

[Cite as *State v. Turns*, 2011-Ohio-1497.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	
	:	No. 10AP-740
v.	:	(C.P.C. No. 04CR 07-5023)
	:	
Kirk D. Turns,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on March 29, 2011

Ron O'Brien, Prosecuting Attorney, and *Kimberly M. Bond*,
for appellee.

Richard Cline & Co., LLC, and *Richard A. Cline*, for
appellant.

APPEAL from the Franklin County Court of Common Pleas.

FRENCH, J.

{¶1} Defendant-appellant, Kirk D. Turns ("Turns"), appeals the judgment of the Franklin County Court of Common Pleas, which found Turns guilty of non-support of dependents, in violation of R.C. 2919.21, a felony of the fifth degree. Having concluded that the trial court's judgment, including its decision that Turns is guilty of felony non-support, is not against the manifest weight of the evidence, and that the court did not err by rejecting Turns' affirmative defense, we affirm the conviction. Nevertheless, because

the trial court imposed restitution in an amount greater than the economic loss suffered as a result of Turns' non-support, we reverse and remand this matter for further proceedings.

{¶2} The Franklin County Grand Jury indicted Turns on one count of non-support of dependents. The indictment alleged that from July 7, 2002 to July 7, 2004, Turns recklessly abandoned or failed to provide adequate support for his son, who was under age 18. The indictment also alleged, in the alternative, that Turns recklessly abandoned or failed to pay support as established by a court order by failing to pay support for at least 26 weeks out of a 104-week period. Following a bench trial, the court found Turns guilty of failing to pay support, in violation of R.C. 2919.21. The court sentenced Turns to five years of community control, with intensive supervision.

{¶3} In its sentencing entry, the trial court imposed a restitution order of \$26,299. That figure represents all past due child support owed by Turns for his son.

{¶4} Turns filed a timely notice of appeal, and he raises the following assignments of error:

I. THE CONVICTION IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

II. THE COURT BELOW ERRED IN FINDING THAT [TURNS] FAILED TO PROVE THE [STATUTORY] AFFIRMATIVE DEFENSE BY A PREPONDERANCE OF THE EVIDENCE.

III. THE COURT BELOW ERRED BY IMPOSING A FINANCIAL SANCTION OF RESTITUTION THAT EXCEEDED THE VICTIM'S ECONOMIC LOSS SUSTAINED AS A RESULT OF THE OFFENSE OF CONVICTION.

{¶5} We consider Turns' first and second assignments of error together. First, Turns contends that the conviction for violating R.C. 2919.21(A) is against the manifest weight of the evidence. In determining whether a verdict is against the manifest weight of the evidence, we sit as a "thirteenth juror." *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52. Thus, we review the entire record, weigh the evidence and all reasonable inferences, and consider the credibility of witnesses. *Id.* Additionally, we 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.' " *Id.*, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175. We reverse a conviction on manifest weight grounds for only the most " 'exceptional case in which the evidence weighs heavily against the conviction.' " *Thompkins* at 387, quoting *Martin* at 175. Moreover, " 'it is inappropriate for a reviewing court to interfere with factual findings of the trier of fact * * * unless the reviewing court finds that a reasonable juror could not find the testimony of the witness to be credible.' " *State v. Brown*, 10th Dist. No. 02AP-11, 2002-Ohio-5345, at ¶10, quoting *State v. Long* (Feb. 6, 1997), 10th Dist. No. 96APA04-511.

{¶6} The charge at issue here arises from R.C. 2919.21, which generally prohibits a person from abandoning or failing to support that person's child. R.C. 2919.21(A) provides: "No person shall abandon, or fail to provide adequate support to" that person's child under the age of 18 or, for a mentally or physically challenged child, under the age of 21. R.C. 2919.21(B) also provides: "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."

{¶7} A person may defend him or herself from a charge under R.C. 2919.21(A) or (B) by proving that he or she "was unable to provide adequate support or the established support but did provide the support that was within the accused's ability and means." R.C. 2919.21(D). It is not a defense to a charge under R.C. 2919.21(B), however, that someone else is supporting the child adequately. See R.C. 2919.21(F).

{¶8} Generally, whoever violates R.C. 2919.21(A) (for abandoning or failing to support a child, for example) or R.C. 2919.21(B) (for failing to pay court-ordered support) is guilty of non-support of dependents, a misdemeanor of the first degree. See R.C. 2919.21(G)(1). There are, however, circumstances under which that person may be guilty of a felony, including when the offender has failed to provide child support for a total accumulated period of 26 weeks out of 104 consecutive weeks. In that case, the violation is a felony of the fifth degree.

{¶9} The evidence before the trial court established that Turns and Brenda Dyer had a child together in 1991. A February 1996 administrative order from the Franklin County Child Support Enforcement Agency ("FCCSEA") required Turns to pay child support in the amount of about \$185 per month. A January 2001 FCCSEA administrative order raised that amount to about \$350 per month.

{¶10} When asked specifically about the period from July 7, 2002 to July 7, 2004, Dyer recounted that payments from Turns were sometimes for \$180 and sometimes for other amounts "like \$108 or \$175, that kind of thing. It was never over like \$200." (Tr. 24.) She did not receive payments every month. Turns also gave her money directly on two occasions, one payment of \$100 and one of \$40.

{¶11} Dyer receives food stamps and medical benefits for herself and her two children. Dyer's son with Turns is severely autistic. He does not speak, and he has seizures. He requires 24-hour care, which Dyer provides. On cross-examination, Dyer confirmed that her son receives Social Security income.

{¶12} Chrissy Tinapple of FCCSEA testified. She authenticated an Account Summary (State's Exhibit B), which identifies all of the payments made by Turns for Dyer. For the two-year period of July 7, 2002 to July 7, 2004, the summary showed that Turns made 11 payments for a total of \$3,849.33.

{¶13} Tinapple also authenticated the 1996 and 2001 administrative support orders (State's Exhibit A). Finally, she authenticated a November 2003 order of the Franklin County Court of Common Pleas, Division of Domestic Relations, which adopted a magistrate's decision that found Turns in contempt for failure to pay child support. The decision approved and adopted the 2001 administrative order and expressly ordered Turns to pay child support in the amount of \$350.07 per month, plus processing. The magistrate allowed Turns to purge his contempt by liquidating a child support arrearage in the amount of \$4,200.61 at the rate of \$35 per month.

{¶14} Turns also testified. Following the birth of their son, he and Dyer lived together until their son turned four years old. He cooperated in the administrative proceedings and establishment of child support in 1995-1996. While employed in various positions, he ensured that his employers withheld the proper amount of support.

{¶15} In July 2002, he was working as a police officer for Clinton Township. He was under investigation for allegedly using excessive force in the performance of outside employment at a nightclub. He was suspended in April 2002 and reinstated in

about September 2002. (During the suspension, he obtained other employment and continued to meet his child support obligations.) Although he was ultimately cleared of any wrongdoing in the excessive-force matter, Clinton Township did not put him back on the payroll, purportedly for budget reasons. Nevertheless, he maintained his position as an auxiliary officer, without pay, for Clinton Township until he was terminated in April 2003. He filed a discrimination complaint against the township with the Ohio Civil Rights Commission. The complaint was settled in August 2003, and he received "a monetary payout." (Tr. 66.)

{¶16} After he lost his Clinton Township position, he tried to get other work and applied at a variety of places. He was unsuccessful. In his view, he was unsuccessful because Clinton Township gave him a bad reference. When he found occasional employment, he paid child support. He sought psychological counseling relating to the Clinton Township matter, and he was diagnosed with an adjustment disorder in 2003.

{¶17} Turns held a job at Old Navy in late 2003. In July 2004, Turns began working on commission for Citywide Mortgage, but made no money from the position. He also attempted to enlist in the military, but was unsuccessful because of the lawsuit against him. He wanted to support his son, but was unable to because he was unemployed. He estimated that he applied for positions at 150 to 200 locations.

{¶18} On cross-examination, Turns was asked about the settlement with Clinton Township and whether he had paid any of it to Dyer. He said that he had. His wife earned an income and provided for them and their newborn child. He stayed home to care for the child while his wife worked. On re-cross, Turns clarified that he had made a lump-sum payment of \$1,711, which came from his retirement account.

{¶19} After the trial, the court found that the state had met its burden to prove all elements of non-support. The court specifically noted that it had to find "[t]hat from on or about July 7 of 2002 to July 7 of 2004 [Turns] recklessly failed to provide adequate support for [his son], who was under the age of 18 at that time, and/or did recklessly fail to provide support as established by a court order to" his son. (Tr. 108.) The court rejected Turns' affirmative defense that he was unable to pay.

{¶20} At the subsequent sentencing hearing, the court stated, "Okay, this is a felony five nonsupport." (Tr. 129.) The judgment entry states that "the Court found the Defendant GUILTY to Count One of the Indictment, to wit: Non Support of Dependents, in violation of Section 2919.21 of the Ohio Revised Code, being a Felony of the Fifth Degree."

{¶21} Turns contends that the evidence does not support a conviction under R.C. 2919.21(A) or (B). R.C. 2919.21(A) required the state to prove beyond a reasonable doubt that Turns "fail[ed] to provide adequate support" to his son. The evidence, he argues, shows that he paid a total of \$2,697.05, which equates to an average of about \$40 per week. Dyer testified that she had a medical card for their son's medical expenses, and she received food stamps and Social Security benefits. She was able to pay rent, utilities, and other living expenses. There was no evidence, Turns argues, that the support he paid was not "adequate."

{¶22} In essence, Turns argues that Dyer was able to support their son using funds obtained from other sources; therefore, the support he paid, while not what he was ordered to pay, was adequate to meet his son's needs. We disagree. Dyer testified that the parties' son required 24-hour care, which she provided. She lived on

state and federal assistance alone. She testified that she twice asked Turns for money because she had no food and no money to buy groceries. While Turns offered a total figure that he averages over the two-year period, the evidence showed that, more often than not, Turns provided no support at all. In fact, for more than a year, November 2002 to December 2003, he paid nothing. We conclude, as the Twelfth District Court of Appeals concluded under similar circumstances, that for these long stretches of time, the payment of no support does not equate to adequate support. See *State v. Smith*, 12th Dist. No. CA2002-04-038, 2002-Ohio-6395, ¶18. Under these circumstances, the court's conclusion that the state proved a violation of R.C. 2919.21(A) was not against the manifest weight of the evidence.

{¶23} Turns also contends that his conviction under R.C. 2919.21(B), for failing to pay support ordered by a court, was against the manifest weight of the evidence. Having concluded that the evidence supported his conviction under R.C. 2919.21(A), however, we need not address the evidence as it relates to R.C. 2919.21(B).

{¶24} Turns also contends that the trial court erred in finding that he did not prove his statutory affirmative defense by a preponderance of the evidence. We disagree.

{¶25} As noted, R.C. 2919.21(D) provides a defense to a charge of failing to support dependents under R.C. 2919.21(A). To succeed, the accused must show by a preponderance of the evidence that he or she was unable to provide adequate support "but did provide the support that was within the accused's ability and means." R.C. 2919.21(D).

{¶26} Turns contends that he provided the support he could, given his diligent search for a job and his difficulty finding one. As the trial court noted, however, Turns was able to stay home and care for his newborn child, actions that suggest he had earning capacity at the time. Turns did not suffer from any disabilities and testified himself that he was able to work. Although Turns testified that he sought employment at 150 to 200 locations, it was for the trier-of-fact to judge, firsthand, the credibility of that testimony. We conclude that the trial court did not err in finding that Turns had not proven the statutory affirmative defense by a preponderance of the evidence.

{¶27} Having concluded that the evidence supports Turns' conviction for non-support under R.C. 2919.21(A), we turn to Turns' contention that the trial court erred by finding him guilty of a felony. As noted, in general, a violation of R.C. 2919.21(A) is a misdemeanor in the first degree. An accused may be found guilty of a felony in the fifth degree, however, if the accused is found to have failed to provide support "for a total accumulated period" of 26 weeks out of 104 consecutive weeks, even if the 26 weeks are not consecutive.

{¶28} Here, the FCCSEA account summary does not break down Turns' support obligation by week. The summary identifies a monthly support obligation and also reflects payments when made. From July 2002 to July 2004, Turns made a total of 11 payments in varying amounts, including one payment in September 2002 for \$1,711.50. No matter how we interpret this evidence or calculate the support paid, it is clear that Turns failed to provide support for at least 26 weeks (or six months) of the 104-week (or two-year) period. As we noted, Turns paid no support from November 2002 until December 2003, or about 52 weeks. Nor did he pay support for an additional 13 weeks

in July 2002, May 2004, and June 2004. Therefore, even a sizable lump-sum payment in September 2002 could not cure his failure to pay.

{¶29} Turns does not appear to disagree that he failed to pay support in 26 weeks of this 104-week period. Rather, he contends that he cannot be convicted of a felony because he had not been ordered by a court to pay support until November 2003 and that he did not fail to pay court-ordered support for a 26-week period. To make this argument, Turns relies on R.C. 2919.21(B), which prohibits a person from failing "to provide support as established by a court order." We agree with Turns that a court did not order him to pay support until November 2003. We do not agree, however, that enhancement of a R.C. 2919.21(A) violation to a felony requires failure to pay court-ordered, as opposed to FCCSEA-ordered, support.

{¶30} A violation of R.C. 2919.21(A), which we conclude was established here, requires the state to prove that an accused failed to "provide adequate support." While R.C. 2919.21(B) requires the state to prove that an accused failed to pay court-ordered support to show a violation of that section, there is no such limitation in R.C. 2919.21(A). Nor is there such a limitation in R.C. 2919.21(G)(1) for purposes of determining whether an accused is guilty of a felony.

{¶31} R.C. 2919.21(G)(1) provides that, "if the offender has failed to provide support under division (A)(2) or (B)" for a total period of 26 weeks out of 104 weeks, "then a violation of division (A)(2) or (B) of this section is a felony of the fifth degree." Here, the evidence showed that Turns failed to "provide support under division (A)(2)" for a period of at least 26 weeks out of 104 weeks. Therefore, the court correctly determined that Turns' violation was a felony of the fifth degree.

{¶32} In summary, we conclude the following: (1) the court's determination that Turns was guilty of a violation of R.C. 2919.21(A) was not against the manifest weight of the evidence; (2) the court did not err by rejecting Turns' affirmative defense; and (3) the court did not err by convicting Turns of a felony in the fifth degree. Accordingly, we overrule Turns' first and second assignments of error.

{¶33} In his third assignment of error, Turns contends that the trial court erred by ordering restitution in the amount of \$26,299. The state concedes that this was error, and we agree.

{¶34} The judgment entry imposes as a "financial sanction" "pursuant to R.C. 2929.18," that Turns must "pay restitution in the amount of \$26,299.00 to" FCCSEA. R.C. 2929.18, however, limits an order of restitution to the amount of economic loss suffered by the victim as a result of the offender's commission of the offense. See R.C. 2929.18(A)(1). See also *State v. Schul*, 12th Dist. No. CA2009-08-215, 2010-Ohio-825, and *State v. McCants*, 12th Dist. No. CA2009-08-214, 2010-Ohio-854 (in appeals from convictions for felony non-support, each reversing a trial court order that imposed restitution in an amount exceeding the support owed for a period of non-support).

{¶35} The trial court could, however, order payment of past due child support as a condition of community control. A trial court has discretion to impose conditions of community control that (1) relate reasonably to rehabilitating the offender, (2) relate to the crime for which the offender was convicted, and (3) relate to conduct that is criminal or to future criminality and serve the ends of probation. *State v. Stewart*, 10th Dist. No. 04AP-761, 2005-Ohio-987, ¶12, citing *State v. Jones* (1990), 49 Ohio St.3d 51, 53. In

Stewart, this court upheld an order that required a defendant convicted of felony non-support to pay the entire amount of support due as a condition of community control.

{¶36} Here, the trial court's statements at the sentencing hearing indicate that it intended the payment as a condition of the community control sentence. The court stated multiple times, for example, that Turns should do what the Probation Department tells him to do and must pay the child support to stay out of jail.

{¶37} Turns asks us to simply correct the trial court order to reflect a restitution order in the amount of \$4,552.35. Given the trial court's statements at sentencing, however, we reverse and remand this matter to the trial court for it to correct its order. On remand, the court may impose restitution in an amount not to exceed the amount of support owed for the 104-week period at issue and, within its discretion, may impose a financial sanction as part of its sentence of community control. Accordingly, we sustain Turns' third assignment of error.

{¶38} In conclusion, we overrule Turns' first and second assignments of error and sustain his third assignment of error. We reverse the judgment of the Franklin County Court of Common Pleas and remand this matter to the trial court for proceedings consistent with this decision and applicable law.

*Judgment reversed;
cause remanded with instructions.*

KLATT and CONNOR, JJ., concur.
