[Cite as *State v. Abubakar*, 2011-Ohio-6299.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
		No. 11AP-440
v.	:	(C.P.C. No. 10CR-05-2942)
Yasser Mohamed Abubakar,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on December 8, 2011

Ron O'Brien, Prosecuting Attorney, and *Barbara A. Farnbacher*, for appellee.

Todd W. Barstow, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, J.

{¶1} Yasser Mohamed Abubakar, defendant-appellant, appeals from a judgment of the Franklin County Court of Common Pleas in which the court found him guilty, pursuant to a jury verdict, of endangering children in violation of R.C. 2919.22, which is a third-degree felony.

{¶2} Appellant lived with T.M. and her two children, Y.M., and S.A, neither of whom was appellant's biological children. On April 2, 2010, T.M. took a neighbor to the hospital, while appellant watched the two children. Y.M., a boy, was five years old at the

time, while S.A., a girl, was a little over one year old. While T.M. was driving into her apartment complex, she received a telephone call from appellant. The call ended when she told appellant that she was in the apartment complex parking lot. When T.M. entered the apartment, she discovered that hot water had burned nearly the entire top of Y.M.'s hand, leaving it red and blistered. Appellant had put toothpaste on the burns. The two decided not to seek medical treatment, as they feared children's services would become involved because S.A. had already been removed from the home for three months from December 2009 to February 2010 by the county children's services agency. After Y.M.'s condition continued to worsen, T.M. eventually took Y.M. to the hospital on the evening of April 5, 2010. Y.M. was given a skin graft and was still receiving treatment as of the date of trial.

{¶3} On May 14, 2010, appellant was indicted on one count of child endangering. On February 28, 2011, a jury trial commenced, and on March 3, 2011, the jury found appellant guilty as charged in the indictment. On April 11, 2011, the trial court held a sentencing hearing. The court sentenced appellant to three years of community control and a suspended five-year prison sentence. The trial court issued a judgment on April 12, 2011. Appellant appeals the judgment of the trial court, asserting the following assignment of error:

> THE TRIAL COURT ERRED AND DEPRIVED APPELLANT OF DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE ONE SECTION TEN OF THE OHIO CONSTITUTION BY FINDING HIM GUILTY OF ENDANGERING CHILDREN AS THAT VERDICT WAS NOT SUPPORTED BY SUFFICIENT EVIDENCE AND WAS ALSO AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶4} Appellant argues in his assignment of error that the trial court's judgment with regard to his endangering children conviction was based upon insufficient evidence and against the manifest weight of the evidence. In reviewing a sufficiency of the evidence claim, the relevant inquiry is whether any rational fact finder, viewing the evidence in a light most favorable to the state, could have found all of the essential elements of the crime proven beyond a reasonable doubt. *State v. Jones*, 90 Ohio St.3d 403, 417, 2000-Ohio-187, citing *Jackson v. Virginia* (1979), 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, and *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus. Whether the evidence is legally sufficient is a question of law, not fact. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52. On review for sufficiency, courts do not assess whether the state's evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction. Id. at 390. In determining the sufficiency of the evidence, an appellate court must give "full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson*, 443 U.S. at 319, 99 S.Ct. at 2789. Consequently, a verdict will not be disturbed based upon insufficient evidence unless, after viewing the evidence in a light most favorable to the prosecution, it is apparent that reasonable minds could not reach the conclusion reached by the trier of fact. *State v. Treesh* (2001), 90 Ohio St.3d 460, 484; *Jenks* at 273.

{¶5} This court's function when reviewing the weight of the evidence is to determine whether the greater amount of credible evidence supports the verdict. *Thompkins* at 387. In order to undertake this review, we must sit as a "thirteenth juror" and review the entire record, weigh the evidence and all reasonable inferences, consider

the credibility of the witnesses, and determine whether the trier of fact clearly lost its way and created a manifest miscarriage of justice. Id., citing *State v. Martin* (1983), 20 Ohio App.3d 172, 175. If we find that the fact finder clearly lost its way, we must reverse the conviction and order a new trial. Id. On the other hand, we will not reverse a conviction as long as the state presented substantial evidence for a reasonable trier of fact to conclude that all of the essential elements of the offense were established beyond a reasonable doubt. *State v. Getsy*, 84 Ohio St.3d 180, 193-94, 1998-Ohio-533.

{¶6} In addressing a manifest weight of the evidence argument, we are able to consider the credibility of the witnesses. See *Martin* at 175. However, in conducting our review, we are guided by the presumption that the jury, or the trial court in a bench trial, is best able to view the witnesses and observe their demeanor, gestures, and voice inflections, and use these observations in weighing the credibility of the proffered testimony. *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 80. Thus, a reviewing court must defer to the factual findings of the jury or judge in a bench trial regarding the credibility of the witnesses. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. Concerning the issue of assessing witness credibility, the general rule of law is that "[t]he choice between credible witnesses and their conflicting testimony rests solely with the finder of fact and an appellate court may not substitute its own judgment for that of the finder of fact." *State v. Awan* (1986), 22 Ohio St.3d 120, 123. Indeed, the fact finder is free to believe all, part, or none of the testimony of each witness appearing before it. *Hill v. Briggs* (1996), 111 Ohio App.3d 405, 412. If evidence is susceptible to more than one construction, reviewing courts must give it the interpretation that is consistent with the verdict and judgment. *White v. Euclid Square Mall* (1995), 107

Ohio App.3d 536, 539. Mere disagreement over the credibility of witnesses is not sufficient reason to reverse a judgment. *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, ¶24.

{¶7} R.C. 2919.22(A) provides:

> No person, who is the parent, guardian, custodian, person having custody or control, or person in loco parentis of a child under eighteen years of age or a mentally or physically handicapped child under twenty-one years of age, shall create a substantial risk to the health or safety of the child, by violating a duty of care, protection, or support. It is not a violation of a duty of care, protection, or support under this division when the parent, guardian, custodian, or person having custody or control of a child treats the physical or mental illness or defect of the child by spiritual means through prayer alone, in accordance with the tenets of a recognized religious body.

{¶8} In the present case, appellant contests only one element of his offense. Appellant contends he was not a person "in loco parentis" of Y.M. Appellant contends that T.M. was the "dominant parent," utilizing language from *State v. Noggle* (1993), 67 Ohio St.3d 31. In support, appellant points out that he called T.M. to tell her of Y.M.'s injury and did not call for help on his own; appellant in no way compelled T.M. to act in a specific way; it was T.M. who decided to take Y.M. to the hospital, without any interference or consultation with appellant; appellant was contributing little financially to the relationship; and there was no evidence appellant exercised any parental authority over Y.M.

{¶9} R.C. 2919.22 does not define "in loco parentis." However, several courts have discussed the meaning of "in loco parentis" as it relates to various Ohio Revised Code sections. In *Noggle*, the Supreme Court of Ohio set forth the following definitions of "in loco parentis":

> The term "in loco parentis" means "charged, factitiously, with a parent's rights, duties, and responsibilities." Black's Law Dictionary (6 Ed.1990) 787. A person in loco parentis has assumed the same duties as a guardian or custodian, only not through a legal proceeding. A "person in loco parentis" was grouped with guardians and custodians in the statute because they all have similar responsibilities.
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> The phrase "person in loco parentis" in R.C. 2907.03(A)(5) applies to a person who has assumed the dominant parental role and is relied upon by the child for support. This statutory provision was not designed for teachers, coaches, scout leaders, or any other persons who might temporarily have some disciplinary control over a child. Simply put, the statute applies to the people the child goes home to.

Id. at 33.

{¶10} However, we found in *State v. Funk*, 10th Dist. No. 05AP-230, 2006-Ohio-2068, that the element of financial support implied in the *Noggle* syllabus is not solely determinative of a person's status as in loco parentis. A close, supportive, and protective in loco parentis relationship need not include provision for the material needs of the child. Id. at ¶70. The offices and duties of a parent are infinitely various. Id. Some have no connection whatsoever with providing for the child; and many of the benefits of such a relationship, under given circumstances, would be much more important than the making of such provision. This court also noted that numerous federal authorities have concluded that the assumption of the in loco parentis relationship is primarily a question of intention, which is shown by the acts, conduct, and declaration of the person allegedly standing in that relationship. Id. at ¶71, citing *Leyerly v. United States* (C.A.10, 1947), 162 F.2d 79, 85, *Banks v. United States* (C.A.2, 1959), 267 F.2d 535; *Meisner v. United States* (W.D.Mo.1924), 295 F. 866; and *Miller v. United States* (C.A.8, 1942), 123 F.2d 715.

{¶11} In *Evans v. The Ohio State Univ.* (1996), 112 Ohio App.3d 724, this court examined whether an "in loco parentis" relationship existed between a female minor and the university sponsored 4-H organization. Relying on *Noggle*, the trial court found that no such relationship existed. On appeal, this court held that the key factors of an in loco parentis relationship have been delineated as the intentional assumption of obligations incidental to the parental relationship, especially support and maintenance. Id. at 736, citing *Nova Univ., Inc. v. Wagner* (Fl.1986), 491 So.2d 1116, 1118, fn.2.

{¶12} In *State v. Reinhardt*, 10th Dist. No. 04AP-116, 2004-Ohio-6443, ¶34, this court found that, because the defendant was his non-biological child's sole caregiver while the biological mother worked long hours outside the home, the defendant had assumed a dominant parental role and he provided support for the child. Id. We found that the fact that the mother was home in the late evenings did not diminish the defendant's role. Id. Further, we found the fact that the defendant did not work outside the home or otherwise contribute monetarily to the family did not mean that he did not provide support for the child. Id. We concluded that "support" of a child is not limited to financial contributions. Id. The defendant supported the children by filling the role of a primary caretaker. Id.

{¶13} Thus, according to the above authorities, the factors to consider when determining whether a person is acting in loco parentis include the following: (1) the person is charged with a parent's rights and responsibilities; (2) the person has assumed the same duties as a guardian or custodian; (3) the person has assumed a dominant parental role; (4) the child relies upon the person for support; (5) the child "goes home" to the person; (6) the person's relationship with the child is close, supportive, and protective;

(7) the person has the intention of acting as a parent, which is shown by the acts, conduct, and declaration of the person; (8) the person intentionally assumes the obligations incidental to the parental relationship; and (9) the person is the primary caretaker for the child while the biological parent is absent due to, for example, employment.

{¶14} In the present case, we find there was sufficient evidence that appellant acted in loco parentis of Y.M., and the jury's finding that he acted in loco parentis was not against the manifest weight of the evidence. T.M., as a witness for the State of Ohio, plaintiff-appellee, gave the only pertinent testimony on this issue, while appellant presented no witnesses.

{¶15} Initially, the testimony was clear that T.M. considered appellant her husband. T.M. testified that she lived with appellant and referred to him throughout the proceedings as her "husband." The two were not legally married, but were married in January 2010 in a Muslim religious ceremony. Accordingly, by virtue of the fact that appellant chose to enter into a marriage-like relationship with T.M., while at the same time living with T.M. and Y.M., strongly suggests appellant intended to assume at least some of the parental responsibilities that inevitably arise under such circumstances. See, e.g., *State v. Evans*, 4th Dist. No. 08CA3268, 2010-Ohio-2554, ¶25 (that the defendant lived with the child and the child's mother supports an in loco parentis theory). Furthermore, because appellant cohabitated with T.M., he was one of the people to which Y.M. went home, as discussed in *Noggle*.

{¶16} The record also reveals appellant had a close, supportive, and protective relationship with Y.M. prior to the incident and clearly manifested his intention to act as

Y.M.'s parent. T.M. said that appellant and Y.M.'s relationship was "great," they "constantly" played together, and the two were "constantly" together. She also testified that appellant attended to all of Y.M.'s needs, loved Y.M., and was very affectionate with Y.M. Also, although T.M. said that she and appellant mutually decided not to take Y.M. to the hospital, she later testified that she wanted to take Y.M. to the hospital immediately, but appellant responded, "[N]o, Children's Services just got involved. Do we really want to go through all that again?" Thus, it appears that appellant also had some influence over T.M. in determining Y.M.'s care.

{¶17} Appellant also assumed similar duties as those of a parent. In December 2009, T.M. registered appellant at the children's hospital as someone who could take Y.M. to the hospital without a biological parent being present. She said appellant would also care for Y.M. while she did laundry, shopped, or went to appointments. In addition, as a result of his close relationship and cohabitation with T.M. and Y.M., appellant was included on the juvenile court case plan for Y.M., evincing that the juvenile court also considered him a parental figure.

{¶18} The evidence also demonstrated that appellant was considered Y.M's father, both by T.M. and Y.M. T.M. testified that appellant was the only "father figure" in Y.M.'s life at the time of the accident, and T.M. referred to appellant as Y.M.'s "stepfather." T.M. said the two had a "father/son" relationship. Y.M. also called appellant "daddy." These circumstances support a finding that an in loco parentis relationship existed. See, e.g., *State v. Burgett*, 3d Dist. No. 9-09-14, 2009-Ohio-5278, ¶25 (that the defendant treated children like his own children and that children loved the defendant "almost like a dad" supported a finding of in loco parentis).

{¶19} With regard to monetary "support," we continue to follow our analysis in *Funk* that the element of financial support implied in *Noggle* is not solely determinative of a person's status as in loco parentis. As discussed above, appellant provided substantial support to Y.M. in other respects, much like a parent would provide to a child. Notwithstanding, T.M. testified that appellant did earn "some money." She also said appellant purchased things for Y.M. Thus, appellant did contribute money to the care and maintenance of Y.M.

{¶20} We finally note that appellant seizes upon the holding in *Noggle* that indicates the term "in loco parentis" applies to a person who has assumed a "dominant parental role." Appellant contends he did not assume a dominant parental role because T.M. was consistently present in Y.M.'s life and also provided parenting. However, this factor alone does not control whether an in loco parentis relationship exists. As explained above, this was one of many factors that the court in *Noggle* used to define "in loco parentis," and this court has also looked at many other factors to determine whether a person acted in loco parentis, as explained above. Further, the court in *Noggle* specifically stated it was defining "in loco parentis" for purposes of R.C. 2907.03(A)(5), *Noggle* at 33, while we are seeking to define "in loco parentis" for purposes of R.C. 2919.22. We also do not view *Noggle* as requiring a court to decide which of two obvious parental figures plays the "dominant" parental role in order to determine whether one is acting in loco parentis; rather, the purpose of the "dominant parental role" factor in *Noggle* is to distinguish between a parental figure and other persons who "might temporarily have some disciplinary role over a child," such as "teachers, coaches, [and] scout leaders." Id.

{¶21} Therefore, for these reasons, we find appellant had many of the same rights, duties, and responsibilities of a parent: Y.M. relied upon appellant for support; appellant lived with Y.M.; appellant's relationship with Y.M. was close, supportive, and protective; and appellant manifested his intention of acting as a parent through his acts and conduct. We have no reason to distrust T.M.'s testimony, and appellant provides none. Thus, we find the jury's verdict was not based upon insufficient evidence or against the manifest weight of the evidence. Appellant's assignment of error is overruled.

{¶22} Accordingly, appellant's single assignment of error is overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

BRYANT, P.J., and TYACK, J., concur.

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