MEMORANDUM DECISION

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IN THE
COURT OF APPEALS OF INDIANA

Kyle B. Conn,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

April 5, 2022

Court of Appeals Case No. 21A-CR-2129

Appeal from the Noble Superior Court

The Honorable Robert E. Kirsch, Judge

Trial Court Cause No. 57D01-1810-F6-355

Altice, Judge.

Case Summary

[1] Kyle Conn appeals his conviction for non-support of a dependent, a Level 6 felony, challenging the sufficiency of the evidence. Conn claims that he adequately proved that he "was unable to provide support" for his child. *Appellant's Brief* at 4.

[2] We affirm.

Facts and Procedural History

[3] In 2001, seventeen-year-old Conn was in an automobile accident and suffered injuries to his spine, brain, hips, and bladder. At some point thereafter, Conn began a romantic relationship with Heather Riecke. B.R. was born to Riecke and Conn on April 10, 2004. Riecke and Conn never married and always lived apart. Riecke was awarded custody of B.R.

[4] When paternity was established on April 29, 2005, Conn was initially ordered to pay $73 per week in child support commencing April 10, 2004. On April 26, 2007, it was determined that Conn had not made any support payments, and the parties agreed to reduce Conn's child support obligation to $57 per week because Conn was unemployed. Conn also agreed to pay $50 per week toward the accumulated arrearage, and he signed a child support obligation worksheet stating that he was able to work at minimum wage. The trial court agreed to the modification and ordered Conn to apply for ten new jobs per week until he secured employment.

[5] Although Conn worked "off and on" at "so many different places," he made no child support payments. *Transcript Vol. II* at 148. On December 12, 2016, Conn acknowledged that he was in contempt of court for failing to pay support and admitted that the arrearage exceeded $33,000. As a result, the trial court sentenced Conn to 120 days in jail but agreed to withhold imposition of the sentence if Conn made his weekly child support and arrearage payments and submitted proof that he applied to ten prospective employers per week. Because Conn maintained that he was not able to work because of the injuries he sustained in the 2001 automobile accident, the trial court also ordered him to obtain a note from a physician and/or other medical providers stating as much.

[6] Between December 1, 2016, and September 19, 2018, Conn made no child support payments or payments toward a $5300 arrearage that had accumulated during that period. Conn also had not submitted any proof that he had applied for employment, nor did he submit a note from any medical professional substantiating his disability claim.

[7] While Conn exercised visitation with B.R. during that period, he failed to provide food, medical care, or support of any kind to B.R.[1] Although Conn had been employed in the past, he repeatedly told Riecke that he could not work. Conn lived with his mother and grandfather and claimed that his only

[1] Pursuant to the child support agreement, Conn was required to pay forty-nine percent of B.R.'s medical expenses and six percent of her uninsured expenses. Riecke took B.R. to the doctor during this period, but Conn failed to pay his share of B.R.'s medical expenses.

source of income was money that he occasionally received from his grandfather.

[8] On October 10, 2018, the State charged Conn with nonsupport of a dependent, a Level 6 felony, alleging that he had failed to pay child support for B.R. from December 1, 2016, through September 19, 2018. Following a jury trial on May 5, 2021, Conn was found guilty as charged. The trial court sentenced Conn to a suspended term of two-and-one-half years of incarceration, except for ninety days, to probation.

[9] Conn now appeals.

Discussion and Decision

[10] When reviewing a challenge to the sufficiency of the evidence, we consider only the evidence most favorable to the verdict and any reasonable inferences that may be drawn from that evidence. *Baker v. State,* 968 N.E.2d 227, 229 (Ind. 2012). We will not reweigh the evidence or judge the credibility of witnesses. *McCallister v. State,* 91 N.E.3d 554, 558 (Ind. 2018). The conviction will be affirmed unless no reasonable factfinder could find the elements of the crime proven beyond a reasonable doubt. *Reust v. State,* 139 N.E.3d 1056, 1063 (Ind. Ct. App. 2019). Further, when we are confronted with conflicting evidence, we consider the evidence most favorable to the trial court's ruling. *Lundquist v. State,* 179 N.E.3d 1051, 1054 (Ind. Ct. App. 2021). We will find sufficient evidence to support a conviction "if an inference may reasonably be drawn from it to support the verdict." *Drane v. State,* 867 N.E.2d 144, 147 (Ind. 2007).

[11] To convict Conn of non-support of a dependent as a Level 6 felony, the State was required to prove that Conn knowingly or intentionally failed to provide support to his dependent child, B.R. Ind. Code § 35-46-1-5(a). A person's inability to provide support, however, is an affirmative defense to the crime of nonsupport of a child. I.C. § 35-46-1-5(d). The burden is on the defendant to prove the defense of the inability to pay. *Stephens v. State*, 874 N.E.2d 1027, 1034 (Ind. Ct. App. 2007), *trans. denied.*

[12] We also note that because the defendant has the burden to prove an affirmative defense, the defendant's appeal is "from a negative judgment." *Mominee v. King,* 629 N.E.2d 1280, 1282 (Ind. Ct. App. 1994). Thus, the defendant must demonstrate that the evidence "points unerringly to a conclusion different from that reached by the [fact finder]." *Cooper v. State*, 760 N.E.2d 660, 665 (Ind. Ct. App. 2001), *trans. denied.* A negative judgment will only be reversed if the judgment is contrary to the law. *Id.* When deciding whether the fact finder has reached a judgment that is contrary to law, we must determine if "the undisputed evidence and all reasonable inferences lead to one conclusion and the [fact finder] reached another conclusion." *Stephens*, 874 N.E.2d at 1034.

[13] In this case, Conn does not dispute that he failed to make any payments toward his weekly child support obligations or arrearages for nearly ninety-four weeks. Rather, Conn maintains that he was unable to pay child support because he is disabled and cannot work. Thus, the burden was on Conn to prove that he was unable to pay his child support because of that alleged disability. *Id.*

[14] Conn has failed to meet this burden inasmuch as he acknowledged that he could work a minimum wage job in order to pay child support when the payment amount was reduced to $57.00 on April 26, 2007. And contrary to the trial court's directive, Conn failed to produce a note from any medical professional stating that he was unable to work because of a disability. Conn's caseworker testified at trial that the support obligation would have been reduced to zero had Conn provided such a note.

[15] We also note that after the initial reduction of Conn's support obligation, he did not seek any further modification. Conn admitted at trial that he had previously been denied social security disability benefits. Additionally, Conn's mother testified at trial that her son was able to drive a car, and she agreed that Conn could probably obtain employment with either Uber or Lyft with flexible hours.

[16] Notwithstanding Conn's testimony at trial that he was unable to work, the jury was not required to find those self-serving allegations credible. *See Stephenson v. State*, 742 N.E.2d 463, 499 (Ind. 2001) (recognizing that it is well within the jury's ability and province to assess witness credibility and to believe the State's evidence over that of the defendant). The evidence presented by the State did not unerringly lead to a different conclusion than the conclusion that was reached by the fact finder, i.e., that Conn failed to demonstrate that he was too disabled to obtain employment and make his child support payments. In short, Conn did not satisfy his burden of establishing the affirmative defense of his

inability to pay. Thus, we conclude that the evidence was sufficient to support Conn's conviction.

[17] Judgment affirmed.

Bailey, J. and Mathias, J., concur.