

[Cite as *State v. King*, 2010-Ohio-2402.]

COURT OF APPEALS
GUERNSEY COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

JENNIFER L. KING

Defendant-Appellant

JUDGES:

Hon. Julie A. Edwards, P.J.

Hon. William B. Hoffman, J.

Hon. Sheila G. Farmer, J.

Case No. 09 CA 000019

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Guernsey County Common
Pleas Court, Case No. 08CR00046

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

May 26, 2010

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

DANIEL G. PADDEN
Guernsey County Prosecuting Attorney
139 West 8th Street, P.O. Box 640
Cambridge, Ohio 43725

LINDSEY K. DONEHUE
213 N. 8th Street
Cambridge, Ohio 43725

Hoffman, J.

{¶1} Defendant-appellant Jennifer L. King appeals her conviction and sentence entered by the Guernsey County Court of Common Pleas, on one count of child endangerment, in violation of R.C. 2919.22(A), following a jury trial. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE CASE AND FACTS

{¶2} On May 23, 2008, the Guernsey County Grand Jury indicted Appellant on one count of involuntary manslaughter, in violation of R.C. 2903.04, a felony of the first degree, with an underlying crime of felonious assault; one count of involuntary manslaughter, in violation of R.C. 2903.04, a felony of the first degree, with the underlying crime of child endangerment; one count of involuntary manslaughter, in violation of R.C. 2903.04, a felony of the third degree, with an underlying crime of assault; one count of felonious assault, in violation of R.C. 2903.11, a felony of the second degree; and one count of child endangerment, in violation of R.C. 2919.22(A), a felony of the third degree. Appellant appeared before the trial court for arraignment on June 2, 2008, and entered a plea of not guilty to the Indictment.

{¶3} Appellant was released on her own recognizance. Subsequently, on January 12, 2009, defense counsel filed a Suggestion of Incompetence to Stand Trial. The trial court granted the request and ordered Appellant be evaluated by the Forensic Diagnostics Center of District Nine, Inc. The trial court received the competency evaluation on January 29, 2009. Denise A. Kohler, PHD, the clinical and forensic psychologist who conducted the evaluation, opined, within a reasonable degree of psychological certainty, Appellant understood the nature and severity of the charges

against her, and was able to assist her attorney in her defense. Via Entry filed February 13, 2009, the trial court found Appellant competent to stand trial, and scheduled the matter for jury trial commencing on April 21, 2009. Prior to trial, Appellant waived her right to be present at the depositions of various doctors who would be called to testify.

{¶4} The following evidence was adduced at trial.

{¶5} Sometime during the afternoon of February 22, 2008, Victor King, Appellant's husband, left the family home to go to work at Monogram Metals. He clocked in at 2:57pm. Appellant was alone with the couple's five children for the remainder of the day and into the evening. Appellant took all of the children to the eldest children's karate class. When they returned home, Appellant made dinner and let the children play for a few hours before putting them into bed. At approximately 10:00pm that evening, Appellant noticed three year old Ethan's body was stiffening, and his breathing was labored. Appellant telephoned her husband, and told him Ethan "wasn't acting right". Victor King advised Appellant to take Ethan to the hospital, however, she decided to wait until the morning to take the boy.

{¶6} Victor King returned home from work at approximately 1:00am on February 23, 2009. Sometime between 2:00am and 3:30am, Victor noticed Ethan's breathing was labored, and his body was "stiff as a board". The couple discussed calling an ambulance, but decided it would be faster for Appellant to drive Ethan to the Emergency Room at Southeastern Ohio Regional Medical Center. As Appellant readied herself to take Ethan to the hospital, the couple's oldest son, Tristen, woke up to use the restroom. Tristen recalled his bedroom clock read 3:30am when he woke up.

Appellant had some difficulty getting Ethan into the car, was forced to drive slowly due to a snowstorm, but ultimately arrived at the hospital at 5:00am on February 23, 2009.

{¶17} Ethan was immediately taken into an examination room. Nurse Janie Gregory noted the boy was breathing rapidly and posturing, which she explained was a stiffening of the arms and legs. Gregory recalled the child was bruised and abraded over his entire body, including his ears. The nurse stated she observed the bruising of an imprint of a hand on one of Ethan's inner thighs. Gregory discussed the treatment administered to Ethan.

{¶18} Doctor Eric Fete, who was the attending physician in the Emergency Room when Ethan was presented, stated his main concern when treating any sick child is an overwhelming infection, or sepsis. Dr. Fete ordered a CAT scan due to the overall picture of Ethan's injuries. The results of the CAT scan revealed Ethan had two subdural hematomas, as well as swelling of the brain. At that point, Dr. Fete decided Ethan needed to be transported to Nationwide Children's Hospital in Columbus. Dr. Fete stated Ethan's injuries were not consistent with the child's history given by Appellant. The doctor testified Ethan's injuries were consistent with being violently shaken.

{¶19} Dr. Jonathan Thackeray, Ethan's treating physician at Nationwide Children's Hospital, testified the boy was in critical condition when he arrived. Dr. Thackeray waited until the following day to conduct his examination. Dr. Thackeray observed Ethan had several bruises, many of which were on the soft tissue areas of his body, the side of his foot, his upper leg, his abdominal wall, and his right arm. The doctor added Ethan had bruising on all four extremities as well as abrasions on his ears.

Dr. Thackeray found the extent and locations of Ethan's bruises to be concerning given the child's age. Dr. Thackeray opined Ethan sustained an abusive head injury, most likely from a shaking mechanism, and such injury was non-accidental in nature. The doctor noted most children who sustain significant abusive head injuries immediately manifest some symptoms, including vomiting, irritability, respiratory trouble, unresponsiveness, seizures, and/or cessation of breathing. The body stiffness Appellant and Victor King observed Ethan exhibiting indicated seizure activity. The doctor stated any delay in seeking medical care for these types of injuries increased the risk of harm to the child.

{¶10} Dr. Joseph Ohr, a forensic pathologist formerly with the Franklin County Coroner's Office, testified he conducted the autopsy of Ethan King's body. Dr. Ohr explained a young child has a thin skull or, in other words, the plates of the forming skull are not completely calcified. Although the brain of a three year old is grossly well formed, it is softer in consistency than the brain of an adult. Upon examination, Dr. Ohr found Ethan's brain was soft and swollen. The features of Ethan's brain were not features one would find in a brain which had not been injured. Ethan's spinal cord was very soft and somewhat ragged in appearance. Dr. Ohr explained the softening of the spinal cord suggests a spinal cord which has not been getting enough oxygen and nutrients. Such softening is not necessarily due to direct trauma, but is the result of the swelling. Dr. Ohr discussed the bruises he observed on Ethan's body, indicating which had been caused by medical intervention and which had been caused by other injury. Dr. Ohr discovered injury to the nerve fibers of the brain, which were caused by a traumatic injury. Dr. Ohr testified Ethan's injuries were consistent with blunt force

shaking of his head, and further opined the cause of Ethan's death was blunt force injury to the head. Dr. Ohr added any delay in seeking medical treatment would aggravate the injury. The doctor concluded the injuries suffered by Ethan King were not of natural causes.

{¶11} Dr. MaryLou McGregor, a pediatric ophthalmologist, was asked to provide a consultation on Ethan King to determine whether the child had suffered a non-accidental trauma. When Dr. McGregor examined Ethan, he was intubated, and was sedated and unconscious. The doctor was not able to conduct a visual acuity test. Although Dr. McGregor found no increased pressure of Ethan's eye, Ethan's pupils were not normal. They measured differently on each side, and were not reacting well to light. Dr. McGregor explained when the eyes do not react well to light such indicates the pathways are not intact and usually means there is swelling of the brain. An external exam of Ethan's eyes was normal. When the doctor examined the retina on each of Ethan's eyes, she observed bleeding on the surface of the retina, inside the layers of the retina, and below the retina. Dr. McGregor opined Appellant's testimony did not substantiate the findings in Ethan's eyes. The doctor further opined Ethan's injuries were consistent with being violently shaken. Dr. McGregor added Appellant's delay in seeking medical treatment for Ethan resulted in further damage with less chance of recovery.

{¶12} Tristen King, who was eleven and a half at the time of trial, recalled the events of the evening preceding Ethan being taken to the hospital. Tristen stated he and his family arrived home from karate at 8:00pm. As Tristen headed for bed, he heard Ethan, who was on the couch, throw up. Tristen stated he heard Appellant yell at

Ethan, asking the boy why he vomited. Tristen acknowledged he had seen his mother hit or shake Ethan, but not on that day. Tristen described Ethan as “a jumpy kid” who would “hit his head off of stuff” all of the time. The boy stated he had observed Appellant and his father spank Ethan, but only on his bottom.

{¶13} Victor King, Appellant’s husband, testified he clocked in at work just before 3:00pm on February 22, 2008, and clocked out at 12:24am on February 23, 2008. During his shift, Victor received a telephone call from Appellant regarding Ethan. He suggested Appellant take Ethan to the hospital. Victor returned home at approximately 1:00am on February 23, 2008. As he was watching TV, he heard a noise, which reminded him to check on Ethan. Victor found Ethan laying on his bed, stiff, as if he had had a seizure. Ethan’s breathing was raspy and loud. Victor carried Ethan to the master bedroom and told Appellant he needed to go to the hospital. Victor recalled the period of time from when he found Ethan and the time Appellant left the house was approximately fifteen to twenty minutes. Victor indicated Appellant had called him twice from the hospital and a nurse had also called two or three times, instructing Victor to come to the hospital. Victor telephoned one of his sisters and asked her to come to the house to watch the other children. Ethan ultimately passed away on February 27, 2008.

{¶14} After hearing all the evidence and deliberating, the jury found Appellant not guilty on Count One of the Indictment, involuntary manslaughter with an underlying charge of felonious assault, but guilty on Count Five of the Indictment, child endangerment. The jury was hung on Counts Two, Three, and Four. Via Entry dated April 27, 2009, the trial court entered a judgment of acquittal as to Count One and a judgment of conviction as to Count Five. The trial court dismissed

Counts Two, Three, and Four. The trial court scheduled the matter for sentencing on May 28, 2009. The trial court imposed a term of imprisonment of four years, and ordered such term be served consecutive to the sentence in Guernsey County Case No. 09CR30.

{¶15} It is from this conviction and sentence Appellant appeals raising the following assignment of error:

{¶16} “I. THE JURY’S GUILTY VERDICT WAS AGAINST THE SUFFICIENCY OF THE EVIDENCE AND THUS MUST BE OVERRULED.

{¶17} “II. THE JURY’S GUILTY VERDICT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND THUS MUST BE OVERRULED.”

I

{¶18} In her first assignment of error, Appellant challenges the sufficiency of the evidence.

{¶19} In *State v. Jenks* (1981), 61 Ohio St.3d 259, 574 N.E.2d 492, the Ohio Supreme Court set forth the standard of review when a claim of insufficiency of the evidence is made. The Ohio Supreme Court held: An appellate courts function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. 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. *Id.* at paragraph two of the syllabus.

{¶20} Appellant was convicted of child endangerment, in violation of R.C. 2919.22(A), which provides:

{¶21} “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. It is not a violation of a duty of care, protection, or support under this division when the parent, guardian, custodian, or person having custody or control of a child treats the physical or mental illness or defect of the child by spiritual means through prayer alone, in accordance with the tenets of a recognized religious body.”

{¶22} Appellant submits the only element the State established with sufficient evidence was that she was one of Ethan’s parents. Appellant argues the fact she was the only adult with Ethan on the day of his injuries does not prove beyond a reasonable doubt she caused those injuries. Appellant adds Victor King was alone with Ethan during the early morning hours of February 23, 2009. Victor, who was holding the injured Ethan in his arms, woke Appellant from a sound sleep. Appellant concludes this fact raises the possibility either she or Victor King injured Ethan. Appellant, implicitly referring to the expert testimony, submits there was no evidence she injured Ethan within the timeframe of the “immediate” presentation of the symptoms of the subdural hematomas.

{¶23} Upon review of the record, we find the jury had sufficient evidence from which to conclude beyond a reasonable doubt Appellant caused Ethan’s fatal injuries. Victor King testified he had not seen Ethan for at least two days prior to finding his son

with labored breathing and a stiffened body. Appellant herself testified she was the only adult who had control of Ethan on the day of the boy's injuries. Appellant further stated, if one of the other children had injured or hurt Ethan, Ethan would have advised her of such. Prior to going to sleep, Ethan had spit up or vomited while he was watching television. Appellant could hear Ethan from his bedroom, sounding raspy and coughing. This evidence indicates Ethan was showing some symptoms of the hematomas. Appellant told Janie Gregory it was "impossible" that one of the older children could have caused Ethan's injuries. Tristen King testified he had observed Appellant shake Ethan, although had not observed her do so on the evening in question.

{¶24} Appellant further asserts the State failed to prove beyond a reasonable doubt she recklessly violated her duty to protect Ethan from abuse or her duty to seek treatment for the abuse.

{¶25} "The existence of the culpable mental state of recklessness is an essential element of the crime of endangering children under R.C. 2919.22(A)." *State v. McGee*, 79 Ohio St.3d 193, 1997-Ohio-156, syllabus. "Reckless" is defined in R.C. 2901.22(C) as follows:

{¶26} "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."

{¶27} We find the jury could reasonably find Appellant acted recklessly. Appellant noticed Ethan was not himself prior to 10 pm on February 22, 2009.

Appellant administered a nebulizer treatment to Ethan. Appellant subsequently telephone Victor at work and told her husband Ethan was not “acting right”. Despite Victor’s advising her to take Ethan to the hospital, Appellant chose not to seek medical attention for her son.

{¶28} Finally, Appellant maintains the State failed to prove beyond a reasonable doubt she knew or should have known about Ethan’s injuries. Appellant notes the experts testified a layperson would not be able to differentiate between the symptoms of a subdural hemotoma and common childhood illnesses such as those Ethan had been experiencing days before the injuries occurred. Appellant adds Ethan did not exhibit a number of the symptoms until after he was taken to the emergency room.

{¶29} We find the record establishes Ethan exhibited a number of symptoms prior to 10 pm. Appellant told Dr. Thackeray Ethan’s breathing became heavy and raspy at approximately 7 pm; the boy had vomited while sitting on the couch watching television; and, at 9 pm, he was having increased trouble breathing. Based upon this evidence, the jury could reasonably find Appellant knew or should have known Ethan was injured.

{¶30} Based upon the foregoing, we find Appellant’s conviction was not based upon insufficient evidence.

{¶31} Appellant’s first assignment of error is overruled.

II

{¶32} In her second assignment of error, Appellant asserts the jury’s guilty verdict was against the manifest weight of the evidence. Specifically, Appellant contends the jury’s verdicts were inconsistent as they found her not guilty of Count One,

involuntary manslaughter with an underlying offense of felonious assault, but guilty of child endangerment. Appellant explains it was inconsistent for the jury to find her not guilty of knowingly causing physical harm to Ethan in Count One, but finding her guilty of causing serious physical harm which elevated the child endangerment offense from a misdemeanor to a felony.

{¶33} Generally, “[i]nconsistency in a verdict does not arise out of inconsistent responses to different counts, but rather inconsistent responses to the same count.” *State v. Gardner*, Montgomery App. No. 21027, 2006-Ohio-1130, ¶ 33, citing *State v. Adams* (1978), 53 Ohio St.2d 223, 374 N.E.2d 137; *State v. Lovejoy* (1997), 79 Ohio St.3d 440, 683 N.E.2d 1112. Furthermore, an inconsistent verdict may very well be a result of leniency and compromise by the jurors, rather than being caused by jury confusion. *State v. Fraley*, Perry App.No. 03CA12, 2004-Ohio-4898, ¶ 15, citing *United States v. Powell* (1984), 469 U.S. 57, 105 S.Ct. 471, 83 L.Ed.2d 461. See, also, *State v. Ballard*, Cuyahoga App.No. 88279, 2007-Ohio-4017, ¶ 17.

{¶34} Accordingly, we reject Appellant’s argument alleging inconsistent verdicts as it is based on different counts. Based upon the evidence recited supra, we find the jury’s verdict was not against the manifest weight of the evidence.

{¶35} Appellant’s second assignment of error is overruled.

{¶36} The judgment of the Guernsey County Court of Common Pleas is affirmed.

By: Hoffman, J.

Edwards, P.J. and

Farmer, J. concur

s/ William B. Hoffman _____
HON. WILLIAM B. HOFFMAN

s/ Julie A. Edwards _____
HON. JULIE A. EDWARDS

s/ Sheila G. Farmer _____
HON. SHEILA G. FARMER

