

IN THE UTAH COURT OF APPEALS

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State of Utah,)	MEMORANDUM DECISION
)	(Not For Official Publication)
Plaintiff and Appellee,)	
)	Case No. 20070108-CA
v.)	
)	F I L E D
David Robert Hittle,)	(March 20, 2008)
)	
Defendant and Appellant.)	2008 UT App 100

Third District, Salt Lake Department, 051903613
The Honorable Robin W. Reese

Attorneys: Lori J. Seppi, Salt Lake City, for Appellant
Mark L. Shurtleff and Jeanne B. Inouye, Salt Lake
City, for Appellee

Before Judges Greenwood, Thorne, and Billings.

PER CURIAM:

David Robert Hittle and the State filed a stipulated motion for summary reversal of Hittle's convictions of criminal non-support. We reverse.

Hittle and the State agree that the trial court erred by failing to instruct the jury that the State was required to disprove Hittle's affirmative defense beyond a reasonable doubt. Inability to pay support is an affirmative defense to a charge of criminal non-support. See Utah Code Ann. § 76-7-201(5)(a) (Supp. 2007). The State "carries the burden of proving beyond a reasonable doubt each element of an offense, including the absence of an affirmative defense once the defense is put into issue." State v. Martinez, 2000 UT App 320, ¶ 9, 14 P.3d 114.

Hittle testified that he was unable to provide support due to his involuntary underemployment and involuntary unemployment, and by doing so raised an affirmative defense. See Utah Code Ann. § 76-7-201(5)(a). Thus, the trial court erred by failing to

instruct the jury that the State was required to disprove Hittle's affirmative defense beyond a reasonable doubt.

Accordingly, Hittle's convictions are vacated and this case is remanded to the trial court for further proceedings.

Pamela T. Greenwood,
Presiding Judge

William A. Thorne Jr.,
Associate Presiding Judge

Judith M. Billings, Judge