[Cite as *State v. Wiley*, 2012-Ohio-5121.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

ASHTABULA COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2012-A-0012**
- vs -	:	
KENNETH R. WILEY,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Ashtabula County Court of Common Pleas, Case No. 2011 CR 92.

Judgment: Affirmed.

Thomas L. Sartini, Ashtabula County Prosecutor, and *Shelley M. Pratt*, Assistant Prosecutor, Ashtabula County Courthouse, 25 West Jefferson Street, Jefferson, OH 44047 (For Plaintiff-Appellee).

Judith M. Kowalski, 333 Babbitt Road, #323, Euclid, OH 44123 (For Defendant-Appellant).

DIANE V. GRENDELL, J.

{¶1} Defendant-appellant, Kenneth R. Wiley, appeals his conviction for Child Endangering, following a jury trial in the Ashtabula County Court of Common Pleas. Wiley was sentenced to a prison term of four years. The issues before this court are whether the conviction is supported by sufficient evidence and/or against the manifest weight of the evidence, where the only evidence of recklessly administering corporal punishment was testimony that the defendant held the child by the neck; whether the

failure to object to questions about the defendant's juvenile convictions amounts to constitutionally ineffective assistance of counsel; and whether a court errs by not appointing substitute counsel when the defendant expresses a lack of confidence in appointed counsel. For the following reasons, we affirm Wiley's conviction.

{¶2} On March 16, 2011, the Ashtabula County Grand Jury indicted Wiley on the following charges: Endangering Children (Count One), a felony of the second degree in violation of R.C. 2919.22(B)(3) and (E)(3), for "choking the child [J.V., D.O.B. 12/15/2007], creat[ing] a substantial risk of serious physical harm to said child"; Endangering Children (Count Two), a felony of the second degree in violation of R.C. 2912.22(B)(3) and (E)(3), for "forcing fecal matter into the mouth of the minor"; Endangering Children (Count Three), a felony of the second degree in violation of R.C. 2919.22(B)(3) and (E)(3), for "excessively spanking the child [S.W., D.O.B. 01/12/2009] leaving welts"; Felonious Assault (Count Four), a felony of the second degree in violation of R.C. 2903.11(A)(2), for "shoot[ing] through the floor of the bedroom where [J.V.] was sleeping"; and Domestic Violence (Count Five), a misdemeanor of the first degree in violation of R.C. 2919.25(A), for causing or attempting to cause physical harm to Amanda Vorse, mother of J.V. and S.W.

{¶3} On March 17, 2011, Wiley was arraigned and entered a plea of not guilty.

{¶4} On October 25, 2011, at a pre-trial hearing, Wiley asked the trial court to appoint new counsel, for the reason that he was "not really being represented the correct way like I should be." The court did not grant Wiley's request, but advised him to "talk to him [appointed counsel] * * * and see if there's witnesses or other evidence

that you need and he can decide if it's something that I would allow and we'll see what happens."

{¶5} On November 2, 2011, Wiley wrote the trial court again asking for the appointment of new counsel for the following reasons: appointed counsel had not come to visit Wiley as promised; appointed counsel was unwilling to use evidence provided by Wiley because he believes "that he won't be able to use it"; and appointed counsel lied to Wiley, claiming that a security guard that Wiley wished to use as a witness had left the state.

{¶6} On November 3, 2011, the trial court, construing Wiley's letter as a request to be appointed new counsel, overruled it.

{¶7} On November 14, 2011, at a status hearing, Wiley again voiced complaints about appointed counsel. Wiley wanted to subpoena a certain officer to whom one of the victims, Amanda Vorse, had spoken. Wiley claimed that this officer could be used to demonstrate that Vorse was still friendly toward him, even after the incidents alleged in the indictment occurred. The trial court agreed to continue trial so that appointed counsel could attempt to contact this potential witness.

{¶8} On December 12, 2011, a jury trial commenced on the charges contained in the Indictment. The following testimony was presented on behalf of the State.

{¶9} Amanda Vorse testified that she began a relationship with Wiley in 2008 and lived with him from 2010 to 2011 in North Kingsville, Ohio, with two minor children. J.V., age three at the time of the Indictment, was Vorse's child from a prior relationship. S.W., age two at the time of the Indictment, was Vorse and Wiley's child. Vorse described J.V. as weighing about 36 pounds.

{¶10} Vorse testified that on the afternoon of January 20, 2011, Wiley was upset about pending charges against him and drinking heavily. While Vorse and Wiley were in the basement of the North Kingsville residence, he produced a handgun and put it under his chin as if he was going to kill himself. Vorse, who did not know that Wiley owned a gun, looked away. Wiley fired a single shot which went through the wall and ceiling of the basement. Vorse testified that the shot went in the direction of a bedroom in which J.V. was sleeping.

{¶11} Vorse testified that in the evening of January 19, 2011, she was in an upstairs bathroom getting the children ready for bed. She left the bathroom to retrieve something downstairs. She returned in less than five minutes. As she was coming up the stairs, she heard "gurgling" and Wiley yelling "that he ought to kill his little ass." As she approached the bathroom she saw Wiley holding J.V. in the air by his throat. "[J.V.] was very scared and he was gurgling. He couldn't breathe for a couple of seconds." Vorse stood there in shock, not knowing what to do. She testified that when Wiley turned and realized she was standing there, he left the area. J.V. "had a little bit of red mark on his neck" after the incident, but no problems breathing. When Vorse confronted Wiley about the incident later, he told her that she didn't see what she thought she saw and that J.V. had hit S.W.

{¶12} Vorse testified that sometime in December 2010, Wiley threatened to make J.V. eat poop if he continued to have accidents. After J.V. had a subsequent accident, Wiley took him to the bathroom to change and clean him. Vorse testified that, afterwards, she found feces on J.V.'s mouth and tongue. When she confronted Wiley about the incident, he told her it was her imagination.

{¶13} Vorse testified that, between December 2010 and January 2011, Wiley began to spank S.W. regularly and hard enough to leave welts on her legs.

{¶14} Vorse testified that, sometime in December 2010, she and Wiley had an argument that resulted in Wiley "slamming [her] around for about 45 minutes or so."

{¶15} Vorse testified that Wiley was no longer living in the residence when she reported the incidents to the police in February 2011.

{¶16} Officer Brandon Nelling of the North Kingsville Police Department testified that, on February 2, 2011, he retrieved a handgun from Vorse's residence at her request. Nelling described Vorse as first appearing "very calm," but as she was discussing the incidents she began to cry and became "very upset." Nelling confirmed that there was a bullet-hole in the wall and ceiling of the basement.

{¶17} Patrolman Hugh Flanigan of the North Kingsville Police Department identified the handgun recovered from Vorse's residence as a fully operational Jennings 9mm Model 59. Flanigan also testified that he recovered a slug from Vorse's residence, "laying on the ceiling tiles in the basement."

{¶18} At the close of the State's case, counsel for Wiley made a Criminal Rule 29 motion to dismiss the charges based on insufficient evidence. The trial court granted the motion with respect to Endangering Children (Count Two) and Felonious Assault (Count Four).

{¶19} The following testimony was proffered on Wiley's behalf.

{¶20} Pamela Jo Thomas testified that she has known Wiley and Vorse for about two years as members of Gateway Church in Austinburg, Ohio. Thomas has also babysat J.V. and S.W. Thomas has never observed marks or injuries on the children.

Thomas acknowledged that Vorse had spoken of violence in the home and that Wiley has issues with anger.

{¶21} Pearl Linda Kerr, Wiley's mother, testified that the children have a normal relationship with Wiley and are not afraid of him. During Christmas 2010, Kerr described Wiley as an angry person and Vorse as depressed.

{¶22} Kenneth Wiley testified and denied holding J.V. in the air by the throat. Wiley testified that, on the date in question, he was outside when he heard his daughter [S.W.] screaming. He went to see what was wrong and found S.W. "laying on the floor" while J.V. was "hitting her with a shoe." Wiley "grabbed [J.V.] by the back of his neck and * * * pulled him backwards," and said, "[J.V.], what the hell are you doing?" Wiley comforted S.W. while Vorse was watching him. He then "walked past her" with "a dirty look on my face 'cause sometimes I get frustrated * * * with dealing with things in the house." Wiley denied ever discussing the incident with Vorse.

{¶23} Wiley testified that he had only spanked S.W. three or four times and that they were just "little pats on the diaper."

{¶24} Wiley denied ever slamming Vorse or J.V. around, becoming physical with her, or threatening to kill himself with a gun.

{¶25} Wiley testified, as stipulated to by the parties, that he has a prior conviction for Endangering Children from 2007.

{¶26} On cross-examination, the prosecutor asked Wiley about prior convictions in Pennsylvania, some of which were apparently committed when Wiley was a juvenile. Specifically, convictions for Burglary, Criminal Conspiracy, and Institutional Vandalism were mentioned. The following exchange occurred:

{¶27} The Court: Excuse me, just a minute. [To defense counsel:] Are you going to object to any of this? I think it's highly inappropriate.

{¶28} Prosecutor: They're felonies, Your Honor.

{¶29} The Court: Juvenile record.

{¶30} Prosecutor: Well, he was treated as an adult in --

{¶31} Wiley: I'm happy to answer anything.

{¶32} Def. Counsel: Your Honor, may we approach?

{¶33} The Court: Yea, I think it'd be a good idea.

[Proceedings out of the jury's hearing.]

{¶34} Def. Counsel: I guess I don't -- it looks like some of these are all in the common pleas and not juvenile court but some of the offense dates are when he was 17 years old, the conviction. And I don't know -- I mean, I -- but it looks like the record could provide and show like the convictions are from '95 and they're like in the adult system.

{¶35} Prosecutor: And they actually showed it as of 2008 he still was not released from that because of actually there's a warrant out on one of the cases in 2008.

{¶36} The Court: Well, I don't think you can bring that out but the convictions, I suppose, for --

{¶37} Def. Counsel: And I've talked to him and he's --

{¶38} The Court: -- credibility.

{¶39} Def. Counsel: -- admitting that he has them but I mean I don't think [the prosecutor] could go into the details of the convictions other than he's --

{¶40} The Court: Well, the fact that he has them I think is as far as you can go on impeachment.

{¶41} Prosecutor: That's fine.

{¶42} Def. Counsel: All right.

{¶43} No further testimony was given regarding Wiley's prior convictions.

{¶44} Following the close of the defense case, the State presented Denise Blenman, Vorse's mother, as a rebuttal witness. Blenman testified, contrary to Wiley's testimony, that she had witnessed Wiley pick J.V. up by the arm and slam him onto a couch and that she had notified children's services about the incident.

{¶45} On December 13, 2011, the jury returned its Verdict. Wiley was found guilty of Endangering Children as charged in Count One of the Indictment, and acquitted of Endangering Children as charged in Count Three of the Indictment and Domestic Violence.

{¶46} On February 16, 2012, following a sentencing hearing, the trial court sentenced Wiley to serve a prison term of four years for Endangering Children (Count One).

{¶47} On March 15, 2012, Wiley filed a Notice of Appeal. On appeal, Wiley raises the following assignments of error:

{¶48} "[1.] The trial court erred to the prejudice of the appellant by failing to dismiss all charges against him pursuant to Ohio Criminal Rule 29, in that the evidence presented was not sufficient to sustain the charges."

{¶49} "[2.] The State failed to prove the applicable mental state for the offense of Endangering Children, which is recklessness, and therefore the trial court erred to the prejudice of the appellant by not dismissing Count 1 of the Indictment, in addition to all of the other charges."

{¶50} "[3.] The verdict was against the manifest weight of the evidence."

{¶51} "[4.] The appellant was denied his Sixth Amendment right to effective assistance of counsel by reason of defense counsel's failure to object when the prosecution cross-examined the appellant concerning his juvenile convictions."

{¶52} "[5.] The trial court erred to the prejudice of defendant by denying his request to replace his attorney, and thus denying appellant the effective assistance of counsel, in violation of his Sixth Amendment rights."

{¶53} Wiley's first three assignments of error will be considered jointly.

{¶54} The manifest weight of the evidence and the sufficiency of the evidence are distinct legal concepts. *State v. Elmore*, 111 Ohio St.3d 515, 2006-Ohio-6207, 857 N.E.2d 547, ¶ 44. With respect to the sufficiency of the evidence, "[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*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus, following *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

{¶55} Whereas "sufficiency of the evidence is a test of adequacy as to whether the evidence is legally sufficient to support a verdict as a matter of law, * * * weight of the evidence addresses the evidence's effect of inducing belief." *State v. Wilson,* 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, ¶ 25, citing *State v. Thompkins*, 78 Ohio St.3d 380, 386-387, 678 N.E.2d 541 (1997). "In other words, a reviewing court asks whose evidence is more persuasive -- the state's or the defendant's?" *Id.* An appellate court considering whether a verdict is against the manifest weight of the evidence must consider all the evidence in the record, the reasonable inferences, the credibility of the witnesses, and 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." *Thompkins* at 387, quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983).

{¶56} "Since there must be sufficient evidence to take a case to the jury, it follows that 'a finding that a conviction is supported by the *weight* of the evidence necessarily must include a finding of sufficiency.'" (Emphasis sic.) *Willoughby v. Wutchiett*, 11th Dist. No. 2002-L-165, 2004-Ohio-1177, ¶ 8, quoting *State v. Roberts*, 9th Dist. No. 96CA006462, 1997 Ohio App. LEXIS 4255, *5 (Sept. 17, 1997); *Thompkins* at 388 ("[a] reversal based on the weight of the evidence * * * can occur only after the State both has presented *sufficient evidence* to support conviction and has persuaded the jury to convict") (emphasis sic), quoting *Tibbs v. Florida*, 457 U.S. 31, 42-43, 102 S.Ct. 2211, 72 L. Ed.2d 652 (1982).

{¶57} In order to convict Wiley of second degree felony Endangering Children, the State had to prove, beyond a reasonable doubt, that he, "to a child under eighteen

years of age," did "[a]dminister corporal punishment or other physical disciplinary measure, or physically restrain the child in a cruel manner or for a prolonged period, which punishment, discipline, or restraint is excessive under the circumstances and creates a substantial risk of serious physical harm to the child." R.C. 2919.22(B)(3). Additionally, the State had to prove that Wiley "previously has been convicted of an offense under this section." R.C. 2919.22(E)(3).

{¶58} "The culpable mental state of recklessness is an essential element of the crime of endangering children under R.C. 2919.22(B)(3)." *State v. O'Brien*, 30 Ohio St.3d 122, 508 N.E.2d 144 (1987), paragraph one of the syllabus. "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). "When recklessness suffices to establish an element of an offense, then knowledge or purpose is also sufficient culpability for such element." R.C. 2901.22(E).

{¶59} Wiley's initial argument is that the evidence that he held J.V. in the air by the neck so that the boy made "gurgling" noises is not sufficient to demonstrate excessive punishment or a substantial risk of serious physical harm. We disagree.

{¶60} A substantial risk of serious physical harm means a "significant possibility" of physical harm entailing death, permanent incapacity, or temporary, substantial incapacity. R.C. 2901.01(A)(5)(b) and (c) and (A)(8). Asphyxiation, the loss of consciousness from an inability to breathe, constitutes serious physical harm. *State v. Church*, 12th Dist. No. CA2011-04-070, 2012-Ohio-3877, ¶ 18 (cases cited). Holding a three-year-old child off the ground by the neck, thereby inhibiting the child's ability to

breathe, creates a significant possibility of asphyxiation, inasmuch as a loss of consciousness would eventually occur. Accordingly, Vorse's testimony in the present case is sufficient to sustain Wiley's conviction of Endangering Children. Wiley suggests that J.V. was not deprived of oxygen for a sufficient period of time to create a significant risk of asphyxiation. Vorse's testimony was that J.V. was scared, gurgling, unable to breathe "for a couple of seconds," and had red marks about his neck. This is sufficient evidence for the issue of whether the risk of asphyxiation was substantial to go to the jury.

{¶61} Wiley next argues that the evidence was insufficient to demonstrate recklessness, in that his conduct "would not have harmed the boy to the extent of needing medical treatment." Again, we disagree.

{¶62} As noted above, depriving J.V. of the ability to breathe would eventually result in his asphyxiation, i.e., serious physical harm. According to Vorse's testimony, Wiley knowingly deprived J.V. of the ability to breathe. This is demonstrated by the fact of holding the child in the air by the throat, as well as Wiley's conduct after the incident, whereby he suggested to Vorse that she had not actually seen him choking J.V. In other words, if Wiley knowingly lifted J.V. off the ground by the throat so that he was gurgling, he acted recklessly with respect to the significant possibility of causing serious physical harm.

{¶63} Wiley's final argument is that Vorse's testimony is not credible. Wiley notes that there was no physical evidence of any actual injury to J.V. (apart from Vorse's testimony regarding the red marks); depriving the child of oxygen for only a few seconds does not create a substantial risk of serious physical harm; evidence that he

held a thirty-six-pound child off the ground with one hand is not credible; and the majority of the State's evidence against him was either found insufficient by the trial court or was rejected by the jury.

{¶64} Wiley cites several legitimate arguments impinging the credibility of Vorse's testimony and the State's case against him; these arguments do not, however, render the evidence against him wholly incredible or unbelievable. Contrary to Wiley's position, there is nothing inherently improbable about Vorse's testimony. Moreover, there was also testimony impinging on Wiley's credibility: several witnesses described him as having anger issues; one witness affirmed that Vorse had complained of violence within the home; and another witness contradicted Wiley's denial of having been physical with J.V.

{¶65} The first three assignments of error are without merit.

{¶66} In his fourth assignment of error, Wiley argues he was denied constitutionally effective assistance of counsel by trial counsel's failure to object to the prosecutor's cross-examination concerning his juvenile convictions.

{¶67} To reverse a conviction for ineffective assistance of counsel, the defendant must prove "(1) that counsel's performance fell below an objective standard of reasonableness, and (2) that counsel's deficient performance prejudiced the defendant resulting in an unreliable or fundamentally unfair outcome of the proceeding." *State v. Madrigal*, 87 Ohio St.3d 378, 388-389, 721 N.E.2d 52 (2000), citing *Strickland v. Washington*, 466 U.S. 668, 687-688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

{¶68} Wiley fails to demonstrate that trial counsel's performance fell below an objective standard of reasonableness. Although the trial court interjected its opinion

that the prosecutor's line of questioning was inappropriate, the court ultimately concluded that the prosecutor could question Wiley about prior adult convictions, but not the underlying facts. The convictions specifically mentioned by the prosecutor - Burglary, Criminal Conspiracy, and Institutional Vandalism - were not juvenile convictions. Under the court's own ruling, the prosecutor was allowed to ask about them. Accordingly, trial counsel's failure to object does not support an ineffective assistance claim.

{¶69} The only circumstance of the underlying convictions asked about by the prosecutor was whether the Institutional Vandalism involved a church. Wiley never answered this question, as the trial court interrupted the line of questioning at this point. Assuming, arguendo, that trial counsel's failure to object at this point constituted ineffective assistance, Wiley cannot demonstrate prejudice arising from this single, unanswered question. Given Wiley's acquittal on the majority of the charges against him and the evidence as a whole, it is not reasonable to suppose that Wiley's sole conviction for Endangering Children was influenced in any meaningful way by the prosecutor's question regarding the vandalizing of a church.

{¶70} The fourth assignment of error is without merit.

{¶71} In the fifth and final assignment of error, Wiley argues that he was denied constitutionally effective assistance of counsel by the trial court's refusal to appoint new counsel to represent him in light of his expressed lack of confidence in appointed counsel's ability to represent him.

{¶72} When confronted with the request for the appointment of new counsel, "it is the duty of the trial judge to inquire into the complaint and make such inquiry a part of

the record. The trial judge may then require the trial to proceed with assigned counsel participating if the complaint is not substantiated or is unreasonable." *State v. Deal*, 12 Ohio St.2d 17, 244 N.E.2d 742, syllabus (1969). Before a defendant is entitled to discharge appointed counsel, "the defendant must show a breakdown in the attorney-client relationship of such magnitude as to jeopardize the defendant's right to effective assistance of counsel." *State v. Coleman*, 37 Ohio St.3d 286, 525 N.E.2d 792 (1988), paragraph four of the syllabus.

{¶73} Whether a trial court errs by refusing to allow a defendant to discharge his or her counsel or seek substitute counsel is reviewed under an abuse of discretion standard. *State v. Cowans*, 87 Ohio St.3d 68, 73, 717 N.E.2d 298 (1999).

{¶74} Wiley asserts, as good cause for the appointment of new counsel, trial counsel's failure to secure the presence of a particular witness and to subpoena telephone records.

{¶75} We find no abuse of discretion in the trial court's refusal to appoint new counsel. At the November 14, 2011 status hearing, the court inquired into Wiley's dissatisfaction with trial counsel and Wiley stated his complaints with particularity, although their substance remained vague. The court assured Wiley of the importance of his securing a fair trial, while expressing doubt about the relevance and/or admissibility of the information sought by Wiley. Ultimately, the court continued trial for the express purpose of allowing trial counsel to locate the witness Wiley desired. The record contains nothing further about the matter and Wiley did not again seek the appointment of new counsel. While Wiley and trial counsel may have had different opinions about the importance of securing this witness' testimony, there was no

evidence of a complete breakdown in the attorney-client relationship so as to require the appointment of new counsel. *State v. Ketterer*, 111 Ohio St.3d 70, 2006-Ohio-5283, 855 N.E.2d 48, ¶ 149 ("[d]isagreement[s] between the attorney and client over trial tactics or approach also do not warrant a substitution of counsel") (citation omitted).

{¶76} The fifth assignment of error is without merit.

{¶77} For the foregoing reasons, Wiley's conviction for Endangering Children in the Ashtabula County Court of Common Pleas is affirmed. Costs to be taxed against appellant.

TIMOTHY P. CANNON, P.J.,

CYNTHIA WESTCOTT RICE, J.,

concur.