[Cite as *State v. Wolf*, 2012-Ohio-3016.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

GEAUGA COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2011-G-3034**
- vs -	:	
JOSEPH A. WOLF,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 11 C 000026.

Judgment: Affirmed.

David P. Joyce, Geauga County Prosecutor, and *J.A. Miedema*, Assistant Prosecutor, Courthouse Annex, 231 Main Street, Chardon, OH 44024 (For Plaintiff-Appellee).

Aviva L. Wilcher, The Law Office of A.L. Wilcher, LLC, P.O. Box 7184, Akron, OH 44306 (For Defendant-Appellant).

TIMOTHY P. CANNON, P.J.

{¶1} Appellant, Joseph A. Wolf, appeals the judgment of the Geauga County Court of Common Pleas. A jury found appellant guilty of two counts of nonsupport of a dependent in violation of R.C. 2919.21(A)(2) and R.C. 2919.21(B), both felonies of the fifth degree. For the following reasons, we affirm.

{¶2} At trial, the state presented two witnesses: Stephanie Istvanic, case manager for the Geauga County Job and Family Services Child Support Enforcement Division, and Jennifer Lowrie, the mother of appellant's child.

{¶3} Ms. Istvanic testified that appellant's original child support payment was modified to reduce appellant's monthly child support obligation. Ms. Istvanic testified with respect to appellant's child support payments for the period of the indictment—from July 1, 2008, through June 30, 2010. Ms. Istvanic testified that appellant missed 81 payments and was in arrears for $2,176.15. She further indicated that appellant made payments from July 28, 2008, until March 23, 2009, totaling $1,255.00. Ms. Istvanic noted that appellant's driver's license was suspended due to the lack of compliance with support, but it was reinstated after appellant made a $1,000 payment. She stated that she was unaware appellant had relocated to St. Kitts; however, upon his return to the United States, he contacted her and explained his failure to pay child support was due to the hardships he encountered while in St. Kitts.

{¶4} As stated in appellant's brief, he did not deny his obligation to pay child support. At trial, appellant asserted an affirmative defense claiming he was unable to provide adequate support. Appellant testified on his own behalf. He stated that he was in the construction business, but due to the economy, his businesses failed. Therefore, appellant, in search of an opportunity to become an international construction specialist, relocated with his wife and two children to St. Kitts, in the Caribbean, on February 11, 2009. Appellant testified that while in St. Kitts, he was employed by Lennox Warner and Partner making $15 per hour. This payment rate, however, was in eastern Caribbean dollars and, therefore, equated to only $5.50 USD. Appellant testified to the hardships he and his family experienced while in the Caribbean, including the expense of daily necessities, such as food. Appellant explained that he was able to procure mangos, coconuts, bananas, and breadfruits for his family free of charge by hiking up a mountain

and picking the produce. Although "it was dangerous because there [were] a couple hundred wild cattle that [he] had to get through to [the fruit]," appellant noted that he was able to regularly get the fruit for his family.

{¶5} Appellant also noted that he and his family were unable to return to the United States because of lack of money and lack of passports. After borrowing the money from his wife's grandmother and obtaining the necessary documents, appellant and his family were able to travel back to the United States. Upon arriving in the United States, appellant was unable to find employment, as his license was suspended due to the non-payment of his child support. Appellant testified that he again had to borrow the money to reinstate his driver's license.

{¶6} The jury also heard the testimony of Ms. Lowrie, the mother of appellant's child. Ms. Lowrie testified to the hardships she has encountered due to the lack of support payments.

{¶7} The jury found appellant guilty of both charges. Appellant was sentenced to five years of community control sanctions, 60 days of residential community control in the Geauga County Safety Center, and ordered to pay restitution in the amount of $2,106.20.

{¶8} Appellant filed a notice of appeal, and, as his first assignment of error states:

{¶9} "The jury lost its way when it returned a guilty verdict against Mr. Wolf against the manifest weight of the evidence when there was sufficient credible evidence proving by a preponderance of the evidence the affirmative defense of inability to pay as described in R.C. 2919.21(D)."

{¶10} Although appellant's assignment of error relates only to the manifest weight of the evidence, a reading of appellant's argument reveals that appellate counsel conflates manifest weight of the evidence with sufficiency of the evidence. Therefore, in the interest of justice, we review both the manifest weight and the sufficiency of the evidence.

{¶11} An appellate court reviewing the sufficiency of the evidence examines the evidence admitted at trial and determines whether, after viewing the evidence in a light most favorable to the state, the jury could have found all elements of the crime proven beyond a reasonable doubt. *State v. Schlee*, 11th Dist. No. 93-L-082, 1994 Ohio App. LEXIS 5862, *13 (Dec. 23, 1994); *State v. Jenks*, 61 Ohio St.3d 259, 273 (1991). "On review for sufficiency, courts are to assess not whether the state's evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction." *State v. Thompkins*, 78 Ohio St.3d 380, 390 (1997) (Cook, J., concurring). "In essence, sufficiency is a test of adequacy. Whether the evidence is legally sufficient to sustain a verdict is a question of law." *Thompkins*, *supra*.

{¶12} In contrast, to determine whether a verdict is against the manifest weight of the evidence, a reviewing court must consider the weight of the evidence, including the credibility of the witnesses and all reasonable inferences, to determine "whether the jury lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *Id.* at 387.

{¶13} Further, "[n]o conviction resulting from a trial by jury shall be reversed on the weight of the evidence except by the concurrence of all three judges hearing the

appeal." (Citations omitted.) *Webber v. Kelly*, 120 Ohio St.3d 440, 2008-Ohio-6695, ¶6.

{¶14} The charges at issue were brought pursuant to R.C. 2919.21, prohibiting a person from abandoning or failing to support the person's child. R.C. 2919.21(A) provides, in part: "No person shall abandon, or fail to provide adequate support to" that person's child under the age of 18. R.C. 2919.21(B) 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."

{¶15} Here, appellant was charged with a felony of the fifth degree, pursuant to R.C. 2919.21(G)(1) ("if the offender has failed to provide support * * * for a total accumulated period of twenty-six weeks out of one hundred four consecutive weeks, whether or not the twenty-six weeks were consecutive, then a violation of division (A)(2) or (B) of this section is a felony of the fifth degree").

{¶16} On appeal, appellant does not dispute that he failed to pay support for his child. Instead, appellant argues he provided sufficient evidence of a statutory affirmative defense to the charges under R.C. 2919.21(A) and (B)—the inability to pay the court-ordered support. R.C. 2919.21(D) states:

{¶17} It is an affirmative defense to a charge of failure to provide adequate support under division (A) of this section or a charge of failure to provide support established by a court order under division (B) 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.

{¶18} To establish this affirmative defense, appellant was required to demonstrate, by a preponderance of the evidence, that he was unable to provide adequate support "but did provide the support that was within [his] ability and means." R.C. 2919.21(D) and R.C. 2901.05(A). "[I]n proving the affirmative defense a lack of means cannot excuse a lack of effort on the part of the accused." *State v. Wheat*, 1993 Ohio App. LEXIS 4970 (6th Dist.1993), citing *State v. Brown*, 5 Ohio App.3d 220 (5th Dist.1982).

{¶19} The evidence indicates that appellant did not pay *any* support for a period of 81 weeks. Although evidence was presented that appellant suffered hardship in the Caribbean, his employer provided his family with living accommodations at a greatly reduced rate. Upon arrival at St. Kitts, appellant made five payments toward support, but then payments ceased. Appellant did not inform Ms. Istvanic that he was residing in St. Kitts nor did he inform Ms. Istvanic that while in St. Kitts he was experiencing hardship. After returning to the United States, appellant testified that he could not find employment due to his license suspension. However, appellant did not testify that he sought employment in any other field other than construction. As a result, appellant remained unemployed from April 28, 2010, until June 30, 2010. The evidence indicates that appellant paid nothing during 81 weeks of the charged period; a small monthly payment would have demonstrated that appellant was making an effort to comply with the order.

{¶20} Based on the evidence, the jury did not err in rejecting appellant's affirmative defense.

{¶21} We further find that appellant's convictions were not against the manifest weight of the evidence. The jury heard the testimony from Ms. Istvanic, Ms. Lowrie, and appellant. The jury heard testimony regarding the hardships appellant encountered with respect to his lack of employment, his travels to the Caribbean, and the difficulty in finding employment upon his return to the states. The jury also heard evidence that appellant did not provide any support to his child for a period of 81 weeks, during which time Ms. Lowrie received public health care assistance for appellant's child.

{¶22} After hearing the evidence, the jury was instructed on the affirmative defense; however, it chose to convict appellant of both counts of non-support of his dependent. We must defer to the jury's credibility determination, and based on the record before us, we cannot say the jury "clearly lost its way" in rejecting appellant's affirmative defense.

{¶23} Appellant's first assignment of error is without merit.

{¶24} Appellant's second assignment of error states:

{¶25} "Appellant Wolf was denied his right to effective assistance of counsel in violation of his Sixth and Fourteenth Amendment rights when trial counsel failed to move to strike a juror who manifested prejudice against Appellant Wolf."

{¶26} In order to prevail on an ineffective assistance of counsel claim, appellant must demonstrate that trial counsel's performance fell below an objective standard of reasonable representation, and there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *State v. Bradley*, 42 Ohio St.3d 136 (1989), paragraph two of the syllabus, adopting the test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). If a claim can be disposed of by showing a lack of

sufficient prejudice, there is no need to consider the first prong, i.e., whether trial counsel's performance was deficient. *Id.* at 142, citing *Strickland* at 695-696. There is a general presumption that trial counsel's conduct is within the broad range of acceptable professional assistance. *Id.* at 142-143.

{¶27} Appellant alleges that his trial counsel was ineffective for failing to challenge Juror 3 for cause. Appellant argues that Juror 3 exhibited animosity toward him when Juror 3 stated he would be unable to "give him a fair shake." The following exchange occurred:

{¶28} THE COURT: You're going to hear a lot of evidence about [appellant] and the claim that he did not pay support and [appellant] is going to present evidence saying he paid as much as he could. You were a person who had to pay support. Can you be fair and impartial as you listen to this case?

{¶29} PROSPECTIVE JUROR 3: Probably not.

{¶30} THE COURT: Why?

{¶31} PROSPECTIVE JUROR 3: Because I had a problem paying spousal support also and I had to do it.

{¶32} THE COURT: Okay. You're going to, as I said, hear testimony as to what was not paid or claimed not to have been paid and reasons given for not paying it. And everybody brings to a jury his or her life experiences. Can you listen to the evidence and base your verdict on what you hear in this court as opposed to what happened to you?

{¶33} PROSPECTIVE JUROR 3: I would probably always weigh my personal experience to where I probably wouldn't give him a fair shake.

{¶34} Later, after the urging of defense counsel, the trial court again asked Juror 3 whether he could be fair and impartial in considering a person who has been charged with not paying support. Juror 3 answered, "Yes." Further, upon questioning, Juror 3 indicated that his frustrations were not with the court or the entity that ordered it but, rather, with the person receiving the spousal support.

{¶35} We are mindful that "[c]ounsel's actions during *voir dire* are presumed to be matters of trial strategy." *Miller v. Francis*, 269 F.3d 609, 615 (C.A.6, 2001). Again, we note that Juror 3 indicated, after further questioning, that if selected as a juror, he would be able to be fair and impartial in this matter. Thus, we do not find appellant's counsel ineffective for failing to strike Juror 3.

{¶36} Appellant's second assignment of error is without merit.

{¶37} Based on the opinion of this court, the judgment of the Geauga County Court of Common Pleas is hereby affirmed.

CYNTHIA WESTCOTT RICE, J., concurs,

DIANE V. GRENDELL, J., concurs with a Concurring Opinion.

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{¶38} I concur in the judgment reached by the majority, affirming Wolf's conviction. I write separately to emphasize that, under the second assignment of error, Wolf has failed to demonstrate that counsel's performance fell below an objective standard of reasonable care and that he was prejudiced by counsel's decision not to remove Juror 3 for cause.

{¶39} The majority properly recognizes that there is a general presumption that a trial counsel's performance fell within the range of acceptable professional assistance. With respect to jury selection, the Ohio Supreme Court has stated that "[f]ew decisions at trial are as subjective or prone to individual attorney strategy as juror voir dire, where decisions are often made on the basis of intangible factors." (Citation omitted.) *State v. Mundt*, 115 Ohio St.3d 22, 2007-Ohio-4836, 873 N.E.2d 828, ¶ 64. The court continued: "The selection of a jury is inevitably a call upon experience and intuition. The trial lawyer must draw upon his own insights and empathetic abilities. Written records give us only shadows for measuring the quality of such efforts." (Citation omitted.) *Id.*

{¶40} In the present case, Juror 3 indicated that his difficulty in giving Wolf "a fair shake" was because he "had a problem paying spousal support also." While Juror 3's experience with spousal support could engender in him the desire to ensure that Wolf fulfill his child support obligations just as he "had to do it," this experience could also bias the juror against the recipient of support as a sort of common enemy. Such an attitude was, in fact, reflected in Juror 3's responses upon further questioning.

{¶41} Wolf has failed to demonstrate that counsel's performance was deficient.

{¶42} Wolf also fails to demonstrate prejudice. Here, the Ohio Supreme Court has stated that, "[w]hen a defendant bases an ineffective-assistance claim on an assertion that his counsel allowed the impanelment of a biased juror, the defendant '*must* show that the juror was *actually biased* against him.'" (Emphasis sic.) (Citation omitted.) *Mundt* at ¶ 67.

{¶43} In the present case, Juror 3 eventually affirmed that he could be fair and impartial toward a person charged with not paying support and indicated that his frustrations were not with the court but, rather, with the person receiving support. After the verdict was returned, the trial court asked Juror 3 directly whether he had "any problem being fair and impartial," to which he responded, "no."

{¶44} Thus, Wolf has failed to demonstrate that Juror 3 was actually biased against him. *State v. Hall*, 11th Dist. No. 2001-L-230, 2004-Ohio-3186, ¶ 41-45 (appellant failed to show prejudice despite the juror's stating "on several occasions that his beliefs would prevent him from doing his duty as a juror").

{¶45} For these reasons, I concur in the majority's decision.