 504, 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.

{¶31} In the instant matter, the evidence indicates that appellant failed to make a single payment from (1) October 1, 2006 to September 30, 2008, (2) October 1, 2008 to

September 30, 2010, and (3) October 1, 2010 to September 30, 2012. At trial, appellant testified that because of his suspended driver's license, finding work as electrician was "really a hardship." He testified that his driver's license was suspended in 2005. However, Raspovic testified that appellant's license was reinstated in 2006, and remained active until October 2010. Appellant did not have any documentation supporting the efforts he made to get a job. Additionally, Raspovic was not aware of any disabilities that appellant had that would prevent him from working.

{¶32} The decision whether, and to what extent, to believe the testimony of a particular witness is "within the peculiar competence of the factfinder, who has seen and heard the witness." *State v. Johnson*, 8th Dist. Cuyahoga No. 99822, 2014-Ohio-494, _ 54. The jury had sufficient information to judge appellant's credibility and "was free to believe all, part, or none of [his] testimony[.]" *State v. Colvin*, 10th Dist. Franklin No. 04AP-421, 2005-Ohio-1448, _ 34; *State v. Smith*, 8th Dist. Cuyahoga No. 93593, 2010-Ohio-4006, _ 16. After hearing the trial testimony, the jury chose to convict appellant of all three counts of nonsupport. The jury did not lose its way simply because it chose to believe the state's version of the events rather than appellant's testimony that he was unable to find employment because his driver's license was suspended. We must defer to the jury's credibility determinations, and based on the record before us, we cannot say that the jury "clearly lost its way" in rejecting appellant's claim that he was unable to find employment.

{¶33} After reviewing the record, we cannot say that this is "an exceptional case"

in which the jury clearly lost its way and created such a manifest miscarriage of justice that appellant's convictions for nonsupport of dependents were against the manifest weight of the evidence. *Thompkins*, 78 Ohio St.3d at 387, 678 N.E.2d 541. Accordingly, appellant's second assignment of error is overruled.

III. Conclusion

{¶34} Appellant's convictions for nonsupport of dependents are supported by sufficient evidence and are not against the manifest weight of the evidence.

{¶35} Judgment affirmed.

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. The defendant's convictions having been affirmed, any bail pending appeal is terminated. 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.

FRANK D. CELEBREZZE, JR., JUDGE

PATRICIA ANN BLACKMON, P.J., and
ANITA LASTER MAYS, J., CONCUR