Criminal Non-Support

Minn. Stat. §609.375

Presenters:

Robin Finke, Swift County Attorney

and

Jennifer Stanfield, Assistant Carver County Attorney

WHY CHARGE?

REASONS

- It is a crime not to support your child(ren).
- A County Attorney has a duty to enforce the law. *See Minn. Stat. §388.051*
- The crime itself is against victims (children), whom in many cases are living in poverty or close to poverty.
- Children deserve the support of both parents.
- Non-support of a child causes harm to the individual family and society as a whole.
- May result in collection of support that you would not have normally seen.

IMPORTANT REMINDER!!!!!!!

- Criminal Non-Support is not an enforcement tool. Do not charge a Defendant with criminal non-support with the expectation that you will get compliance and support paid.
- You are charging the case because the Defendant is guilty of a crime. The goal is to punish that individual.
- Getting support is a secondary benefit that you hope you obtain.
- This is not criminal contempt! That is a separate charge under Minn. Stat.§ 588 and is not criminal non-support.

COUNTY PROCESS

- Develop a process by which cases are referred to the County Attorney's Office for charging.
- Decide whether you will be using a Support Officer as the signatory to a complaint or the use of a Police Investigator. Using a Police Investigator to interview your Defendant pre-complaint is the best route to get new information and possible admission of the crime. Otherwise use of a Support Officer is fine as well.

REMINDERS!!!

- This is a criminal case. You have to prove beyond a reasonable doubt that the Defendant is guilty. You will need to rely and use your support officer to gather as much information as possible about the case (or the Investigator).
- Once you have all the information, you can determine what evidence you can use in court.
- From there you will need to determine how to get the evidence entered. Remember this is very different from a civil action. Don't get mixed up between civil and criminal procedure.

ELEMENTS OF THE CRIME
MINN. STAT. §609.375

- The Defendant had a legal obligation to provide care and support to a child or a spouse.
- The Defendant knew of the obligation to provide support to a child or spouse.
- The Defendant omitted or failed to provide court-ordered child or spouse support for a period in excess of _____.
- An act or acts occurred in _____County or in the County in which the support obligor resides or in the County where the Obligee or child resides.

**GUILTY OF A MISDEMEANOR

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GROSS MISDEMEANOR
MINN. STAT. 609.375, SUBD. 2

- Guilty of Misdemeanor elements, and

  - Violation continues for a period of more than 90 days, but nor more than 180 days, **or**

  - Arrears total six times the monthly obligation but less than nine times the monthly support obligation

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FELONY
MINN. STAT. 609.375, SUBD. 2a

- Guilty of Misdemeanor elements, and

  - Violation continues for a period of more than 180 days, **or**

  - Arrears total nine times the monthly obligation but less than nine times the monthly support obligation

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PREREQUISITE TO CHARGING

- Obtain or Attempt to Obtain a civil contempt under Chapter 518A.
- The attempt is satisfied by showing that service of an Order to Show Cause for Contempt (OTSC) was attempted.
- Amendment to the Statute effective August 1, 2001, and applies only to charges involving any time period after that.
- Time frame in the complaint must match the time frame in the civil contempt order, or time frame of period of non-payment through last date attempted service was made on an OTSC. *See State of Minnesota v. Nelson*, 671 N.W.2d 586 (Minn. App. 2003).

ARREARS ONLY

- Carver County has successfully utilized the statute in arrears only cases where there is a clear order establishing a payback.

STATUTE OF LIMITATIONS

- Three years (Minn. Stat. §628.26). It has been interpreted that it is three years from the last month stated in your civil contempt order or from the last month the OTSC was attempted.
- Multiple Counts are encouraged.

CRIMINAL COMPLAINT

- Include the facts about your case that are necessary to meet the elements. This will include the history of the case, from first order through the civil contempt order. You may also include information about compliance with the civil contempt order and total arrears owing.
- See attached examples of criminal complaints.
- Carver County also obtains certified copies of all the orders from the beginning and attaches them to the complaint.

SUMMONS VS. WARRANT

- Each County needs to adopt their own policy.
- Carver and Swift County issue a Summons versus a warrant on all cases unless the Defendant has a history of not appearing in court, has other warrants out for his/her arrest, or is in locate (no verified address). Some Counties also issue warrants if the arrears are over a certain amount.

PROBABLE CAUSE

- Probable Cause Challenge

PRE-TRIAL MOTIONS

- Motions in Limine:
  - Use it to ask that the court rule on evidence (i.e., allow the certified orders in).
  - Prohibit evidence
  - Prohibit the Defendant or counsel from using certain phrases or from mentioning things in court (i.e., parenting time, biological father, etc.).
- Motion for specific jury Instructions
  - Define Lawful Excuse
  - Define Knowingly
  - Use specific instructions for this charge

TRIAL!!!!!!!!

What happens if this goes to trial? How do I prove my case?

JURY?????

- The Defendant will have the option of choosing either a trial by Jury or by Judge.
- If the Defendant chooses a jury, voir dire will need to be done.
- A Prosecutor will need to create jury voir dire questions.
- Voir dire questions should focus on not only the specific elements in the crime but on gathering information from the potential jury. This will give you an idea on who the potential juror is. See example Voir Dire questions.
- You will also need to prepare and review jury instructions. Go to CrimJIG to obtain them.

1. The Defendant had a legal obligation to provide care and support to a child or a spouse.

- Identification of the Defendant
  - Former Spouse or Partner testimony
  - Child Support Officer
  - Investigator
  - Defendant's Admission
- Proving Defendant had an Obligation
  - Enter a certified copy of the support orders. This can be done via the Obligee or the Support Officer.
  - Public Records or reports. Have the custodian of records certify they are authentic.
  - Defendant stipulates to Entry of Orders.

2. The Defendant knew of the legal obligation to provide care and support to a child or a spouse.

- Proving Knowledge of the Defendant:
  - Proof of Service of the Initial Order and Orders via the Custodian of Records
  - Child Support Officer, Investigator or Obligee can testify to actual knowledge of the Defendant.
  - Friends, Employers or Family Members can testify.
  - Prior Statements of the Defendant (ie, admission in a civil contempt proceeding which is in an order or a transcript).

**Defenses (You don't want the Defendant to be able to show that he/she was never served or that he/she thought the obligation ended).

3. The Defendant omitted or failed to provide court ordered child or spousal support for a period in excess of _____.

- Proving Failure of the Defendant to Pay:
  - Testimony of the Child Support Officer. Enter a detailed payment record, PRISM history, etc, via the business records exception of the evidence rules. However, don't have any document entered into evidence that is too complicated for the Jury and the Judge to understand. Have your support officer create a payment record document that is easy to understand and read!
  - Obligee to testify about lack of payment, which presents a more human face to the case.
  - Prior statements of the Defendant.
  - Stipulation of the Defendant.

3. The Defendant omitted or failed to provide court ordered child or spousal support for a period in excess of _____.

Defenses:

- Lawful Excuse

- Allows for a defense to be put forward regarding the Defendant's inability to seek relief from the court process which grants legal excuses for non-payment of support. So a modification of support under Minn. Stat. 518A.

- In a general intent crime, the State must only prove the Defendant intended to do that which the law prohibited. The State does not need to prove the Defendant intended the harm or result.

- The Defendant does not have a lawful excuse unless he/she sought legitimate relief from the support obligation. The Child Support Officer can testify to what relief was attempted by the Defendant.

- Ability to pay is not an element of the crime. "So I have never worked or I cannot work is not a lawful excuse."

3. The Defendant omitted or failed to provide court ordered child or spousal support for a period in excess of _____.

- Defenses (cont'd):

  - However, if you are presented with evidence of a mental or physical disability that prevented the Defendant from filing a motion or working at all, you may want to reconsider proceeding and dismissing your case.

4. An act or acts occurred in ____ County or in the County which the support obligor resides or in the County in which the obligee or child resides.

- Jurisdiction and Venue

  - Testimony from the Child Support Officer or the Obligee will establish the element of where the crime occurred, or where the Defendant, Obligee or child resides.

  - Venue was challenged in Clay County when the orders were in Clay County but the Defendant, Obligee and Child no longer resided in Clay County. The Court of Appeals in an unpublished case, held that when reading both the venue portion of Minn. Stat. §609.375 and the general venue statute Minn. Stat. §627.01, even if no one resides in the charging County as long as the support order was located in that County, that County had venue to charge. *See State of Minnesota v. Stewart, 2004 WL 2988171 (Minn. App.)*

DISCHARGE OR DISMISSAL MINN. STAT. §609.3751

- Effective August 1, 2001.
- Eligible when:
  - No previous felony convictions.
  - No previous non-support convictions.
  - No diversion program for non-support.
  - No previous probation for non-support.

PROCEDURE FOR DISCHARGE OR DISMISSAL MINN. STAT. §609.3751

- After guilty verdict or plea of guilty
- It defers entering judgment and further proceedings and places Defendant on probation.
- Defendant must provide child support office with affidavit containing current information and agree to a payment agreement approved by the court to pay the support and arrears.
- Court may dismiss the matter in it entirety if arrears are brought current.
- Upon violation of probation or payment agreement, a judgment of guilt is entered by the Court.

SENTENCING

- Criminal Felony Non-Support is considered a felony level 1 on the sentencing guidelines. For a Defendant with a criminal history score of 0-2 (typical), the presumptive sentence is one year and a day (366 days).
- Remember that many counties now have a rule that if the original sentence is over a year, if the sentence is executed (even if the time left to serve is under a year), the Defendant will serve that time in prison versus jail.

PLEA BARGAINING

- Consider reduce a felony charge to a gross or misdemeanor if the Defendant agrees to make a large lump sum offer.
- Consider having the initial jail sentence anywhere from 30-60 days with work release.
- Consider weekend jail time if the Defendant is working full-time and it can be verified.
- Sometimes PD's will want EHM but do so only in very limited circumstances.
- Don't use restitution as part of the agreement. Do any payment plan with the agency.
- Discuss any plea with the investigator, agency and the victim.
- Allow the court to decide the payment of fines, PD payment, etc.

PROBATION

- You should meet with the probation office in your county to discuss this type of case. As part of that discussion you will be educating them on criminal non-support.
- Decide with them the process of when a Defendant stops payment. In Carver County, three months of non-payment generates a email to the assigned agent. The agent will then decide if lack of payment is enough to warrant a violation (usually is).
- Discuss ideas of recommendations they can make to Defendants. Part of probation conditions are follow all recommendations of the probation officer. So for example, if a Defendant is not paying and clams unemployment, they can recommend that they search for jobs, keep logs, and pay a minimal amount of support or use a local Workforce Center.

PROBATION CONDITIONS

- If the original charge is a felony, probation cases will get referred to the agency your county utilizes. In Carver County all felony level cases got to the Department of Corrections. In Swift County, all of the felony probation (with a few exceptions) goes through our community corrections agency (including criminal non-support).

PROBATION CONDITIONS

- Conditions of Probation should generally be:
  - Remain law abiding,
  - Follow all rules and recommendations of the probation officer,
  - Update address and employment information with the probation officer, courts and support agency.
  - Pay the full court ordered support obligation each month. (You must specifically state this on the record, including any case specifics otherwise the court clerk will often miss it and not get this in the order).
  - Lump sum agreements.
  - Any case specific agreements if necessary.

OTHER CONSIDERATIONS

- Extradition

  - You have to keep in mind that if a Defendant is out of State and you have a nation-wide warrant, you may need to make the call about whether to extradite or not. This you will want to discuss with your criminal division manager and/or county attorney.

  - Strongly consider that if you have charged the case out and consider it serious enough to do so, then you should extradite and attempt to gain the fees back in your plea bargain. However, this may be different for all counties and based upon their financial positions.

  - Remember if you do an extradition, there is a special extradition statute that applies to these types of cases and requires additional information to be provided to the Attorney General's office above and beyond the normal requirements. See Minn. Stat. §518C.801 and 802.

QUESTIONS? IDEAS?

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THANK YOU!
THE END

Complaint

Your complainant (CSO or INVESTIGATOR), is employed by Carver County as (TITLE). In that capacity, your Complainant has had the opportunity to review the investigative file of the Carver County Child Support Unit. From this report, your complainant has learned the following facts to be true and correct to the best of her knowledge and belief. In this capacity your Complainant believes the following to be true and correct.

(DEFENDANT), hereinafter referred to as Defendant, was court ordered to pay support in the amount of $481.00 per month, $100.00 in medical support, $300.00 in child care and 20% of that total towards arrears owing, effective October 1, 2004 (*See* Exhibit A). The support amount has been increased to $500.00 due to a Cost of Living Adjustment that took place in 2006.

The Defendant failed to make his monthly support payments and was served personally with an Order to Show Cause, Motion for Contempt. A hearing was held on June 29, 2006 and the court issued a contempt order for a period of three years with a stayed sentence of 90 days (*See* Exhibit B). The Defendant did not abide by the contempt order and the court held review hearings whereby the Defendant was ordered to abide by additional stay conditions on November 28, 2006, January 25, 2007, and March 27, 2007 (*See* Exhibits C-E).

The Order dated March 27, 2007 ordered the Defendant to make his support obligations in full for three months or serve up to 20 days in jail for each occurrence. The Defendant failed to do so and failed to report to jail. He served a total of sixty of the ninety days stayed under the contempt order.

The Defendant filed a motion to modify his obligation. The court issued an order on October, 2007 which modified the Defendant's child care cost only to $71.00 per month effective September 1, 2007 (*See* Exhibit F). The court held two more additional contempt review hearings and issued orders on October 31, 2007 and February 8, 2008 (*See* Exhibits G-H). Both orders requested that the Defendant make payments on his obligation and/or find employment. The Defendant failed to do so and the court scheduled an evidentiary hearing in which it would have been determined if the Defendant would have served the remaining 30 days under the contempt order. The Defendant failed to appear at the evidentiary hearing and a warrant was issued for his arrest. There has been no payment made since June, 2007.

A Judgment and Decree was issued on May 1, 2008 which kept the court ordered support the same as prior orders (*See* Exhibit I).

The Defendant's arrearages/judgments due to his failure to pay and previous failures to pay are $40169.78 through June, 2008 (*See* Exhibit J).

Carver County is the proper venue for this action because the support obligor or the support obligee or the child either resides in Carver County or resided in Carver County

WHEREFORE YOUR COMPLAINANT COMPLAINS AS FOLLOWS:

Count:	1
Charge:	Non-Support of Spouse/Child-9 times monthly obligation
In Violation of:	609.375, subd. 2(a)(2)
Maximum Penalty:	2 years or $5,000, or both

That on or about October 1, 2004 through June 30, 2006 in the County of Carver and State of Minnesota, the above named individual, was legally obligated to provide care and support to a minor child and knowingly omitted and failed to do so amassing arrears in court-ordered child support, in an amount equal to or greater than 9 times the person's totally monthly support.

Count:	2
Charge:	Non-Support of Spouse/Child-Over 180 Days
In Violation Of:	609.375, subd. 2(a)(1)
Maximum Penalty:	2 years or $5,000, or both

That on or between the dates of October 1, 2004 through June 30, 2006, the above-named individual, within the County of Carver, was legally obligated to provide care and support to his minor children, and knowingly omitted and failed to do so for a continuous period in excess of 180 days

Count:	3
Charge:	Misdemeanor Criminal Contempt of Court
In Violation of:	588.20, subd. 2(4)
Maximum Penalty:	$700.00 fine or 90 days in jail or both

That on or between the dates of July 1, 2006 through June 30, 2008, the above named individual, within the County of Carver, did engage in willful disobedience to the lawful process or other mandate of a Court and willfully failed to pay court-ordered child support when the obligor had the ability to pay, by violating previous court orders.

Count:	4
Charge:	Misdemeanor Criminal Contempt of Court
In Violation of:	588.20, subd. 2(8)
Maximum Penalty:	$700.00 fine or 90 days in jail or both

That on or between the dates of July 1, 2006 through June 30, 2008, the above named individual, within the County of Carver, did engage in willful disobedience to the lawful

process or other mandate of a Court and willfully failed to pay court-ordered child support when the obligor had the ability to pay, by violating previous court orders.

Complaint

Your complainant (NAME) is employed by Carver County as (TITLE). In that capacity, your Complainant has had the opportunity to review the investigative file of the Carver County Child Support Unit. From this report, your complainant has learned the following facts to be true and correct to the best of her knowledge and belief. In this capacity your Complainant believes the following to be true and correct.

(DEFENDANT), hereinafter referred to as Defendant, was court ordered to pay basic support in the amount of $316.00 per month, medical support in the amount of $50.00 per month and child care costs in the amount of $224.00 per month, effective July 1, 2002 (*See* Exhibit A). A Stipulation and Order was filed on March 21, 2003 whereby the child care amount was decreased to $80.00 per month (*See* Exhibit B). Child Care was administratively stopped on January, 2007.

The Defendant failed to pay his obligation. The Defendant was served with an Order to Show Cause for failure to pay his child support and a hearing was held on March 11, 2003. At that hearing, the court issued a contempt order against the Defendant for a period of one year with a stayed sentence of 30 days for so long as the Defendant pay is court ordered obligations (*See* Exhibit C). The court issued another contempt order in September, 2007 against the Defendant for failure to pay his support obligation for a period of two years with a stayed sentence of sixty days. (*See* Exhibit D). The Defendant was placed on a gradual payment plan with the ultimate goal of paying the full court ordered amount. The court held a review hearing where the Defendant was already in default of this contempt order and set the matter on for a revocation evidentiary hearing (*See* Exhibit E). The Defendant failed to appear and a warrant was issued for his arrest. He was subsequently picked up on the warrant and a hearing was held on March 12, 2008. An order issued from that hearing required that the Defendant find full time employment and complete job search logs (*See* Exhibit F). The Defendant found employment and was then ordered at a review hearing in April, 2008 to begin making his full court ordered support obligations (*See* Exhibit G). The Defendant again failed to pay his obligations and the court gave him one more opportunity to begin making his payments. (*See* Exhibit H). The Defendant did not comply so the court ordered him to file a motion to modify and appear at an evidentiary hearing (*See* Exhibit I). At the evidentiary hearing, the Defendant was ordered to pay his support obligations for the months of January and February, 2009 or he would report to serve up to 20 days in the Carver County jail for lack of compliance (*See* Exhibit J) The Defendant did not pay and therefore served some jail time. The court issued a final contempt order which required the Defendant to make support payments for July and August, 2009 or serve the remaining sentence (*See* Exhibit K). The Defendant failed to do so and a warrant was issued for his arrest.

Since, 2002, he has knowingly and has willfully failed to pay his support even after being given chance after chance to do so.

The Defendant's arrearages/judgments due to his failure to pay and previous failures to pay are $37,974.46 through November, 2009 (*See* Exhibit L).

Carver County is the proper venue for this action because the support obligor or the support obligee or the child either resides in Carver County or resided in Carver County

WHEREFORE YOUR COMPLAINANT COMPLAINS AS FOLLOWS:

Count:	1
Charge:	Non-Support of Spouse/Child-9 times monthly obligation
In Violation of:	609.375, subd. 2(a)(2)
Maximum Penalty:	2 years or $5,000, or both

That on or about July, 2002 through July, 2007 in the County of Carver and State of Minnesota, the above named individual, was legally obligated to provide care and support to a minor child and knowingly admitted and failed to do so amassing arrears in court-ordered child support, in an amount equal to or greater than 9 times the person's totally monthly support.

Count:	2
Charge:	Non-Support of Spouse/Child-Over 180 Days
In Violation Of:	609.375, subd. 2(a)(1)
Maximum Penalty:	2 years or $5,000, or both

That on or between the dates of July, 2002 through July, 2007, the above-named individual, within the County of Carver, was legally obligated to provide care and support to his minor children, and knowingly omitted and failed to do so for a continuous period in excess of 180 days

Count:	3
Charge:	Misdemeanor Criminal Contempt of Court
In Violation of:	588.20, subd. 2(4)
Maximum Penalty:	$700.00 fine or 90 days in jail or both

That on or between the dates of August, 2007 through November, 2009 the above named individual, within the County of Carver, did engage in willful disobedience to the lawful process or other mandate of a Court and willfully failed to pay court-ordered child support when the obligor had the ability to pay, by violating previous court orders.

Count:	4
Charge:	Misdemeanor Criminal Contempt of Court
In Violation of:	588.20, subd. 2(8)
Maximum Penalty:	$700.00 fine or 90 days in jail or both

That on or between the dates of August, 2007 through November, 2009, did engage in willful disobedience to the lawful process or other mandate of a Court and willfully failed to pay court-ordered child support when the obligor had the ability to pay, by violating previous court orders.

State of Minnesota v. Jeffrey Scott Larson, (Unpub.), CX-02-1388, filed 5-20-03 (Minn. App. 2003): The State does not have the duty to rebut evidence presented by the defendant that he is unable to work due to physical limitations. The state only has the burden to present sufficient evidence to prove beyond a reasonable doubt that the defendant was able to provide support. The offense of criminal non-support is predicated on the ability to support.	No Duty to Rebut Evidence of Physical Limitation
State of Minnesota v. Jeffrey Scott Larson, (Unpub.), CX-02-1388, filed 5-20-03 (Minn. App. 2003): The trial court did not err when it excluded evidence of non-paternity at the criminal non-support trial, where the defendant had been adjudicated the father of the child in the dissolution decree, and did not appeal.	Evidence of Non-Paternity Excluded
State of Minnesota v. Nelson, 671 NW 2d 586 (Minn. App. 2003): A condition precedent to a criminal non-support of a child charge is an attempt by the state to obtain a court order holding the person in constructive civil contempt for failing to pay support during the time period specified in the complaint. A finding of contempt for unrelated time periods does not satisfy the statutory prerequisite.	Must First Attempt Civil Contempt for Time Period Specified in Complaint
United States v. Bigford, 365 F. 3d 859, 10th Circuit (Okla. April 13, 2004): Defendant's claim that the Oklahoma default child support judgment was rendered without personal jurisdiction over him may be raised as a defense in a Deadbeat Parents Punishment Act criminal prosecution, even if he had not challenged the default judgment within three years of entry in the state court (the state's 'absolute verity' rule) as provided by state law. Even if the federal court decides that prosecution is barred in federal court based upon 14th amendment due process considerations, that decision does not interfere with the state's ability to enforce the order under its own laws. Defendant would have to re-raise the personal jurisdiction defense in state court under state law to challenge any state enforcement action. Defendant bears the burden to prove lack of personal jurisdiction.	Defendant may Challenge Personal Jursidiction in State c/s Case as Defense to Federal Prosecu-tion under DPPA
Wahl v. Wahl, (Unpub.), A03-1738, F & C, filed 8-2-04 (Minn. App. 2004): This unpublished case cites published cases that differentiate civil vs. criminal contempt proceedings. "Whether contempt is civil or criminal is determined by the court's purpose in responding to the alleged misconduct, rather than the nature of the misconduct itself." In re Welfare of A.W, 399 NW 2d 223,225 (Minn. App. 1987). Civil contempt: (a) purpose not to punish but to compel perfor-mance, (b) indefinite duration of sentence, (c) power to shorten the sentence by performing, (d) involves disobedience of a court order, and (e) is committed outside the presence of the court. (citing Mahady, Swancutt, Minn. State Bar Ass'n v. Divorce Assistance Ass'n, Inc. 248 NW 2d 733,741. Criminal contempt: (1) misconduct directed at the court, (2) unconditional sentence or fine, (3) purpose to preserve the authority of the court by punishing misconduct. Hicks ex rel Feiock v. Feiock, 485 U.S. 624,647 (U.S. S. Ct, 1988).	Distinction Between Civil and Criminal Contempt
United States v. Card, 390 F.3d 592, 2004 U.S. App. (8th Cir., filed December 9, 2004): Even though the U.S. Sentencing Guidelines Manual § 3E1.1(a) cmt., application n. 3 (2003) provides for a reduction in a defendant's offense level if he clearly demonstrates acceptance of responsibility for his offense, a guilty plea does not entitle a defendant to the adjustment as a matter of right. The pivotal issue is whether the defendant shows a recognition and affirmative responsibility for the offense and sincere remorse. Where defendant made no post indictment child support payments, made no effort to find work or apply for disability payments, and offered no evidence that he could not work, he was not entitled sentence reduction based on acceptance of responsibility. Citing United States v. Nguyen, 339 F.3d 688, 690 (8th Cir. 2003).	Sentencing in Federal Nonsupport Cases
United States v. Rater, 99 Fed. Appx. 80, 8th Cir, filed April 30, 2004 No. 03-1449: Where obligor worked only sporadically and turned down or left jobs despite his substantial past-due support obligations; failed to seek employment commensurate with his capabilities; his only regular voluntary payments during the charged time period were *de minimis*, and were made to avoid further orders of contempt in state court; and had plotted with his girlfriend to disguise assets, evidence was sufficient to permit a reasonable trier of fact to conclude beyond a reasonable doubt that obligor acted willfully in violation of section 228(a)(3). See United States v. Robinson, 217 F.3d 560, 564 (8th Cir.) (standard of review), cert. denied, 531 U.S. 999, 148 L. Ed. 2d 468, 121 S. Ct. 497 (2000).	Turning Down and Quitting Jobs, Making Payments only to Avoid Contempt, and Hiding Assets are Sufficient Proof that Failure to pay Support is Willful in Federal Case.

Westlaw.

Not Reported in N.W.2d
2004 WL 2988171 (Minn.App.)
(Cite as: 2004 WL 2988171 (Minn.App.))

Court of Appeals of Minnesota.

STATE of Minnesota, Respondent,
v.
Daniel Dean STEWART, Appellant.

No. A03-2014.

Dec. 28, 2004.

Clay County District Court, File No. KX-02-2389.

Mike Hatch, Attorney General, Kimberly Parker, Assistant Attorney General, St. Paul, MN; and Lisa Borgen, Clay County Attorney, Moorhead, MN, for respondent.

John M. Stuart, State Public Defender, Sara L. Martin, Assistant Public Defender, Minneapolis, MN, for appellant.

Considered and decided by SHUMAKER, Presiding Judge, HALBROOKS, Judge, and HUSPENI, Judge.

UNPUBLISHED OPINION

HUSPENI, Judge. [FN*]

FN* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

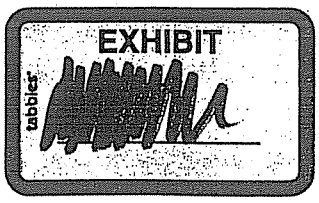
*1 Appellant challenges his conviction on the charge of felony nonsupport of a child, arguing that the trial court erred in determining that venue was proper in Clay County and in its refusal to permit appellant to testify regarding his inability to pay child support. Appellant further argues that he received ineffective assistance of counsel and, as a result of cumulative error, that he was denied a fair trial. Because appellant has shown no prejudice, we affirm the determination that venue was proper in Clay County. Because the trial court abused its discretion in refusing to permit appellant to testify regarding his inability to pay child support, we reverse and remand for a new trial and we conclude the actions of appellant's trial attorney did not rise to the level required to sustain a determination of ineffective assistance of counsel.

FACTS

Appellant Daniel Deane Stewart and Victoria Owens are parents of a child born in 1986. A subsequent Goodhue County order directed that appellant pay child support. The parties married in 1990 and were divorced in 1991 pursuant to a decree issued in Clay County, Minnesota. At the time of the dissolution, appellant was the custodial parent of a child from another marriage, unemployed, and receiving aid from the State of Minnesota. The dissolution judgment stated that appellant would not be required to pay child support to Owens until he found full-time employment. At the time of the dissolution, however, appellant was $4,776.81 in arrears under the Goodhue County order. Pursuant to a stipulated order in 1996, appellant was to pay $80 per month toward these arrearages.

A hearing was held in early 1999 in Clay County to determine appellant's current child-support obligation. Appellant testified he was a self-employed truck driver and submitted income tax forms to prove income. The ALJ determined that appellant was voluntarily underemployed and had the ability to earn $12 per hour as a tractor trailer operator; appellant was ordered to pay $303 per month in child support. [FN1] The district court denied appellant's motion for review.

FN1. According to the Minnesota Child



> Support Guidelines, Minn.Stat. § 518.551, subd. 5 (1998), child support would have been $403 per month. The ALJ deviated downward due to appellant's custody of another child.

In May 2002, the Clay County district court found appellant in civil contempt for nonpayment of child support. In December 2002, the Clay County Attorney's Office charged him with felony nonsupport of a child in violation of Minn.Stat. § **609.375**, subd. 2a(2) (2002). Appellant moved to dismiss the charge due to lack of probable cause, and at an omnibus hearing in May and June 2003, he submitted income tax returns for the years 1999, 2000, and 2001, and argued that he had a lawful excuse for nonpayment because of his minimal income. He later filed a revised motion to dismiss the charge due to a lack of jurisdiction, improper venue, and lack of probable cause. Appellant argued that because neither he, Owens, nor the child lived in Clay County, the district court did not have jurisdiction to hear the matter, and venue was improper. The district court concluded that Clay County was a proper venue because the order for child support originated there. Appellant's emergency petition for a writ of prohibition or mandamus was denied by this court, noting that appellant had not shown the required basis for granting such a remedy.

***2** On the morning of trial in August 2003, appellant's counsel officially served notice to the court of his affirmative defense of the inability to pay as a lawful excuse for nonpayment of support. Counsel stated he was unable to file the notice earlier, and the issue of inability to pay had already been raised at the omnibus hearing. Respondent argued that not filing the written motion of the affirmative defense violated Minn. R.Crim. P. 9.02. The trial court ruled that because under the rules written notice of an affirmative defense is required, presentation of the affirmative defense was precluded. The jury found appellant guilty. Imposition of sentence was stayed on condition that appellant serve 30 days in jail, complete 200 hours of community service, and make all child support payments in a timely manner. This appeal followed.

DECISION

I.

We initially address appellant's claim that **venue** was improper in Clay County. The pretrial remedy for improper **venue** is a change of **venue**. Minn.Stat. § 542.10 (2002); *Rosnow v. Comm'r of Pub. Safety,* 444 N.W.2d 591, 592 (Minn.App.1989), *review denied* (**Minn**. Aug. 22, 1989). Pursuant to Minn.Stat. § 542.10, **venue** is proper if "the county where the action was begun is a county in which the cause of action or some part thereof arose." As to **venue**, the state must prove beyond a reasonable doubt that the charged offense occurred in the charging county. **Minn**. Const. art. I, § 6. "**Venue** is determined by all the reasonable inferences arising from the totality of the surrounding circumstances." *State v. Carignan,* 272 N.W.2d 748, 749 (**Minn**.1978).

Respondent argues that this court already decided the issue of **venue** by denying appellant's writ of mandamus. A petition for writ of mandamus is the proper vehicle for review of a pretrial **venue** order. *Ebenezer Soc'y v. Minn. State Bd. of Health,* 301 **Minn**. 188, 193, 223 N.W.2d 385, 388 (1974). When an appellate court has determined a legal issue on the merits, that ruling becomes the law of the case and will not be re-examined in a later appeal. *Loo v. Loo,* 520 N.W.2d 740, 744 n. 4 (Minn.1994). But, the order of this court denying appellant's emergency petition did not settle the issue of proper venue, but rather determined that "the state has shown some grounds for trying petitioner in Clay County, although for purposes of this petition we need not decide whether the state can prove proper venue at trial."

Pursuant to Minn.Stat. § 627.01, subd. 1 (2002), "every criminal cause shall be tried in the county where the offense was committed." Further, " '[c]ounty where the offense was committed' means any county where any element of the offense was committed." *Id.,* subd. 2 (2002). According to the nonsupport of a child statute,

> [a] person who violates this section *may* be prosecuted and tried in the county in which the support obligor resides or in the county in which the obligee or the child resides. [FN2]
>
> FN2. Language used in **Minnesota** Statutes is given specific meaning by the section governing interpretation of statutes; thus "may" is permissive while

"shall" is mandatory. Minn.Stat. § 645.44, subds. 15, 16 (2002).

*3 Minn.Stat. § **609.375**, subd. 5 (2002) (emphasis added). Appellant contends that as a result of the nonsupport statute, **venue** is not proper in Clay County because none of the parties reside in that county. We disagree.

Applying the two statutes, **venue** is established in the county where any element of the offense was committed *or may* be tried in the county in which any of the parties reside. Appellant was charged with nonpayment of child support pursuant to Minn.Stat. § **609.375**, subd. 1 (2002). The legal obligation of support is an element of the crime of nonsupport. Minn.Stat. § **609.375**, subd. 1. Meeting its burden, at trial respondent elicited testimony, establishing that the order was a Clay County order. We conclude that because the obligation to provide care and support to the child originated in Clay County, the case was properly venued in Clay County. *See* Minn.Stat. § 627.01.

II.

Appellant next argues that the trial court's erroneous evidentiary ruling improperly denied him the right to present the affirmative defense of lawful excuse to nonsupport of a child. Rulings on evidentiary matters are within the broad discretion of the trial court and will be reversed only upon a clear abuse of that discretion. *State v. Hooper,* 620 N.W.2d 31, 38 (Minn.2000). "Entitlement to a new trial on the grounds of improper evidentiary rulings rests upon the complaining party's ability to demonstrate prejudicial error." *Kroning v. State Farm Auto. Ins. Co.,* 567 N.W.2d 42, 46 (Minn.1997).

A. Lawful Excuse

Initially, the parties disagree over whether inability to pay is a lawful excuse. The nonpayment-of-child-support statute does not provide a specific definition of lawful excuse. The statute provides:

> It is an affirmative defense to criminal liability under this section if the defendant proves by a preponderance of the evidence that the omission and failure to provide care and support were with lawful excuse.

Minn.Stat. § **609.375**, subd. 8 (2002).

Appellant, in arguing that inability to pay is a lawful excuse under **Minnesota** law, relies on *State v. Townsend,* 259 **Minn.** 522, 529, 108 N.W.2d 608, 613 (1960), where the court held that a defendant was not criminally liable for failing to pay support when that failure was due to an inability to pay and the defendant made a reasonable attempt to work and earn money. In *Townsend,* a father had been recently released from prison, was working temporary jobs secured by the Minnesota State Employment Office, reported to the employment office almost daily, had no skills, and could only obtain common labor. *Id.* at 528, 108 N.W.2d at 612 . The supreme court concluded that the "return of the defendant from a long prison term of several years, in part accounting for a derelict existence; his inability at the time in question to obtain regular or steady work; and his physical disability are all conditions which might be shown to overcome alleged intent or willfulness," which was required by the 1960 statute. *Id.* at 529, 108 N.W.2d at 613.

*4 Respondent argues that the ruling in *Townsend* is distinguishable because it was based on an antiquated statute and appellant did not prove that he made a reasonable attempt to find employment. Further, respondent argues that inability to pay is not one of those limited situations where the courts have determined that lawful excuse exists for nonpayment of child support; that physical disability, incarceration, and mental incapacity must be shown. *See State v. Burg,* 648 N.W.2d 673, 680 (Minn.2002) (implicitly accepting the district court's determination that mental incapacity was a lawful excuse and holding that the state had the burden of proof) [FN3]; *State v. Wood,* 168 Minn. 34, 38, 209 N.W. 529, 530-31 (1926) (holding that incarceration, without additional facts, was not sufficient to prove lawful excuse, as appellant may not have exhausted prior income, and still may have had the ability to pay support to his children); *State v. Garrison,* 129 Minn. 389, 391, 152 N.W. 762, 763 (1915) (stating that medical illness was a lawful excuse).

> FN3. This was based upon the pre-2001 statute that included the phrase "without lawful excuse" within the paragraph

> defining the crime. This element was subsequently moved to another subdivision, under the heading of affirmative defense.

We cannot limit the concept of lawful excuse as stringently as respondent would seem to suggest, however. Neither the courts nor the legislature have clearly defined "lawful excuse." Though the courts have recognized this concept in a number of situations, they clearly have not limited its application to only those situations that have specifically been addressed. We conclude that a case-by-case analysis is proper.

B. Evidentiary Ruling

The defense must give notice of a defense before the omnibus hearing. Minn. R.Crim. P. 9.02, subd. 1(3)(a). While there is no dispute that the formal notice of affirmative defense was late because it was tendered only on the morning of trial, [FN4] as a general matter, the court should consider the following factors in deciding whether evidence preclusion is proper: (1) the reason why disclosure was not made; (2) the extent of prejudice to the opposing party; (3) the feasibility of rectifying that prejudice by a continuance; and (4) any other relevant factors. *State v. Lindsey,* 284 N.W.2d 368, 373 (Minn.1979). Preclusion of evidence is a severe sanction, which should not be lightly invoked. *Id.* at 374.

> FN4. The parties disagree over what was required to plead the affirmative defense of lawful excuse. Appellant claims that his attorney simply failed to check a box on form 18, Notice of Defenses and Defense Witnesses for Felony or Gross Misdemeanor Cases. Respondent claims that appellant was required to specify facts, which provide the basis for the affirmative defense of lawful excuse. We agree with appellant that all that was required was to check the box on the form denoting that he was bringing the affirmative defense of lawful excuse.

Here, appellant raised the issue of inability to pay at the omnibus hearing; he submitted tax returns for the years 1999, 2000, and 2001, and both appellant and respondent argued the issue of ability to pay at that hearing. Any prejudice to respondent from the late presentation was, at worst, minimal. Respondent clearly had notice of the lawful-excuse argument since the time of the omnibus hearing. In denying appellant's request to present an affirmative defense, the trial court stated "the rules require notice in this kind of a situation and that's my ruling and you didn't give notice, so you're not going to present it." According to the record, the trial court did not consider a continuance. The prejudice that respondent may have encountered surely would have been cured by a brief continuance. Even the need for a continuance is doubtful, however, in view of the thorough litigation of the issue of inability to pay during the omnibus hearing. We conclude that the trial court abused its discretion by denying appellant the ability to present evidence of lawful excuse, and a new trial is warranted in which appellant shall be permitted to present that evidence. While on the record before us it is unclear whether a fact-finder would deem appellant's employment situation to be a lawful excuse, the fact-finder should at least have the opportunity to consider the evidence.

III.

*5 Appellant's next argument is similar to that which he makes regarding presentation of an affirmative defense of lawful excuse. He testified in his own behalf at trial, and wished to explain his intent and motivation for nonpayment of child support; he had been involved in a vehicle accident that resulted in a death, and that such a record severely limited his ability to be gainfully employed as a truck driver. He urges that the trial court's refusal to allow him to explain these matters to the jury deprived him of his constitutional right to testify on his own behalf. He also argues that respondent opened the door for the testimony appellant seeks to present by arguing that he was voluntarily underemployed. He alleges that he was entitled to rebut this argument of respondent with his own testimony. *See Morissette v. United States,* 342 U.S. 246, 274, 72 S.Ct. 240, 255 (1952) (holding that the existence of criminal intent is a question of fact, which must be submitted to a jury).

There is merit in appellant's argument. If a trial court's evidentiary ruling is determined to be

erroneous, and the error reaches the level of a constitutional error, such as denying the defendant the right to present a defense, the standard of review is whether the exclusion of evidence was harmless beyond a reasonable doubt. *State v. Richardson,* 670 N.W.2d 267, 277 (Minn.2003). The error cannot be said to be harmless beyond a reasonable doubt, and therefore reversible, where there is a reasonable possibility that the error complained of may have contributed to the conviction. *Id.*

The U.S. Supreme Court has held that a criminal defendant has a constitutional right to testify in his or her own behalf. *Rock v. Arkansas,* 483 U.S. 44, 51, 107 S.Ct. 2704, 2708 (1987). Even though this right is limited by rules of evidence, courts have concluded that "the defendant's constitutional right to give testimony regarding his intent and motivation is very broad." *State v. Buchanan,* 431 N.W.2d 542, 550 (Minn.1988). And this court has found that criminal defendants have a due-process right to explain their conduct to the jury, "whether or not their motives constitute a valid defense." *State v. Rein,* 477 N.W.2d 716, 719 (Minn.App.1991), *review denied* (Minn. Jan. 30, 1992).

We conclude that the district court committed error in precluding appellant from testifying on his own behalf. And the trial court's error cannot be said to be harmless beyond a reasonable doubt. Therefore, a new trial is required. [FN5]

> FN5. Because we reverse and remand for a new trial due to an abuse of discretion in denying an affirmative defense and limiting appellant's trial testimony, we do not address appellant's argument that cumulative errors of the trial court necessitated a new trial.

IV.

Appellant's final claim is that his trial counsel's failure to provide notice to the court of the affirmative defense of lawful excuse deprived him of effective assistance of counsel. Arguably, our determination that the trial court abused its discretion in ruling as it did on the notice of claim of affirmative defense makes it unnecessary for us to address this issue. We shall do so, nonetheless, in the interests of fully addressing all issues on appeal.

***6** A claim of ineffective assistance of counsel requires a defendant to show (1) that defense counsel's representation fell below an objective standard of reasonableness, and (2) that there is a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different. *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 2064 (1984); *Gates v. State,* 398 N.W.2d 558, 561 (Minn.1987). There is a strong presumption that counsel's performance fell within the wide range of reasonable assistance. *State v. Lahue,* 585 N.W.2d 785, 789 (Minn.1998).

Appellant argues that a reasonably competent attorney would have followed the rules of discovery. Because of defense counsel's discovery violation, appellant's affirmative defense of lawful excuse because of an inability to pay was precluded. All evidence pertaining to appellant's alleged difficulties in gaining and maintaining employment was precluded, as well as appellant's income tax filings. Appellant argues, therefore, that he was prejudiced by the discovery violation, and that defense counsel's representation was clearly ineffective. We disagree. Appellant's attorney presented the lawful-excuse argument at the omnibus hearing, and it was at least arguably reasonable that the attorney believed any further notice was unnecessary. Under the particular facts of this case, the failure to check the appropriate box on form 18 does not rise to the level required to prove ineffective assistance of counsel.

Affirmed in part, reversed in part, and remanded.

2004 WL 2988171 (Minn.App.)

END OF DOCUMENT

STATE OF MINNESOTA
COUNTY OF CARVER

DISTRICT COURT
FIRST JUDICIAL DISTRICT
CRIMINAL DIVISION

STATE OF MINNESOTA,
Plaintiff,

Court File No:

v.

,

NOTICE OF MOTION AND MOTION IN LIMINE

Defendant.

YOU WILL PLEASE TAKE NOTICE that the undersigned brings the following motion in limine for hearing before the above-named court on the 9th day of May, 2009, at the Justice Center, Government Center, 604 East Fourth Street, Chaska, Minnesota 55318-2102:

Based upon all the files and the records in this case, and upon the points and authorities cited herein, plaintiff the State of Minnesota hereby moves this Court:

1. For an order prohibiting defense counsel from referring to the Defendant's parenting time with the minor children and the victim's role in the parenting time during the trial. This motion is based upon Minnesota Rules of Evidence 401 and 402 which in part allows for the preclusion of irrelevant evidence. The parenting time of the minor child is not relevant. It does not 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. In addition, this motion is also based upon Minnesota Rules of Evidence 102. Allowing defense counsel to refer to the Defendant's parenting time with the minor children or lack thereof, is not an element of the offense of the crime charged, or an affirmative defense. Mentioning the parenting time only causes undue delay, unfairness to the victim, and prevents the court from focusing on relevant issues to the case.

2. For an order of the court allowing certified court orders issued under the family support file FA-04-467 to be presented by the Plaintiff and utilized by the court as evidence during trial as a public records exception under Minnesota Rules of Evidence 902 (4) and 1005. In addition, for an order of the court determining the certified family court orders as relevant evidence pursuant to Minnesota Rules of Evidence 401 and 402. The purpose of which is to prove the Defendant's knowledge of his support obligations and proof that a civil contempt order was obtained against the Defendant. Both of which are elements of the felony non-support charges pursuant to Minnesota Statutes §609.375.

Dated this 18th day of May, 2009.

JAMES W. KEELER, JR.
CARVER COUNTY ATTORNEY

By: _____

Jennifer L. Stanfield, Reg. No.: 313440
Assistant County Attorney
Government Center, Justice Center
604 East Fourth Street
Chaska, Minnesota 55318-2188
(952) 361-1400

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF CARVER FIRST JUDICIAL DISTRICT

Case No.

State of Minnesota,

Plaintiff,

vs.

,

Defendant.

NOTICE OF MOTION AND MOTION PURSUANT TO MINN. R. CRIM. PRO. 9.02 TO COMPEL DISCOVERY

To the above-named defendant and through his attorney, , Assistant First District Public Defender, please take notice that on June 6, 2008, at 9:00 am or as soon as can be heard thereafter, the undersigned is seeking to compel the disclosure of a witness list, exhibits and the Defendant's lawful excuse as a defense.

Based upon all the files and the records in this case, and upon the points and authorities cited herein, plaintiff the State of Minnesota hereby moves this Court as follows:

1. Compel Discover pursuant to Minnesota Rules of Criminal Procedure 9.02

Documents:
Pursuant to Minnesota Rules of Criminal Procedure 9.02, subd. 1, the Defendant without court order shall provide the prosecuting attorney with the disclosure of any evidence the Defendant intends to introduce at trial which includes documents and other tangible objects. The Defendant has not provided the prosecuting attorney with any evidence that the Defendant intends to introduce at trial.

Notice of Defense:
Pursuant to Minnesota Rules of Criminal Procedure 9.02, subd. 3, the Defendant shall inform the prosecuting attorney in writing of any defense, other than that of not guilty, on which the Defendant intends to rely on at trial. The Defendant notified the prosecuting attorney that his defense was "inability to work." However, pursuant to Minn. Stat. §609.375, subd. 8, an affirmative defense to a charge under this statute is a lawful excuse. Inability to work is not a lawful excuse. A lawful excuse would be any reason under Minn. Stat. §518A.39, for why a court would modify the Defendant's support obligation to zero. Examples, would be incarceration, in-patient treatment, disabled, etc. As a result the Defendant has not presented the State with a lawful excuse for non-payment of support, hence his defense as required pursuant to the rule.

Notice of Defense Witnesses:

Pursuant to Minnesota Rules of Criminal Procedure 9.02, subd. 3, the Defendant shall provide to the prosecuting attorney a list of any names and addresses of persons whom the Defendant intends to call as witnesses at the trial, together with their record of convictions. The Defendant has provided the State with no list of any witnesses he intends on calling.

The fair and efficient administration of justice requires that both sides engage in free and open discovery. Only with prompt disclosure can each side adequately prepare for the technical aspects of this trial. Minnesota judicial traditions and rules do not allow trial by ambush or surprise. All rules and procedures of the Minnesota criminal trial process are to be "construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense or delay." Minn. Rule Crim. Pro. 102. The Defendant has not provided the State with the above items as required by Minn. Rule Crim. Pro. 9.02. The State is respectfully asking that the Defendant provide the items listed above in a timely matter prior to trial. The trial has been continued two times now without the information provided.

DATED: _____ BY: _____

Jennifer L. Stanfield
Assistant County Attorney
MN Attorney Regis. No. 313440

STATE OF MINNESOTA
COUNTY OF CARVER

DISTRICT COURT
FIRST JUDICIAL DISTRICT
CRIMINAL DIVISION

STATE OF MINNESOTA,

Plaintiff,

-vs-

NOTICE OF MOTION AND MOTION

,

Defendant.

District Court File No.

PLEASE TAKE NOTICE that the undersigned will bring the following motion on for hearing before the above-named Court on the Tuesday, July 8, 2008 at 8:30 am or as soon thereafter as counsel can be heard, at the Carver Court House at Courthouse, 604 East Fourth Street, Chaska MN 55318-2102, as set forth below.

MOTION

Comes now the State of Minnesota, by and through Assistant County Attorney, Jennifer Stanfield, to move this Court in limine for the following:

1. For an order prohibiting the defense from inquiring about, offering evidence upon, or commenting upon in the presence of potential jurors and the jury, the possible punishment or other adverse effects which defendant may face if a conviction results.

Authority: Only relevant evidence is admissible at trial. Minn. R. Evid. 402. The question of punishment is exclusively for the court. *State v. Chambers*, 589 N.W.2d 466, 474 (Minn. 1999); *State v. Finley*, 214 Minn. 228, 231-2, 8 N.W.2d 217, 218 (1943). Therefore, it is not relevant to any of the issues which the jury must consider as the finder of fact. In *Chambers*, the Supreme Court held the trial court properly refused to allow voir dire on the consequences of a guilty verdict such as the sentence. *Id.* at 474. In *Finley*, the Supreme Court held:

> The responsibility of imposing punishment upon a defendant in a criminal case rests exclusively with the court. The jury goes outside their province as triers of the facts if they include the matter of punishment in their deliberations.

Id. at 231-2, 8 N.W.2d at 218. (Emphasis added).

The possibility that a conviction in this case will result in probation, jail or imprisonment, has nothing at all to do with the issue of whether defendant committed the crimes charged, which is the sole issue for the jury to consider. Therefore, the defense should be precluded from mentioning it to the jury or asking questions about the possible sentence in voir dire.

2. For an order prohibiting defense counsel from telling the jury that the defendant was instructed or advised not to testify by defense counsel.

Authority: *State v. Harris*, 333 N.W.2d 873, 876 (Minn. 1983).

3. For an order prohibiting defense counsel from mentioning the word "willful non-payment of support" in the presence of the jury.

Authority: Minn. Stat. §609.375. "Willful non payment of support by the Defendant is not an element of the crime as charged and by allowing defense counsel to mention it in front of the jury will only cause confusion with the jury and prejudice the State's case. The general intent of this crime is "knowingly omits" which means that the Defendant "knew" that he had an obligation and "failed" to make the payments as ordered.

5. For an order adding the following language to the standard jury instruction regarding *Lawful Excuse:*

   "Lawful Excuse", means that the Defendant must prove that he has obtained a court ordered modification under Minn. Stat. 518A.39, that either modifies or suspends his support obligation based upon the facts of the particular case."

Authority:

The only lawful excuse for not paying one's support is obtained through a court ordered modification that either modifies or suspends one's obligation based upon the facts of the case under Minn. Stat. 518A.39. No other lawful excuse for paying one's support exists in the State of Minnesota. An individual who is seeking relief from the payment of his support is obligated to come forward and make appropriate motions to the court to relieve him or her of their support obligation. A Defendant who has failed to make such a motion cannot put forward any lawful excuse for not making his support payments. The support obligation remains as ordered as the law does not allow for any retroactive relief from a support obligation other than from the date of the motion forward under Minn. Stat. §518A.39 as follows:

Therefore, if the Defendant failed to file a motion and obtain an order he is barred from making any other lawful excuse for non-payment because the courts are not allowed to retroactively amend the Defendant's obligation under Minn. Stat. 518A.39. Therefore, the obligation still remains.

6. For an order of the court allowing a certified transcript issued under the family support file F6-92-50529 from a hearing held on February 14, 2006 to be presented by the Plaintiff and utilized by the court as evidence during trial as a public records exception under Minnesota Rules of Evidence 1005.

Dated: June 12, 2008

_____

Jennifer L. Stanfield
Assistant County Attorney
604 East Fourth Street
Carver County Courthouse
(952) 361-1400
Attorney Registration Number: 313440

- Submitting a supplemental jury questionnaire to be filled out by the venire prior to jury selection
- If you feel that any of the above has been denied improperly, object to preserve the issue for appeal

CRAFTING AN EFFECTIVE VOIR DIRE

1. Develop a theme. It is important to have a theme to your case. The theme should be used throughout the case, starting in the voir dire.

2. Develop your own style. What works for one person may not work for another. Watch other prosecutors in voir dire to obtain ideas, but if the "style" or "routine" of another person doesn't feel comfortable to you, it won't go over well with the jury either. Do not be a fake... they can sense it. Likewise, the questions offered here are suggestions... perhaps rewording them, or creating your own, similar scenarios will work better for you. Sincerity and credibility are your most valuable weapons at this point.

3. Identify yourself with the panel. "We are all in this together" is the touchstone for voir dire and presents a team approach to interaction and potential leadership. Let the jury know that they can trust you to "guide" them through this process of trial in a forthright manner.

4. Link your voir dire to your opening statement, closing argument, direct examinations and cross-examinations. Plant the seeds of your theme/s the first time you talk to the jurors, then when you give your opening and eventually your closing argument, they will have reached the same conclusions as you.

5. Address and debunk domestic violence (or other) myths. You should address and debunk domestic violence myths starting with voir dire. It is the only time you can have a conversation with your jurors.

6. Use jury instructions to prepare for voir dire. The criminal jury instructions for your jurisdiction are a great resource to use when you prepare your questions. Identify what you must prove in your case, as well as what you do not have to prove.

7. Address your weaknesses. Address (don't hide) what you perceive as your weaknesses, turning them into strengths or non-issues at the outset of the case, so you won't be perceived as hiding facts when they come out in trial. This goes to your credibility. Acknowledging the weakness/es in your case minimizes their negative effect on the jurors and improves your credibility when you are able to prove your case in spite of the weakness/es.

8. Have confidence in your case. Jurors can tell if you don't believe in your case. If you show by your words, body language, or lack of confidence that you wouldn't

vote "guilty," how can you expect them to? Remember to align your case theme/s with common sense and common experiences; don't ask too much of your jury by overselling your evidence.

ISSUES TO ADDRESS

1. Focus jurors on "State" as prosecutor and prepare them for absent victim if necessary. You can and should prepare your case under the presumption that the victim will not testify or cooperate with the prosecution. Even the best case based solely on the evidence will fail if the jury expects the witness to testify and that expectation is not fulfilled. Let the jurors know right away that the victim will not be testifying for the State and address their concerns about your ability to prove the case without her.

2. Educate jury on the following:
    a. Victims do not press charges. Victims are just that, victims. They have no duty to prosecute the case or even participate. The focus must be placed on the defendant and the criminal nature of their actions.

    b. Domestic violence is not a family matter. Many people still believe that what goes on in the home between family members is not a crime and should be solved by family, friends or clergy.

    c. Domestic violence is a crime against society. Domestic violence reaches beyond the bedroom. Domestic violence is a leading cause of death among women, has a devastating effect on children in the home, and results in lost revenue for business. The case before the jury is not an isolated incident but one episode in an ongoing pattern of power, control and violence.

    d. The jury has a duty to follow the law. Regardless of the victim's desire to prosecute, the lack of witnesses, the victim's unsympathetic demeanor or the defendant's sympathetic one, the jury has a duty to apply the law. If you prove your case beyond a reasonable doubt, they must convict.

    e. The purpose of the law is to
        i. Protect victims. Most of the time, the case that goes to trial is not the first incident of abuse. Many victims do not know how to escape the violence or are too afraid to do so. In enforcing the law, juries are protecting victims. The courtroom is where justice keeps its promise.

        ii. Hold offenders accountable. Domestic violence is an exercise of power and control. Batterers must learn that they do not control the criminal justice system and that domestic violence is not tolerated. Be careful that this does not become a "call to arms," which is

objectionable and, in some jurisdictions, may constitute prosecutorial misconduct.

3. Don't be afraid to ask tough questions and encourage in-chambers discussions with reluctant jurors. Domestic violence, like all violent crimes, can be horrific and uncomfortable. Jurors may wish to avoid the harsh reality of the case or their own experiences. Make sure your jurors can listen to all the evidence and decide impartially. Asking tough questions is not mutually exclusive with creating a rapport with your jury. Always remember to be polite and understanding. You do not want to alienate your jurors by making an individual talk about very uncomfortable and personal experiences in front of strangers, so push for in-chambers conversations when appropriate. (For some reason, jurors don't mind when we require victims to do it.....)

4. Probe for bias in varying ways
    a. State's role in intervention. Just because a crime is committed between intimate partners does not mean that the State does not have an obligation to step in. Regardless of whether the victim recants or refuses to testify, a crime was committed against the State and the State must intervene. If you have been effective in your "DV 101" education, some jurors may even understand that domestic violence cases make it more necessary for the State to step in.

    b. Ability to follow the law over bias towards private matter. Regardless of your attempts to educate a juror, they may just refuse to accept that domestic violence is not a private issue. If a juror is unable to apply the law, you may have a challenge for cause.

    c. Understanding victim behaviors/emotions. Jurors believe people with whom they identify. Many times a victim of domestic violence may act in a way that others don't understand. Educate your jury on the dynamics of domestic violence and victim behavior so they know what to expect and are able to give it an explanation.

5. Know the potential weak juror
    a. DV survivors. At first blush, a domestic violence survivor may be the perfect juror. However, victims who were able to leave without government intervention may be less sympathetic to a victim who was not.

    b. Professional women. Professional women may view chronic victims negatively due to personal philosophy that they would, and could, leave if they were ever hit by a man.

    c. Good ol' boys. Good ol' boys view your governmental focus on domestic violence as a threat to family autonomy and manhood. These are your

"Bubbas" and no amount of education is going to change them. Identify them quickly, don't let them infect the rest of your panel and strike them.

6. Discriminatory men. Men who view women as inferior will deomonstrate or identify with some level of power and control in relationships with women.

7. Address the "CSI effect." Nine of the top 20 television shows are about crime – CSI (all three versions), Law and Order (all three versions), Cold Case files, etc. It is important to know which of your jurors watch these shows as it will shape their expectations of you, your law enforcement witnesses and your evidence. Talk about the issues of fiction and Hollywood as compared to reality and remind them that, in reality, we all do the best we can with the information available to us.

8. In the end, if you are uncertain about a specific juror, trust that uncertainty. If you cannot see yourself having a cup of coffee with a juror or talking with a juror at a dinner party, chances are that the juror doesn't think much of you either. Trust your instincts.

Sample Questions

On the following pages you will find sample questions to include in your voir dire. The questions are organized by issue and type of crime and are not intended as a complete voir dire on their own. Remember that every case is different and the questions should be selected with your goals and case theme/s in mind.