

2004

The State of Utah v. Nile Gene Nelson : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH, :
 :
 Plaintiff/Appellee, :
 :
 v. :
 :
 NILE GENE NELSON : Case No. 20040914-CA
 :
 Defendant/Appellant. :

BRIEF OF APPELLANT

Appeal from a judgement of conviction for Criminal Non-support, a third degree felony, in violation of Utah Code Ann. § 76-7-201 (1999), entered by the Honorable Denise P. Lindberg, Third District Court, Salt Lake County, Utah. Appellant is not incarcerated.

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	iii
JURISDICTIONAL STATEMENT	1
STATEMENT OF THE ISSUE, STANDARD OF REVIEW, PRESERVATION	1
TEXT OF RELEVANT STATUTE AND CONSTITUTIONAL PROVISIONS	2
STATEMENT OF THE CASE	2
STATEMENT OF THE FACTS	3
SUMMARY OF THE ARGUMENT	9
ARGUMENT	
POINT. THE MARSHALED EVIDENCE FAILS TO SUPPORT THAT APPELLANT COMMITTED CRIMINAL NONSUPPORT AS DEFINED BY UTAH CODE ANN. § 76-7-201 (1999).	9
A. Criminal Nonsupport Requires the State to Prove that Appellant Knowingly Failed to Support his Children While in Needy Circumstances and that the Total Arrearage Was in Excess of \$10,000.	13
B. The Marshaled Evidence Fails to Support the State’s Allegation that Nile Knowingly Failed to Provide Support for his Children While They Were in Needy Circumstances and that the Total Arrearage Was in Excess of \$10,000.	15
(1) The marshaled evidence fails to establish that Nile’s total child support arrearage was in excess of \$10,000.	20

(2) The marshaled evidence fails to establish that Nile
knowingly failed to provide for his children while
they were in needy circumstances. 22

CONCLUSION 24

Addendum A: Judgment

Addendum B: Text of Relevant Statutory Provision

TABLE OF AUTHORITIES

Page

CASES

<u>State Farm Fire & Casualty Co. v. Sundance Development Corp.</u> , 2003 UT App 367, 485 Utah Adv. Rep. 32	13
<u>State v. Barlow</u> , 851 P.2d 1191 (Utah Ct. App. 1993)	11
<u>State v. Booker</u> , 709 P.2d 342 (Utah 1985)	11
<u>State v. Boyd</u> , 2001 UT 30, 25 P.3d 985	11
<u>State v. Bradley</u> , 752 P.2d 874 (Utah 1985)	10
<u>State v. Brown</u> , 948 P.2d 337 (Utah 1997)	10, 12, 24
<u>State v. Chaney</u> , 1999 UT App 309, 989 P.2d 1091	11
<u>State v. Cravens</u> , 2000 UT App 344, 15 P.3d 635	11
<u>State v. Gonzales</u> , 2000 UT App 136, 2 P.3d 954	10
<u>State v. Harman</u> , 767 P.2d 567 (Utah Ct. App 1989)	10
<u>State v. Heaps</u> , 2000 UT 5, 999 P.2d 565	2
<u>State v. Holgate</u> , 2000 UT 74, 10 P.3d 346	10
<u>State v. Hopkins</u> , 1999 UT 98, 989 P.2d 1065	11
<u>State v. James</u> , 819 P.2d 781 (Utah 1991)	12
<u>State v. Lamm</u> , 606 P.2d 229 (Utah 1980)	11
<u>State v. Leleae</u> , 1999 UT App 368, 993 P.2d 232	10
<u>State v. Maestas</u> , 2002 UT 123, 63 P.3d 621	14

	<u>Page</u>
<u>State v. Merila</u> , 966 P.2d 270 (Utah Ct. App. 1998)	12
<u>State v. Ostler</u> , 2001 UT 68, 31 P.3d 528	13
<u>State v. Petree</u> , 659 P.2d 443 (Utah 1983)	10, 12
<u>State v. Rudolph</u> , 2000 UT App 155, 3 P.3d 192	2
<u>State v. Shumway</u> , 2002 UT 124, 63 P.3d 94	12
<u>State v. Smith</u> , 927 P.2d 649 (Utah Ct. App. 1996)	10, 22
<u>State v. Spainhower</u> , 1999 UT App 280, 988 P.2d 452	12
<u>State v. Vessey</u> , 967 P.2d 960 (Utah Ct. App. 1998)	10

STATUTES, RULES AND CONSTITUTIONAL PROVISIONS

Utah Code Ann. § 76-1-501 (2003)	14, 15
Utah Code Ann. § 76-7-201 (1999)	1, 2, 9, 10, 13, 14
Utah Code Ann. § 78-2a-3(e) (2002)	1

IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH, :
Plaintiff/Appellee, :
v. :
NILE GENE NELSON : Case No. 20040914-CA
Defendant/Appellant. :

JURISDICTIONAL STATEMENT

Appellant/Defendant Nile Gene Nelson ("Nile" or "Appellant") appeals from a judgment of conviction for Criminal Non-support, a third degree felony, in violation of Utah Code Ann. § 76-7-201(1999), entered by the Honorable Denise P. Lindberg, Third District Court, Salt Lake County, Utah. This Court has jurisdiction over criminal convictions other than first degree felonies. Utah Code Ann. § 78-2a-3(e) (2002). A copy of the judgment is in Addendum A.

STATEMENT OF THE ISSUE, STANDARD OF REVIEW, PRESERVATION

Issue. Whether the trial court erred in denying Appellant's motion for a directed verdict where the state failed to present sufficient evidence indicating that he knowingly failed to provide support for his children while they were in needy circumstances and his arrearage totaled at least \$10,000?

Standard of Review. This Court will reverse a jury verdict "when, after viewing the evidence and all inferences drawn therefrom in a light most favorable to the verdict, [it] find[s] that 'the evidence to support the verdict was completely lacking or was so slight and unconvincing as to make the verdict plainly unreasonable and unjust.'" State v. Rudolph, 2000 UT App 155, ¶22, 3 P.3d 192 (quoting State v. Heaps, 2000 UT 5, ¶19, 999 P.2d 565 (citation omitted)).

Preservation. This issue was preserved below. R. 210:150-51, 153-54.

TEXT OF RELEVANT STATUTE AND CONSTITUTIONAL PROVISIONS

The text of the following statutory provision is in Addendum B:

Utah Code Ann. § 76-7-201 (1999).

STATEMENT OF THE CASE

On March 31, 2003, the state charged Nile Nelson by Information with one count of criminal non-support, a third degree felony, in violation of Utah Code Ann. § 76-7-201 (1999). R. 3-5. On June 16, 2004, a jury trial was held on the matter. R. 209, 210. At the close of the state's case, defense counsel made a motion for a directed verdict which was denied. R. 210:150-51, 153-54. At the conclusion of the trial, the jury found Nile guilty of criminal non-support. R. 128; 210:235. On September 24, 2004, the trial court sentenced Nile to an indeterminate term not to exceed five years in prison. R. 166-168. The trial court suspended the prison term and sentenced Nile to a term of 90 days in jail. R. 166-67. Nile was placed on supervised probation for 36 months with Adult

Probation and Parole. R. 167. The trial court ordered Nile to pay attorney fees in the amount of \$350 plus interest and restitution of \$658 per month to the Office of Recovery Services (ORS). R. 167. On October 18, 2004, Nile filed a timely notice of appeal. R. 187-88.

STATEMENT OF THE FACTS

The state charged Nile Nelson with one count of criminal non-support alleging he failed to provide support for his children between May 1, 1999 until February 28, 2003.

R. 3-5. The following facts are taken from the witnesses at trial. R. 210.

Nile and Chris Nelson were married from 1976 to 1997. R. 210:67, 76, 163. The couple had four children together; Cody, 23; Brook, 21; Casey, 19 and C.N., 8. R. 210:67. The couple also raised a daughter together, L.N., 11, who was not the natural child of Nile. R. 210:67-68; 78-79, 163. During their marriage, the couple lived apart most of the time. R. 210:77. L.N., was conceived while the couple were separated. R. 210:78-79. In 1997, Chris obtained a default divorce. R. 210:68, 76, 80-81. On the petition for divorce, Chris named all five children as being the children of Nile. R. 210:78, 80. When Chris filed for divorce in 1997 she was not working. R. 210:69, 91. The divorce petition indicated that Nile's income was \$2600 and Chris' income was zero. R. 210:136. Based on the information given the court by Chris, the divorce court ordered Nile to pay \$909 of child support a month. R. 210:68. Chris did not know if the payment automatically lowered as each child turned 18 but she has not gone into court to

change the award. R. 210:68.

At the time of trial, June 2004, Chris had worked for the Utah State Treasurer's office for eight years making between \$9.50 and \$10 an hour in May 1999 and \$11 by February 2003. R. 210:69, 91. Because Chris was not working at the time she filed for divorce, her income was not calculated into the child support payment. R. 210:136. Chris and Nile remained friendly and would "talk regularly about [the] kids and . . . life in general." R210:88. Chris testified throughout the trial that she received direct child support payments from Nile but she had no idea how much he had paid within the charged period. R. 210:101. Nile also admitted that he did not have any idea of how much child support he had paid. R. 210:156. However, Chris and Nile agreed that he has always made an effort to pay her when he has had money. R. 210:72, 156. Despite this, Chris had an occasion where she received help with some clothing when she first started working and borrowed a couple hundred dollars, although she couldn't recall exactly when she had received the help. R. 210:70. Chris has also had to borrow money from friends but has paid them all back. R. 210:71. Chris also received help with utilities and food a couple of times during the charged period from her church. R. 210:71. However, during the entire time Chris and Nile were married they did not have much money. R. 210:103-04.

Nile does concrete work as a profession which is not year-round work. R. 210:167. Nile makes most of his money during the summer months when the weather is

good. R. 210:168. In winter months, if Nile has been working for a company he collects unemployment for a few months and takes odd jobs. R. 210:167. In 2001, Nile made an attempt at being self-employed but his attempt failed when the Georgia company he did work for finished its job in Utah. R. 210:169. During this period of self-employment, Nile opened up a checking account in his business's name, NGN concrete Maintenance. R. 210:93,156-57, 169. During the charged period, Nile made on average about \$1,800 to 2,000 a month. R. 210:169. Some years he would earn up to \$24,000 and others around \$20,000. R. 210:169.

During the charged period, Nile's unemployment checks were garnished five times by ORS. R. 210:117-18. Chris could not remember if she received any payments from ORS during this time period. R. 210:72. However, Chris did acknowledge receiving payments directly from Nile. R. 210:72. Chris did not notify ORS of the direct payments made to her by Nile because she "didn't realize that Recovery Services had an open case." R. 210:73, 89, 103. After being contacted by ORS regarding child support paid by Nile, Chris tried to calculate a dollar amount that Nile's directly paid to her. R. 210:74. Chris filled out an affidavit sent to her by ORS regarding the payments given her directly by Nile. R. 210:82-83. On the affidavit regarding child support, Chris only noted the four biological children she had with Nile and did not include L.N. R. 210:86-87.

Although Chris told ORS that she did not keep track of the payments made to her by Nile, ORS told her to estimate it. R. 210:84, 89, 92. On the affidavit for the years 1999, 2000 and 2002, Chris indicated that she had not received any child support. R. 210:84-85. For the year 2001, Chris indicated that she had received approximately \$2000 in child support. R. 210:85. On this affidavit, Chris noted that "Nile doesn't pay child support on a regular basis but there are many times when he had helped me out with \$100 here and there . . . And I'm approximating that as \$2,000." R. 210:86. Chris estimated \$2,000 for the year 2001 because that was the year that fell in the middle of all the years inquired about and not because that was the only time she received payments. R. 210:92, 100.

After Nile presented proof of some of the checks written to Chris on the business checking account he had in 2001, ORS credited Nile for these payments consisting of "a \$400 check, . . . a couple of \$200 checks, three \$200 checks, a \$500 check, another \$200 check, another \$75 check, another \$200, \$200, \$800" check. R. 210:94, 98, 100, 106; Respondent's Exhibit 3. Chris admitted receiving these checks from Nile. 210:98. This 2001 period when Nile was self-employed was the only time Nile had a checking account. R. 210:156-57. Upon seeing the checks, Chris stated she did not "realize [Nile had] paid [her] that much throughout that time period." R. 201:101; see also Respondent's Exhibit 3. Nile also made direct payments to Chris in the form of cash. R. 201:100, 156-57, 174. After Nile would get paid he would call Chris up and ask her how

much she needed. R. 210:157. Nile also gave money directly to the children and bought them clothes and shoes and helped with their first car. R. 210:158, 166, 190. Nile maintains regular visitation with his children and provides for their needs while they are with him. R. 210:159, 164-65.

It was not until criminal charges were brought against him that Nile started asking for receipts of the credit Chris gave him for child support owed when Nile had fixed something around her house. R. 210:141, 156. Nile built Chris a new wood deck, worked on her air conditioner, repaired her fence several times, poured her a patio for \$1500 and performed various other tasks as needed around her home but never asked for a receipt except for the patio. R. 210:159-161. Because Nile was homeless and living in a camper for a significant amount of time, his filing system consisted of keeping any receipts or checks in his glove box. R. 210:162.

Over defense counsel's objection, Roberta Casados, an ORS worker, testified from case notes regarding the record of payments and contacts ORS has kept on its computer system regarding Nile. R. 210:111-148. ORS's payment history is based upon the original divorce decree establishing child support. R. 210:117, 131. ORS's calculation was never modified to take into account Chris' income. R. 210:136, 145. The amount of child support in the ORS records is reduced upon the emancipation of every child. R. 210:119.

Part of an ORS agent's job is to maintain contact with the custodial and non-custodial parent. R. 210:138. Record of contacts made with the custodial and non-custodial parents are also kept on ORS's system. R. 210:122. Some of the contacts are made by automated letters from the ORS system and other demand and collection letters are made by ORS agents. R. 210:121. Casados never sent any of the letters and never had any contact with Nile. R. 210:121, 130. Chris also testified that she had not been in contact with ORS for years. R. 210:99. Casados testimony was based solely off the records kept on the ORS system. R. 210:121-22, 127, 130.

Nile has never made any payments directly to ORS. R. 210:139, 143-44, 172. ORS informs custodial parents that it needs to be made aware of any direct payments collected. R. 210:139. In the contact between ORS and Chris, Chris never indicated that Nile had been giving her money directly until just before the criminal case was filed. R. 210:140. Chris indicated to ORS that she didn't know how much child support Nile had paid her directly. R. 210:140. It wasn't until Nile was able to show proof of some of his direct payments made to Chris that ORS recalculated the amount of child support due. R. 210:120, 141, 143. ORS did not credit Nile for other checks or receipts he had where a date was missing on it to establish that it was made within the charged period. R. 210:95. The receipts Nile was able to present were not formal receipts but "little slips of paper that were written out . . . I received this amount of money from Nile." R. 210:141. Nile never sought a modification of his child support because he believed you

needed an attorney to help with that and he couldn't afford one. R. 210:188. Nile also believed that Chris and he were taking care of child support between themselves. R. 210: 172-73, 188.

The jury convicted Nile of criminal non-support as charged in the Information. R. 210:235. This appeal followed. 187-88.

SUMMARY OF THE ARGUMENT

In this case, the marshaled evidence failed to support that Nile committed criminal non-support as defined by statute. The state was required to prove that Nile knowingly failed to support his children while they were in needy circumstances and that his arrearage was in excess of \$10,000. The evidence was insufficient to support these elements. Chris Nelson, testified throughout the trial that Nile paid child support directly to her but she did not know how much those payments were because she never kept a record. Nile never paid ORS directly and Chris never reported the direct payments to ORS, therefore, the ORS debt computation was insufficient to prove what child support arrearage was owed. Because it is not an element of the criminal non-support statute to fail to pay ORS or fail to report direct payments to the custodial parent, the state failed to sustain its burden beyond a reasonable doubt. Therefore, the conviction must be vacated.

ARGUMENT

POINT. THE MARSHALED EVIDENCE FAILS TO SUPPORT THAT APPELLANT COMMITTED CRIMINAL NONSUPPORT AS DEFINED BY UTAH CODE ANN. § 76-7-201 (1999).

The State failed to present sufficient evidence to support that Nile Nelson knowingly failed to support his children while they were in needy circumstance and "the total arrearage [was] in excess of \$10,000." Utah Code Ann. §76-7-201 (3)(c) (1999). The evidence that was presented by the State, even when viewed in a light most favorable to the jury's verdict, is "sufficiently inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt" that Mr. Nelson committed criminal nonsupport as defined by statute. State v. Brown, 948 P.2d 337, 343 (Utah 1997) (citation omitted).

"We reverse the jury's verdict in a criminal case when we conclude as a matter of law that the evidence was insufficient to warrant conviction." State v. Smith, 927 P.2d 649, 651 (Utah Ct. App. 1996) (quoting State v. Harman, 767 P.2d 567, 568 (Utah Ct. App. 1989)). The defendant must overcome a heavy burden in challenging the sufficiency of the evidence for a jury verdict. See id.; State v. Vessey, 967 P.2d 960, 966 (Utah Ct. App. 1998). "We view the evidence in a light most favorable to the jury verdict," State v. Bradley, 752 P.2d 874, 876 (Utah 1985), and "will reverse only if the evidence is so 'inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime.'" Smith, 927 P.2d at 651 (quoting Harman, 767 P.2d at 568 (quoting State v. Petree, 659 P.2d 443, 444 (Utah 1983))). However, though the burden is high, it is not impossible. See id. "We will not make speculative leaps across gaps in the evidence." Id. (internal quotations and alterations omitted). "Every element of the crime charged must be proven beyond a reasonable doubt." Harman, 767 P.2d at 568. "To affirm the jury's verdict, we must be sure the State has introduced evidence sufficient to support all elements of the charged crime." Smith, 927 P.2d at 651.

State v. Gonzales, 2000 UT App 136, ¶10, 2 P.3d 954; see also State v. Holgate, 2000 UT 74, ¶18, 10 P.3d 346; State v. Leleae, 1999 UT App 368, ¶17, 993 P.2d 232.

While it is well established that "circumstantial evidence alone may be sufficient to establish the guilt of the accused," the circumstantial evidence must be of "such quality and quantity as to justify a jury in determining guilty beyond a reasonable doubt." State v. Barlow, 851 P.2d 1191, 1193 (Utah Ct. App. 1993) (quotations and citations omitted). To succeed on a claim of insufficient evidence, the defendant "must marshal the evidence in support of the verdict and then demonstrate that the evidence is insufficient when viewed in the light most favorable to the verdict.'" State v. Boyd, 2001 UT 30, ¶13, 25 P.3d 985 (quoting State v. Hopkins, 1999 UT 98, ¶14, 989 P.2d 1065 (citation omitted)).

In the event the evidence presented at trial is contradictory or conflicting, so long as a reasonable interpretation of that evidence supports each element of the offense, the Court will not disturb the jury's verdict. See Boyd, 2001 UT 30, ¶14.

[W]e do not sit as a second trier of fact: "It is the exclusive function of the jury to weigh the evidence and to determine the credibility of the witnesses.' So long as there is some evidence, including reasonable inferences, from which findings of all the requisite elements of the crime can reasonably be made, our inquiry stops."

Id. at ¶16 (quoting State v. Booker, 709 P.2d 342, 345 (Utah 1985) (quoting State v. Lamm, 606 P.2d 229, 231 (Utah 1980))); see also State v. Cravens, 2000 UT App 344, ¶18, 15 P.3d 635 ("it is the province of the trier of fact to determine which testimony to believe and what inferences to draw from the facts" (citation omitted)); State v. Chaney, 1999 UT App 309, ¶30, 989 P.2d 1091 ("We may not weigh evidence or assess witness

credibility, but instead ‘assume that the jury believed the evidence and inferences that support the verdict’” (citation omitted); State v. James, 819 P.2d 781, 784 (Utah 1991) (the mere existence of conflicting evidence does not warrant reversal).

Notwithstanding the presumptions in favor of the jury’s decision this Court still has the right to review the sufficiency of the evidence to support the verdict. The fabric of evidence against the defendant must cover the gap between the presumption of innocence and the proof of guilt. In fulfillment of its duty to review the evidence and all inferences which may reasonably be drawn from it in the light most favorable to the verdict, the reviewing court will stretch the evidentiary fabric as far as it will go. But this does not mean that the court can take a speculative leap across a remaining gap in order to sustain a verdict.

State v. Shumway, 2002 UT 124, ¶15, 63 P.3d 94 (quoting Petree, 659 P.2d at 444-45).

Therefore, if the verdict "is based solely on inferences that give rise to only remote or speculative possibilities of guilt," the charge must be dismissed. State v. Brown, 948 P.2d 337, 344 (Utah 1997); see also State v. Spainhower, 1999 UT App 280, ¶5, 988 P.2d 452 (reversal is required if the state has failed to establish an element of the offense with direct evidence or reasonable inferences). With that in mind, the function of a reviewing court is to ensure "that there is sufficient competent evidence as to each element of the charge to enable a jury to find, beyond a reasonable doubt, that the defendant committed the crime." State v. Merila, 966 P.2d 270, 272 (Utah Ct. App. 1998) (quoting James, 819 P.2d at 784).

As set forth below, in this matter the state failed to present evidence sufficient to establish that Nile committed criminal nonsupport as defined by statute. The conviction,

therefore, must be dismissed.

A. Criminal Nonsupport Requires the State to Prove that Appellant Knowingly Failed to Support his Children While in Needy Circumstances and That the Total Arrearage Was in Excess of \$10,000.

In order to sustain a conviction for criminal non-support under Utah Code Ann. § 76-7-201, the state must prove that a defendant "knowingly fail[ed] to provide for the support of the . . . children when any one of them . . . is . . . or would be in needy circumstances but for support received from a source other than the defendant . . ." Id. To be convicted of felony criminal non-support the state is required to prove that a defendant failed to provide support "in each of 18 individual months within any 24-month period, or the total arrearage is in excess of \$10,000." Utah Code Ann. §76-7-201 (3)(c). In this case, the state attempted to prove that Mr. Nelson's arrearage was in excess of \$10,000.

When interpreting a statute, this Court will "seek to give effect to the intent of the legislature in light of the purpose the act was meant to achieve." State v. Ostler, 2001 UT 68, ¶7, 31 P.3d 528 (quotations and citation omitted). In doing so, "this [C]ourt looks first to the statute's plain language to determine the Legislature's intent and purpose" . . . reading "the plain language of the statute as a whole . . ." State Farm Fire & Casualty Co. v. Sundance Dev. Corp., 2003 UT App 367, ¶4, 485 Utah Adv. Rep. 32 (citations omitted). This Court's purpose when interpreting statutory language is "to render all parts [of the statute] relevant and meaningful,' and . . . presume the legislature

use[d] each term advisedly and . . . according to its ordinary meaning." State v. Maestas, 2002 UT 123, ¶52, 63 P.3d 621 (alterations in original) (citations omitted).

Despite the evidence showing that Nile paid child support directly to his wife, the state argued that Nile's child support arrearage was in excess of \$10,000. The basis of the state's evidence was an ORS debt computation report that indicated that Nile had never paid child support to ORS for his children. However, failure to send ORS child support payments is not an element of the criminal non-support statute. See Utah Code Ann. §76-7-201. In addition, failure to report direct payments made to the custodial parent is also not an element of the charged offense. Utah Code Ann. §76-1-501(2) (2003) defines "element of the offense" as "(a) [t]he conduct, attendant circumstances, or results of conduct proscribed, prohibited, or forbidden in the definition of the offense; [and] (b) [t]he culpable mental state required." Id. Under the basic principles of statutory construction, neither failure to pay ORS child support nor failure to report to ORS direct payments is an element of the offense under section 76-7-201.

In this case, the state failed to produce sufficient evidence that Nile knowingly failed to provide child support for his children while they were in needy circumstances and that his total arrearage was in excess of \$10,000. In fact, the evidence supports that Nile did pay child support to Chris for his children but because neither Chris nor Nile kept record of the payments, the amount of child support could not be established. Therefore, the State failed to prove every element of the offense beyond a reasonable

doubt and the conviction for criminal non-support must be reversed. See Utah Code Ann. § 76-1-501 (1), (2b) (2003).

B. The Marshaled Evidence Fails to Support The State's Allegation That Nile Knowingly Failed to Provide Support For His Children While They Were in Needy Circumstances and That the Total Arrearage Was in Excess of \$10,000.

Defense counsel made a motion to dismiss the criminal non-support charge on the ground that the state failed to establish that Nile knowingly failed to provide for the support of his children and that his total arrearage was in excess of \$10,000. R. 210:150-53. The trial court denied the motion. R. 210:153.

The marshaled evidence is as follows: Chris Nelson obtained a default divorce from Nile in 1997. R. 210:67, 76, 80. Based on the information provided to the court by Chris, Nile was ordered to pay \$909 a month in child support. R. 210:68. Chris testified that she had needed help from other sources "a couple of different times," after her divorce from Nile. R. 210:70-72,76. However, even when Chris and Nile were married they did not have much money. R. 210:103-04.

Chris testified that she did not know whether she received, during the charged time period, any payments from ORS that had been garnished from Nile's unemployment checks. R. 210:72. Instead, Chris received direct child support payments from Nile in the form of checks and cash. R. 210:72, 88. However, child support payments made by check were only during a short period when Nile had a business checking account. R. 210:88, 93, 95; see also Respondent's Exhibit 3. Chris testified that "Nile has made an

effort to pay [her] when he's had [money]." R. 210:72. And although Chris testified that the payments were not consistent she stated that "it seemed like if [the money] was really needed, [Nile] seemed to be able to come up with it." R. 210:72-73. Nile also provided for his children by buying them clothes, shoes and providing for their needs during his regular visitation with them. R. 210:158-59, 164, 166, 190.

Chris did not notify ORS of Nile's direct payments stating:

I didn't realize that Recovery Services had an open case. I wasn't on assistance and I was working. I was taking care of the kids and I wasn't, you know, going to ORS for anything and I wasn't having any financial help so I didn't realize that there was a case that I needed to report to.

R. 210:73.

Chris also did not keep track of when and what amount of child support Nile paid to her because she did not know she was expected to. R. 210:84, 89, 92.

. . . Nile has given me, you know, I don't know exactly how much Nile has given me. . . . I never kept records. Like I said, I didn't - I wasn't on assistance. I didn't know that if my ex-husband gave me \$100 that I had to report it to someone because there was no open case as far as I knew and so I didn't keep records. I didn't keep track. I [gave] him a receipt and we went on from there.

R. 210:89.

In addition to direct payments, Nile also did home improvements and repairs on Chris's and the children's home for credit on his child support obligation. R. 210:95, 159-161, 177-78. For example, Nile built Chris a new wood deck, worked on her air conditioner, repaired her fence several times, poured her a patio, and performed various

other tasks needed on the home. R. 210:159-161. However, it was only when ORS contacted Chris about Nile's child support payments that Chris tried to remember what Nile has paid her over the charged period. R. 210:73-74, 83. When trying to fill out the affidavit sent to her by ORS, Chris called ORS and "told them that [she] didn't know, that he had made payments, [but she] didn't keep track of it, [she] didn't know exactly how much he made." R. 210:84, 92. ORS told her "to estimate it." R. 210:84, 92.

When filling out the affidavit, Chris indicated that no direct payments were received in 1999, 2000 and 2002. R. 210:83-84. For the year 2001, Chris wrote that she had received approximately \$2,000. R. 210:85. At the bottom of the affidavit Chris noted that "Nile doesn't pay child support on a regular basis but there are many times when he had helped me out with \$100 here and there" which Chris approximated as being about \$2,000. R. 210:86. However, Chris clarified that she actually did not "know exactly how much Nile ha[d] given [her]." R. 210:88. The only reason Chris approximated the amount in 2001 was because that was the year that fell in the middle of the charged period. R. 210:92, 100. In fact, upon seeing just some of the amounts on the returned child support checks Nile had kept for 2001, Chris stated, "[i]ts like, oh wow, I didn't realize [Nile] paid me that much throughout that time period. I'm not saying he didn't pay me. I didn't realize it added up to that much." R. 210:101.

Chris attempted to explain the discrepancy between the amount of the checks and the amount of her approximation on the affidavit by stating:

When I signed the letter [in June 2002] saying the approximate, that was the first I'd heard from Recovery Services for years. I hadn't any contact with them. That was the first I'd heard from them. I get a letter in the mail, they wanted to know what Nile paid me. I didn't know, I called them up, they told me what to do. At that time I believed it was in June and I estimated around \$2,000. Okay? When you're talking the whole year, you're talking those checks in December and in November. When I estimated [\$]2000, that was in June. You're going another six months, that could be possibly why our amounts aren't the same. I'm not trying to get (inaudible) of Nile or discredit him for anything. I'm just simply saying he didn't pay consistently, I don't know exactly the amounts but

R. 210:99

However, all the child support checks shown Chris were received by her in 2001 yet she did not sign the affidavit regarding the approximate amount of direct child support payments received from Nile until a year later, in 2002. R. 210:100; see also Respondent's Exhibit 3. Furthermore, Chris agreed that in addition to this sampling of checks shown her which Nile had found, she had received other direct payments from Nile in the form of cash. R. 210:100. Chris stated, "Right, I've received money from Nile and like I say, to the best of my knowledge he paid me around \$2,000, \$2,500 something like that," over the charged period. R. 210:100. Asked if that was still her testimony upon seeing the checks she received, Chris stated:

No. At the time I signed this - at the time that they asked me what he paid, at that time I was trying to remember and I just called and estimated it. If you can show me those checks, it's like, oh wow, I didn't realize you'd paid me that much throughout that time period. I'm not saying he didn't pay me. I didn't realize it added up to that much. . . . And I still don't know how much it adds up to.

R. 210:101.

Chris clarified again that she actually had no idea how much Nile had paid her in the charged period stating:

You know, no, I couldn't give you an in fact dollar amount but I know that he did not pay his child support. I mean I know how you're asking the question. Nile has records of what he's paid. Nile had a receipt for everything he paid. I didn't keep track of it.

R. 210:101.

Chris admitted that she actually did not know what records Nile had but just meant that "with his checks, he had a record of it." R. 210:101. Furthermore, Chris never contacted ORS and told them the amount she had estimated was wrong. R. 210:103. Explaining her failure to report, Chris again stated "I didn't know ORS had any interest in me. Like I said, it had been years and years. I hadn't been on welfare forever and I didn't know they had anything to do. So no, I did not approach ORS." R. 210:103.

The only other testimony offered by the State was that of Roberta Casados, an ORS caseworker who compiled a debt computation of child support owed by Nile based on the divorce decree from 1997. R. 210:117. Because Ms. Casados never had any direct or indirect contact with Nile, her debt computation which totaled the child support arrearage at \$26,895.17 was based solely on the records kept by ORS's computer system. However, it was established that other than the five times ORS garnished Nile's unemployment check, Nile had never made a direct payment to ORS. R. 210:144. Instead, Nile paid Chris directly. ORS never received any notification of Nile's direct

payments to Chris until the year 2002 when ORS contacted Chris regarding child support. Until then, Chris did not believe that ORS had an interest in her child support arrangement.

(1) The marshaled evidence fails to establish that Nile's total child support arrearage was in excess of \$10,000.

The marshaled evidence, even when viewed in a light most favorable to the State, failed to show that Nile's child support arrearage was in excess of \$10,000. Chris, the state's only witness with direct knowledge regarding child support payments, testified throughout trial that Nile paid child support directly to her but she did not keep a record. Therefore, Chris did not "know exactly how much Nile has given [her] . . . [because she] never kept records." R. 210:89. In addition to not keeping track of child support payments made, neither Chris nor Nile reported direct payments to ORS. It was only after ORS had sent Chris an affidavit regarding child support that she gave any thought of the amount Nile had been paying her. However, this task proved difficult for Chris so she contacted ORS and tried to explain that she "didn't know, that he had made payments, [but she] didn't keep track of it, [she] didn't know exactly how much he made." R. 210:84, 92. ORS told Chris to estimate the amount. R. 210:?

Although Chris made an attempt, estimating that Nile had paid her a total of \$2,000, this speculative estimation was inherently unreliable given the evidence. For example, Nile's was able to prove that in just the short amount of time he had a checking account he had paid Chris child support of more than \$2,000 in check form alone.

R. 210:94, 98, 100, 106; see also Respondent's Exhibit 3. Upon seeing the checks, Chris stated "oh wow, I didn't realize [Nile] paid me that much throughout that time period. . . . I didn't realize it added up to that much." R. 210:101. Furthermore, the estimation is unreliable because Chris affirmed her position that she actually did not "know exactly how much Nile ha[d] given [her]." R, 210:88, 101. In addition to the checks, Nile had made cash payments to Chris and performed in kind services around the home for credit on his child support. R. 210:100, 141, 156-57, 159, 161, 174

The only other evidence of the alleged arrearage amount was given by the ORS caseworker, Roberta Casados. Casados testimony regarding Nile's total arrearage was based solely on an ORS debt computation which did not and could not take into account Nile's direct child support payments to Chris. Although Chris made an attempt to estimate the amount of the direct child support payments, the evidence establishes that her estimation was unreliable and that she just did not know what Nile had paid. ORS only credited its estimation of the total arrearage Nile's owed with the amount Nile could actually prove he paid with dated checks and receipts within the charged period. R. 210:120, 141, 143. However, the evidence established that these few checks and receipts did not represent all the cash payments, lost checks and other services performed against his child support obligation.

Finally, it is not an element of the criminal non-support statute to not pay ORS directly or to fail to notify them of payments made directly to the custodial parent. The

evidence established that Nile paid child support directly to Chris. However, no one kept a record nor could remember exactly how much child support had been paid during the charged period. The only evidence to show that Nile's arrearage was in excess of \$10,000 was the ORS debt computation record which was made by an ORS agent who did not have any contact with Chris or Nile and never received information regarding the direct payments made until sometime in 2002. Even then, the estimation ORS received was inaccurate and unreliable and was not enough to establish beyond a reasonable doubt that Nile's total child support arrearage was in excess of \$10,000.

Therefore, ORS's debt computation of total child support owing is inaccurate at best and required the jury to make "speculative leaps across [the] gaps in the evidence" to find beyond a reasonable doubt that Nile's knowingly failed to support his children and that his arrearage was in excess of \$10,000. State v. Smith, 927 P.2d 649, 651 (Utah Ct. App. 1996) (quotations and citations omitted).

(2) The marshaled evidence fails to establish that Nile knowingly failed to provide for his children while they were in needy circumstances.

The marshaled evidence, even when viewed in a light most favorable to the State, failed to show that Nile's knowingly failed to provide for his children while they were in needy circumstances. The strongest testimony offered by the state to show that Nile was behind in his child support was when Chris clarified that her testimony was not that Nile "wasn't good [at paying child support] - he wasn't consistent. I couldn't count on it and there were several times when we were in a bind." R. 210:90. However, this testimony

falls short of proving that Nile failed to support his children according to the statute.

Chris's testimony is clear that "Nile has made an effort to pay [her] when he's had [money]." R. 210:72. And although those payments were not always consistent, "it seemed like if [the money] was really needed, [Nile] seemed to be able to come up with it." R. 210:72-73. The evidence also showed that in addition to child support payments made directly to Chris in the form of cash and check, Nile performed tasks around the children's home to improve their living situation. R. 210:95, 159-161, 177-78. Some of the improvements Nile made to the children home was to build a new wood deck, repair their air condition, repair their fence several time, pour a patio and various other tasks as needed to improve their home. R. 210:159-61. In addition to the checks, cash and in-kind services, Nile provided for his children by buying them clothes, shoes and providing for their needs during his regular visitation with them. R. 210:158-59, 164, 166, 190.

In fact, Chris clarified that her testimony was not that Nile "wasn't good [at paying child support] - he wasn't consistent. I couldn't count on it and there were several times when we were in a bind." R. 210:90. However, the evidence shows that just in the approximately six month time frame that Nile was able to show proof of the type of payments he had been making to Chris, these checks show that Nile made consistent payments. See Respondent's Exhibit 3. The evidence presented by the state fails to show that Nile knowingly failed to support his children while they were in needy circumstances. Rather, the evidence shows that Nile, although there may have been a

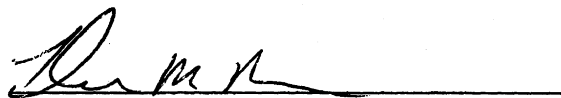
few times Chris and the children were in a bind, was good about paying child support. And although not always consistent, Nile came through when the payments were really needed.

The evidence demonstrates that Nile made direct payments to Chris in the form of checks, cash and in-kind payments. He made repairs to the children's home, he bought them shoes and clothing and fed the children while they were in his care. Chris and Nile's failure to keep track or report to ORS these direct child support payments made does not establish beyond a reasonable doubt that Nile knowingly failed to support his children while they were in needy circumstances. Because the state failed to prove every element of the crime charged beyond a reasonable doubt, the jury's verdict was "based solely on inferences that [gave] rise to only remote or speculative possibilities of guilt," therefore, the conviction must be reversed. Brown, 948 P.2d at 344.

CONCLUSION

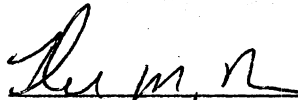
The Appellant, Mr. Nelson, respectfully requests this Court to reverse the trial court's denial of his motion for a directed verdict and reverse his conviction.

SUBMITTED this 23rd day of March, 2005.


DEBRA M. NELSON
HEATHER BRERETON
PATRICK W. CORUM
Attorneys for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, DEBRA M. NELSON, hereby certify that I have caused to be hand-delivered the original and seven copies of the foregoing to the Utah Court of Appeals, 450 South State, 5th Floor, P.O. Box 140230, Salt Lake City, Utah 84114-0230, and four copies to the Utah Attorney General's Office, Heber M. Wells Building, 160 East 300 South, 6th Floor, P.O. Box 140854, Salt Lake City, Utah 84114-0854, this 23rd day of March, 2005.



DEBRA M. NELSON

DELIVERED to the Utah Court of Appeals and the Utah Attorney General's Office as indicated above this _____ day of March, 2005.

ADDENDA

ADDENDUM A

3RD DISTRICT COURT - SALT LAKE COURT
SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH, : MINUTES
Plaintiff, : SENTENCE, JUDGMENT, COMMITMENT
: NOTICE
:
:
vs. : Case No: 031902200 FS
:
NILE GENE NELSON, : Judge: DENISE P LINDBERG
Defendant. : Date: September 24, 2004

PRESENT

Clerk: valerieb

Prosecutor: NELSON, STEPHEN L

Defendant

Defendant's Attorney(s): BRERETON, HEATHER

DEFENDANT INFORMATION

Date of birth: January 10, 1955

Video

Tape Number: 9/24/04 Tape Count: 11:21 48

CHARGES

1. CRIMINAL NONSUPPORT - 3rd Degree Felony
- Disposition: 06/16/2004 Guilty

SENTENCE PRISON

Based on the defendant's conviction of CRIMINAL NONSUPPORT a 3rd Degree Felony, the defendant is sentenced to an indeterminate term of not to exceed five years in the Utah State Prison. The prison term is suspended.

Case No: 031902200
Date: Sep 24, 2004

SENTENCE RECOMMENDATION NOTE

the AG's office is to evaluate this case as well as AP&P

SENTENCE JAIL

Based on the defendant's conviction of CRIMINAL NONSUPPORT a 3rd Degree Felony, the defendant is sentenced to a term of 90 day(s)

SENTENCE TRUST

The defendant is to pay the following:

Attorney Fees: Amount: \$350.00 Plus Interest

The amount of Adult Probation & Parole

ORDER OF PROBATION

The defendant is placed on probation for 36 month(s).
Probation is to be supervised by Adult Probation & Parole.
Defendant to serve 90 day(s) jail.

Defendant is to pay a fine of 0

PROBATION CONDITIONS

Participate in and complete any educational; and/or vocational training as directed by the Department of Adult Probation and Parole.

Violate no laws.

The defendant to enter into and complete the Cognitive Restructuring classes approved by the Court or Probation Officer. defense counsel disputes the amount of restitution, a hearing will be set.

maintain full time employment

pay attorney's fees in the amount of \$350.00 payable to AP&P

pay restitution at the rate of \$658.00 per month

all money being paid on restitution in this case is to be paid to ORS and not AP&P

Case No: 031902200
Date: Sep 24, 2004

SENTENCE PROBATION SERVICE NOTE

At the restitution hearing the defendant is to provide proof of employment and any evaluations obtained.

RESTITUTION HEARING is scheduled.

Date: 01/04/2005

Time: 09:00 a.m.

Location: Fourth Floor - W46

THIRD DISTRICT COURT

450 SOUTH STATE

SLC, UT 84114-1860

Before Judge: DENISE P LINDBERG

Dated this 24 day of Sept, 2004.


DENISE P LINDBERG
District Court Judge



In compliance with the Americans with Disabilities Act, individuals needing special accommodations (including auxiliary communicative aids and services) during this proceeding should call Third District Court-Salt Lake at 238-7500 at least three working days prior to the proceeding. The general information phone number is (801)238-7300.

ADDENDUM B

10/10/2020

76-7-201. Criminal nonsupport.

(1) A person commits criminal nonsupport if, having a spouse, a child, or children under the age of 18 years, he knowingly fails to provide for the support of the spouse, child, or children when any one of them:

(a) is in needy circumstances; or

(b) would be in needy circumstances but for support received from a source other than the defendant or paid on the defendant's behalf.

(2) Except as provided in Subsection (3), criminal nonsupport is a class A misdemeanor.

(3) Criminal nonsupport is a felony of the third degree if the actor:

(a) has been convicted one or more times of nonsupport, whether in this state, any other state, or any court of the United States;

(b) committed the offense while residing outside of Utah; or

(c) commits the crime of nonsupport in each of 18 individual months within any 24-month period, or the total arrearage is in excess of \$10,000.

(4) For purposes of this section "child" includes a child born out of wedlock whose paternity has been admitted by the actor or has been established in a civil suit.

(5) (a) In a prosecution for criminal nonsupport under this section, it is an affirmative defense that the accused is unable to provide support. Voluntary unemployment or underemployment by the defendant does not give rise to that defense.

(b) Not less than 20 days before trial the defendant shall file and serve on the prosecuting attorney a notice, in writing, of his intention to claim the affirmative defense of inability to provide support. The notice shall specifically identify the factual basis for the defense and the names and addresses of the witnesses who the defendant proposes to examine in order to establish the defense.

(c) Not more than ten days after receipt of the notice described in Subsection (5)(b), or at such other time as the court may direct, the prosecuting attorney shall file and serve the defendant with a notice containing the names and addresses of the witnesses who the state proposes to examine in order to contradict or rebut the defendant's claim.

(d) Failure to comply with the requirements of Subsection (5)(b) or (5)(c) entitles the opposing party to a continuance to allow for preparation. If the court finds that a party's failure to comply is the result of bad faith, it may impose appropriate sanctions.