No. SC92648

In the Supreme Court of Missouri

STATE OF MISSOURI,

Respondent,

v.

JOSEPH N. HOLMES,

Appellant.

Appeal from Christian County Circuit Court
Thirty-Eighth Judicial Circuit
The Honorable John S. Waters, Judge

BRIEF OF AMICUS CURIAE

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STATEMENT OF FACTS

Defendant was convicted of one count of misdemeanor criminal non-support in violation of § 568.040, RSMo (Cum. Supp. 2010).[1]

Defendant is the father of J.K.H., born November 19, 2003 (Tr. 6; L.F. 47-50). Defendant and his wife (child's mother, hereinafter, "Mother") were still married at the time of trial, but had separated in July 2008 (Tr. 7). Defendant was under an administrative order from the State of Missouri, Family Support Division, to make support payments of $428 per month, but did not pay child support for the months of March, April, and May 2011 (Tr. 9, 24; L.F. 22-25). Defendant was also ordered to provide health insurance for the child (L.F. 23, 25), but did not do so (Tr. 9).

Mother testified that during the months of March, April, and May 2011, Defendant provided no payments, no clothing, no food, no medical care, and did not keep a health insurance policy on their son, who had been dropped from

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[1] Both the appellant's and the respondent's brief mistakenly cite to a subsequent amendment, which did not take effect until August 28, 2011. The violations at issue in this case took place between March 1, 2011 and May 31, 2011 and the charging document was filed on August 19, 2011. (L.F. 47). Thus, the statute contained in the 2010 Cumulative Supplement, which includes the 2009 amendments but not the 2011 amendment effective August 28, 2011, controls.

Medicaid in February 2011 (Tr. 9). The son went without medical care when he was dropped from Medicaid until Mother obtained insurance, although Defendant was required by order to provide medical insurance (Tr. 9; L.F. 23, 25).[2] Mother testified that Defendant was required by order to pay $428 per month for the support of their eight-year-old son beginning November 15, 2010 (Tr. 6-8). Defendant had not done so (Tr. 7, 9).

Mother testified that she was the primary custodial parent (Tr. 12) and that she and Defendant did not share custody (Tr. 14). During January, February and March, Mother and child lived in Rolla where child was enrolled in school, while Defendant continued to reside in Christian County (Tr. 14-15). When Mother and child returned to Christian County, child lived with her (Tr. 15). Child visited Defendant 2-3 days a week (Tr. 15).

Defendant told Mother that he did not want the State to be involved, and that he "would pay [Mother] what he could pay [her] when he could pay [her]."

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[2] Mother testified on direct examination that the child went without medical care between the time he lost Medicaid coverage and the time she obtained medical insurance for him (although it was Defendant's obligation). On cross-examination, she testified that the child did not suffer a lack of medical services because she and her employer provided health coverage (Tr. 15).

(Tr. 10).[3] Defendant further told Mother that he would fight the court order "as much as he possibly can." (Tr. 11).[4]

Mother testified that Defendant was physically and mentally capable of working (Tr. 11). Defendant worked during the marriage and was described in the present tense at trial as a self-employed tile setter and landlord (Tr. 6).

Mother further testified that she knew "positively" that Defendant had rental property that he got an income from every month (Tr. 11). Defendant had told Mother that rent had been paid on the property during March, April, and May 2011 (Tr. 12). Some of the rental property Defendant owned was purchased prior to the marriage (Tr. 11). A property in Boonville was purchased during the marriage (Tr. 11). Defendant owned a property that his banking records would

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[3] This quotation is rendered differently in the respondent's brief.

[4] While the parties and Mother refer to this order as a court order, it was technically an administrative order docketed with the court that had the force of a court order. Section 454.490, RSMo (2000); *see*, *State ex rel. Hilburn v. Staeden*, 91 S.W.3d 607 (Mo. banc 2002) ("force and effect" provision constitutional as enforcement mechanism and does not transform administrative order into circuit court judgment). The trial court took judicial notice that the order was docketed in cause No. 10CT-MC01492 in Christian County (Tr. 8).

show was jointly owned with his sister, but Defendant was paying the mortgage on it each and every month, and collecting the rental income (Tr. 11).

Katrina Lowe, a child support enforcement technician for the Missouri Department of Social Services ("DSS"), testified that the Department's child support calculation summary was based upon wage data reported to Employment Security under each of the parents' Social Security numbers after they failed to return financial statements as requested (Tr. 25-26). Defendant made $2,268 per month for a six-month period (Tr. 27). The income determination for Defendant was based on "exact data quarters" for Defendant from Employment Security, a Missouri state agency, and not upon imputed income (Tr. 27). Ms. Lowe, who had worked for the DSS for more than 20 years (Tr. 21), had found the Employment Security data to be accurate (Tr. 27).

The calculation resulted in an administrative order docketed in Christian County requiring Defendant to pay $428 per month child support (Tr. 21-26). Defendant had been served with the notice and finding of financial responsibility and had not availed himself of any appeals with the agency (Tr. 22). Defendant was allowed 20 days after service of the notice and finding to provide additional information, but did not do so (Tr. 22). Defendant was also permitted to request an administrative hearing before the Division of Legal Services, but did not do so (Tr. 22).

Ms. Lowe had access to the records of child support payments (Tr. 23). No such payments were received from Defendant in March, April, or May of 2011, and the obligation for these months was not abated (Tr. 24-25).[5]

Defendant put on no evidence (Tr. 29).

According to the docket sheet in the legal file, the court found Defendant guilty of non-support following a bench trial (L.F. 3).[6] The court sentenced Defendant to 180 days in jail and required him to pay restitution of $1,284 (L.F. 3). The court suspended execution of the jail time and placed Defendant on probation for two years conditioned on Defendant obeying all laws, making restitution of $1,284 by December 31, 2012, and paying costs (L.F. 3-4).

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[5] Defendant did receive a default abatement in January 2011, which would logically pertain to months preceding that date, because Mother did not respond "timely enough" (Tr. 28) to Defendant's claim, but the nonsupport charged in this case was for subsequent months in 2011 and had nothing to do with custody arrangements or child tax credit agreements for 2010 (L.F. 47).

[6] No order pertaining to this finding of guilt is included in the legal file, nor was it attached to the notice of appeal. (L.F. 10-14)

ARGUMENT

The trial court did not err by overruling Defendant's motion for judgment of acquittal because Defendant failed to preserve his constitutional challenge and failed to inject the issue of "[i]nability to provide support for good cause." Missouri's criminal non-support statute does not impermissibly shift the burden of proof where the absence of good cause is not an essential element of the offense, but rather inability to provide support is an affirmative defense. Moreover, assuming *arguendo* that absence of good cause is an element of the offense, Defendant's "as applied" challenge to the constitutionality of the statute fails because Defendant did not inject the issue as required and the State met its burden at trial.

Defendant's sole point on appeal challenges the constitutionality of Missouri's criminal non-support statute, § 568.040, RSMo (Cum. Supp. 2010)[7] on the grounds that it reversed the burden of persuasion on the alleged "element" of the Defendant's inability to provide support for "good cause." Defendant contends this violates the Due Process Clause of the 14th Amendment.

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[7] All further statutory citations herein are to RSMo (Cum. Supp. 2010) unless otherwise indicated.

However, there is no such violation because the legislature removed "without good cause" from the elements of the offense by making "inability to provide support for good cause" an "affirmative defense" in its 2009 amendments designed to reverse this Court's holding in *State v. Latall*, 271 S.W.3d 561, 563-564 (Mo. banc 2008). In *Latall*, this Court held that while the burden of injecting the issue of "good cause" through the production of evidence of "good cause" was on the Defendant, the burden of persuasion was on the State to show absence of good cause under the RSMo (2000) version of the statute.[8]

Moreover, Defendant failed to inject the issue as statutorily required under § 568.040.4, or to preserve his constitutional claim by raising it at the earliest opportunity.

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[8] The charged offense took place between March 1 and May 31, 2011, after 2009 amendments making "inability to provide support for good cause" an "affirmative defense" on which the injecting party has the burden of proof under § 568.040.3, but prior to the effective date of the 2011 amendment removing "without good cause" from § 568.040.1 (L.F. 47). *Compare* § 568.040, RSMo (Cum. Supp. 2012) (encompassing amendment effective on August 28, 2011). Appellant's brief mistakenly preserves one reference to the phrase, "without good cause" when quoting § 568.040.1 while deleting the other, a version of the statute which, so far as *amicus* can discern, never existed. Appellant's Brief at 4.

Finally, even assuming *arguendo* that the burden was required to rest with the State, the statute was not unconstitutionally applied to Defendant because the State produced sufficient evidence that Defendant's failure to provide support was "without good cause."

A. Text of the Statute at Issue

At the time of Defendant's offense, Section 568.040 provided in relevant part as follows:

> 1. . . . a parent commits the crime of nonsupport if such parent knowingly[9] fails to provide, without good cause, adequate support which such parent is legally obligated to provide for his or her child or stepchild who is not otherwise emancipated by operation of law.
>
> 2. For purposes of this section:
>
> * * *
>
> (2) **"Good cause**" means any substantial reason why the defendant is unable to provide adequate support. Good cause does not exist if the defendant purposely maintains his inability to support;

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[9] The *mens rea* required is "knowingly." The evidence required to establish the *mens rea* is minimal. *State v. Reed*, 181 S.W.3d 567, 569 (Mo. banc 2006) (proof of relationship of parent to minor child sufficient to establish a *prima facie* basis for a legal obligation of support; knowledge of support order not required).

(3) **"Support"** means food, clothing, lodging, and medical or surgical attention.

* * *

3. Inability to provide support for good cause shall be an affirmative defense under this section. A person who raises such affirmative defense has the burden of proving the defense by a preponderance of the evidence.

4. The defendant shall have the burden of injecting the issues raised by subdivisions (2) and (4) of subsection 2 and subsection 3 of this section.

B. Standard of Review

Constitutional challenges to a statute are reviewed *de novo*. *Sanders v. Ahmed*, 364 S.W.3d 195, 202 (Mo. banc 2011). A statute is presumed to be constitutional and will not be held unconstitutional unless it clearly and undoubtedly contravenes the constitution. *Id.* The courts will enforce the statute unless it plainly and palpably affronts fundamental law embodied in the constitution. *Id.* The party claiming that the statute is unconstitutional bears the burden of proof. *Id.*

C. Preservation

Defendant failed to preserve the "good cause" issue and any constitutional implications thereof: 1) by failing to plead the constitutional issue at the first opportunity (by motion under Rule 24.04(b)(2) prior to trial); and 2) by failing to inject the statutory "good cause" issue and failing to meet his burden of

production (as required by both the statute and the *Latall* decision of this Court even prior to the 2009 amendments).

The Supreme Court has exclusive appellate jurisdiction in all cases involving the validity of a statute of the state. Mo. Const. art. V, sec. 3 (as amended 1982). However, if the constitutional attack has not been preserved, transfer to the Supreme Court is not required. *In re Marriage of Welsh*, 714 S.W.2d 640, 647 (Mo. App. S.D. 1986).

To preserve a constitutional attack for appellate review, a litigant must, among other things, raise the question at the earliest opportunity consistent with good pleading and orderly procedure, and must specify the section or sections of the constitution claimed to have been violated. *Id. See also, State v. Brookshire*, 325 S.W.2d 497, 500 (Mo. 1959).[10]

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[10] Defendant does not claim to have preserved any claim under Article I, § 11 of the Missouri Constitution prohibiting imprisonment for "debt, except for nonpayment of fines and penalties imposed by law." *State v. Davis*, 675 S.W.2d 410, 418 (Mo. App. W.D. 1984) (no constitutional error preserved where not raised until appeal). Moreover, this Court and other State courts reject such a theory, noting that support of children is a "legal duty" and not a "debt," the support obligation does not arise from a contract, and/or that imprisonment for nonsupport is a penalty imposed by law. *State v. Davis*, 469 S.W.2d 1, 3 (Mo.

In the case at bar, Defendant failed to raise the issue by motion prior to trial as required by Rule 24.04(b)(2).[11] That rule provides in relevant part:

> Defenses and objections based on defects in the institution of the prosecution or in the indictment or information other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before trial. The motion shall include all such defenses and objections then available to the defendant. Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver. . .

Id.

1971) (jail sentence for conviction of criminal nonsupport is for punishable offense against the State and is not imprisonment for debt). *See, e.g., State v. Krumroy*, 923 P.2d 1044, 1047-1048 (Kan. App. 1996) ("debt" applies only to liabilities arising upon contract); *Lyons v. Texas*, 835 S.W.2d 715, 718 (Tex. App. 1992) (obligation to support children not considered a "debt," but a legal duty); *Wisconsin v. Lenz*, 602 N.W.2d 173, 177-178 (Wis. App. 1999) (not "debt" because not founded on contract).

[11] All Rule references are to the Missouri Rules of Criminal Procedure (2012). The date of trial was April 30, 2012 (Tr. 2).

No relief of the waiver for cause was sought or granted. Indeed, when defense counsel attempted to raise constitutionality for the first time after an objection was sustained during his cross-examination of Mother about her income, the trial court properly held, "the time for that, in my opinion, Mr. Burt, has passed." (Tr. 17).[12]

Defendant's reply brief contends that there was no need to raise the issue until the motion for judgment of acquittal after the State had rested its case without meeting what the defense contends is an element of proof required to apply the statute constitutionally ("without good cause"). Appellant's Reply Brief at 1. Defendant thus implicitly concedes that he is not making a facial challenge to the statute; in those cases in which the State meets its alleged burden of proof on the element of "without good cause," Defendant would apparently regard the statute as constitutional. *See, id.* Because any facial challenge is unpreserved and has been waived, no facial challenge is before this Court. *See, In re Marriage of Welsh*, 714 S.W.2d at 647.

Nor may Defendant make an "as applied" challenge because he failed to inject the issue of "good cause" at trial as required by both Section 568.040.4 and

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[12] When defense counsel protested that he had to preserve the issue, the court said it would allow him to do so and that constitutionality was a matter for the appellate courts (Tr. 17-18).

this Court's decision in *State v. Latall*, 271 S.W.3d at 564 (burden of injecting issue and production of evidence on Defendant even under previous version of statute, which imposed burden of persuasion on State).

Defendant put on no evidence that there was "good cause" for a finding of inability to provide support and cites to none provided by other witnesses. By way of analogy, "under Missouri law the defendant has the burden of injecting the issue of self-defense, but is not required to inject it through his own testimony. Rather, he can inject it through any evidentiary source." *Johnson v. Minor*, 594 F.3d 608, 611 (8th Cir. 2010) (state appellate court's determination that trial court did not force murder defendant to testify was not an unreasonable application of federal law). *See*, *Latall*, 271 S.W.3d at 563-566 (injecting the issue analogous to burden of production and requires that it be supported by evidence; observing MAI CR 322.08 then provided that "when there is evidence of good cause" issue is made an element of the state's case to disprove). *See also*, *State v. Davis*, 469 S.W.2d 1, 5 (Mo. banc 1971); § 556.051, RSMo (2000) (issue not to be submitted to trier of fact unless supported by evidence).

D. Inability to provide support for good cause is an affirmative defense rather than an element of the crime.

Up until the 2009 amendments to the statute, the State had the burden to prove that the Defendant did not have good cause for failing to make support

payments. *State v. Latall*, 271 S.W.3d at 564. In response to *Latall*, the Missouri legislature adopted § 568.040.3, which provides that inability to provide support for good cause shall be an affirmative defense and that a person who raises such affirmative defense has the burden of proving the defense by a preponderance of the evidence, as well as "injecting" the issue as required by Section 568.040.4.

As this Court made plain in *State v. Faruqi*, 344 S.W.3d 193, 202 n.3 (Mo. banc 2011): "An affirmative defense is an independent bar to liability with respect to which the defendant carries the burden of persuasion that 'does not serve to negative any facts of the crime which the State must prove in order to convict' the defendant." *Id.* (quoting *Patterson v. New York*, 432 U.S. 197, 207 (1977)). This Court contrasted an affirmative defense from an ordinary defense, in which the burden of proving guilt remains on the State and the defendant attempts merely to disprove one of the crime's essential elements. *Id.* at 202 n.4.

Because the legislature chose to define inability to provide support without good cause as an "affirmative defense," it cannot be a defense that merely attempts to disprove one of the crime's essential elements. *Id.* Hence, the absence of good cause was no longer an element of the crime as of the time of the 2009 amendments and the State was not required to prove "without good

cause" in this 2011 action for payments which were not made in March through May of 2011.[13]

E. In addition to the plain language of the statute, the canons of construction favor treating "good cause" as an affirmative defense rather than an element of the crime.

An act of the General Assembly is presumed constitutional and must not be held otherwise unless it "clearly and undoubtedly" contravenes the Constitution. *Prokopf v. Whaley*, 592 S.W.2d 819, 824 (Mo. banc 1980). Legislative enactments should be recognized and enforced by our courts as

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[13] While the legislature, apparently in an abundance of caution, further closed the door on any question that "without good cause" was no longer an element of the crime by deleting that phrase from § 568.040.1 in 2011 amendments to the statute, this does not undermine the requirement that the court attach meaning to the 2009 amendments and to the specific language of 568.040.3. "Statutory amendments may be used to clarify or restate legislative intent, and subsequent statutes may be considered in construing previously enacted statutes, in order to ascertain the uniform and consistent purpose of the legislature." *Anderson v. Kauffman & Sons Excavating, LLC,* 248 S.W.3d 101, 109 (Mo. App. W.D. 2008) (quoting *Mo. Hosp. Ass'n v. Air Conservation Comm'n*, 874 S.W.2d 380, 394 (Mo. App. W.D. 1994) (internal citations omitted)).

embodying the will of the people unless they plainly and palpably impinge on the fundamental law contained in the Constitution. *Americans United v. Rogers*, 538 S.W.2d 711 (Mo. banc 1976). Though a statute cannot lawfully supersede the Constitution, this Court, whenever possible, must harmonize the statute with the Constitution, interpreting the statute within the strictures of our organic law. *McIntosh v. Haynes*, 545 S.W.2d 647 (Mo. banc 1977). This Court is bound to avoid, if possible, a construction which would bring the statute into conflict with constitutional limitations. *Cascio v. Beam*, 594 S.W.2d 942 (Mo. banc 1980).

In the case at bar, this Court need do nothing more than to apply the literal language of 568.040.3 and hold that inability to provide support without good cause is an affirmative defense, and was no longer an element to the crime as of the 2009 amendments to § 568.040. In light of the express language inserted and its proximity in time to this Court's holding in *Latall*, the canons of construction--including plain language, legislative intent, and the insertion of specific language trumping that which is more general--all favor adopting this conclusion.

An amended statute should be construed on the theory that the legislature intended to accomplish a substantive change in the law. *Sermchief v. Gonzales*, 660 S.W.2d 683, 689 (Mo. banc 1983). Moreover, where one provision of a statute contains general language and another provision in the same statute

contains more specific language, the general should give way to the specific. *Brandsville Fire Protection Dist. v. Phillips*, 374 S.W.3d 373, 378 (Mo. banc 2012) (quoting *Younger v. Missouri Pub. Entity Risk Mgmt. Fund*, 957 S.W.2d 332, 336 (Mo. banc 1997)).

In the case at bar, the legislature, in the immediate aftermath of the *Latall* decision, adopted specific language in § 568.040.3 designed to remove the inability to provide support for good cause from the elements of the statute and to specifically provide that it is an affirmative defense required to be proven by a preponderance of the evidence by the person who raises such affirmative defense, not merely an issue required to be injected or for which there was merely a burden of production by the defense as held in *Latall*. This more specific language trumps the general language of § 568.040.1, which does not expressly discuss the burden of proof on the "good cause" issue.

Because the absence of "good cause" was no longer an element of the offense at the time of trial, the statute is not facially unconstitutional because it does not reverse the burden of proof on an element of the offense as prohibited in *Hicks v. Feiock*, 485 U.S. 624, 629-630 (1988).

F. This Court need not reach Defendant's "as applied" challenge, and the challenge fails because Defendant failed to inject the issue and thereby failed to meet his burden of production as required by *Latall*, regardless of which party bore the burden of persuasion. Moreover, the

State produced sufficient evidence from which a reasonable factfinder could conclude that Defendant failed to provide "support" to his minor child "without good cause" regardless of who had the burden of persuasion.

Although § 568.040.4 provides that the defendant has the burden of injecting the issue of inability to provide support for good cause, Defendant failed to inject the issue, even under the previous standards of *State v. Latall*, 271 S.W.3d at 564.

In *Latall*, this Court held that an issue was injected only if "supported by evidence" and analogized the requirements for meeting the burden of production. *Id.* at 563-564. *See also*, *State v. Strubberg*, 616 S.W.2d 809, 816 (Mo. banc 1981). By way of analogy, "under Missouri law the defendant has the burden of injecting the issue of self-defense, but is not required to inject it through his own testimony. Rather, he can inject it through any evidentiary source." *Johnson v. Minor*, 594 F.3d 608, 611 (8th Cir. 2010) (state appellate court's determination that trial court did not force murder defendant to testify was not an unreasonable application of federal law).

In the case at bar, Defendant put on no evidence at all and cites to no evidence from "any evidentiary source" that injected the issue of "good cause" or met his burden of production. *Latall*, 271 S.W.3d at 563-564.

"The support of one's children involves the discharge of one of the most basic responsibilities that a person assumes as a member of society." *Id.* (quoting *In re Warren*, 888 S.W.2d 334, 336 (Mo. banc 1994)). Every parent has a legal obligation to provide for his or her children regardless of the existence of a child support order. *Id.* The proof of the relationship of parent to child is sufficient to establish a *prima facie* basis for a legal obligation of support. *Id.* While a child support order is not required, it may be considered evidence of what constitutes adequate support. *State v. Reed*, 181 S.W.3d 567, 570 (Mo. banc 2006).

Under previous versions of the statute, when the State had the burden of proving that Defendant did not have good cause for not providing support, it was permissible to do so by circumstantial evidence. *State v. Coe*, 233 S.W.3d 241, 250 (Mo. App. S.D. 2007). In general, the State may establish lack of good cause by circumstantial evidence showing ability to work and statements of the defendant indicating unwillingness to pay. Dierker, 32 Mo. Prac., Missouri Criminal Law § 31.4 (2d. ed. 2012) at 2.

In the case at bar, the State established that Defendant was physically and mentally able to work; Defendant was a self-employed[14] tile setter and

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[14] *Amicus* can locate no evidence in the record to support Defendant's assertions at oral argument about any change in his employment status or ability to pay at the time of the hearing and Defendant cites to none in his brief. There is no

landlord; Defendant was receiving income on multiple rental properties during the months in which he paid no child support; and calculations based on six months of actual wage data supplied to the State showed that Defendant made $2,268 per month and resulted in an order that Defendant pay $428 per month child support and to provide health insurance for the child. Defendant had supplied no additional information subsequently and had not sought a hearing to dispute the finding.

The State also put on evidence that Defendant did not respect the support order and told Mother he would fight the order to pay child support "as much as he possibly can." (Tr. 11-12). Defendant's method of fighting apparently involved simply not paying and not providing health insurance, as he supplied no information to the State justifying a re-calculation, did not seek a hearing on the administrative determination, and did not seek a modification.

Mother's testimony established that Defendant provided no payments, no clothing, no food, no medical care, and did not keep a health insurance policy on their son, who had been dropped from Medicaid in February 2011 (Tr. 9).

This evidence was sufficient for a reasonable finder of fact to conclude that Defendant acted "without good cause," particularly where it is uncontroverted

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evidence of Defendant supplying additional information, requesting a hearing on the finding and calculation, or seeking a modification in the record.

that Defendant had interests in multiple rental properties and did not sell these assets to support his child. *See*, *State v. Orando*, 284 S.W.3d 188, 191 (Mo. App. E.D. 2009) (substantial evidence of knowing failure to pay child support where defendant knew of parent-child relationship and defendant was aware of decree ordering support that had not been modified; defendant claimed he did not pay because he was unemployed and could not pay and thought the amount would be modified on this basis); *State v. Lewis*, 124 S.W.3d 525, 527 n.5 (Mo. App. S.D. 2004) (father failed to meet burden of injecting the issue of good cause at trial where only evidence he pointed to was that he made little money and could barely sustain himself, let alone his child; father gave no reasons such as a physical or mental disability or lack of education to explain why he could not get a better job; "Merely proving a lack of adequate employment is not enough to inject the issue of good cause.")

Defendant therefore lacks standing to bring a constitutional challenge as he is not among those aggrieved by any constitutional error. "If a statute can be applied constitutionally to an individual, that person 'will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional.'" *State v. Self*, 155 S.W.3d 756, 760 (Mo. banc 2005) (quoting *U.S. v. Raines*, 362 U.S. 17, 21 (1960)).

Because Defendant failed to inject the issue as required even prior to the language establishing that inability to provide support for good cause was an affirmative defense, and because the State proved the element of "without good cause" if it was an element of the offense, Defendant's constitutional challenge fails as applied to him and he lacks standing to bring a facial challenge. The evidence supported the conviction regardless of which party bore the burden of persuasion and Defendant was not prejudiced. *See*, *Neely v. McDaniel*, 677 F.3d 346 (8th Cir. 2012) (no violation of Due Process Clause regardless of whether reasonable mistake of age was an affirmative defense, or knowledge of victim's age was an element of the offense of sexual indecency with a child—if affirmative defense under State law, State not required to prove as an element; if an element, statute is not unconstitutional because State does have to prove and therefore due process is respected).[15]

G. *Hicks* is distinguishable.

Defendant relies solely on the U.S. Supreme Court case of *Hicks v. Feiock*, 485 U.S. 624 (1988), a case which struck down a criminal contempt statute of the State of California where the Court deferred to the state court's findings that inability to pay was both an element of the offense and was required to be proven by the defendant beyond a reasonable doubt. *Id.* at 629-630. *Hicks* is

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[15] *Neely* was a facial challenge, but its logic may be consistently applied here.

inapposite where the Missouri legislature has provided that inability to provide support for good cause is an affirmative defense, rather than an element of the statute. Section 568.040.3.

Hicks requires only that the burden of persuasion rest with the state as to the elements of the statute as defined by state law; it does not preclude the state from placing the burden of proof on affirmative defenses on the defendant. *See*, *Hicks*, 485 U.S. at 629-630. *See also*, *Neely v. McDaniel*, 677 F.3d at 352.

At most, *Hicks* supports the State's argument that the statute should be construed under state law to hold that "[i]nability to provide support for good cause" is an affirmative defense (i.e., "without good cause" is not an element of the offense of failure to provide adequate support). Such a construction is consistent with *Hicks*, which makes clear that it is up to state courts to decide the elements of the offense and who bears the burden of proof, and it preserves the statute's constitutionality under *Hicks*. *See*, *Hicks*, 485 U.S. at 629-630.

H. Conclusion

Whether the absence of good cause is an element of the crime required to be proven by the State, or is an affirmative defense required to be proven by the Defendant, this constitutional challenge fails where the Defendant failed to even

inject the issue and where the State put forth evidence sufficient under previous case law when the State had the burden of persuasion.[16]

The 2009 amendments, which followed the *Latall* decision, should be construed in the light which preserves the constitutionality of the statute and applies their specific language over the general; they were designed to remove "without good cause" from the elements required to be proven by the State, and to make "[i]nability to provide support for good cause" an affirmative defense required to be proven by the Defendant.

Should this Court reach a contrary conclusion, it should sever subsection 3 of § 568.040 (Cum. Supp. 2010), which would leave "without good cause" as an element of the offense in § 568.040.1 and thus preserve the statute's constitutionality under *Hicks*. Section 1.140, RSMo (2000).

However, the Court should not strike down the existing version of the statute, § 568.040 (Cum. Supp. 2012), which does not contain the words "without good cause" in § 568.040.1, and clearly does not include that language as an element of the offense. Section 568.040.3 (Cum. Supp. 2012) should remain in place, including its identical language that the inability to provide support for good cause is an affirmative defense, because *Hicks* defers to state law on what

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[16] Defendant did not and does not challenge the sufficiency of the evidence to convict.

the elements of the offense are, and does not hold that the burden of proof is impermissibly reversed under the Due Process Clause if the burden of proof on the elements (as defined by the State) rests with the State.

CONCLUSION

Defendant's conviction and sentence should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b) and contains 5567 words, excluding the cover and certification, as determined by Microsoft Word 2007 software; and

2. That a copy of this notification was sent through the eFiling system on this 11th day of March, 2013, to:

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