

**IN THE  
MISSOURI SUPREME COURT**

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**No. SC 89322**

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**ROBERT LATALL JR.,**

**Appellant,**

**v.**

**STATE OF MISSOURI,**

**Respondent.**

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**RESPONDENT'S SUBSTITUTE BRIEF**

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## **JURISDICTIONAL STATEMENT**

This case comes to the Court from a bench trial in the Circuit Court of Cole County in which the circuit court found Robert Latall guilty of the class A misdemeanor of criminal nonsupport as defined in § 568.040, RSMo. Appellant appealed the judgment and sentence of the Circuit Court to the Missouri Court of Appeals, Western District. The Western District affirmed the judgment. *State v. Latall*, \_\_ S.W.3d \_\_, 2008 WL 564619 (Mo. App. W.D., March 4, 2008). This Court sustained Appellant's Application for Transfer and has jurisdiction over the matter under Article V, Section 10, of the Missouri Constitution.

## **STATEMENT OF FACTS**

Appellant, Robert Latall Jr., fathered a child, Landon Blake Latall (DOB May 14, 1999) with Danette Lindsey. (LF 1, TR 3). On February 1, 2000, the Cole County Circuit Court entered a paternity judgment finding a parent-child relationship between Appellant and Landon and ordered Appellant to pay child support in the amount of \$948 per month. (State's trial exhibit 3).

The State charged Appellant with criminal nonsupport, and in the Information accused him of failing to provide adequate support for his son from November 1, 2004 to May 1, 2005 ("the charge period"). (LF 1). Appellant initially pled guilty to the charge, but on his motion, the circuit court set aside the plea and the case proceeded to bench trial on December 8, 2005. (LF 5).

The State called Danette Lindsey as a witness. (TR 3). She testified that Landon lived with her, that Appellant was Landon's father (TR 3), and that she received only one payment of \$245 from Appellant during the charge period. (TR 7). Appellant confirmed that amount. (TR 27). Lindsey also testified that Appellant did not provide his son with any food, clothing, or shelter during this time. (TR 9).

Appellant had worked at Natsch & Company (TR 13) where he made a "hundred-some-thousand a year." (TR 34). Natsch is a sheet metal business where Appellant held a management position. (TR 6). Through Natsch, he had a 401K

account that at one point was worth around \$180,000. (TR 17). When he left Natsch, he took a job at Hankins Roofing, but lost that job in March 2004. (TR 14-15). He then performed carpentry work for \$10 per hour. (TR 15).

Then in September 2004, he purchased a bar and restaurant that he knew “wasn’t making any money.” (TR 17). Even so, he used \$72,000 of his 401K money to purchase it. (TR 25). After purchasing the bar, Appellant experienced financial problems: delinquent utilities (TR 17); home foreclosure (TR 20); and, competition from another bar (TR 17). At the time of trial, he testified that he was still not making any money at the bar. (TR 17).

Between October 2004 and the time of trial (December 2005), Appellant did not look for any employment other than running the bar. (TR 27). On cross examination he admitted that he was literate, did not suffer from a disability, and could perform other jobs besides running the bar. (TR 26).

Rejecting Appellant’s argument that his lack of income and financial problems constituted good cause for failure to pay child support, the circuit court found Appellant guilty, suspended imposition of sentence, and placed him on probation. (LF 9). The court later revoked his probation and entered a suspended execution of sentence on November 7, 2006. (LF 10). Appellant filed his notice of appeal on November 17, 2006. (LF 11).

## ARGUMENT

### I.

**The Court did not shift the burden of persuasion on the issue of good cause to Appellant and the evidence was sufficient to support his conviction.**

Appellant's sole point on appeal is that the circuit court erred by shifting to him the burden of persuasion on the issue of good cause. This is not the point he raised below where he argued the State did not adduce sufficient evidence on the issue of good cause. His point relied on has evolved, somewhat, from his point relied on in his brief filed in the Western District in that he now includes an allegation that the circuit court shifted the burden. Parties may not add new claims of error on transfer to this Court. *Dupree v. Zenith Goldline Pharmaceuticals, Inc.*, 63 S.W.3d 220, 222 (Mo. banc 2002).

In any event, Appellant cites to nothing in the record that supports his argument. There is no indication in the record that the circuit court did anything other than hold appellant to the burden of injecting the issue of good cause, as required by § 568.040.3, RSMo.

Although appellant's alleged error is that the trial court misallocated the burden of proof, substantively his brief is devoted to argument concerning the sufficiency of the evidence on the issue of good cause. Thus, in addition to

addressing Appellant’s claim about the burden of injecting the issue of good cause, Respondent will address the sufficiency of the evidence.

**A. Appellant failed to offer sufficient evidence to inject the issue of good cause.**

A “parent commits the crime of nonsupport if such parent knowingly fails to provide, without good cause, adequate support which such parent is legally obligated to provide for his child or stepchild who is not otherwise emancipated by operation of law.” Section 568.040.1, RSMo. While “without good cause” may become an element the State must prove in a given case, it is only such if a defendant injects it. Section 568.040.3, RSMo; *State v. Coe*, 233 S.W.3d 241, 250 (Mo.App. S.D. 2007). When a defendant has the burden of injecting the issue under the criminal code, the issue “is not submitted to the trier of fact unless supported by evidence.” Section 556.051(1), RSMo. This point is underscored by the verdict director for criminal nonsupport. In Note 4 of the Notes on Use for MAI-CR3d 322.08, “The statute uses the phrase ‘without good cause’ in defining the offense of nonsupport. The statute defines ‘good cause’ and casts the burden of injecting this issue upon the defendant. Section 568.040.3. When there is evidence of good cause, the issue must be submitted to the jury by including optional paragraphs . . . .” See Appendix, pp. 5-6.

Thus, the absence of good cause is something the State must prove only after the defendant has injected the issue, Section 568.040.3, RSMo; and to determine if the defendant has met the burden of injecting an issue, the reviewing court views the evidence in the light most favorable to the defendant. *State v. Avery*, 120 S.W.3d 196, 200 (Mo. banc 2003) (discussing self-defense). Here, Appellant's evidence, viewed most favorably to him, was insufficient to inject the issue of good cause.

Simply presenting evidence of unemployment is insufficient to inject the good cause issue into the case. *State v. Degraffenreid*, 877 S.W.2d 210, 213-14 (Mo.App. S.D. 1994). Like Appellant, the defendant in *Degraffenreid* testified that he lost a job. *Id.* at 212. The court stated, "The absence of earnings from employment alone does not absolve a nonsupporting parent of his or her obligation to support if that parent has other assets that are readily available but which he or she willfully withholds. The ability to provide support is not based solely on one's current earnings." *Id.* at 214. The court found that Degraffenreid failed to inject good cause because he provided no evidence about the nature and extent of his assets. *Id.*

Appellant testified that his bar was not "making any money" (TR 17), but he provided little specific information and offered no financial records to show the revenues or expenses of the business over the course of the charge period. Unlike

Degraffenreid, Appellant testified about his assets, but did not testify that he had insufficient assets from which to pay child support. Although not specific about the time period, he testified that he had “about 180–some–thousand dollars” in a 401K plan and that the value of the plan decreased – to an unspecified amount – so he decided before he “lost all that money, to invest it in the bar . . . .” (TR 17). He paid \$100,000 for the bar (TR 26). This money came, at least in part, from two large draws against his 401K – “I took two draws off of it. One was 34,000 and one was 38, I think.” (TR 25). He did not testify that these draws depleted the account. Nor did he testify specifically concerning the value of the assets of the bar during the charge period or if he made any effort to borrow against the assets to help provide for his son. But the Court could infer that since he purchased the assets of the bar for \$100,000 in September of 2004 (TR 17), the assets retained some value during the charge period – November of 2004 to May of 2005. So like *Degraffenreid* where the court found that defendant failed to inject good cause because he did not demonstrate that he could not pay support from his assets, Appellant testified that he had assets worth presumably several thousand dollars from which he presumably could pay child support. And he certainly did not establish that he did not have assets in the amount of \$6,636.00, the amount of support owed for the charge period.

Most crucial, perhaps, Appellant offered no explanation why he was no longer working at the job doing carpentry work for \$10 hour, or some other work, – at least on a part time basis – to provide support for his son. In essence, he withheld an available asset in the form of his human capital or labor from his son by making the decision to work all day every day in an unprofitable enterprise.

Because Appellant did not explain why his assets were unavailable to support his son, and because he did not establish good cause as to why he could not be gainfully employed, the evidence was too scant to inject the issue of good cause into the case.

**B. Alternatively, even if Appellant offered sufficient evidence to inject good cause, the State presented sufficient evidence for the circuit court to find beyond a reasonable doubt that Appellant failed to provide child support without good cause.**

A finding of guilt in a bench-tried case has the force and effect of a jury verdict. Rule 27.01(b). “[A]ppellate review is as though a jury has returned a verdict of guilty. If there is substantial evidence to support the findings of the trial court, its judgment is to be affirmed.” *State v. Carroll*, 41 S.W.3d 878, 880 (Mo. banc 2001). The reviewing court must determine whether sufficient evidence existed such that the circuit court could have concluded beyond a reasonable doubt that the defendant was guilty. *State v. Pettry*, 179 S.W.3d 295, 297 (Mo.App. S.D.

2005). When determining whether sufficient evidence existed, “the Court accepts as true all evidence in the record tending to prove the defendant’s guilt together with inferences favorable to the state that can be reasonably drawn therefrom. The Court disregards all contrary evidence and inferences.” *State v. Lewis*, 188 S.W.3d 483, 487 (Mo. App. W.D. 2006) (quoting *State v. Carroll*, 41 S.W.3d 878, 880 (Mo. banc 2001)). “Great deference is given to the trier of fact.” *State v. Sellers*, 77 S.W.3d 2, 4 (Mo.App. W.D. 2002). “A reviewing court does not undertake to determine the credibility of witnesses or weigh the evidence; rather a reviewing court will defer to the trial court’s superior position from which to determine the credibility of the witnesses.” *State v. Carroll*, 41 S.W.3d at 882.

Missouri’s criminal nonsupport statute, § 568.040, RSMo, is designed “to compel recalcitrant parents to fulfill their obligations of care and support.” *State v. Reed*, 181 S.W.3d 567, 570 (Mo. banc 2006). It criminalizes a parent’s knowing failure to provide adequate support for his child. It is intended to punish parents who *won’t pay* support for their children. By contrast, there are some parents who fail to provide support because they can’t. Parents who can’t pay may inject “good cause” as an exculpatory factor to the charge. Section 568.040.2(2), RSMo. Good cause is “any substantial reason why the defendant is unable to provide adequate support.” *Id.* It “refers to a parent’s inability to provide support.” *State v. Reed*, 181 S.W.3d at 571. But “good cause does not exist if the defendant purposely

maintains his inability to support.” Section 568.040.2(2), RSMo. “That a parent cannot escape his child support responsibilities by deliberately reducing his income is well-established law.” *Sieg v. Sieg*, 255 S.W.3d 20, 23 (Mo.App. W.D. 2008). To rise to the level of good cause, the substantial reason why defendant is unable to provide support cannot be self imposed. Section 568.040.2(2) RSMo.

Viewed in the light most favorable to the verdict, there was sufficient evidence to show that appellant had failed to pay child support without good cause. It is undisputed that he did not pay child support during the charge period. And while appellant asserts he had good cause not to pay, there was evidence he had sufficient assets from which he could pay support. For example, he owned a bar and he had a 401K account. Moreover, while Appellant claims he could not pay because of his job situation, this circumstance was self-imposed. Appellant did not offer evidence that he could not work to earn a livelihood; in fact, he testified that he worked seventeen hours per day. (TR 21). Appellant is literate and does not suffer from a disability. (TR 27). He testified that after he lost his job with the sheet metal company in March 2004, he found work as a carpenter and earned \$10 an hour. (TR 15-16). But he left this work to purchase a bar in September of 2004 – a business he knew was not profitable. (TR 16). As of the trial date, he had operated it for 15 months and it was still not a profitable venture. (TR. 17).

Good cause does not exist if a defendant purposely maintains an inability to pay. Section 568.040.2(2), RSMo. “A person ‘acts purposely’, or with purpose with respect to his conduct or to a result thereof when it is his conscious object to engage in that conduct or to cause that result.” Section 562.016.2, RSMo. The State presented sufficient evidence from which the circuit court could have concluded that Appellant purposely maintained his inability to provide support because he made the conscious choice to work solely in a position where he earned no money. From the evidence that Appellant worked long hours and was not disabled, the circuit court could rightly conclude that he had options to earn money that could be used to support his son. For example, he could have limited the hours his bar was open, or hired a manager to mind the store for a period of time each day, or sold the bar. Any of these options would have allowed him to obtain a job where he earned income and thereby provide support for his child. Instead, if his testimony is believed, he made a deliberate choice to work all day, every day, at a job where he earned no net income. The only logical inference from the evidence was that he purposely maintained his inability to support his son.

Furthermore, Appellant’s argument ignores the standard of review and the Court is not required to believe him. While it was not Appellant’s burden to prove that beyond a reasonable doubt that he could not pay child support, there was no compelling evidence to prove that he had good cause not to pay. The trial court

simply could have disbelieved Appellant's testimony that his bar was "not making any money." (TR 17). Appellant testified that his bar "is a cash business" (TR 24), but he offered no specifics about the net profit or loss of the business was during the charge period. Nor did he present evidence of the reasonable and necessary expenses of the business, including whether or not it paid him any salary. He said he forgot to bring his tax returns to trial. (TR 27). The trial court was in superior position to judge Appellant's credibility and could easily have disbelieved his testimony that he had no net income.

Appellant's contention that the circuit court's ruling interprets good cause "so narrowly as to strip it of any meaning" is inaccurate. There are a number of scenarios that would establish good cause. For example, a defendant who has no assets may have an inability to pay based on a physical or mental impairment. Or a defendant may have been incarcerated or in substance abuse treatment during the charge period as was the defendant in *State v. Calvin*, 204 S.W.3d 220 (Mo. App. W.D. 2002). Likewise a defendant could show he lost a job, then made diligent, but unsuccessful, efforts to find another job; nevertheless he made some effort to provide some support from savings or unemployment benefits. The good cause defense or exception could be available to exculpate defendants in these types of situations.

Appellant's situation comes closest to the last scenario, but he did not stay at the job where he earned \$10 per hour and provide some support for his son. He made one support payment of \$245 during the charge period. He used his substantial resources to buy a bar that he knew was not making money. Then 15 months later, at the time of trial, he was still doing nothing more productive than running a bar that was not making any money. And, Appellant did not establish that he could not perform work other than running the bar. Rather, he elected not to seek other gainful employment, in spite of his support obligation. Good cause should not be defined in a way to benefit a defendant whose reason for not supporting his child is self-imposed.

### **CONCLUSION**

For the reasons stated above, the conviction should be affirmed.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 3<sup>rd</sup> day of September, 2008, one true and correct copy of the foregoing brief, and one disk containing the foregoing brief, were mailed, postage prepaid, to:

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**CERTIFICATE OF COMPLIANCE**

I hereby certify that the labeled disk, simultaneously filed with the hard copies of the brief, has been scanned for viruses and is virus-free. The brief contains 3,266 words and contains the information required by Rule 55.03 and Rule 84.06(b).

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