

[Cite as *State v. Pipkins*, 2010-Ohio-3420.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93688

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

CRAIG PIPKINS

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-491654

BEFORE: Cooney, J., Kilbane, P.J., and McMonagle, J.

RELEASED: July 22, 2010

**JOURNALIZED:
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COLLEEN CONWAY COONEY, J.:

{¶ 1} Defendant-appellant, Craig Pipkins (“Pipkins”), appeals his conviction and sentence for felony child endangering. We find no merit to the appeal and affirm.

{¶ 2} In February 2007, Pipkins was charged in a five-count indictment with four counts of child endangering and one count of felonious assault. The case proceeded to a jury trial at which the following evidence was presented.

{¶ 3} On August 24, 2006, Jonice Shepherd, Pipkins's girlfriend with whom he lived, went to work at approximately 11:30 a.m. and left her two children in Pipkins's care as was her custom. The victim, Kylah, was ten months old and her sister, Jailah, was one and one-half years old. At approximately 7:40 p.m., Pipkins called Shepherd at work, stating, "You're going to be mad at me." Shepherd testified that Pipkins sounded scared and told her that Kylah had fallen off the bed while he was getting Jailah out of the bathtub. Shepherd advised Pipkins that she was coming home right away.

{¶ 4} A few minutes later, Pipkins called Shepherd again and stated that Kylah was not alert. Shepherd instructed Pipkins to call 911 immediately. Shepherd arrived home in time to travel in the ambulance with Kylah to Rainbow Babies and Children's Hospital where she was found to have subdural bleeds, retinal damage, and a parietal skull fracture.

{¶ 5} A jury found Pipkins guilty of one count of child endangering resulting in serious physical harm in violation of R.C. 2919.22(A) as charged in Count 4 of the indictment and acquitted Pipkins of the remaining four charges. The court sentenced him to four years in prison. Pipkins now appeals, raising three assignments of error.

Proximate Cause

{¶ 6} In the first assignment of error, Pipkins argues the State failed to prove all four elements of felony child endangering beyond a reasonable doubt.

The indictment also includes language charging Pipkins with causing “serious physical harm.” Pipkins does not dispute the fact that Kylah suffered serious injuries. Rather, he claims that the State failed to show beyond a reasonable doubt that he proximately caused Kylah’s injuries.

{¶ 7} In support of his argument, Pipkins relies on *State v. Torr*, Franklin App. No. 00AP-1418, 2002-Ohio-524, in which the defendant’s five-year-old son, William, died in a fire at the family home. The defendant, Angel Torr (“Torr”), went to the store and requested that her half-sister, Nicole, babysit William. Before leaving, Torr told Nicole that she would find William and send him home to check in with Nicole. Torr also sent Nicole on an errand to deliver a note across the street.

{¶ 8} The child arrived home while Nicole was still across the street on her errand. Shortly thereafter, Nicole and her grandmother heard William’s screams from inside the house. As they returned to the house, they observed smoke coming from the upstairs windows. They were unable to rescue the child from the house.

{¶ 9} Torr was charged with voluntary manslaughter and endangering children. The trial court found Torr not guilty of voluntary manslaughter, but guilty of felony child endangering. On appeal, the reviewing court reversed the trial court’s decision, holding that Torr should have been found guilty of the misdemeanor offense of child endangering rather than felony child endangering

because the State failed to prove that Torr's conduct was the proximate cause of the victim's death. The court reasoned that Torr's act of going to the store was not the sole proximate cause of the victim's death. Forensic evidence indicated that the victim contributed to his own death by playing with a lighter. We find *Torr* is distinguishable from the instant case.

{¶ 10} Here, the jury found Pipkins guilty of child endangering in violation of R.C. 2919.22(A), which 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."

{¶ 11} Shepherd testified that on the day Kylah was injured, she had left her children in Pipkins's care at approximately 11:30 a.m. when she went to work. Shepherd fed her children before leaving for work and her children appeared as healthy as usual that morning. However, later that day after the children were left alone with Pipkins, Pipkins called and informed Shepherd that Kylah had fallen off the bed and that she was not alert.

{¶ 12} The State's expert medical witness, Dr. Lolita McDavid ("Dr. McDavid"), testified that examinations of Kylah at the hospital revealed that she had multiple subdural hemorrhages of different ages, a skull fracture, and multiple hemorrhages in all layers of the retina. Unlike the child in *Torr* who contributed to his own injury, Dr. McDavid testified that Kylah could not have inflicted these

injuries on herself nor could her older sister have caused these injuries. Dr. McDavid explained that retinal hemorrhages are not caused by a single impact, such as a fall from a bed, but rather are caused by a shaking action. Dr. McDavid concluded that Kylah's injuries were consistent with shaken baby syndrome and that they were intentionally inflicted.

{¶ 13} Thus, the evidence demonstrated that Kylah was in the custody and control of Pipkins when she sustained her injuries. The uncontroverted evidence indicated that Kylah's injuries were consistent with shaken baby syndrome. Because Pipkins was in control of the children and they were healthy when Shepherd left for work that day, the logical conclusion is that Pipkins caused Kylah's injuries. Based on this evidence, the jury properly found beyond a reasonable doubt that Pipkins committed felony child endangering.

{¶ 14} Therefore, the first assignment of error is overruled.

Sentencing

{¶ 15} In the second assignment of error, Pipkins claims he should not have been sentenced for a third degree felony. He asserts that "the trial court disregarded the deficiencies in the state's case in finding Pipkins guilty of felony child endangering and sentencing Pipkins accordingly."

{¶ 16} However, in sentencing a defendant, the trial court is bound by the facts reflected in the jury verdict or admitted by the defendant. *State v. Foster*,

109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, ¶7, quoting *Blakely v. Washington* (2004), 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403.

{¶ 17} The jury found Pipkins guilty of felony child endangering, a violation of R.C. 2919.22(A) as charged in Count 4. The indictment also charged Pipkins with causing serious physical harm, which makes child endangering a third degree felony. R.C. 2919.22(E)(2)(c). R.C. 2929.14(A)(3) provides that the prison term for third degree felonies “shall be one, two, three, four or five years.” The trial court sentenced Pipkins to a four-year prison term, which is within the statutory range.

{¶ 18} Therefore, the second assignment of error is overruled.

Manifest Weight of the Evidence

{¶ 19} In the third assignment of error, Pipkins contends that “[i]mposing a felony based prison sentence on Pipkins was against the manifest weight of the evidence.” Generally convictions, not sentences, are challenged as being against the manifest weight of the evidence. Nevertheless, because the court’s sentence is based on the facts reflected in the jury verdict, the sentence is dependent on the conviction.

{¶ 20} When reviewing a claim that the judgment was against the manifest weight of the evidence, we must review the entire record, weigh both the evidence and all the reasonable inferences, consider the credibility of witnesses and determine whether in resolving conflicts in the evidence, 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. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387, 678 N.E.2d 541. A manifest weight of the evidence claim contests the believability of the evidence presented. *Id.*

{¶ 21} As previously explained, the State proved every element of felony child endangering proscribed by R.C. 2919.22(A) and that Pipkins caused serious physical harm to Kylah beyond a reasonable doubt. Dr. McDavid's testimony that Kylah's injuries were intentionally inflicted by shaking, when combined with Shepherd's testimony that she left her children in Pipkins's care and control, demonstrates that the verdict is not against the manifest weight of the evidence.

{¶ 22} Accordingly, the third assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover of appellant 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 common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

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

COLLEEN CONWAY COONEY, JUDGE

MARY EILEEN KILBANE, P.J., CONCURS;
CHRISTINE T. McMONAGLE, J., DISSENTS (WITH SEPARATE
OPINION)

{¶ 23} I dissent. Craig Pipkins was charged in a five-count indictment, the first count being felonious assault, and the remaining four counts being various manner and means of committing the crime of endangering children. Pipkins was found guilty only of Count 4.

{¶ 24} The indictment for Count 4 reads as follows:

“The State of Ohio v. Craig Pipkins. A true bill indictment for Endangering Children R.C. 2919.22(A). Date of Offense August 24, 2006.

“The Jurors of the Grand Jury of the State of Ohio, within and for the body of the County aforesaid, on their oaths, in the name and by the authority of the state of Ohio, Do find and present, that the above named Defendant(s), on or about the date of the offense set forth above, in the County of Cuyahoga, unlawfully being the parent and/or guardian, and/or person having custody or control and/or person in loco parentis of Jane Doe, DOB: November 2, 2005, a child under the age of eighteen years of age, did recklessly create a substantial risk to the health or safety of

such child by violating a duty of care, protection or support, in violation of Section 2919.22 of the Ohio Revised Code, resulting in serious physical harm to Jane Doe, DOB; November 2, 2005.”

{¶ 25} On March 19, 2009, Pipkins moved for a bill of particulars, requesting the location and time of the alleged offense, and a description of the overt act attributed to him. On April 15, 2009, the State replied that the location of the crime was 7700 Woodland Avenue, #7H, and the date and time were “on or about August 24, 2006 at approximately 8:00 p.m.” The State declined to provide information as to the act or acts alleged, stating, “[t]he Prosecuting Attorney is not required to disclose through a Bill of Particulars, the other evidentiary matters requested in the Defendant’s Motion for a Bill of Particulars.”

{¶ 26} The only evidence of what happened on that date, at that address, and at that time, came from Pipkins’s statement to EMS, his statement to the child’s mother, and his testimony at trial. In all three instances, he stated that he had been bathing the nine- month-old victim and her two-year-old sister. He stated that he lay the nine-month-old baby on the bed and went to retrieve the sister from the tub, a distance of only a few feet, when the baby rolled off the bed, and fell on a thinly-carpeted floor. When the baby would not stop crying, he called the baby’s mother and EMS.

{¶ 27} EMS responded to his call and described the baby as “alert, breathing, crying and no trauma noted.” The EMS technician further noted that her “pupils were equal and reactive to light,” that she “consoled easily, her vitals were within normal limits, she acted appropriately, and no changes were noted on the trip to the hospital.” (Tr. 117–121.)

{¶ 28} At the hospital, however, as a result of an MRI, it was noted that the baby had retinal hemorrhaging, a right parietal skull fracture, and subdural bleeds of various “ages.” Dr. Lolita McDavid, University Hospitals Medical Director of Child Advocacy and Protection, and the State’s *only* expert witness, concluded that “a single fall is not consistent with the magnitude of the injuries” (tr. 233), and “all of these injuries did not happen from a single fall off a bed.” (Tr. 243-244.) Upon questioning of Dr. McDavid, the following colloquy occurred:

{¶ 29} **“Q: Beyond any degree of medical certainty, can we say today that any of the injuries discovered, discussed or looked at that you referred to in this report, can any of these to a degree of medical certainty be traced to that fall at 8:00?”**

{¶ 30} **“A: No, no.”**

{¶ 31} **“Q: We have no idea who caused them.”**

{¶ 32} **“A: We don’t know who caused them.”**

{¶ 33} “Q: **And we don’t know when they happened, based on this report, do we, doctor?**

{¶ 34} “A: **No.**”

{¶ 35} The only other significant evidence in this case was that Pipkins admitted to being a drug dealer by trade, and he fulfilled significant child-care responsibilities for the two minor children in the ten days preceding August 24, 2006. Whether he and the mother were the sole caretakers during that period (as she contended) or whether up to six other persons, including the child’s biological father and his mother, had access to these children during that time period (as Pipkins contended), was contested.

{¶ 36} Nonetheless, Pipkins was indicted for injuring the child on August 24, 2006 at 8:00 p.m. The effects of shaken baby syndrome were discovered when the baby was taken to the hospital and examined, but the State’s expert was unequivocal that the acts attributed to Pipkins on August 24, 2006 at 8:00 p.m. were **not** the cause of the serious physical harm done to this child.

{¶ 37} Accordingly, I concur with appellant that it is against the manifest weight of the evidence to conclude that the serious physical harm charged in the indictment was caused by any action of Pipkins on or about August 24,

2006 at 8:00 p.m. Accordingly, I would reduce this conviction to a misdemeanor of the first degree.¹

¹The “serious physical harm” alleged in the indictment is not an element of the crime of child endangering under R.C. 2919.22(A), but rather solely a sentencing enhancement. See R.C. 2919.22(E)(2)(c).