

IN THE COURT OF APPEALS 08/20/96

OF THE

STATE OF MISSISSIPPI

NO. 95-KA-00864 COA

CHARLES FINLEY NIX

APPELLANT

v.

STATE OF MISSISSIPPI

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND
MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. ANDREW C. BAKER

COURT FROM WHICH APPEALED: TATE COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

DAVID CLAY VANDERBURG

ATTORNEY FOR APPELLEE:

PAT FLYNN

DISTRICT ATTORNEY: ROBERT J. KELLY

NATURE OF THE CASE: CRIMINAL: FAILURE TO PAY CHILD SUPPORT AND
NONSUPPORT

TRIAL COURT DISPOSITION: GUILTY VERDICT ON FAILURE TO PAY COUNT; NOT
GUILTY VERDICT ON NONSUPPORT; SENTENCED TO 2 YRS IN PRISON

BEFORE FRAISER, C.J., BARBER, AND SOUTHWICK, JJ.

SOUTHWICK, J., FOR THE COURT:

Charles Nix was convicted of failing to pay child support, although found not guilty on a charge of nonsupport. He was sentenced to two years in prison. On appeal, Nix challenges the weight and sufficiency of the evidence. We affirm.

FACTS

Because of his failure to meet support obligations imposed upon him under the terms of his divorce, Nix was found in contempt of court in February 1992. The Tate County Chancery Court issued an order submitted by Nix and his former wife, providing for support of the couple's three daughters in the amount of \$300.00 per month. Despite the obligation imposed in the original divorce and the reinforcement of that obligation in the contempt order, Nix continued to fail in meeting his obligations and was indicted for failure to pay child support and nonsupport. In the four years at issue in the indictment, Nix paid only \$2,300.00 to support his children. In the interim, he remarried and had two more children with his new wife.

At the close of the trial, the jury rendered a verdict in favor of Nix on the charge of nonsupport but found him guilty of failure to pay child support. The trial court sentenced him to two years in prison.

DISCUSSION

Nix challenges the weight and sufficiency of the evidence. Our standard for reviewing challenges to convictions based on sufficiency of the evidence is well established. As to each element of the offense, we consider all of the evidence in the light most favorable to the verdict. We reverse when, with respect to an element of the offense charged, the evidence is such that reasonable and fair-minded jurors could only find the accused not guilty. *McClain v. State*, 625 So. 2d 774, 778 (Miss. 1993). As to whether the verdict is contrary to the overwhelming weight of the evidence, a similar standard is employed. We view the evidence in the light most favorable to the verdict. The trial court is given discretion to order a new trial in the face of overwhelming evidence contrary to the jury's verdict to prevent an unconscionable injustice. *McClain*, 625 So. 2d at 781 (citation omitted).

As to the charge of failure to pay child support in this case, one of Mississippi's criminal provisions dealing with offenses affecting children states:

Any parent who shall . . . wilfully . . . refuse to provide for the support and maintenance of his . . . child . . . while said child . . . [is] under the age of eighteen . . . years[,] shall be guilty of a felony and, on conviction thereof, shall be punished

Miss. Code Ann. § 97-5-3 (1972). This statute places on the prosecution the burden of proving five elements: (1) venue; (2) paternity; (3) the minority of the child; (4) failure of support and maintenance; and (5) willfulness. The prosecution proved each element at trial in this case.

The heart of Nix's appeal concerns whether inability precluded him from satisfying his child support obligations. While the supreme court has not yet specifically addressed the issue of whether inability is an excuse sufficient to avoid conviction under the child support statute, we conclude that the defense must be available. From the plain language of the statute, it is evident that it criminalizes an intentional, contumacious refusal to pay support. Absent such a refusal, no conviction will lie. In contempt cases, "an honest inability to perform according to the dictates of the order" excuses

compliance as the behavior is not "willful or deliberate." *See Banks v. Banks*, 648 So. 2d 1116, 1123 (Miss. 1994) (citations omitted) (civil contempt case). We assume that, aside from the plain language that requires proof of willfulness, the Legislature understood and was aware of the preexisting contempt scheme when it enacted the criminal provision. *See Quick Shops, Inc. v. Bruce*, 232 So. 2d 351, 353 (Miss. 1970). Accordingly, the defense of inability to provide support is available to defendants confronted with a failure to provide financial support. A different conclusion leads to little more than imprisonment for debt.

Despite the availability of the defense, there was ample evidence in this case that Nix's refusal to pay support was willful. Nix claimed that his work as a heavy equipment operator was seasonal and that he could work only six months out of the year. As a consequence, Nix argued that he was unable to meet the financial obligations imposed on him following his divorce. However, the prosecution offered proof that Nix was capable of making very good money in an area experiencing a building boom. The evidence showed that Nix had paid only \$2,300.00 in four years for the support of his children, despite making \$21,000.00 in nine months during one period of time. In addition, there was testimony that Nix ignored the needs of his children after their house was lost to a fire in December 1993. In light of this evidence, the jury could legitimately conclude that Nix had the capacity to obtain work to meet his support obligations, but that he refused to make an effort to do so. Aside from the ordered support, the jury could also have concluded that Nix made no efforts to provide support to his children in any way—even if not at the level ordered in his divorce.

Accordingly, we affirm.

THE JUDGMENT OF CONVICTION OF THE TATE COUNTY CIRCUIT COURT OF FAILURE TO PAY CHILD SUPPORT AND SENTENCE OF TWO YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO TATE COUNTY.

FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., BARBER, COLEMAN, DIAZ, KING, McMILLIN, AND PAYNE, JJ., CONCUR.