[Cite as *Mayfield Hts. v. Durr*, 2016-Ohio-5249.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 103856

CITY OF MAYFIELD HEIGHTS

PLAINTIFF-APPELLEE

vs.

KURTRYNA D. DURR

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Lyndhurst Municipal Court
Case No. 15 CRB 00541

BEFORE: Boyle, J., E.T. Gallagher, P.J., and Stewart, J.

RELEASED AND JOURNALIZED: August 4, 2016

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MARY J. BOYLE, J.:

{¶1} This case came to be heard upon the accelerated calendar pursuant to App.R. 11.1 and Loc.R. 11.1.

{¶2} Defendant-appellant, Kurtryna Durr, appeals from her endangering children conviction, entered after a bench trial in the Lyndhurst Municipal Court. Durr raises the following single assignment of error:

> Appellant's conviction of child endangering was based upon insufficient evidence as to two elements of the offense: the mental culpability element of "reckless," and the substantial risk to the child's health or safety element.

{¶3} "'[S]ufficiency' is a term of art meaning that legal standard which is applied to determine whether the case may go to the jury or whether the evidence is legally sufficient to support the jury verdict as a matter of law." *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997), citing *Black's Law Dictionary* 1433 (6th Ed.1990). When an appellate court reviews a record upon a sufficiency challenge, "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." *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus.

{¶4} Durr's single assignment of error relates to the evidence presented at her bench trial. Durr, however, has failed to provide a transcript of the proceedings, despite having the duty to do so. *See Strongsville v. Petronzio,* 8th Dist. Cuyahoga No. 102345,

2016-Ohio-101, ¶ 18, citing App.R. 9(B) ("It is an appellant's obligation to provide the reviewing court with a sufficient record of the lower court proceedings."). The record also does not contain a statement of evidence under App.R. 9(C) or an agreed statement under App.R. 9(D). While Durr relies on the findings of fact stated in the trial court's opinion, she also attacks the trial court's conclusions on the basis of certain evidence being absent from the record. Based on the record before us, however, we have no way to reach the merits of Durr's claim and must presume regularity of the proceedings below.

As the Ohio Supreme Court has explained,

> When portions of the transcript necessary for resolution of assigned errors are omitted from the record, the reviewing court has nothing to pass upon and thus, as to those assigned errors, the court has no choice but to presume the validity of the lower court's proceedings, and affirm.

Knapp v. Edwards Laboratories, 61 Ohio St.2d 197, 199, 400 N.E.2d 384 (1980).

{¶5} Accordingly, because we must presume regularity in the proceedings below, we cannot say that the state failed to meet its burden of proof to support Durr's conviction.

{¶6} The single assignment of error is overruled.

{¶7} Judgment affirmed.

It is ordered that appellee recover from appellant 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 Lyndhurst Municipal 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.

MARY J. BOYLE, JUDGE

EILEEN T. GALLAGHER, P.J., CONCURS;
MELODY J. STEWART, J., DISSENTS (WITH SEPARATE OPINION)

MELODY J. STEWART, J., DISSENTING:

{¶8} The issue raised in this appeal is straightforward: does a daycare worker who mistakenly undercounts the number of children in her care during an outing and inadvertently leaves a child behind at a children's play facility for 16 minutes, commit the crime of child endangering?

{¶9} The majority finds that Durr's failure to provide a trial transcript forces us to presume the regularity of the proceedings below and summarily affirms. I disagree that this is the course we must take.

{¶10} A fundamental tenet of judicial review is that courts should decide cases on the merits. *Hawkins v. Marion Corr. Inst.*, 28 Ohio St.3d 4, 501 N.E.2d 1195 (1986). Furthermore, "[f]airness and justice are best served when a court disposes of a case on the merits." *DeHart v. Aetna Life Ins. Co.*, 69 Ohio St.2d 189, 193, 431 N.E.2d 644 (1982).

{¶11} As the majority notes, if a trial transcript is necessary for the appellate court

to resolve an assignment of error and the appellant fails to provide it, then the appellate court has no choice but to presume the validity of the trial court's proceedings and affirm. *Knapp v. Edwards Laboratories*, 61 Ohio St.2d 197, 199, 400 N.E.2d 384 (1980). However, an appellant's failure to file a trial transcript is a bar to appellate review only when the appellant actually contests factual findings on appeal. Durr does not do so in this appeal. She neither disputes the evidence presented at trial nor the trial court's very extensive factual findings — she complains that the court's legal conclusion that she committed the crime of endangering children could not be sustained from its factual findings. This is a question of law, not fact. *See* R.C. 2505.01(A)(2) (an appeal on "'questions of law' means a review of a cause upon questions of law, including the weight and sufficiency of the evidence."). The issue raised in this appeal is reviewable solely by reference to the court's findings of fact, so I dissent and would reach the merits of this appeal. *Greenwood Auto v. Olszak*, 11th Dist. Trumbull No. 95-T-5361, 1996 Ohio App. LEXIS 3008, at *9 (July 5, 1996).

{¶12} To prove child endangering, the city had to show that Durr, acting as a guardian or person in loco parentis, created a substantial risk to the health or safety of a child. R.C. 2919.22(A) does not contain a mental state, so the default mental state is "recklessless." *See State v. Adams*, 62 Ohio St.2d 151, 404 N.E.2d 144 (1980), paragraph one of the syllabus. A person is "reckless" with respect to circumstances when, with heedless indifference to the consequences, the person disregards a known substantial and unjustifiable risk that such circumstances are likely to exist. *See* R.C.

2901.22(C).

{¶13} The court's findings of fact show that Durr was a supervisor for a daycare facility. She and three other chaperones took 41 children, ages 3-5, on a field trip to Chuck E. Cheese where the children ate lunch and played for a few hours. As the outing ended, two of the children were picked up by their parents. When it came time for the rest of the children to board the buses to go back to the daycare center, Durr thought that there were only 38 children to transport— a number she verified by head count. She was mistaken — there were 39 children remaining. The daycare buses left the facility, leaving behind a four-year-old.

{¶14} A parent-customer at Chuck E. Cheese with her children noticed the child playing alone on a jungle gym. Seeing the child's identifying daycare t-shirt and having taken note that the daycare buses left the premises, the parent took the child into her care. She notified workers at the facility, then called the daycare to report that she had the child, but she was "not satisfied by the response she received," so she called the police. Shortly after the police arrived, two daycare workers arrived to retrieve the child. Surveillance video showed that exactly 16 minutes elapsed from the time the daycare buses left the premises to the time when the two daycare employees returned to get the child.

{¶15} Recklessness requires something more than mere negligence. *Fabrey v. McDonald Village Police Dept.*, 70 Ohio St.3d 351, 356, 639 N.E.2d 31 (1994). The facts found by the court show that Durr was perhaps negligent in failing to ensure that all

of the children under her supervision were on the bus as it left Chuck E. Cheese, but she did not act recklessly. The court confirmed this conclusion when it stated that Durr "believed that 38 was the correct number of children." In other words, Durr made an honest mistake and did not consciously act in a way that her conduct would in all probability result in leaving a child behind. *O'Toole v. Denihan*, 118 Ohio St.3d 374, 2008-Ohio-2574, 889 N.E.2d 505, paragraph three of the syllabus.

{¶16} It is important to note that this is not a case where someone told Durr that a child was missing and Durr refused to double-check and left anyway. If present, those facts might have justified a finding that Durr disregarded a known risk in leaving. In this case, however, Durr mistakenly believed that only 38 children remained for transportation. Her headcount verified that number of children. Durr did not make a conscious decision to do or not to do something knowing that the decision could affect the child's well-being. This was not evidence of recklessness for purposes of proving the crime of child endangering.

{¶17} Tellingly, the lack of evidence to show that Durr was reckless in leaving the child behind caused the court to focus on Durr's behavior afterwards. For example, the court criticized Durr for not getting back to Chuck E. Cheese sooner upon learning that a child had been left behind or, worse yet, by failing to call Chuck E. Cheese. In addition, the court found that Durr lied to the child's parent about what happened that day.

{¶18} While these facts may reflect poorly on Durr's qualifications to be a daycare provider, they are irrelevant to the question of whether she committed the crime of

endangering a child. The basis of the court's guilty verdict was that Durr failed to ensure a proper headcount before the bus left Chuck E. Cheese, so what Durr did or did not do after the bus left had no bearing on the question of whether she endangered the child by failing to ensure that he boarded the daycare bus.

{¶19} Finally, the court found that Durr should have known that a child wandering around a Chuck E. Cheese was subject to a substantial risk to health and safety: the possibility of being injured playing; falling off the steps leading to the jungle gym or suffering and injury trying to come down head first from the jungle gym; self-mutilation with sharp kitchen utensils; potentially choking on food; being burned by hot pizza ovens; exiting the building and wandering into the parking lot; and being abducted by someone with ill intent were examples given by the court. The proprietors of Chuck E. Cheese would likely disagree that the court's litany of horrors exist on their premises and pose such a grave threat to their core customers. But even if one were to agree that those kinds of things could happen to a child left behind, some of the risks found by the trial court are speculative and remote. For a child endangering conviction under R.C. 2919.22(A), the risk must be substantial and there must be a strong possibility that the injury might happen.

{¶20} There is a long line of cases where courts found a parent, or person in loco parentis, not guilty of child endangering under more serious circumstances than the one this case presents. For example, in *State v. Bennett*, 8th Dist. Cuyahoga No. 68039, 1995 App. LEXIS 2940, 7-8 (July 3, 1995), this court reversed a conviction for child

endangering when a four-year old climbed on a five-foot entertainment center, took the lighter that was placed there by her parents and set herself on fire, while the father was using the bathroom for five minutes. *See also State v. Boone*, 1st Dist. Hamilton No. C-950427, 1996 Ohio App. LEXIS 3387 (Aug. 14, 1996) (holding that a mother's method of disciplining her seven-year old child by intentionally driving away and leaving him in a store parking lot by himself for 15 minutes, did not as a matter of law, create a substantial risk to the child); *State v. Graves*, 62 Ohio Misc.2d 358, 598 N.E.2d 914 (M.C.1992) (holding that the father who operated a motor vehicle while intoxicated and while his children where unbuckled in the back seat did not, as a matter of law, create a substantial risk to the children's health and safety); *State v. Martin*, 134 Ohio App.3d 41, 42, 730 N.E.2d 386 (1st Dist.1999) (reversing the trial court's conviction for endangering her child when a mother left an eight-year old in the car parked in a mall parking lot for half an hour and the car rolled out of the parking space); *State v. Allen*, 140 Ohio App.3d 322, 747 N.E.2d 315 (1st Dist.2000) (holding that a father's conduct in leaving his seven-year old child unsupervised at home for twenty minutes while he left to borrow butter from a neighbor was not child endangerment).

{¶21} On the other hand, this court found sufficient evidence to support a conviction for endangering a child when a three-month-old baby with a fractured skull exhibited symptoms consistent with having been severely shaken, and the grandmother who cared for the baby and saw the symptoms lied about the injuries, and did not take the baby to the doctor for several hours, which exacerbated the severity of the injuries as the

child's brain continued to swell. *State v. Brooks*, 8th Dist. Cuyahoga Nos. 75711 and 75712, 2000 Ohio App. LEXIS 1354, 25-27 (Mar. 30, 2000). *See also Beachwood v. Hill*, 8th Dist. Cuyahoga No. 93577, 2010-Ohio-3313 (court upheld a conviction for endangering children when a mother left three children, ages four, seven, and eight alone in the car while she shopped at 9:00 PM with the car window open, the parking lot a busy street and very close to the highway, and steady pedestrian and vehicular traffic).

{¶22} Durr made an unfortunate, but unknowing mistake; she was not reckless. Furthermore, her actions in this case cannot be said to have put the child left behind at risk of substantial harm to his health or safety. The court erred by finding that the city presented sufficient evidence to prove that Durr committed the crime of endangering a child. I would therefore reverse and vacate the conviction.