IN THE UTAH COURT OF APPEALS

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State of Utah, Plaintiff and Appellee, v. Nile Gene Nelson, Defendant and Appellant.	MEMORANDUM DECISION (Not For Official Publication) Case No. 20040914-CA F I L E D (December 8, 2005) 2005 UT App 526

Third District, Salt Lake Department, 031902200
The Honorable Denise P. Lindberg

Attorneys: Debra M. Nelson, Heather A. Brereton, and Patrick W. Corum, Salt Lake City, for Appellant
Mark L. Shurtleff and Kenneth A. Bronston, Salt Lake City, for Appellee

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Before Judges Bench, Davis, and Orme.

DAVIS, Judge:

Defendant appeals a conviction for criminal nonsupport, a third degree felony. See Utah Code Ann. § 76-7-201 (1999). We affirm.

Defendant was charged with one count of criminal nonsupport in violation of Utah Code section 76-7-201. See id. Under that statute,

> A person commits criminal nonsupport if, having . . . children under the age of [eighteen] years, he knowingly fails to provide for the support of the . . . children when any one of them:
>
> (a) is in needy circumstances; or
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> (b) would be in needy circumstances but for support received from a source other than the defendant or paid on the defendant's behalf.

Id. § 76-7-201(1)(a)-(b). Criminal nonsupport is a third degree felony if the total arrearage is in excess of $10,000. See id.

§ 76-7-201(3)(c). A jury trial was held. At the close of the State's case-in-chief, Defendant moved for a directed verdict, arguing that the State had not presented enough evidence to demonstrate that Defendant's total arrearage was in excess of $10,000. The trial court determined that the State had established a prima facie case and denied the motion. A jury convicted Defendant of the offense as charged.

Defendant states that his only issue on appeal is whether there was sufficient evidence to warrant sending the case to the jury. At the same time, however, Defendant argues repeatedly that the evidence was insufficient to support the jury's verdict. We will address both challenges.[1]

"We review for correctness the trial court's conclusion that the evidence established a prima facie case." State v. Kihlstrom, 1999 UT App 289,¶8, 988 P.2d 949. We will reverse a jury's guilty verdict only if "the evidence and its inferences are so inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime of which he was convicted." State v. Moore, 802 P.2d 732, 738 (Utah Ct. App. 1990) (quotations and citation omitted). However, the jury verdict will be upheld, and the trial court's denial of a motion for a directed verdict will be affirmed, if "upon reviewing the evidence and all inferences that can reasonably be drawn from it, we conclude that some evidence exists from which a reasonable jury could find that the elements of the crime had been proven beyond a reasonable doubt." State v. Dibello, 780 P.2d 1221, 1225 (Utah 1989).

Defendant argues that the State failed to present sufficient evidence to demonstrate that the total arrearage was in excess of $10,000, alleging that his child support payments were frequently made in cash and neither the Office of Recovery Services (ORS) nor his ex-wife kept track of them.[2] Defendant also contends

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[1]When an appeal focuses on a denial of a motion for directed verdict made at the close of the State's case-in-chief, "this court's review of the sufficiency of the evidence is limited to the evidence adduced by the prosecution in its case-in-chief," and the evidence presented after the close of State's case-in-chief is irrelevant. State v. Kihlstrom, 1999 UT App 289,¶9, 988 P.2d 949. However, when we review the sufficiency of the evidence in support of the jury verdict, we look at all of the evidence presented at trial.

[2]Defendant places great emphasis on the fact that his ex-wife stated that she did not "know exactly how much [Defendant]

(continued...)

that he supported his children by providing for their needs during their visitation and by improving and repairing the home of his ex-wife and children.

Despite these allegations, the State presented more than enough evidence to warrant sending the issue to the jury and to support the jury verdict. ORS created a history of Defendant's child support payments, which reflected Defendant's decreased support obligations as his children were emancipated and took into account all payments obtained through ORS, credit for repair work done around the house, and payments made directly to Defendant's ex-wife (as evidenced by copies of checks and written receipts).[3] The amount of the payments that Defendant made directly to his ex-wife was determined at a meeting among ORS, Defendant, Defendant's ex-wife, and counsel. According to the payment history, Defendant was in arrears in the amount of $26,895.17. Clearly, there was sufficient evidence both to warrant sending the issue of whether the total arrearage was in excess of $10,000 to the jury and to support the jury verdict.

Defendant also argues that the State did not present sufficient evidence to demonstrate that Defendant knowingly failed to support his children while they were in needy circumstances. However, this issue was not preserved in the trial court. "[I]n general, appellate courts will not consider an issue . . . raised for the first time on appeal unless the trial court committed plain error or the case involves exceptional circumstances." State v. Dean, 2004 UT 63,¶13, 95 P.3d 276. We will decline to review an argument where, as here, Defendant has not asserted either of the exceptions--plain error or exceptional circumstances--to the general rule. See State v. Hodges, 2002 UT 117,¶5, 63 P.3d 66. Even if the issue had been preserved, we would determine that the State presented sufficient evidence to demonstrate that Defendant's children were in needy circumstances or would have been so absent the assistance of others. Defendant's ex-wife testified that she struggled to buy food and clothing for her children and that she had to borrow or was given financial assistance from her friends, parents, and church. Furthermore, Defendant's failure to support his children was clearly done knowingly--ORS sent Defendant numerous notices and letters informing him of the amount due and of possible

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[2](...continued)
ha[d] given [her]," and that she estimated that Defendant had paid only $2000 in child support when it is undisputed that Defendant had paid more than $2000 child support in checks alone.

[3]Defendant's ex-wife generally gave Defendant receipts when he paid child support.

criminal repercussions that could result from his failure to pay. Quite simply, there was sufficient evidence both to warrant sending this issue to the jury and to support the jury verdict.[4]

Affirmed.

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James Z. Davis, Judge

I CONCUR:

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Russell W. Bench,
Associate Presiding Judge

ORME, Judge (concurring):

The facts appearing of record suggest this is a case that does not cry out for prosecution. Defendant and his ex-wife were of limited means and both seem to have done what they could to provide for their children, neither being particularly mindful of the child support obligations imposed by their divorce decree or the intended role of ORS in the collection, distribution, and accounting of the support payments due.

Reluctantly, I concur in this court's decision because its legal analysis appears to be unassailable. In particular, while I question whether the State proved that Defendant knowingly failed to support his children, I must agree that the issue was not preserved for appeal and cannot be reached by us in the

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[4]We also note that Defendant testified in general about his indigence and inability to pay the child support ordered by his divorce decree. However, Defendant never filed a petition to modify his support obligations or asserted an affirmative defense in the criminal action. See Utah Code Ann. § 76-7-201(5)(a) (1999) (making the inability to provide child support an affirmative defense). Furthermore, the jury was specifically instructed that Defendant's failure to provide support for his minor children was excused if, through no fault of his own, Defendant was unable to provide for them.

absence of a "plain error" or "exceptional circumstances" argument.

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Gregory K. Orme, Judge