UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1544

September Term, 2014

JASON CLARIT

v.

STATE OF MARYLAND

Meredith,
Berger,
Kenney, James A., III
(Retired, Specially Assigned),

JJ.

Opinion by Berger, J.

Filed: July 29, 2015

The appellant, Jason Clarit, was convicted on June 18, 2014, by a jury sitting in the Circuit Court for Frederick County of two counts of criminal non-support of a minor child and two counts of constructive criminal contempt. Sentencing was postponed twice in order to allow the appellant to pay $10,000 of accumulated child support arrearage. After he failed to do so, the appellant was sentenced to five years of incarceration for one of the contempt convictions, with all but one year suspended, and three years of supervised probation. No sentence was imposed on the remaining convictions.[1]

Clarit appealed, and presents one question for our review: "Did the court err in allowing the State to elicit irrelevant and overly prejudicial testimony at two separate points in the trial?" For the following reasons, we shall affirm the judgments of the circuit court.

BACKGROUND

The appellant and Stacy Briggs are the parents of two children: Briggs Daughter 1 and Briggs Daughter 2, who were 7 and 14 years old, respectively, at the time of trial. The couple divorced in 2004. The separation agreement, which was incorporated into the judgment of divorce, provided for the appellant to make child support payments of $600 a month. Thereafter, the order for child support underwent several modifications which altered the amount of the support payments. At issue in this case were two of the modified

[1] At sentencing, defense counsel argued that the convictions for criminal non-support merged into the convictions for contempt, and that the two contempt convictions merged into each other. After imposing the sentence on one of the criminal contempt convictions, and without ruling on the merits of the argument, the court stated "I am not imposing sentences [on the remaining counts]. I'm simply entering them as guilty findings and that'll get us around . . . any merger issue.

orders: one that was in effect from October 2009 through December 2011, and a second order that was effective December 2011 up to and including the date of the trial (referred to jointly as "the child support orders").

Between January 2011 and December 2013, the appellant failed to pay 21 of the 36 monthly payments that were due pursuant to the child support orders. Of the 15 payments that were received, over half represented only partial payments.

The appellant's defense was that, for reasons beyond his control, he did not have sufficient income to be able to comply fully with the child support orders. He testified that after sustaining an injury to his leg in the course of his employment as an ironworker in 2009, he was physically unable to return to his regular job duties. He started a security company in 2011, but the business failed to be profitable and it folded in early 2012. Thereafter, while he continued looking for full-time employment, he worked three nights a week providing security at a bar, and had "side jobs" doing yard work and power washing.[2] Nonetheless, the appellant claimed that he was unable to earn enough money to meet all his financial obligations, which included two other child support orders; one for a son in New Jersey, and one for another child in Prince George's County.[3] He also owed over $8,000 in delinquent state and federal taxes. The appellant was able, however, to earn

[2] The appellant also worked as a dog trainer at a "dog club," but, according to Gerlach, the appellant was not paid for most of the work he did there, but was compensated with a waiver of his dog club dues.

[3] The New Jersey child support case was closed in October 2011.

enough money from side work to make full child support payments for Briggs Daughter 1 and Briggs Daughter 2 for six consecutive months between September 2012 and February 2013, a period of time during which the court had threatened jail time if he missed a payment. His ability to find work was hampered by the intermittent suspension of his driver's license as a consequence of his failure to pay child support.

The appellant testified that he had continued to look for full-time work. Nevertheless, the evidence presented at trial included the fact that, in April 2011, the appellant fathered a fifth child, Gerlach Daughter, with Karen Gerlach, with whom he had been living since 2010. In September 2011, when Gerlach's maternity leave expired, the appellant became a stay-at-home father and cared for Gerlach Daughter during the day, while Gerlach worked, saving them $275 a week in daycare expenses. Gerlach who was called as a witness for the State, testified, over objection, that she earned $100,000 a year. She also testified that she owned the townhome where they lived, and paid the mortgage and all the bills.

Later in the trial, when the appellant took the stand in his own defense, he claimed that they had no other option but for him to stay home with Gerlach Daughter, as they could not afford daycare. At the time of trial, Gerlach Daughter was three years old and attending pre-school two days a week. Gerlach dropped Gerlach Daughter off at school at 7:00 a.m., on her way to work and the appellant would usually pick her up in the evening if Gerlach could not be there by 6:00 p.m. The appellant testified that he continued to look for full-time work and work at side jobs when he was able to get a babysitter for Gerlach Daughter.

Additional facts may be introduced in the discussion as they become relevant.

DISCUSSION

The appellant argues that the court erred in admitting two pieces of evidence: 1) that Briggs Daughter 1 and Briggs Daughter 2's mother, Briggs, paid for their non-covered medical expenses, summer camp and after-school programs; and 2) that Gerlach had an annual salary of $100,000. This evidence, according to the appellant, was irrelevant to the charged offenses, and unfairly prejudicial because the evidence "urged the jury's disdain for [him] without proving his guilt."

The State responds that the testimony regarding the children's after-school activities and other expenses informed the jury about Briggs Daughter 1 and Briggs Daughter 2's need for child support and was relevant to show the appellant's ability to pay, because while he did not pay for the after-school activities for Briggs Daughter 1 and Briggs Daughter 2, he was able to send his three-year-old daughter, Gerlach Daughter, to school two days a week. The State further responds that Gerlach's salary was relevant to his ability to pay child support because "he did not have to provide for himself."

While the trial court may have erred in admitting the amount of Gerlach's salary into evidence, we conclude that admitting this evidence was harmless. We further conclude that the evidence regarding appellant's lack of contribution to the children's expenses, to the extent it was preserved, was relevant.

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Maryland Rule 5-401. Maryland Rule 5-402 provides that "[e]xcept as otherwise provided by constitutions, statutes, or these rules, or by decisional law not inconsistent with these rules, all relevant evidence is admissible. Evidence that is not relevant is not admissible."

"[T]he issue of whether a particular item of evidence should be admitted or excluded 'is committed to the considerable and sound discretion of the trial court[.]'" *Donati v. State*, 215 Md. App. 686, 736, *cert. denied*, 438 Md. 143 (2014) (quoting *Simms v. State*, 420 Md. 705, 724-25 (2011)). We review a trial court's determination of relevancy under an abuse of discretion standard. *Id*. "Maryland Rule 5-402, however, makes it clear that the trial court does not have discretion to admit irrelevant evidence. . . . [T]he 'de novo' standard of review is applicable to the trial judge's conclusion of law that the evidence at issue is or is not 'of consequence to the determination of the action.'" *Id.*

In reviewing whether the objected to evidence was "of consequence to the determination," we consider what the State was required to prove. The elements of the offense of criminal non-support of a minor are: 1) that the appellant was a parent; 2) that the appellant failed to provide monetary support to his children; 3) that at the time of the failure, the children were under the age of 18 years of age; and 4) that the failure was willful. Maryland Code (2012 Repl. Vol.) Family Law Article (FL), § 10-203(a).

The second charge of constructive criminal contempt required the State to prove, beyond a reasonable doubt, "'a deliberate effort or a wilful act of commission or omission by the alleged contemnor committed with the knowledge that it would frustrate the order of the court.'" *Bryant v. Social Services*, 387 Md. 30, 47 (2005) (citation omitted).

The entire case turned on whether or not the appellant's failure to pay child support was willful. The appellant did not dispute paternity of Briggs Daughter 1 and Briggs Daughter 2, or the fact that he had not made payments as required by the child support orders. The sole defense to the charges was that the appellant honestly struggled to maintain a steady and sufficient source of income with which to pay child support, and, therefore, his failure to pay was not willful.

The court instructed the jury on the element of willfulness as follows:

> In order for the [appellant] to be found guilty of [non-support of his minor child] you must find that there has been a willful failure by the [appellant] to provide monetary support for his minor child. . . . Willful means an act which was done with deliberate intention for which there is no reasonable excuse. The [appellant] must have had the means of support or the ability to obtain the means of support and his failure to [ ] provide support must have been done with the deliberate intention for which there was no reasonable excuse.

a. Gerlach's salary

At the time it was introduced, Gerlach's salary was not relevant to any of the issues before the jury, including whether the appellant's failure to pay was willful, because Gerlach was not legally obligated to pay child support for Briggs Daughter 1 and Briggs Daughter

2. The State maintains that the amount of Gerlach's salary was relevant to show that the appellant had the ability to pay because he had no living expenses of his own. While it was relevant that the appellant was being financially supported by Gerlach, that fact was established by a line of questions that came after the query about her annual salary that established that she owned their home and paid the mortgage and all their living expenses. The exact dollar figure of her salary was, at that point in the trial, irrelevant to the issues before the jury.

Nevertheless, any error in admitting the evidence of Gerlach's salary at that point was harmless it because the appellant opened the door to its admission when he testified that he and Gerlach had no choice but for him to become the primary caregiver for Gerlach Daughter because they could not afford childcare.[4] At that point, it was entirely proper to allow the jury to consider the household income, and the State would have been allowed to elicit this information during the appellant's cross-examination or by calling Gerlach as a rebuttal witness. Further, whether or not $275 a week in daycare was affordable for a household with an income of $100,000 was of consequence to the jury's determination of whether the appellant "deliberately and without reasonable excuse" had limited his income.

[4] "Under the 'opening the door' doctrine, initially irrelevant evidence may be admitted when the opposing party has 'opened the door' to such evidence." *Daniel v. State*, 132 Md. App. 576, 591, *cert. denied,* 361 Md. 232 (2000) (citations omitted, internal quotation marks altered).

Moreover, the evidence was relevant for the jury to assess the appellant's "ability to obtain the means of support" by becoming the primary caretaker for Gerlach Daughter.

b. Appellant's financial contributions to child-related expenses

The appellant argues that the court erred in admitting evidence that Briggs paid for the children's medical expenses, sports programs and summer camp. Our review of the record, however, raises questions about whether this issue was properly preserved. The record demonstrates that, at trial, there was no objection to Briggs' testimony that she paid any of these costs. In addition, although defense counsel objected to the question of whether the appellant offered to pay for Briggs Daughter 1's gymnastics class, there was no objection to the analogous question of whether he contributed to Briggs Daughter 2's cheerleading program:

> [PROSECUTOR]: Who's involved in gymnastics?
>
> [BRIGGS]: [Briggs Daughter 1] does gymnastics.
>
> [PROSECUTOR]: Is that a free program or is that . . .
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Overruled.
>
> [BRIGGS]: It's a paid program.
>
> [PROSECUTOR]: Okay. And who pays for that program?
>
> [BRIGGS]: I do.
>
> [PROSECUTOR]: Has the [appellant] offered to pay for that program?

[DEFENSE COUNSEL]: Objection.

THE COURT: Overruled.

[BRIGGS]: No.

* * *

[PROSECUTOR]: And one of the children is involved in cheerleading, you said?

[BRIGGS]: Yes.

[PROSECUTOR]: Who is that?

[BRIGGS]: [Briggs Daughter 2].

[PROSECUTOR]: Is that a free program or is that a, do you pay for that as well?

[BRIGGS]: Yes, I do. That's a paid program.

[PROSECUTOR]: Okay. And who pays for that?

[BRIGGS]: I do.

[PROSECUTOR]: Have you received any contributions from the [appellant] toward that?

[BRIGGS]: No.

We note that "it is not reversible error when evidence, claimed to be inadmissible, is later admitted without objection." *Tichnell v. State*, 287 Md. 695, 716 (1980). *See also Robeson v. State*, 285 Md. 498, 507 (1979), *cert. denied*, 444 U.S. 1021 (1980) ("The law in this state is settled that where a witness later gives testimony, *without objection*, which is to the same

effect as earlier testimony to which an objection was overruled, any error in the earlier ruling is harmless." (emphasis in original)).

Assuming the issue regarding who paid and who did not pay for each particular expense was fully preserved, evidence that the appellant did not contribute to the cost of items such as physical education, summer camp and non-covered medical expenses for his children was relevant to prove an essential element of a crime with which he was charged, specifically, his failure to provide monetary support. F.L. § 10-203(a).

JUDGMENTS OF THE CIRCUIT COURT FOR FREDERICK COUNTY AFFIRMED. COSTS TO BE PAID BY THE APPELLANT.