[Cite as *Beachwood v. Hill*, 2010-Ohio-3313.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93577

CITY OF BEACHWOOD

PLAINTIFF-APPELLEE

vs.

JANESSA HILL

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART, REVERSED IN PART,
AND REMANDED

Criminal Appeal from the
Shaker Heights Municipal Court
Case No. 08 CRB 00985

BEFORE: Gallagher, A.J., Dyke, J., and Boyle, J.
RELEASED: July 15, 2010

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

SEAN C. GALLAGHER, A.J.:

{¶ 1} Appellant Janessa Hill appeals her conviction and sentence from the Shaker Heights Municipal Court. For the reasons stated herein, we affirm in part and reverse in part and remand.

{¶ 2} On July 31, 2008, Beachwood police officer Charlene Traub issued a citation to Hill on a charge of child endangerment. Hill had left her three children, ages eight, seven, and four, in the car while she went inside a Giant Eagle store in Beachwood, Ohio, to shop for groceries. On August 19, 2008, Hill entered a not guilty plea. A bench trial commenced on December 16, 2008; it was continued until April 1, 2009, on which date the trial concluded.

{¶ 3} The evidence adduced at trial was as follows: at approximately 9:00 p.m. on July 31, 2008, Officer Traub was in the parking lot of the Giant Eagle on Chagrin Boulevard when she noticed a child extending the upper half of his body out of a car window. Officer Traub then noticed another child extending her head out of the same window. She approached the car, where she noticed three children in the backseat and no adult present. She inquired of the oldest child where his parents were, and he explained to her that his mother was in the store shopping. He also told her that his mother had been in the store for about five minutes.

{¶ 4} Officer Traub called for backup at 9:02 p.m.; additional officers responded to the scene. Officer Traub and Officer Preston LaFrance testified they spoke with the children and determined the children were not injured, were not afraid, and were by all accounts happy and well-mannered. The officers remained with the children until their mother, Hill, exited the store approximately fifteen minutes later. Officer LaFrance testified Hill was pushing a cart full of grocery bags. Officer Traub issued Hill a citation for child endangerment, pursuant to Beachwood Codified Ordinances 636.11(a), which is analogous to R.C. 2919.22(A).

{¶ 5} At the close of the state's case, Hill moved for a Crim.R. 29 judgment of acquittal, which the court denied.

{¶ 6} The defense presented three witnesses: Hill's oldest child; Selena Brown, a teacher who knew two of Hill's children; and Hill herself. Hill's son, who was eight years old at the time of the incident, testified that his mother left him and his sisters in the car while she went into Giant Eagle to shop. He testified he had not stuck any part of his body out of the window, and when his youngest sister stuck her head out of the window, he made her sit back down. Hill's son also testified he was not afraid to be in the car without an adult and that he had learned from school what to do in case a stranger approached the car. He testified the window was open far enough for his sister to stick her head out or for someone to reach inside.

{¶ 7} Brown testified she knew Hill because she had previously taught Hill's oldest and middle children. She testified Hill was a conscientious mother and she believed Hill would never do anything to harm her children or put them in any danger. She also testified Hill's son was very mature for his age.

{¶ 8} Hill testified she was in Giant Eagle getting a few items for her children's dinner. She parked her car approximately 40 feet from the entrance to the store. She stated she was in the store less than 15 minutes, and her sales receipt, which was admitted as an exhibit, reflected that she bought $8.70 worth of goods and that she checked out at 9:09 p.m. She also stated she trusted her son to watch his little sisters for a short period of time. Hill testified she had locked her children in the car with her cell phone, and she had left one window cracked open a small amount.

{¶ 9} At the close of Hill's case, defense counsel moved for a directed verdict, which the court denied. In a July 22, 2009, journal entry, the court entered a guilty verdict on the child endangerment charge and pronounced sentence of 12 months inactive probation and a $250 fine, with the fine suspended as long as Hill did not violate her probation. Hill was not present when the court found her guilty and imposed sentence.

{¶ 10} Hill filed her notice of appeal, raising four assignments of error for our review.

{¶ 11} "I. The trial court's denial of appellant's Criminal Rule 29 motion for acquittal and subsequent finding of guilt as to the charge of child endangerment was not supported by sufficient evidence."

{¶ 12} In her first assignment of error, Hill argues that the city failed to present evidence she violated her duty of care, she acted recklessly, and she placed her children at a substantial risk of harm.

{¶ 13} Hill argues first that R.C. 2919.22(A) is vague such that it does not alert citizens as to what behavior is proscribed. However, R.C. 2919.22 survived a constitutional challenge for vagueness in *State v. Sammons* (1979), 58 Ohio St.2d 460, 391 N.E.2d 713. In *Sammons*, the supreme court held that "R.C. 2919.22(A) provides fair notice that the contemplated conduct is forbidden and proscribes conduct that by any reasonable modern standard of our society is unacceptable." Id. at paragraph two of the syllabus. Therefore, we address whether the city presented sufficient evidence on all the elements of child endangerment.

{¶ 14} A motion for acquittal under Crim.R. 29(A) is governed by the same standard used for determining whether a verdict is supported by sufficient evidence. *State v. Tenace*, 109 Ohio St.3d 255, 2006-Ohio-2417, 847 N.E.2d 386, ¶ 37. "The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a

reasonable doubt. The weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts." (Citations and quotations omitted.) Id.

{¶ 15} R.C. 2919.22(A) states: "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. * * *"[1]

{¶ 16} Although this statute does not specify a culpable mental state, the Ohio Supreme Court has held that recklessness is an essential element of the offense. See *State v. McGee* (1997), 79 Ohio St.3d 193, 680 N.E.2d 975, syllabus; *State v. Massey* (1998), 128 Ohio App.3d 438, 715 N.E.2d 235. R.C. 2901.22(C) states that "[a] person acts recklessly when, with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature. A person is reckless with respect to circumstances when, with heedless indifference to the consequences, he perversely disregards a known risk that such circumstances are likely to exist."

[1] Hill acknowledges that she is the parent of these three children, all under the age of 18.

{¶ 17} Further, the city must prove Hill created a "substantial risk to the health or safety of the child." R.C. 2901.01(A)(8) defines a "substantial risk" as "a strong possibility, as contrasted with a remote or significant possibility, that a certain result may occur or that certain circumstances may exist." See *State v. Sammons*, supra.

{¶ 18} Hill argues that the city failed present sufficient evidence that she violated a duty of care to her children, acted recklessly, and created a substantial risk to her children's health and safety. She cites several cases in which Ohio appellate courts overturned convictions of defendants who left their child or children in a vehicle without adult supervision, most notably *State v. Martin* (1999), 134 Ohio App.3d 41, 730 N.E.2d 386, and *State v. Hughes*, Shelby App. No. 17-09-02, 2009-Ohio-4115.

{¶ 19} In *Martin*, the defendant left her eight-year-old child asleep in a car, entered a department store to return a gift, and was gone for approximately 20 to 30 minutes; the child woke, accidentally dislodged the gear shift, and the car rolled into a parking lane. In *Hughes*, the defendant left his five-year-old in a locked car with the engine running while he went into a Wal-Mart for approximately 30 minutes; the child apparently unlocked the door for the policemen who found her.

{¶ 20} However, the facts in *Martin* and *Hughes* are distinguishable from the facts before us. Here Hill left three children alone, the youngest of

whom was four years of age. It was 9:00 p.m. Hill's car window was open far enough for her four-year-old to extend part of her body out the window, and someone could have reached inside. The parking lot was on a busy street, very close to Interstate 271,[2] and had steady pedestrian and vehicular traffic. Any rational trier of fact could have found these factors presented a substantial risk to the health or safety of the children.

{¶ 21} Rarely will we find earlier cases decided on facts that are identical to the ones we face presently; it seems that the outcome of child endangerment cases are highly fact-specific. Yet, this is all the more reason to find that the city presented sufficient evidence to support a conviction as charged. This court must view the evidence in a light most favorable to the prosecution. While it is fortunate that the children were not injured or harmed, we find there was sufficient evidence Hill acted recklessly and violated a duty of care by creating a substantial risk to the health and safety of her children.

{¶ 22} Hill's first assignment of error is overruled.

{¶ 23} "II. The trial court's finding of guilt as to the charge of child endangering is against the manifest weight of the evidence."

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[2] According to the complaint, which is part of the record on appeal, the Giant Eagle store was located at 24601 Chagrin Blvd., Beachwood, Ohio, which is less than one mile from Interstate 271. See *State v. White* (1962), 116 Ohio App. 522, 189 N.E.2d 160 (judicial notice of an address).

{¶ 24} In her second assignment of error, Hill argues that the court lost its way given that much of the testimony from the police officers was in direct conflict with the evidence presented by the defense.

{¶ 25} In reviewing a claim challenging the manifest weight of the evidence, the question to be answered is whether "there is substantial evidence upon which a jury could reasonably conclude that all the elements have been proved beyond a reasonable doubt. In conducting this review, we must examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, and determine whether the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." (Internal citations and quotations omitted.) *State v. Leonard*, 104 Ohio St.3d 54, 2004-Ohio-6235, 818 N.E.2d 229, ¶ 81.

{¶ 26} Hill cites to several places in the record where the police officers' testimony was in direct conflict with her own or her son's. In one instance, Hill notes that Officer Traub testified Hill was gone at least 15 minutes from the time the officer saw the children. Hill testified that she was in the store less than 15 minutes total, and that her sales receipt, showing she checked out at 9:09 p.m., suggests Officer Traub was mistaken as to how long the children were alone. In another instance, Officer LaFrance testified Hill returned with a cart full of groceries, implying Hill was in the store

significantly longer than 15 minutes. Hill's receipt showed she bought less than $10 worth of groceries, and she testified she was carrying only one bag of groceries. In yet another instance, Officer Traub testified she witnessed two of the three children hanging out of the window, suggesting the window was open more than just a small crack for ventilation. Hill testified the window was not open far enough for her son to put his body out of the window, and that the children remained in their seats, secured by seatbelts the entire time she was in the store. She based her testimony on discovering her children seated in the backseat when she returned to the car, just as she had left them 15 minutes earlier.

{¶ 27} There is no question the evidence presented was contradictory on some points. However, the court, as fact finder, was in the best position to weigh the witnesses' testimony and determine credibility. What is perhaps more significant here is that even if Hill's testimony were accurate and the officers' testimony were exaggerated in any way, this does not mean the court lost its way finding her guilty of child endangerment. Hill left her three very young children unattended in a public parking lot, on a busy street, at 9:00 p.m., for 15 minutes.

{¶ 28} Although the record does not indicate whether diversion was considered, we find the court did not lose its way finding Hill guilty of child endangerment. Hill's second assignment of error is overruled.

{¶ 29} "III. The trial court violated the appellant's constitutional right to be present and be heard at sentencing."

{¶ 30} In her third assignment of error, Hill argues the court violated her constitutional right by pronouncing its sentence without her being present and without giving her a chance to allocute. In its brief, the city conceded that Hill was not present when the court sentenced her, and that a criminal defendant has the right to be present when the court imposes its sentence; however, the city argued that with the facts before us, any error was harmless, and Hill did not demonstrated how she was prejudiced.[3]

{¶ 31} Section 10, Article I of the Ohio Constitution and Crim.R. 32(A)(1) and 43(A) require that the defendant be present at every stage of criminal proceedings, including the imposition of sentence. See *State v. Welch* (1978), 53 Ohio St.2d 47, 372 N.E.2d 346. A trial court commits reversible error when it imposes a sentence upon a defendant without the defendant being present. Id. Further, Crim.R. 43(A) requires the physical presence of a defendant during sentencing.

{¶ 32} The purpose of allocution is to allow the defendant an opportunity to state for the record any further information that the judge may take into consideration when determining the sentence to be imposed. Crim.R. 32(A). The right of allocution applies to both misdemeanor and felony convictions.

[3] At oral argument, the city conceded this assigned error.

Defiance v. Cannon (1990), 70 Ohio App.3d 821, 828, 592 N.E.2d 884; *State v. Brown*, 166 Ohio App.3d 252, 2006-Ohio-1796, 850 N.E.2d 116, ¶ 8.

{¶ 33} We find it was error for the court to pronounce sentence in Hill's absence. Hill had a right to be present and allocute, if she chose. While it may not have made any difference in her sentence, the court should have notified Hill that it intended to pronounce its verdict and sentence, thereby giving Hill an opportunity to be present and address the court.[4]

{¶ 34} Hill's third assignment of error is sustained.

{¶ 35} "IV. The trial court failed to hear the trial on the merits within the guidelines as set forth by the Rules of Superintendence to the appellant's detriment."

{¶ 36} In her fourth assignment of error, Hill argues the excessive length of time between her arraignment and the pronouncement of her sentence, a period of more than nine months, was a violation of her rights. She relies exclusively on Ohio Rule of Superintendence 39(B), which sets forth a time frame under which misdemeanor criminal cases should be tried.

{¶ 37} We note at the outset that the body of rules to which Hill cites does not confer upon her specifically protected individual rights, but instead provides guidance for common pleas courts in managing their dockets. The Rules of Superintendence "were intended as an administrative directive from

[4] A conviction does not occur until the pronouncement of sentence.

the Supreme Court to all the Common Pleas Courts of this State * * * succinctly setting forth procedures designed to more clearly define judicial duties and responsibilities and to provide for more uniform and effective methods of general court administration. The Rules of Superintendence were not intended to function as rules of practice and procedures." *State v. Smith* (Feb. 12, 1976), Cuyahoga App. No. 34426.

{¶ 38} On appeal, Hill has not raised a statutory speedy trial violation, nor has she raised a constitutional speedy trial violation. Even so, such an argument would have been unsuccessful since Hill was brought to trial within the statutorily prescribed time period for a first degree misdemeanor, as set forth in R.C. 2945.71(B).[5] Instead, Hill argues it was a violation of her rights that the court did not conclude her trial in a timely manner. We are not persuaded that this constitutes error.

{¶ 39} Hill's argument is that the nine-month delay is, in and of itself, a violation of her rights. In fact, we have admonished the domestic relations court of the same need to conclude cases on a timely basis. Although it may not serve as a justification for the delay, the court acknowledged on the record

[5] By letter dated August 18, 2008, Hill's attorney entered an appearance and acknowledged that she waived the time requirement from arraignment to the pretrial she requested. R.C. 2945.72 states: "The time within which an accused must be brought to trial, or, in the case of felony, to preliminary hearing and trial, may be extended only by the following: * * *(C) Any period of delay necessitated by the accused's lack of counsel * * *[.]" Therefore, we begin computing time after the first pretrial on October 7, 2008.

that scheduling conflicts with five competing municipal dockets prevented it from concluding the trial sooner.

{¶ 40} Hill does not articulate any violation of her rights or prejudice she suffered as a result of the delays in concluding her trial. While this case underscores the importance of maintaining continuity during trials, the failure to do so in every instance is not reversible error.

{¶ 41} Hill's fourth assignment of error is overruled.

Judgment affirmed in part, reversed in part, and cause remanded for proceedings consistent with this opinion.

It is ordered that appellant and appellee share the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the municipal court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

SEAN C. GALLAGHER, ADMINISTRATIVE JUDGE

ANN DYKE, J., CONCURS IN JUDGMENT ONLY;
MARY J. BOYLE, J., DISSENTS WITH SEPARATE OPINION

MARY J. BOYLE, J., DISSENTING:

{¶ 42} Respectfully, I dissent. I do not agree that a parent who goes into a grocery store for less than ten to fifteen minutes while leaving her three children, ages 8, 7, and 4, in her locked automobile with her cell phone is guilty of the crime of child endangering.

{¶ 43} Hill was convicted of violating R.C. 2919.22(A), which provides "no person, who is the parent * * * of a child under eighteen 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."

{¶ 44} Substantial risk is defined as "a strong possibility, as contrasted with a remote or significant possibility, that a certain result may occur or that certain circumstances may exist." R.C. 2901.01(A)(8). Recklessness is an essential element of the offense. *State v. McGee*, 79 Ohio St.3d 193, 195, 1997-Ohio-156, 680 N.E.2d 975; *State v. Adams* (1980), 62 Ohio St.2d 151, 152, 404 N.E.2d 144. A person acts recklessly "when, with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result, or is likely to be of a certain nature. * * *" R.C. 2901.22(C).

{¶ 45} The city's evidence showed that Hill was in the store for less than ten to fifteen minutes, and her sales receipt reflected she bought $8.70 worth of goods at 9:09 p.m., that Officer Traub called for backup at 9:02 p.m., and that she left her three children, ages 8, 7, and 4, in a locked car with a cell phone, giving the children the ability to contact their mother.

{¶ 46} The evidence further showed that the children "were not injured, were not afraid, and were by all accounts happy and well-mannered." Even viewing this evidence in a light most favorable to the prosecution, the city failed to prove Hill's conduct gave rise to a "*substantial safety risk"* to her children. The children were not injured, and the city failed to prove beyond a reasonable doubt that there was a strong possibility that they would be injured. While Hill's actions may have created a speculative risk to her children's safety, mere speculation about what might have happened is insufficient to show that there was a strong possibility that an event might occur. *Eastlake v. Carrao*, Lake App. No. 2002-L-094, 2003-Ohio-2373, at ¶17, citing *State v. Allen* (2000), 140 Ohio App.3d 322, 747 N.E.2d 315; *State v. Martin* (1999), 134 Ohio App.3d 41, 44, 730 N.E.2d 386; *State v. Massey* (1998), 128 Ohio App.3d 438, 715 N.E.2d 235.

{¶ 47} The city also failed to prove beyond a reasonable doubt that Hill acted recklessly. While her actions may have been inappropriate and imprudent, I cannot conclude that Hill perversely disregarded a known risk or acted with heedless indifference to the consequences.

{¶ 48} While not condoning Hill's inappropriate actions, as this court has recognized, parents and other child caregivers are not criminally liable for every error in judgment or act of bad parenting. *State v. Bennett* (July 13, 1995), Cuyahoga App. No. 68039. See, also, *Allen*, at 325. The city's evidence, even when viewed in a light most favorable to the prosecution, was insufficient to

sustain a conviction for child endangering, under R.C. 2919.22(A). Thus, I would hold that the trial court erred in denying Hill's Crim.R. 29 motion for acquittal.