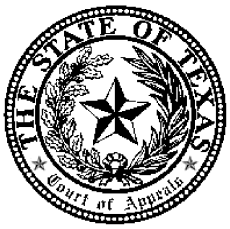
Affirmed and Majority and Dissenting Opinions filed October 11, 2001.



In The

Fourteenth Court of Appeals

NO. 14-99-01130-CR
NO. 14-99-01131-CR

ALFRED EDWARD JOHNSON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 337th District Court
Harris County, Texas
Trial Court Cause Nos. 785,381 & 785,382

M A J O R I T Y O P I N I O N

Alfred Edward Johnson appeals two convictions for criminal nonsupport of his two children[1] on the grounds that: (1) the evidence is insufficient to support his conviction; (2) he received ineffective assistance of counsel; (3) the prosecutor engaged in improper argument; and (4) double jeopardy bars this prosecution. We affirm.

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[1] Appellant was convicted in a single jury trial of both offenses, sentenced by the trial court to two years confinement for each offense, and placed on community supervision.

Sufficiency of the Evidence

The first three of appellant's six points of error argue that the evidence was: (1) legally and factually insufficient to prove that appellant intentionally and knowingly failed to support his children; and (2) factually insufficient to support the jury's failure to find that he was unable to pay.

Standard of Review

In conducting a legal sufficiency review of evidence to prove an offense, we consider the evidence in the light most favorable to the jury's verdict and determine whether any rational jury could have found the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Cardenas v. State*, 30 S.W.2d 384, 389 (Tex. Crim. App. 2000). In conducting a factual sufficiency review of evidence to prove an offense, we determine whether a neutral review of all the evidence, both for and against the finding, demonstrates that the proof of guilt is so obviously weak as to undermine confidence in the jury's determination, or the proof of guilt, although adequate if taken alone, is greatly outweighed by contrary proof. *Johnson v. State*, 23 S.W.3d 1, 11 (Tex. Crim. App. 2000). A factual sufficiency review of evidence supporting a failure to find an affirmative defense similarly considers all of the evidence and determines whether the judgment is so against the great weight and preponderance of the evidence as to be manifestly unjust. *Clewis v. State*, 922 S.W.2d 126, 132 (Tex. Crim. App. 1996).

A person commits the offense of criminal nonsupport if he intentionally or knowingly fails to provide support for his child who is either younger than eighteen years of age or the subject of a court order requiring the actor to support the child. TEX. PEN. CODE ANN. § 25.05(a) (Vernon 1994). A person acts knowingly with respect to the nature of his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or that the circumstances exist. *Id*. § 6.03(a). It is an affirmative defense to prosecution for criminal nonsupport that the actor could not provide support for his child. *Id*. § 25.05(d).

Review of the Evidence

In this case, appellant was ordered in 1989 to pay $800 per month for the support of his two children pursuant to a divorce. He paid child support until 1993 but not thereafter. Viewing this evidence in the light most favorable to the verdict, a rational trier of fact could have found appellant knowingly failed to provide support to his children. Accordingly, appellant's first point of error is overruled.

With regard to appellant's second and third points of error, in 1993, appellant was found in criminal contempt of court for failure to pay child support and served 180 days in jail. Appellant testified that he was unable to pay child support because his real estate business failed in 1992 and 1993 and because of injuries he sustained from being beaten by fellow inmates while in jail. Appellant also testified that he could no longer sell weapons for a living because his business partner had sold his weapons. Following his release from jail, appellant attempted unsuccessfully to have his child support payments reduced.

Although appellant testified that he owns several corporations, most of which have no value, other evidence showed that two corporations he owned, Al Johnson International Corp. ("AJI") and Condor Texas, Ltd., could be worth as much as ten million and fifty million dollars, respectively, depending on the outcome of two lawsuits. AJI has fifty-six million dollars in securities in the Army Bank of Guatemala. Appellant claims that he has no access to those funds because they belong to investors in two banks appellant intended to form. The funds were frozen when appellant was indicted for writing a bad check for fifty thousand dollars. As a result of the check writing charge, appellant was ordered to pay $15,000 in legal fees. Appellant testified that that payment caused him to fall behind in his child support payments. However, appellant paid the legal fees in 1997, four years after he had stopped paying child support. Appellant also testified that B. F. Fleming Investments was a corporation which controlled trust funds for the benefit of his children. The trusts are funded with the proceeds of books appellant has written under the pseudonym, "B. F. Fleming."

With regard to appellant's ability to work, the State produced medical records dated March 30, 1998, in which a physician wrote, "Physical exam showed a well-developed and well-nourished man in no apparent distress." In light of the foregoing evidence, the proof of guilt is neither so obviously weak as to undermine confidence in the jury's determination, nor greatly outweighed by contrary proof; and the judgment is not so against the great weight and preponderance of the evidence as to be manifestly unjust. Accordingly, appellant's second and third points of error are overruled.

Jury Argument

Appellant's fifth point of error[2] claims that the prosecutor committed "fundamental" error by expressing his personal opinion during closing argument, despite appellant's failure to object. However, there is no longer fundamental error for jury argument where a defendant fails to object. *Valencia v. State,* 946 S.W.2d 73, 82 (Tex. Crim. App. 1997). Accordingly, appellant's fifth point of error is overruled.

Double Jeopardy

Appellant's sixth point of error contends that this prosecution was barred by the Double Jeopardy Clause of the United States Constitution[3] because he was previously held in contempt and confined in the Harris County jail for failure to pay child support. However, this contention is invalid because appellant's contempt finding pertained to his failure to pay support during a different period (1993 and 1994) than this case (1995 to 1998). *See State v. Johnson*, 948 S.W.2d 39, 40 (Tex. App.–Houston [14th Dist.] 1997, no pet.). Accordingly, appellant's sixth point of error is overruled.

Ineffective Assistance of Counsel

Appellant's fourth point of error contends that he received ineffective assistance of counsel because his trial counsel failed to pursue his protection under the double jeopardy

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[2] We address the fifth and sixth points of error before the fourth to facilitate an orderly presentation of the issues.

[3] *See* U. S. CONST. amend. V.

clause,[4] failed to develop defense evidence, admitted appellant's guilt, and failed to object to impermissible hearsay and improper argument.

To prevail on a claim of ineffective assistance of counsel, an appellant must show, first, that counsel's performance was deficient, *i.e.*, it fell below an objective standard of reasonableness, and, second, that the appellant was prejudiced in that there is a reasonable probability that but for counsel's errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Ex parte Varelas*, 45 S.W.3d 627, 629 (Tex. Crim. App. 2001). To be sustained, an allegation of ineffective assistance of counsel must be firmly founded in, and affirmatively demonstrated by, the record. *Id*.

Moreover, in reviewing ineffectiveness claims, scrutiny of counsel's performance must be highly deferential. *Strickland*, 466 U.S. at 689; *Tong*, 25 S.W.3d at 712. A court must indulge, and a defendant must overcome, a strong presumption that the challenged action might be considered sound trial strategy under the circumstances. *Strickland*, 466 U.S. at 689. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight and to evaluate the conduct from counsel's perspective at the time. *Id*. Thus, the presumption that an attorney's actions were sound trial strategy ordinarily cannot be overcome absent evidence in the record of the attorney's reasons for his conduct. *Busby v. State*, 990 S.W.2d 263, 268-69 (Tex. Crim. App. 1999), *cert. denied*, 120 S.Ct. 803 (2000).

In this case, the record is silent as to why appellant's trial counsel did or failed to do the things of which appellant complains. Therefore, appellant has failed to rebut the presumption that trial counsel's actions and omissions resulted from sound trial strategy. In addition, because appellant has made no record of the defense evidence he claims his counsel failed to adduce, we have no basis to conclude that any such evidence existed or was of such a nature as to produce a reasonable probability of a different result at trial. Lastly, as to appellant's complaint that his counsel admitted in closing argument that appellant had

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[4] Because appellant's double jeopardy contention is without merit, as described in the preceding section, we need not address his ineffectiveness claim regarding the failure to assert it.

failed to pay support, there is nothing in the record to suggest that the jury could have reached any different conclusion based on the evidence presented, and thus that the admission could have been prejudicial to appellant. Accordingly, appellant's fourth point of error is overruled, and the judgment of the trial court is affirmed.

/s/ Richard H. Edelman
Justice

Judgment rendered and Opinion filed October 11, 2001.

Panel consists of Justices Anderson, Edelman, and Baird.[5] (Baird, J. dissenting).

Do Not Publish — TEX. R. APP. P. 47.3(b).

[5] Former Judge Charles F. Baird sitting by assignment.

Affirmed and Majority and Dissenting Opinions filed October 11, 2001.

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D I S S E N T I N G O P I N I O N

Believing the evidence is factually insufficient to rebut appellant's affirmative defense of inability to pay child support, I would sustain the third point of error. Because the majority does not, I dissent.

I. Standard of Appellate Review

Section 25.05 of the Texas Penal Code does not have as an element the ability to provide child support. Instead, inability to provide support is an affirmative defense. *See* TEX. PEN. CODE ANN. § 25.05(d).[6]

The Court of Criminal Appeals in *Johnson v. State*, 23 S.W.3d 1 (Tex. Crim. App. 2000), reaffirmed its holding in *Clewis v. State*, 922 S.W.2d 126, 129-30 (Tex. Crim. App. 1996), that the courts of appeals are constitutionally empowered to review the judgment of the trial court to determine the factual sufficiency of the evidence used to establish the elements of an offense. The *Johnson* Court recognized that determining the legal and factual sufficiency of evidence requires the implementation of separate and distinct standards of appellate review. *See Johnson*, 23 S.W.3d at 7.

The primary difference is how the appellate court views the evidence. Under a legal sufficiency review the appellate court views the relevant evidence in the light most favorable to the verdict and determines whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). In contrast, a factual sufficiency review dictates that the evidence be viewed in a neutral light, favoring neither party. *Clewis*, 922

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[6] Specifically, TEX. PEN. CODE ANN. § 25.05 (d) provides: "It is an affirmative defense to prosecution under this section that the actor could not provide support for his child."

> The jury charge incorporated this affirmative defense as follows:
>
> It is an affirmative defense to prosecution for criminal nonsupport that the defendant could not provide support for his child.
>
> The burden of proof is on the defendant to prove an affirmative defense by a preponderance of the evidence. The term "preponderance of the evidence" means the greater weight of credible evidence.
>
> Now, therefore, if you find and believe from the evidence beyond a reasonable doubt that the defendant did commit the offense of criminal nonsupport as alleged in the indictment, but you further find by a preponderance of the evidence that the defendant could not provide support for his child, [], you will acquit the defendant and say by your verdict "not guilty."

S.W.2d at 134. In conducting a factual sufficiency analysis, the reviewing court "does not indulge inferences or confine its view to evidence favoring one side of the case. Rather it looks at all the evidence on both sides and then makes a predominantly intuitive judgment...." *Johnson* 23 S.W.3d at 7, (quoting William Powers and Jack Ratliff, *Another Look at "No Evidence" and "Insufficient Evidence,*" 69 Tex. L. Rev. 515, 519 (1991)).

In this neutral light, "the appellate court reviews the fact finder's weighing of the evidence and is authorized to disagree with the fact finder's determination." *Clewis,* 922 S.W.2d at 133. The *Johnson* Court cautioned, however, that this review must employ appropriate deference to prevent an appellate court from substituting its judgment for that of the fact finder. *Johnson,* 23 S.W.3d at 7. The degree of deference a reviewing court provides must be proportionate with the facts it can accurately glean from the trial record. *Id.,* at 8. A factual sufficiency analysis can consider only those few matters bearing on credibility that can be fully determined from a cold appellate record. Such an approach occasionally permits some credibility assessment, but usually requires deference to the jury's conclusion based on matters beyond the scope of the appellate court's legitimate concern. *Ibid,* (citing George E. Dix & Robert O. Dawson, 42 TEXAS PRACTICE--CRIMINAL PRACTICE AND PROCEDURE §§ 36.69 (Supp.1999)).

The *Johnson* Court adopted the entire civil factual sufficiency standard. *Johnson,* 23 S.W.3d at 11. In civil matters, the courts of appeals are empowered to consider and weigh all the evidence in the case and set aside the verdict and remand the cause for a new trial if it concludes that (1) the evidence is insufficient or if (2) the verdict is so against the great weight and preponderance of the evidence as to be manifestly unjust, regardless of whether the record contains some evidence of probative force in support of the verdict. *Pool v. Ford Motor Co.,* 715 S.W.2d 629, 635 (Tex.1986). In the civil context, these are known as "insufficient evidence" points or "great weight and preponderance of evidence" points depending on whether the complaining party had the burden of proof. *Johnson,* 23 S.W.3d at 9-10 (quoting W. Wendell Hall, *Revisiting Standards of Review in Civil Appeals*, 24 St. Mary's L. J. 1045, 1137 (1993)). Under this standard, if the complaining party is attacking

the factual sufficiency of an adverse finding on an issue to which he did *not* have the burden of proof, he must demonstrate that there is insufficient evidence to support the adverse finding. In reviewing an insufficiency of the evidence challenge, the court of appeals must first consider, weigh, and examine all of the evidence that supports and that is contrary to the jury's determination. Having done so, the court should set aside the verdict only if the evidence standing alone is "so weak" as to be clearly wrong and manifestly unjust. *Johnson*, 23 S.W.3d at 10. However, if the complaining party is attacking the fact finder's adverse determination on an issue upon which he had the burden of proof, he must demonstrate that the adverse finding is actually against, i.e., outweighed by, the great weight and preponderance of the available evidence. *Ibid.* The *Johnson* Court noted the latter standard is properly utilized when the defendant bore the burden of proving an affirmative defense by a preponderance of the evidence, and on appeal he hopes to demonstrate that the state of the evidence preponderates greatly against the jury's finding. *See e.g., Ex Parte Schuessler,* 846 S.W.2d 850 (Tex. Crim. App.1993) (insanity defense); *Meraz v. State,* 785 S.W.2d 146, 155 (Tex. Crim. App. 1990) (competency to stand trial).

In adopting these standards for criminal factual sufficiency review, the *Johnson* Court stated:

> Because the State always carries the burden of proof to establish the elements of a criminal offense at trial, an appellant's points of error challenging the sufficiency of the evidence used to establish the elements of the charged offense could claim that the evidence used to establish the adverse finding was so weak as to be factually insufficient. This is the most equitable approach, especially given the fact criminal defendants are not under any obligation to present evidence on their behalf and usually rely, instead, on forcing the State to prove its case beyond a reasonable doubt. Alternatively, in the event a defendant does muster contrary evidence, this standard of review allows him, if he so chooses, to present the argument on appeal that his evidence greatly outweighed the State's evidence to the extent that the contrary finding is clearly wrong and manifestly unjust.

Id. at 11 (footnote omitted). *See also Mata v. State,* 939 S.W.2d 719, 728 (Tex. App.–Waco 1997, no pet.) (Vance, J., concurring).

Therefore, we should review this point of error and determine whether appellant, who had the burden of proving by a preponderance of evidence the inability to pay child support, can demonstrate that the available evidence outweighs the jury's adverse determination of that issue. *Johnson*, 23 S.W.3d at 10.

II. The Facts

The following is a detailed account of the evidence developed through each witness as they appeared in the trial court.

A. The State's Case-in-Chief

Kathy Johnson (hereafter referred to as Kathy) testified that she and appellant were high school sweethearts who married in 1983 in Arizona. This union produced two children, Alfred and Candace, the named complainants. In 1988, the family moved to Texas. In May of 1989, Kathy instituted divorce proceedings, which resulted in a decree of divorce being entered in December of 1989. While in Texas, appellant held a Class III firearms license and sold weapons; he also worked as a mortgage broker.

Pursuant to the decree, Kathy was awarded custody of the children and appellant was ordered to pay child support in the amount of $400.00 on the first and fifteenth day of each month. Appellant appealed the judgment of the trial court and did not pay support during the pendency of the appeal. However, upon affirmance of the trial court's judgment, *Johnson v. Johnson*, 804 S.W.2d 296 (Tex. App.–Houston [1st Dist.] 1991, no writ), appellant paid the arrearage and paid child support until 1993. When the payments stopped, Kathy instituted contempt proceedings. The trial court ordered appellant to pay the child support arrearage. Appellant did not comply with that order, was held in contempt, and confined in the Harris County Jail. Following his release from confinement, appellant never resumed child support payments.

Tamara Oliver, custodian of child support records for the Harris County Clerk's Office, was responsible for overseeing the receipt and disbursement of child support payments. Through Oliver, the State introduced appellant's child support payment records, which showed his last payment was on February 18, 1993. Both Oliver and Kathy testified

appellant had made no payments from June 1, 1995 until April 15, 1998, the period of time alleged in the indictment.

Janet Whitfield, an officer with the Texas Attorney General's Child Support Enforcement Division, was assigned the task of obtaining back child support from appellant. Whitfield testified that under Texas law twenty-five percent of a person's net pay is the most an individual could be ordered to pay in child support for two children. Under this formula, a child support obligation of $800.00 per month would require a monthly net income of $3,200.00. Whitfield made no independent determination of appellant's income; in fact, appellant's income was not an issue as she was simply seeking compliance with the court-ordered child support. However, her records indicated that in 1993 appellant was self-employed as a mortgage broker and in that capacity he drew $1,000.00 per month. This information was furnished by Shelby Ranly. Additionally, Whitfield stated that depending upon the financial circumstances of the person ordered to pay child support, the amount of may be modified.[7] Appellant applied for a child support modification in January of 1999 but because of the backlog of such requests Whitfield had not acted on appellant's application by the time of trial. At the conclusion of Whitfield's testimony, the State rested its case-in-chief.

B. Appellant's Case-in-Chief

Appellant began the presentation of his case by offering his medical records, which were admitted without objection. Appellant then testified at length. From 1974 until 1988, appellant was employed with the Phoenix, Arizona Police Department. In 1978, appellant became licensed to sell firearms. In the late 1980s, appellant was licensed as a mortgage broker, public investigator, real estate salesperson and contractor. In 1988, appellant and his family moved from Phoenix to the greater Houston area. However, only the firearms license transferred from Arizona to Texas. Shortly after the move, Kathy instituted divorce proceedings and the parties separated.

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[7] Whitfield testified $155.00 was typically assigned to those working for a small hourly wage. However, if the person was unemployed there would be nothing to modify.

At the time the divorce was granted, appellant was working as a mortgage broker with Shelby Ranly and Associates and receiving a draw of $1,000.00 per month. This was appellant's sole source of income. Appellant was not able to sell firearms because his inventory had been awarded to Kathy in the divorce. The divorce decree, which was entered into evidence, ordered that the firearms be sold on consignment by a firearms dealer and the proceeds given to Kathy. Appellant later borrowed money to acquire additional weapons. However, they were seized by the Harris County District Attorney's office. This seizure destroyed appellant's firearm sales business.[8]

Initially, appellant did well financially as a mortgage broker and was current with his child support obligation. However, in December of 1992 he terminated his relationship with Ranly. Eventually, appellant ceased making his child support payments and was confined in the Harris County jail from late 1993 until mid-August of 1994. While in confinement, appellant was assaulted by an inmate who had learned of appellant's prior service as a police officer. That assault injured appellant's spine and he began treatment while in confinement. The spinal injury caused migraine headaches, vision loss and numbness to the arms and hands. Appellant testified that these symptoms had not subsided since the date of the injury and were still present at the time of his testimony. Shortly after his release, appellant moved to Dallas for one year where he was under constant medical care to correct his spinal injury. Despite this treatment, appellant had trouble walking and the migraine headaches were affecting his vision. According to appellant it was painful to move, even with medication. Appellant did not work while in Dallas; he lived there rent free in the home of a cousin.

While in Dallas, appellant was arrested in the instant cases and returned to Houston. Appellant was confined for thirty days until his release on a pretrial services bond. Upon his release, appellant described himself as "totally destitute" and medically unable to work. Appellant applied for social security disability benefits and began receiving food stamps. During this time, appellant lived with friends where he slept on a couch and did not pay rent.

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[8] Appellant likened the ability to sell firearms without samples to a car dealership without cars.

At the time of trial, appellant was living with another friend, Ann Oaks, and was "vastly behind" in the rent amount of $100.00 per month.[9] Appellant testified that he did not own a home; that he had not owned a car since he went to jail in 1993, and that the bus was his means of transportation; that he did not have any personal bank accounts, any saving or any assets to liquidate to pay the back child support. Appellant testified that he had filed for bankruptcy.[10]

Appellant stated his medical treatment was secured through a letter of guarantee from an attorney, Betty Homminga, who was handling several litigation matters for appellant on a contingency fee basis. Appellant testified he twice attempted to have the amount of child support modified by the domestic court judge. When those attempts proved unsuccessful, appellant sought modification through Whitfield at the attorney general's office. Appellant testified that he was being represented by court-appointed counsel in the instant case.[11]

Ann Oaks testified that appellant lived in her home for one and one-half years. That appellant was suppose to pay $100.00 per month in rent, which he was frequently unable to pay. In lieu of the rent, appellant helped with Oaks' children and washed the dishes. Oaks testified that appellant did not own a car, had few clothes, and rode the bus as his means of transportation. Oaks testified that she had never seen appellant with money.

III. Analysis

The *Johnson* Court specifically cited *Meraz,* 785 S.W.2d 146, for guidance in resolving cases where the fact finder rejected an affirmative defense and the defendant argues on appeal that the evidence preponderates greatly against the jury's finding. *See Johnson,* 23 S.W.3d at 10. The *Meraz* Court noted that "[a]t the foundation of every affirmative defense is the practical, if not technical, necessity of the defendant acknowledging he

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[9] Appellant received two $100.00 checks from a friend in Mexico City and gave these funds to Oaks for rent.

[10] Appellant testified to having established several business entities over the years but these entities had "zero" value.

[11] The clerk's record contains orders appointing both trial and appellate counsel due to appellant's indigency.

committed the otherwise illegal conduct. . . . In every instance it is inevitable that the defendant would have to at least by implication concede the commission of the act in order to avail himself of the affirmative defense. . . . [a] review of the facts relative to proof of an affirmative defense does not inexorably lead to a review of facts relative to proof of the elements of the offense." *Meraz*, 785 S.W.2d at 153.[12] Consistent with this precedent, I will concentrate on the evidence of whether appellant could not provide support for his children. *See* TEX. PEN. CODE ANN. § 25.05 (d). To ensure that this proper standard of review has been followed and that the role of the jury is not usurped, I will detail all the evidence relevant to the issue. *See Johnson*, 23 S.W.3d at 9 (*citing Maritime Overseas Corp. v. Ellis*, 971 S.W.2d 402, 407 (1998), *cert. denied*, 525 U.S. 1017, 119 S.Ct. 541, 142 L.Ed.2d 450 (1998); *Ellis County State Bank v. Keever*, 888 S.W.2d 790, 794 (Tex.1994)); *Clewis*, 922 S.W.2d at 135.

Initially, it must be noted that the only evidence of appellant's income was $1,000.00 per month in draw at his employment with Shelby Ranly and Associates. This amount was testified to by appellant and substantiated by Whitfield. However, appellant's employment with Ranly ceased *before* the dates alleged in the indictment. Significantly, the cessation of this employment coincides with when appellant stopped making his court-ordered child support payments, the timing of which was confirmed by Kathy, Whitfield and Oliver.

Kathy further corroborated appellant's testimony that he was confined in the Harris County jail for a period of approximately nine months as a result of his failure to pay child support. The evidence further established through appellant and his medical records that appellant suffered a spinal injury while in confinement. Those medical records document appellant's testimony that he continually sought, and was advised to continue seeking, medical treatment as a result of his injury. The medical records further confirm that appellant was prescribed medication for migraine headaches.

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[12] Inexplicably, the majority does not even cite *Meraz*, much less apply it to the instant case. The majority, therefore, has used an incorrect legal analysis in resolving the third point of error.

My careful review of the record reveals no evidence that appellant was ever gainfully employed after leaving Ranly's employment in 1992. Indeed, the evidence is to the contrary. The medical records confirm appellant sought social security benefits. Those records also establish that appellant was qualified to receive food stamps and that appellant was physically disabled, which precluded him from gainful employment. All of the record evidence is that appellant received no income during the period of time alleged in the indictment.

Also the evidence establishes through the testimony of appellant and corroborated by Oaks that appellant lived as a tenant with Oaks and was behind on his rent, that he had no money, no means of transportation and few clothes. This is consistent with appellant's testimony that he had stayed with others rent-free; the bus was his means of transportation; that he did not have any personal bank accounts, any savings, or any assets to liquidate to pay the back child support. The testimony of appellant, this time corroborated by Whitfield, also establishes that appellant sought to have his child support modified. Finally, the record conclusively establishes that appellant was too poor to retain counsel in the instant case. The State offered no evidence to rebut this affirmative defense.[13] *See Meraz v. State*, 785 S.W.2d 146, 150 (Tex. Crim. App. 1990) ("It is particularly important to note that the State offered

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[13] On direct examination, the State asked Kathy why she contacted the Family Criminal Law Division of the Harris County District Attorney's Office. She replied: "It was my contention that [appellant] had the wherewithal to pay and was refusing to pay to provide for his children." However, Kathy did not state the basis for her belief, the State did not make further inquiry into this area, and no evidence was offered that appellant had the wherewithal to provide support. On cross-examination, Kathy admitted she had no personal knowledge of appellant's living situation or lifestyle.

As noted in footnote 5, *supra*, on cross-examination the State sought to establish that appellant had resources available to provide child support. However, appellant replied that those entities had "zero" value. The prosecutor's assertions to the contrary are not evidence unless, of course, the witness confirms those assertions. *See Hoffpauir v. State*, 596 S.W.2d 139, 142 n. 2 (Tex. Crim. App. 1980). Moreover, even if the jury chose to disbelieve appellant, such disbelief does not provide substantive proof. *See Johnson v. State*, 673 S.W.2d 190, 196 (Tex. Crim. App. 1984), and cases cited therein; *Reina v. State*, 940 S.W.2d 770, 774 (Tex. App.–Austin 1997, pet. ref'd); *Miranda v. State*, 813 S.W.2d 724, 735 (Tex. App.–San Antonio 1991, pet. ref'd). Nor may a jury resort to speculation to reach a verdict. *See Reese v. State*, 653 S.W.2d 550, 553 (Tex. App.–Beaumont 1983, no pet).

no evidence to rebut the defendant's affirmative defense."); *Jackson v. State,* 941 S.W.2d 351 (Tex. App.–Corpus Christi 1997, no pet.) (same). Because there was no "contradictory" evidence for which the jury was required to make a credibility determination, the above stated facts relevant to the affirmative defense can be accurately gleaned from the trial record. Therefore, the degree of deference we must provide the jury on its rejection of this affirmative defense is slight. Consequently, when this evidence is viewed in a neutral light we are authorized to disagree with the jury's determination that appellant could provide support for his children. *Clewis,* 922 S.W.2d at 133. Based upon the evidence set forth above, which established appellant was not gainfully employed from December of 1992 until the time of trial and that he had no assets to liquidate to provide support for his children, I would hold the jury's rejection of appellant's affirmative defense that he was not able to provide support for his children from June 1, 1995 through April 15, 1998 is so against the great weight and preponderance of the available evidence as to be manifestly unjust. *See Johnson*, 23 S.W.3d at 10; *Pool v. Ford Motor Co.*, 715 S.W.2d at 635.

The majority states that appellant "could be" worth millions "depending on the outcome of two lawsuits." Slip op. pg. 3. But the very fact that the lawsuits were *pending* defeats any argument that appellant had the present ability to pay child support. Further, the fact that appellant may have paid legal fees in the past is of "actually outweighed by the great weight and preponderance of the available evidence," namely a judicial determination that appellant was indigent and too poor to hire counsel in the instant case. *Johnson*, 23 S.W.3d at 10. On this same line, it must be noted there is no evidence that appellant was authorized to use trust funds, if any, to escape his personal child support obligation. Finally, the majority relies on one page of appellant's medical records to state that appellant was well-developed, well nourished and in no apparent distress on March 30, 1998. Slip op. pg. 4. But to rely on that page, the majority must ignore countless others that regularly and consistently describe appellant as a man who was unable to work, had applied for social security disability benefits and was qualified to receive food stamps.

The majority has followed the same path as appellant's ex wife, Kathy, and surmised that appellant "had the wherewithal to pay and was refusing to pay to provide for his children." *See* n. 8, *supra*. But jurists should not react as laymen. We must look to the record evidence in resolving the issues before us. There is simply no evidence whatsoever in this record to show that appellant ever possessed the ability to pay child support for the dates alleged in these indictments. Indeed, all of the evidence is to the contrary and that evidence is corroborated by witnesses, medical records, and judicial order. While we are all sympathetic to a mother who is forced to provide the sole financial support for her children, we should not let that sympathy cloud our judicial review of the record evidence in this case, which preponderates in favor of appellant's affirmative defense and outweighs the jury's adverse determination of that issue. *Johnson*, 23 S.W.3d at 10. We should sustain the third point of error and reverse the judgment of the trial court. Because the majority does not, I dissent.[14]

/s/ Charles F. Baird
Justice

Judgment rendered and Opinion filed October 11, 2001.
Panel consists of Justices Anderson, Edelman, and Baird.[15]
Do Not Publish — TEX. R. APP. P. 47.3(b).

[14] I agree the instant prosecution was not jeopardy barred and that the evidence was legally sufficient to support the jury's verdict.

[15] Former Judge Charles F. Baird sitting by assignment.