[Cite as *State v. Cartulla*, 2009-Ohio-2794.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2008-L-133**
- vs -	:	
KIMBERLY M. CARTULLA,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 07 CR 000824.

Judgment: Affirmed.

Charles E. Coulson, Lake County Prosecutor, and *Karen A. Sheppert*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

Michael H. Peterson and *John A. Powers*, Ian N. Friedman & Associates, L.L.C., 700 West St. Clair Avenue, Suite 214, Cleveland, OH 44113 (For Defendant-Appellant).

TIMOTHY P. CANNON, J.

{¶1} Appellant, Kimberly M. Cartulla, appeals the judgment entered by the Lake County Court of Common Pleas. Cartulla was sentenced to an aggregate prison term of three years for her convictions for endangering children.

{¶2} Robyn Ryant works as a bartender at Manny's Place in Eastlake, Ohio. On November 24, 2007, Ryant was working at Manny's Place and described it as a slow night. Ryant testified that Cartulla entered Manny's Place between 10:00 and

10:30 that evening. Ryant testified that Cartulla was "kinda buzzed" or "a little intoxicated" when she entered the bar.

{¶3} Cartulla approached Ryant and ordered a shot of Jager, which she immediately consumed. Thereafter, Cartulla played a game of pool by herself. Next, Cartulla sat at the bar and had conversations with Ryant and Chuck Lagrew, who was another patron of Manny's Place that night. During this timeframe, Ryant served Cartulla another shot of Jager, which Cartulla consumed. Later in the evening, Cartulla rested her head on the bar and fell asleep. Upon Ryant's request, Lagrew moved Cartulla from the bar to a table near the pool table. Cartulla continued to want to sleep, so Ryant told her she had to leave the bar. Lagrew agreed to give Cartulla a ride, and they left the bar together at 1:20 a.m.

{¶4} Manuel Salgado, the owner of Manny's Place, arrived at approximately 2:00 a.m. to help Ryant close the bar. About 30 minutes later, when they were leaving for the evening, Ryant noticed a car parked in the parking lot with its engine running. Upon inspection, Salgado and Ryant discovered two children in the car. The children told Salgado their mother was in the bar. Salgado called the police and reported the unattended children. The children were taken to the Eastlake Police Station, where the children's uncle arrived and took them to his house. The children were identified as Cartulla's children, who were six and nine years old at the time of the incident.

{¶5} Several hours later, at approximately 9:00 a.m., police officers found Cartulla at a local residence. Upon arriving at the residence, John Berzanske permitted the officers to enter the home. He acknowledged Cartulla was inside the home. Lagrew was also present in the home that morning. When asked by the police officers if

she knew where her children were, Cartulla responded they were with a baby-sitter. When one of the officers asked her to "try again," she stated the children were in police custody.

{¶6} Cartulla was indicted with two counts of endangering children, in violation of R.C. 2919.22(A). The offenses were charged as fourth-degree felonies, due to the allegation that Cartulla had a prior conviction for endangering children.

{¶7} Cartulla pled not guilty to the charges, and a jury trial was held. After the state's case-in-chief, Cartulla moved for acquittal pursuant to Crim.R. 29, which the trial court denied. Cartulla called two witnesses – her mother, Donna Cartulla, and Berzanske. The jury found Cartulla guilty on both charges. The trial court sentenced Cartulla to 18-month prison terms for each of her endangering children convictions. The trial court ordered the prison terms to be served consecutively, resulting in an aggregate prison term of three years.

{¶8} Cartulla raises two assignments of error. Her first assignment of error is:

{¶9} "The trial court erred in denying Appellant's Motion for Judgment of Acquittal, pursuant to Crim.R. 29, as the evidence adduced at trial was insufficient to support the verdict, thereby denying Appellant's Constitutional Right to due process."

{¶10} There is nothing in the record suggesting that Cartulla renewed her Crim.R. 29 motion at the conclusion of all the evidence. In *State v. Miller*, this court recognized that "[a] split of authority exists on whether [an appellant] is permitted to argue insufficiency of the evidence where he has not renewed his Crim.R. 29 motion." *State v. Miller*, 11th Dist. No. 2004-P-0049, 2005-Ohio-6708, at ¶67, citing *State v. Murray*, 11th Dist. No. 2003-L-045, 2005-Ohio-1693, at ¶42; *State v. Shadoan*, 4th Dist.

No. 03CA764, 2004-Ohio-1756, at ¶16; and *State v. Jones* (2001), 91 Ohio St.3d 335, 346. Therefore, for the purpose of this appeal, we will proceed as if Cartulla has not waived her constitutional right to challenge the sufficiency of the evidence and will address her first assignment of error on its merits. Id.

{¶11} A trial court shall grant a motion for acquittal when there is insufficient evidence to sustain a conviction. Crim.R. 29(A). When determining whether there is sufficient evidence presented to sustain a conviction, "[t]he 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* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus, following *Jackson v. Virginia* (1979), 443 U.S. 307.

{¶12} Cartulla was charged with two counts of endangering children, in violation of R.C. 2919.22, which provides, in part:

{¶13} "(A) 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. ***

{¶14} "(E)(1) Whoever violates this section is guilty of endangering children.

{¶15} "(2) If the offender violates division (A) or (B)(1) of this section, endangering children is one of the following, and, in the circumstances described in division (E)(2)(e) of this section, that division applies:

{¶16} "***

{¶17} "(b) If the offender previously has been convicted of an offense under this section or of any offense involving neglect, abandonment, contributing to the delinquency of, or physical abuse of a child, except as otherwise provided in division (E)(2)(c) or (d) of this section, a felony of the fourth degree[.]"

{¶18} The applicable mental state for the offense of endangering children is reckless. *State v. McGee* (1997), 79 Ohio St.3d 193, syllabus.

{¶19} "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." R.C. 2901.22(C).

{¶20} Cartulla argues the state failed to present sufficient evidence that she created a substantial risk to the health or safety of her children. She notes the children were not harmed as a result of her conduct. However, we note the state presented evidence that Cartulla created several individual risks to the health and/or safety of the children by leaving them unattended in the car for several hours.

{¶21} One risk to the children was exposure to the cold. Patrolman Richard Greer of the Eastlake Police Department responded to Manny's Place when Salgado and Ryant discovered the two children in the car. He testified that he checked the weather upon returning to the police station, and a local weather station reported the temperature at 33 degrees. Ryant testified that while the vehicle's engine was running, the fan for the heat was turned off.

{¶22} In addition, Patrolman Greer testified that Cartulla's six-year-old daughter told him she was cold while waiting in the car. Finally, Cartulla did not attempt to check on the welfare of her children at any time prior to her being found at the residence the next day. Thus, while the engine of the car was running when the children were found, without intervention, the car would likely have run out of gasoline and stalled, thereby eliminating the potential heat source. The state presented sufficient evidence that Cartulla recklessly created a substantial risk to the health of the children by essentially abandoning her children in a car when the outside temperature was only 33 degrees.

{¶23} Further, by leaving the children in a car with the engine running, there was a substantial risk to the health or safety of the children. The children could have engaged the vehicle in gear, causing it to move and strike something, injuring the children. The Clermont County Court of Common Pleas held that there was substantial risk to the safety of a 12-year-old girl by leaving her unattended in a car with the engine running. *State v. Voland* (1999), 99 Ohio Misc.2d 61, 72. The child eventually placed the car in gear, causing it to lurch forward and strike a fence. Id. at 65-66. In this matter, there was sufficient evidence presented that Cartulla recklessly created a substantial risk to the health or safety of her children by leaving them in a car with its engine running, as one of the children could have engaged the car in gear and caused it to strike something.

{¶24} Finally, the children were left in an unlocked car with its engine running. The car was parked outside of a bar, in the late night and early morning hours. Ryant testified that Manny's Place is located near other bars. An individual with illicit intentions could have assaulted or kidnapped the children. The state presented

sufficient evidence that Cartulla recklessly created a substantial risk to the safety of the children by leaving her young children in an unlocked car with its engine running, thus exposing them to potentially dangerous persons.

{¶25} The above risks, when taken together and viewed in a light most favorable to the state, are sufficient for a rational trier of fact to conclude that Cartulla recklessly created a substantial risk to the health or safety of the children by leaving her young children in an unlocked car with its engine running on a cold night.

{¶26} Cartulla cites *State v. Martin* in support of her position that leaving a child unattended in a car does not necessarily create a substantial risk to the health or safety of the child. *State v. Martin* (1999), 134 Ohio App.3d 41. In *State v. Martin*, the First Appellate District held that there was not a substantial risk to the safety of the child in a case where an eight-year-old boy was left alone in his mother's car and knocked the car out of gear, resulting in the car rolling backward a short distance. Id. at 42-43. However, we believe the case sub judice is readily distinguishable from *State v. Martin*. In *Martin*, the child's mother was a short distance away inside a retail store; the mother was only gone about 30 minutes; the engine of the car was not running; the doors to the car were locked; and the incident occurred during daylight hours, at 4:00 p.m. Id. at 42. Cartulla's children were left unattended for at least four hours in an unlocked car; with the engine running; outside of a bar; at 2:30 a.m.; in cold weather; and, when they were finally discovered, Cartulla could not be found, as she had left the bar. These factors make the situation in the case sub judice much more egregious than that in the *Martin* case.

{¶27} Cartulla's first assignment of error is without merit.

{¶28} Cartulla's second assignment of error is:

{¶29} "The sentence imposed by the trial court is contrary to law and an abuse of discretion and must be vacated."

{¶30} After the *State v. Foster* decision, "[t]rial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences." *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, at paragraph seven of the syllabus. The Supreme Court of Ohio, in a plurality opinion, has recently held that felony sentences are to be reviewed under a two-step process. *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, at ¶26. The court held:

{¶31} "First, [appellate courts] must examine the sentencing court's compliance with all applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law. If this first prong is satisfied, the trial court's decision in imposing the term of imprisonment is reviewed under the abuse-of-discretion standard." Id.

{¶32} Cartulla argues the record does not demonstrate that the trial court properly considered the principles of sentencing set forth in R.C. 2929.11. Specifically, she contends the trial court failed to indicate that it conducted a proportionality review pursuant to R.C. 2929.11(B). While trial courts are required to "engage in the analysis" of R.C. 2929.11, the statute does not require them to make specific findings on the record. *State v. Newman*, 11th Dist. No. 2002-A-0007, 2003-Ohio-2916, at ¶10, citing *State v. Bolton*, 8th Dist. No. 80263, 2002-Ohio-4571, at ¶20.

{¶33} In its judgment entry, the trial court stated "this Court finds that a prison sentence is consistent with the purposes and principles of sentencing set forth in R.C. 2929.11 ***." Moreover, at the sentencing hearing, the trial court stated:

{¶34} "I've also considered the overriding purposes of felony sentencing pursuant to Revised Code 2929.11, which are to protect the public from future crime by this offender and others similarly situated and to punish this offender. I have considered the need for incapacitation, deterrents, rehabilitation and restitution, along with the public burden on governmental resources. I have reasonably calculated this sentence to achieve the two overriding purposes of felony sentencing and to be commensurate with and not demeaning to the seriousness of this offender's conduct and its impact on the victims and on society, and *to be consistent with sentences imposed for similar crimes committed by similar offenders*." (Emphasis added.)

{¶35} This court has previously held that it was unaware of any "requirement that a trial court needs to cite specific cases on the record when conducting the analysis required by R.C. 2929.11(B)." *State v. Newman*, 2003-Ohio-2916, at ¶12.

{¶36} The trial court noted that it considered the purposes and principles of R.C. 2929.11, and we find that the trial court's decision was not contrary to law. See, e.g., *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, at ¶26.

{¶37} Next, Cartulla argues the trial court abused its discretion by imposing an aggregate three-year sentence. She asserts there was no actual harm to the children as a result of her conduct, she accepted responsibility for her conduct, and acknowledged that she has a drinking problem.

{¶38} The trial court noted that Cartulla had two prior convictions for endangering children. One of the prior convictions resulted from an incident in 2003, where Cartulla was found in a highly-intoxicated state, in a stranger's vehicle with the engine running, and her two-year-old daughter was asleep in the passenger seat. The second prior conviction arose from an incident in 2004, where Cartulla parked her vehicle in a stranger's driveway. When discovered, Cartulla was sleeping and her young daughter was crawling in the back seat with wet clothes. Further, officers noticed that Cartulla had a strong odor of alcohol on her breath and slurred speech. Accordingly, as noted by the trial court, both of Cartulla's prior convictions for endangering children involved alcohol and automobiles.

{¶39} In addition, the trial court observed Cartulla had recent convictions for assault on a police officer, possession of cocaine, and escape. Finally, the trial court noted that the instant offenses occurred while Cartulla was on probation.

{¶40} In regard to her substance abuse problem, the trial court observed and acknowledged that Cartulla had been referred to treatment programs by other courts, yet those treatment efforts were unsuccessful, in that alcohol was a factor in the instant offense.

{¶41} In light of the foregoing, the trial court did not abuse its discretion by imposing an aggregate three-year prison term.

{¶42} Cartulla's second assignment of error is without merit.

{¶43} The judgment of the Lake County Court of Common Pleas is affirmed.

DIANE V. GRENDELL, J., concurs,

COLLEEN MARY O'TOOLE, J., dissents with Dissenting Opinion.

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COLLEEN MARY O'TOOLE, J., dissents with Dissenting Opinion.

{¶44} I respectfully dissent from the majority regarding assignment of error two. The acts of appellant in this case exemplify what we know about the disease of alcoholism.

{¶45} The children were found unharmed and apparently unalarmed in the car asleep. Clearly, this mother is, at this time, an unsuitable parent due to the disease of alcoholism. The proper statute to deal with this issue is R.C. Chapter 2151. Juvenile court is the more appropriate forum as the mother's actions clearly constitute neglect, and/or abuse. I understand the frustration and anger of the trial court, especially in light of mother's heinous actions.

{¶46} However, to give maximum and consecutive sentences to the mother when there was no physical harm to these children, thanks to well-meaning Good Samaritans, not only punishes the mother and delays much needed treatment for her disease, but more critically this lengthy incarceration punishes the children who are also victims of the mother's illness and neglect. Also, the state of Ohio must now support their mother in jail for three years at a hefty cost to an already overburdened budget. It would be far more effective to take the children from the mother's care and compel her to become sober by working a case plan before she can have any further parenting authority.

{¶47} The PSI recommends that appellant needs to get "serious treatment for her alcoholism." It recommended Northeast Ohio Community Alternative Program. The psychological report also indicates her prior offenses were drug and alcohol related. At the time of sentencing, she was working on a case plan through the department of children services.

{¶48} The overriding purposes of felony sentencing cannot, in this writer's humble opinion, be best served when the public can be protected from future crimes by the offender in a more effective, cost efficient manner than incarceration. Incarceration is the most expensive and least successful method of dealing with chemical dependency. This writer does not mean to insinuate that this appellant should not experience consequences for her acts. However, the court, in punishing the mother with a sentence that does not address the underlying problem, has also severely punished the victim's children, by not allowing the practical alternative of juvenile court and children services to navigate this family through a most devastating disease. The result shall be three years of delaying a resolution at the expense of a publically supported criminal justice system already overburdened. The overall purposes of felony sentencing, in protecting the public, includes considering the long term effects and residual consequences of this sentence upon the victims, as well as protecting the public's interest as a whole. The record in this matter does not support the length or term of incarceration. The decision of the trial court does not comport with reason or the record and as such is an abuse of discretion. See *State v. Ferranto* (1925), 112 Ohio St. 667, 676-678.

{¶49} Using the draconian solution of maximum imprisonment will protect the public for the short term of duration of appellant's sentence, at a very hefty price tag in taxpayer funds, but does not deal with its aftermath, and it is one of the least effective and efficient ways of protecting the public and the children from this offender. The statute encourages, and the public demands, best practices in protecting the public. The sentence of the trial court, in light of the record, and in my humble opinion, constitutes an abuse of discretion.

{¶50} For the foregoing reasons, I dissent.