

[Cite as *State v. Gamble*, 2004-Ohio-4954.]

STATE OF OHIO            )  
                                  )ss:  
COUNTY OF WAYNE    )

IN THE COURT OF APPEALS  
NINTH JUDICIAL DISTRICT

STATE OF OHIO

Appellee

v.

KISHA A. GAMBLE

Appellant

C.A. No.    04CA0024

APPEAL FROM JUDGMENT  
ENTERED IN THE  
COURT OF COMMON PLEAS  
COUNTY OF WAYNE, OHIO  
CASE No.    03-CR-0131

DECISION AND JOURNAL ENTRY

Dated: September 22, 2004

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

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Carr, Presiding Judge.

{¶1} Appellant, Kisha Gamble, appeals the judgment of the Wayne County Court of Common Pleas, which convicted her of child endangering. This Court affirms.

I.

{¶2} On April 24, 2003, appellant was home alone with her three-year-old stepson Travis. That same night, emergency medical personnel were dispatched to appellant's home. Upon arriving at the home, emergency medical personnel attended to Travis and transported him to Wooster Community Hospital. The

attending medical personnel at Wooster Community Hospital believed that Travis may have been a victim of child abuse and contacted the police.

{¶3} On June 19, 2003, appellant was indicted by the Wayne County Grand Jury on one count of felonious assault, a violation of R.C. 2903.11(A)(1); and one count of endangering children, a violation of R.C. 2919.22(B)(1). The case proceeded to a jury trial. The jury found appellant guilty of child endangering and not guilty of felonious assault. The trial court sentenced appellant to a term of imprisonment of two years.

{¶4} Appellant timely appealed, setting forth one assignment of error for review.

## II.

### **ASSIGNMENT OF ERROR**

“THE VERDICT OF GUILT ON THE CHARGE OF CHILD ENDANGERMENT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.”

{¶5} In her sole assignment of error, appellant claims that her conviction of child endangerment was against the manifest weight of the evidence. This Court disagrees.

{¶6} When a defendant maintains his conviction is against the manifest weight of the evidence,

“an appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a

manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.” *State v. Otten* (1986), 33 Ohio App.3d 339, 340.

{¶7} This power is to be invoked only in extraordinary circumstances where the evidence presented at trial weighs heavily in favor of a defendant. *Id.*

{¶8} Appellant was convicted of child endangering in violation of R.C. 2919.22(B)(1), which provides: “No person shall do any of the following to a child under eighteen years of age or a mentally or physically handicapped child under twenty-one years of age: \*\*\* Abuse the child[.]”

{¶9} At trial, Robert Goodrich, a firefighter and emergency medical technician (“EMT”) for Wooster Township Fire Department, testified on behalf of the State. Goodrich testified that he was the first one to enter appellant’s residence upon arrival at the scene. Goodrich testified that, based on his training, he did not feel that Travis’ injuries were consistent with appellant’s explanation of what happened. As an example of why the injuries were inconsistent with appellant’s explanation, Goodrich testified that appellant told him that Travis had fallen out of bed and that she had found him face down on the floor. However, Goodrich went on to testify that, upon examining Travis and the scene, he found blood around Travis’ mouth, but no blood on the floor. Furthermore, Goodrich testified that the severity of Travis’ injuries did not match appellant’s explanation of what happened. Goodrich testified that in order to sustain such a serious injury, Travis would have had to hit the nightstand in the room and that the nightstand was a

“pretty good distance from the bed and a child in a full lower body cast doesn’t typically stand up on a bed and fall off.” When questioned regarding the severity of the situation, Goodrich stated that he believed it was a life threatening situation.

{¶10} Mark Edwards, another EMT for Wooster Township Fire Department who responded to appellant’s home on the night in question, also testified on behalf of the State. Edwards testified that, upon arriving at the scene, he found Travis posturing, which is indicative of a massive head trauma. Edwards went on to testify regarding the treatment Travis was given before he was transported to Wooster Community Hospital and stated that, in his opinion, Travis’ injuries were life threatening.

{¶11} Vicki Musselman, appellant’s stepmother, was also called to be a witness for the State. Mrs. Musselman testified that it was very difficult for Travis to move in the spica cast. Mrs. Musselman further testified that Travis could crawl on his stomach with the cast on; however, she testified that she did not know if Travis could turn over with the cast on.

{¶12} Mrs. Musselman testified that she kept Travis at her house on the night in question while appellant attended a yoga class. Mrs. Musselman testified that she left Travis with her husband, appellant’s father, while she went to her son’s concert. Mrs. Musselman testified that, when she left for the concert, there were no marks on Travis’ cheeks.

{¶13} The next witness called by the State was Galen Musselman, appellant's father. Mr. Musselman testified that he watched Travis after his wife left to go to her son's concert. Mr. Musselman further testified that he and Travis went to pick up appellant after her yoga class and he then took Travis and appellant home. Mr. Musselman testified that he did not see any marks on Travis that night.

{¶14} The State then called Ryan Gamble, appellant's husband and Travis' father, as a witness. Mr. Gamble testified that he was at work when the incident at issue occurred. Mr. Gamble testified that Travis could crawl and pull himself up with the spica cast on. Mr. Gamble further testified that he had never seen Travis roll over or pull himself up in his bed with the cast on.

{¶15} The State also called Jane Kacsandi, a nurse at Wooster Community Hospital, to testify. Ms. Kacsandi testified that she was in charge of recording what was being done to Travis when he was brought into the emergency room. Ms. Kacsandi testified that, based on her experience, Travis injuries were inconsistent with appellant's explanation of what had happened. Ms. Kacsandi further testified that she observed signs of severe neurological trauma.

{¶16} Tamara Howard, another nurse at Wooster Community Hospital, also testified on behalf of the State. Ms. Howard was the charge nurse the night Travis was brought into the emergency room. Ms. Howard testified that Travis was posturing when he was brought into the hospital. Upon being questioned, Ms.

Howard testified that posturing was a sign of neurological damage. Ms. Howard further testified that Travis had a bruise on the left side of his face and bruising around his eyes. Ms. Howard testified that in her opinion, the explanation given by appellant didn't fit Travis' injuries. Ms. Howard explained her opinion by testifying that Travis' injuries were too severe to match the appellant's explanation of what happened to cause his injuries.

{¶17} Dr. James Steed, an emergency room physician at Wooster Community Hospital, also testified on behalf of the State. Dr. Steed testified that he was also the physician on call when Travis was brought into the emergency room approximately a month earlier with a broken leg. Dr. Steed testified that his physical examination of Travis on April 24, 2003, combined with Travis' history was enough to notify the police.

{¶18} Dr. Phillip Aldana, a pediatric neurosurgeon at Akron Children's Hospital, testified as an expert witness on behalf of the State. Dr. Aldana testified that, based on his experience and training, Travis' injuries were not consistent with a child falling from a bed. Dr. Aldana further testified that with the spica cast on, Travis would not have the ability to move his hips.

{¶19} Upon being questioned as to the possibility of Travis striking his head on the nightstand in his room, Dr. Aldana testified that he did not believe that Travis' injuries were a result of him hitting his head on the nightstand. Specifically, Dr. Aldana testified that the fact that the height of the nightstand in

Travis' room was greater than the height of Travis' bed and the nature of Travis' injuries would not lead him to the conclusion that Travis hit his head on the nightstand. Dr. Aldana further testified that Travis' hitting his head on the nightstand in his room alone could not have caused his injuries, but that hitting his head combined with a significant shaking could have.

{¶20} When questioned regarding the amount of force if a three-year-old did fall off a bed with a spica cast on, Dr. Aldana testified that the force would have been lessened by the weight of the cast.

{¶21} Dr. Daryl Steiner, an emergency medicine physician and medical director of the Care Center at Akron Children's Hospital, also testified as an expert witness on behalf of the State. Dr. Steiner testified that, in his opinion, Travis was the victim of an abusive injury. Dr. Steiner testified that Travis' injuries were not consistent with Shaken Baby Syndrome because his injuries were impact injuries. Dr. Steiner further testified that Travis' injuries were consistent with the type present in Tin Ear Syndrome. Dr. Steiner explained that Tin Ear Syndrome is the result of a child being hit hard in the region of the ear causing the head to whip lash laterally resulting in subdural hematoma on the side of impact. When questioned regarding the amount of force necessary to cause Travis' injuries, Dr. Steiner testified that, in his opinion, Travis' injuries were the result of a violent blow to the side of his face.

{¶22} Dr. Steiner went on to testify that Travis could not have pulled himself up with the spica cast on. When asked if Travis could have pulled himself up to a standing position using the headboard of his bed and then fallen, Dr. Steiner testified that that information would not have changed his opinion as to what caused the force necessary to result in Travis' injuries. Dr. Steiner testified that the fall from Travis' bed was too short of a fall to cause his injuries. Furthermore, Dr. Steiner testified that the cast would have acted as a counter weight and lessened Travis' impact with the floor. Dr. Steiner testified that in order to sustain the type of injuries Travis sustained, the fall would have had to have been from a distance greater than 15 feet.

{¶23} Dr. Steiner was also asked if Travis were standing on his bed in his spica cast and fell striking the nightstand would be enough force to cause the injuries Travis sustained. Dr. Steiner testified that it was his opinion that the amount of force from such a fall would not be have been great enough to cause the type of injuries that Travis sustained.

{¶24} At trial, appellant testified on her own behalf. Appellant first testified regarding the events that led to Travis being in a spica cast. Appellant then testified that she had seen Travis pull himself up from a position on his bed using the bed's headboard. Appellant further testified that Travis was able to roll over with the spica cast on.



{¶25} Appellant testified that, on the night in question, she put Travis to bed around 8:15 p.m. Appellant testified that she placed Travis on his back. Appellant testified that around 10:00 p.m., she heard a noise coming from Travis' bedroom. Appellant testified that she went to Travis' bedroom where she found him laying face down on the floor. Appellant testified that she rolled Travis over and saw blood on his top lip. Appellant further testified that when Travis would not respond to her questions, she picked him up underneath his shoulders and shook him. She then testified that she put Travis on his bed and called 911. Appellant testified that while she was on the phone with the 911 operator, she was grabbing Travis' face, shaking him, and pulling at his eyes. Appellant testified that the 911 operator told her that Travis was having a seizure and to stop shaking him. Appellant went on to testify that after the EMT personnel arrived she was told that she couldn't ride in the ambulance with Travis so she drove herself to Wooster Community Hospital. Finally, upon being asked whether she struck Travis with anything on the night the incident occurred, appellant testified that she did not.

{¶26} Dr. John J. Plunkett also testified on behalf of the defense. Dr. Plunkett was offered as an expert witness in the field of child head injury. Dr. Plunkett testified that Travis' injuries could have occurred accidentally without the involvement of another human being. Dr. Plunkett testified that he believed a fall from the bed in Travis' room could have caused the injuries Travis suffered. Dr.

Plunkett further testified that the type of injury that Travis had was an impact injury. Dr. Plunkett testified that he could not rule out the possibility that Travis' injuries were caused by Travis striking his head on the nightstand in his bedroom. Dr. Plunkett testified that he could not conclude to a reasonable degree of medical certainty that anyone knowingly caused serious physical harm to Travis. Furthermore, Dr. Plunkett testified that he could not conclude to a reasonable degree of medical certainty as to whether anyone abused Travis.

{¶27} Upon cross-examination, Dr. Plunkett testified that he agreed with studies that stated that short falls such as falling from a bed are unlikely to produce seizures or life threatening trauma in small children.

{¶28} After careful review of the record, this Court is unable to conclude that the trier of fact lost its way and created a manifest miscarriage of justice when convicting appellant of child endangering. Although conflicting testimony was presented, this Court refrains from overturning the verdict because the jury chose to believe testimony that was damaging to appellant. A conviction will not be overturned as against the manifest weight of the evidence merely because the trier of fact believed the prosecution testimony. *State v. Gilliam* (Aug. 12, 1998), 9th Dist. No. 97CA006757. Consequently, this Court finds that appellant's conviction was not against the manifest weight of the evidence. Appellant's assignment of error is overruled.

## III.

{¶29} Appellant's assignment of error is overruled. The judgment of the Wayne County Court of Common Pleas is affirmed.

Judgment affirmed.

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The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Wayne, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to appellant.

Exceptions.

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DONNA J. CARR  
FOR THE COURT

WHITMORE, J.  
BATCHELDER, J.  
CONCUR

APPEARANCES:

CLARKE W. OWENS, Attorney at Law, 132 South Market Street, Suite 204,  
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