[Cite as *State v. Flugga*, 2009-Ohio-5648.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
STATE OF OHIO	:	Hon: W. Scott Gwin, P.J.
	:	Hon: William B. Hoffman, J.
Plaintiff-Appellee	:	Hon: Julie A. Edwards, J.
	:	
-vs-	:	
	:	Case No. 2009-CA-5
COREY S. FLUGGA	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Criminal appeal from the Licking County Court of Common Pleas, Case No. 08-CR-448
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	October 19, 2009

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
KENNETH W. OSWALT Licking County Prosecutor By: DANIEL H. HUSTON 20 South Second St., 4th Fl. Newark, OH 43055	DAVID BARTH 320 Pinehurst Drive Granville, OH 43023

Gwin, P.J.

{¶1} Appellant, Corey Flugga, appeals his convictions for one count of murder in violation of R.C. 2903.02(B), with felonious assault as a predicate offense, and one count of murder in violation of R.C. 2903.02(B) with child endangering as a predicate offense. Appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} On July 7, 2008, appellant was indicted by the Licking County Grand Jury on two counts of Murder.

{¶3} The charges stem from an incident that occurred on June 21, 2008. On that date, appellant was the caretaker of his stepson, three-year old Carson Hanson. Heather Flugga, the mother of Carson Hanson, left for work at 2:30 p.m. At approximately 3:00 p.m., appellant called Ms. Flugga's brother, Matt Cosart, seeking advice on punishing Carson who had messed his pants and would not stay in the corner. Appellant further told Matt that he had spanked Carson, but that it did not affect him.

{¶4} Appellant took a second, younger child outside to play and occasionally returned to the residence to check on Carson. On the final check, appellant did not find the child in his room. Appellant testified that he located the child in the bathtub, lying on his back, covered in vomit. Appellant contends that he attempted CPR and other efforts while a neighbor called 9-1-1.

{¶5} 9-1-1 was called at 5:29 p.m. EMS responded and the child was transported to Licking Memorial Hospital. Efforts to revive the child continued until it was determined that such effort were futile and the child was pronounced dead.

{¶6} By his own admission, appellant was the only individual in the immediate area of his stepson, Carson Hanson, during the timeframe in question. (2T. at 381; 3T. at 519).

{¶7} Dr. Jeffrey Lee responded to the hospital and later performed the autopsy. Based upon his physical observations and the results of the autopsy, he concluded that the cause of death was an acute hemorrhage due to the crushing of the mesentery tissues and that the manner of death was homicide. Dr. Lee further testified that Carson lost approximately 22% of his blood volume due to this hemorrhaging, and established the timeline from the point of injury to time of death as 15 minutes to an hour, with the outside range of 2 hours. Dr. Lee was positive that a fist caused the entire injury complex, and that this was the result of a punch to the abdomen, "no questions asked."

{¶8} Dr. Lee specifically ruled out the scenario of Carson inflicting this injury on himself, either by punching himself or by falling onto something. In ruling out other hypothetical's, Dr. Lee testified that:

{¶9} "It's such a peculiar pattern for it to be anything other than a fist, for one thing...there's nothing that can cause this type of pattern on the skin and the injury deep as well. You can get the injury deep with other methods, you can get the injury on the skin with other things, but you can't get both of these in the same setting or the same set of circumstances any other way than a punch to the abdomen." (1T. at 181).

{¶10} Criminalist Tim Elliget testified as to his inspection of the crime scene. Based upon his observations of the surface bruise patterns on Carson, Elliget opined that the bruises on the child's stomach were indications of punching or knuckle bruising. Mr. Elliget inspected the apartment for anything that might have been consistent with

the bruise pattern; however, he was unable to locate anything inside the apartment that was consistent with the pattern of the bruises.

{¶11} Dr. James Bryant testified on appellant's behalf. Although he did not differ with Dr. Lee on the cause of death, he did take issue with Dr. Lee's conclusion on the manner of death. Dr. Bryant did not believe that the bruising was likely caused by a fist or a blow from a human hand. It was the opinion of Dr. Bryant that anything could have been the cause of the injury – a fall onto an object for example – and that it could not be stated that a "punch" was the cause. Dr. Bryant testified that he was not familiar with the autopsy details and results regarding the crushed mesentery tissue and its relationship to the surface bruise patterns. When asked by the prosecuting attorney, Dr. Bryant was not able or willing to offer an alternative explanation regarding the manner of death.

{¶12} Appellant testified that he did not strike the child and that he committed no act which could have caused the injuries which lead to the death of the child.

{¶13} On January 8, 2009, the jury found the appellant guilty as charged in the indictment. Appellant was sentenced to serve an aggregate prison term of fifteen years to life.

{¶14} It is from this conviction and sentence that the appellant now appeals, setting forth the following assignments of error:

{¶15} "I. THE RECORD BELOW FAILS TO DEMONSTRATE THAT THE CONVICTION OF THE DEFENDANT-APPELLANT WAS SUPPORTED BY SUFFICIENT EVIDENCE TO PROVE EACH ELEMENT OF THE OFFENSE BY PROOF BEYOND A REASONABLE DOUBT.

{¶16} "II. THE CONVICTION OF THE DEFENDANT-APPELLANT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE PRESENTED BELOW."

I. & II.

{¶17} In his first assignment of error, appellant maintains that his convictions for murder are based upon insufficient evidence; in his second assignment of error appellant argues that his convictions for murder are against the weight of the evidence. Because we find the issues raised in appellant's first and second assignments of error are closely related, for ease of discussion, we shall address the assignments of error together.

{¶18} Our standard of reviewing a claim a verdict was not supported by sufficient evidence is to examine the evidence presented at trial to determine whether the evidence, if believed, would convince the average mind of the accused's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in the 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 (*1981), 61 Ohio St.3d 259, 574 N.E.2d 492 *,* superseded by constitutional amendment on other grounds in *State v. Smith,* 80 Ohio St.3d 89, 1997-Ohio-355, 684 N.E.2d 668.

{¶19} The Supreme Court has explained the distinction between claims of sufficiency of the evidence and manifest weight. Sufficiency of the evidence is a question for the trial court to determine whether the State has met its burden to produce evidence on each element of the crime charged, sufficient for the matter to be submitted to the jury.

{¶20} Manifest weight of the evidence claims concern the amount of evidence offered in support of one side of the case, and is a jury question. We must determine whether the jury, in interpreting the facts, so lost its way that its verdict results in a manifest miscarriage of justice, *State v. Thompkins,* 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541, superseded by constitutional amendment on other grounds as stated by *State v. Smith*, 80 Ohio St.3d 89, 1997-Ohio-355, 684 N.E.2d 668.

{¶21} On review for manifest weight, a reviewing court is “to examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses and determine whether in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the judgment must be reversed. The discretionary power to grant a new hearing should be exercised only in the exceptional case in which the evidence weighs heavily against the judgment.” *State v. Thompkins*, supra, citing *State v. Martin* (1983), 20 Ohio App.3d 172, 175. Because the trier of fact is in a better position to observe the witnesses’ demeanor and weigh their credibility, the weight of the evidence and the credibility of the witnesses are primarily for the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, syllabus 1.

{¶22} In *State v. Thompkins*, supra, the Ohio Supreme Court held "[t]o reverse a judgment of a trial court on the basis that the judgment is not sustained by sufficient evidence, only a concurring majority of a panel of a court of appeals reviewing the judgment is necessary." Id. at paragraph three of the syllabus. However, to "reverse a judgment of a trial court on the weight of the evidence, when the judgment results from a trial by jury, a unanimous concurrence of all three judges on the court of appeals

panel reviewing the case is required." Id. at paragraph four of the syllabus; *State v. Miller* (2002), 96 Ohio St.3d 384, 2002-Ohio-4931 at ¶38, 775 N.E.2d 498.

{¶23} In the case at bar, the appellant argues, essentially, that the circumstantial evidence does not prove beyond a reasonable doubt that appellant is guilty of the charged offenses. Appellant also argues that the evidence presented by the appellant to rebut the appellee's experts' opinions creates reasonable doubt as to the appellant's guilt. We disagree.

{¶24} In this case, appellant was convicted of one count of murder in violation of R.C. 2903.02(B), with felonious assault as a predicate offense, and one count of murder in violation of R.C. 2903.02(B) with child endangering as a predicate offense.

{¶25} R.C. 2903.02(B) sets forth the elements for murder and states as follows:

{¶26} "(B) No person shall cause the death of another as a proximate result of the offender's committing an offense of violence that is a felony of the first or second degree and that is not a violation of section 2903.03 or 2903.04 of the Revised Code."

{¶27} An offense of violence is defined in R.C. 2901.01(A)(9) to include, inter alia, a violation of R.C. 2903.11 (felonious assault) and a violation of R.C. 2919.22(B)(1-4) (child endangering).

{¶28} R.C. 2903.11(A) (1) sets forth the pertinent elements of felonious assault and states as follows:

{¶29} "(A) No person shall do either of the following:

{¶30} "(1) Cause serious physical harm to another or another's unborn";

{¶31} Serious physical harm to persons is defined in R.C. 2901.01 and means any of the following:

{¶32} "(a) Any mental illness or condition of such gravity as would normally require hospitalization or prolonged psychiatric treatment;

{¶33} "(b) Any physical harm that carries a substantial risk of death;

{¶34} "(c) Any physical harm that involves some permanent incapacity, whether partial or total, or that involves some temporary, substantial incapacity;

{¶35} "(d) Any physical harm that involves some permanent disfigurement or that involves some temporary, serious disfigurement;

{¶36} "(e) Any physical harm that involves acute pain of such duration as to result in substantial suffering or that involves any degree of prolonged or intractable pain."

{¶37} R.C. 2919.22(B) (1) sets forth the pertinent elements of child endangering and states as follows:

{¶38} "(B) No person shall do any of the following to a child under eighteen years of age* * *:

{¶39} "Abuse the child";

{¶40} Pursuant to 2919.22((E) (1) (d), if a violation of 2919.22(B) (1) results in serious physical harm to the child, the offense is a felony of the second degree.

{¶41} Under the felony murder statute a defendant may be found guilty of murder even if he did not "intend" to cause the victim's death. *State v. Miller,* 96 Ohio St.3d 384, 775 N.E.2d 498, 2002-Ohio-4931, at ¶¶ 31-34. The critical issue is whether the defendant had the requisite culpable mental state to support a conviction for the underlying felony offense. Id. See, also, *State v. Berry,* Cuyahoga App. No. 83756, 2004-Ohio-5485, at ¶ 35, citing *State v. Irwin,* Hocking App. Nos. 03CA13 & 03CA14,

2004-Ohio-1129. Felony murder as defined in R.C. 2903.02(B), with the underlying offense of violence being felonious assault, is supported by evidence that establishes that the defendant knowingly caused serious physical harm to the victim. As the Ohio Supreme Court explained in *Miller,* supra, "a person acts *knowingly, regardless of purpose,* when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature." *State v. Miller,* 96 Ohio St.3d 384, 775 N.E.2d 498, 2002-Ohio-4931, at ¶ 31 (emphasis in original).

{¶42} R.C. 2901.01(A)(5) defines serious physical harm as " * * * (b) any physical harm that carries a substantial risk of death; (c) any physical harm that involves some permanent incapacity, whether partial or total, or that involves some temporary, substantial incapacity * * *."

{¶43} Although not stated in R.C. 2919.22, recklessness is the culpable mental state for the crime of child endangering. *State v. O'Brien* (1987), 30 Ohio St.3d 122, 508 N.E.2d 144; *State v. Conley*, Perry App. No. 03-CA-18, 2005-Ohio-3257 at ¶20. Recklessness is defined in R.C. 2901.22(C), which states:

{¶44} "(C) 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."

{¶45} It appears that, in determining the appellant's guilt or innocence, the jury was left to consider the appellant's versions of the event, medical testimony, autopsy findings and the conclusions of both the appellant's and appellee's experts. In

considering the evidence, the jury was essentially asked to determine whether Carson's fatal injuries were the result of an accident, the abusive actions of the appellant, or the actions of some unidentified third party. Prior to deliberations, the jury was instructed that it was free to believe or disbelieve any witness and was given guidance on the manner in which they could judge the credibility of both lay and expert witnesses.

{¶46} Based upon the verdict, it appears that the jury gave more weight to the testimony of the medical professionals and experts who treated and examined Carson's pattern of injuries. The mere fact that the jury chose to believe the testimony of the prosecution's witnesses does not render a verdict against the manifest weight of the evidence. *State v. Moore,* Wayne App. No. 03CA0019, 2003-Ohio-6817 at paragraph 18. Upon a review of the record, we find that the evidence provided by the state's witnesses supported the jury's verdict.

{¶47} Dr. Jeffrey Lee responded to the hospital and later performed the autopsy. Based upon his physical observations and the results of the autopsy, he concluded that the cause of death was an acute hemorrhage due to the crushing of the mesentery tissues and that the manner of death was homicide. Dr. Lee further testified that Carson lost approximately 22% of his blood volume due to this hemorrhaging, and established the timeline from the point of injury to time of death as 15 minutes to an hour, with the outside range of 2 hours. Dr. Lee was positive that a fist caused the entire injury complex, and that this was the result of a punch to the abdomen, "no questions asked."

{¶48} Dr. Lee, in discussing Carson Hanson's bruise pattern interpretation, described it as a "textbook pattern injury." He testified this bruise pattern is what you

see when a child is punched, i.e., bruises from knuckles or tips of fingers. In support of his conclusion that the victim was punched, Dr. Lee testified that:

{¶49} "... the pattern of the bruises with their size and shape, also a clustering of the bruises, the lack of other distinctive linear type of injuries in the abdomen plus the overwhelming deep injury that does not seem to equate with what we see on the surface injury. That's very distinctive, specifically for punches, because of the small area of force that this large force is directed." (1T. at 175-176).

{¶50} In this context, Dr. Lee specifically ruled out the scenario of Carson inflicting this injury on himself, either by punching himself or by falling onto an object. Dr. Lee testified that a fall would not result in the same pattern injury on the skin, as well as the deep injury. Further, multiple "falls" would be required. (1T. 180-181).

{¶51} Dr. James Bryant, the appellant's expert, had a different perspective. Although he did not differ with Dr. Lee on the cause of death, he did take issue with Dr. Lee's conclusion on the manner of death. While he opined that, a fist could have caused the surface bruising, in his opinion it was not definitive. Dr. Bryant did not believe that a fist or a blow likely caused the bruising. It was the opinion of the defense expert that anything could have been the cause of the injury – a fall onto an object for example – and that it could not be stated that a "punch" was the cause. (2T. at 431-432; 449). However, Dr. Bryant did not review any autopsy photographs, photographs of the scene, investigative reports generated by law enforcement, or witness statements. (2T. at 438-442).

{¶52} Viewing the evidence in the case at bar in a light most favorable to the prosecution, we conclude that a reasonable person could have found beyond a

reasonable doubt that appellant knowingly caused serious physical harm to Carson, and that appellant recklessly abused Carson.

{¶53} We hold, therefore, that the State met its burden of production regarding felony murder as defined in R.C. 2903.02(B), with the underlying offense of violence being felonious assault and, murder in violation of R.C. 2903.02(B) with child endangering as a predicate offense. Accordingly, there was sufficient evidence to support appellant's convictions.

{¶54} "A fundamental premise of our criminal trial system is that 'the *jury* is the lie detector.' *United States v. Barnard,* 490 F.2d 907, 912 (C.A.9 1973) (emphasis added), cert. denied, 416 U.S. 959, 94 S.Ct. 1976, 40 L.Ed.2d 310 (1974). Determining the weight and credibility of witness testimony, therefore, has long been held to be the 'part of every case [that] belongs to the jury, who are presumed to be fitted for it by their natural intelligence and their practical knowledge of men and the ways of men.' *Aetna Life Ins. Co. v. Ward,* 140 U.S. 76, 88, 11 S.Ct. 720, 724-725, 35 L.Ed. 371 (1891)". *United States v. Scheffer* (1997), 523 U.S. 303, 313, 118 S.Ct. 1261, 1266-1267.

{¶55} Although appellant cross-examined the witnesses and presented his own expert to support his claim that he did not inflict serious physical harm or abuse Carson, the weight to be given to the evidence and the credibility of the witnesses are issues for the trier of fact. *State v. Jamison* (1990), 49 Ohio St.3d 182, certiorari denied (1990), 498 U.S. 881.

{¶56} The jury was free to accept or reject any and all of the evidence offered by the parties and assess the witness's credibility. "While the jury may take note of the inconsistencies and resolve or discount them accordingly * * * such inconsistencies do

not render defendant's conviction against the manifest weight or sufficiency of the evidence". *State v. Craig* (Mar. 23, 2000), Franklin App. No. 99AP-739, citing *State v. Nivens* (May 28, 1996), Franklin App. No. 95APA09-1236 Indeed, the jurors need not believe all of a witness' testimony, but may accept only portions of it as true. *State v. Raver,* Franklin App. No. 02AP-604, 2003-Ohio-958, at ¶ 21, citing *State v. Antill* (1964), 176 Ohio St. 61, 67, 197 N.E.2d 548.; *State v. Burke,* Franklin App. No. 02AP-1238, 2003-Ohio-2889, citing *State v. Caldwell* (1992), 79 Ohio App.3d 667, 607 N.E.2d 1096. Although the evidence may have been circumstantial, we note that circumstantial evidence has the same probative value as direct evidence. *State v. Jenks* (1991), 61 Ohio St. 3d 259, 574 N.E. 2d 492.

{¶57} After reviewing the evidence, we cannot say that this is one of the exceptional cases where the evidence weighs heavily against the convictions. The jury did not create a manifest injustice by concluding that appellant was guilty of the crimes charged in the indictment.

{¶58} We conclude the trier of fact, in resolving the conflicts in the evidence, did not create a manifest injustice to require a new trial.

{¶59} Appellant’s first and second assignments of error are overruled.

{¶60} The judgment of the Licking County Court of Common Pleas is affirmed.

By Gwin, P.J.,

Hoffman, J., and

Edwards, J., concur

_____
HON. W. SCOTT GWIN

_____
HON. WILLIAM B. HOFFMAN

_____
HON. JULIE A. EDWARDS

WSG:clw 0928

[Cite as *State v. Flugga*, 2009-Ohio-5648.]

IN THE COURT OF APPEALS FOR LICKING COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
COREY S. FLUGGA	:	
Defendant-Appellant	:	CASE NO. 2009-CA-5

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Licking County Court of Common Pleas is affirmed. Costs to appellant.

_____
HON. W. SCOTT GWIN

_____
HON. WILLIAM B. HOFFMAN

_____
HON. JULIE A. EDWARDS