[Cite as *State v. Mills,* 2017-Ohio-7970.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO Plaintiff-Appellee -vs- CRISTA MILLS Defendant-Appellant	JUDGES: Hon. W. Scott Gwin, P. J. Hon. John W. Wise, J. Hon. Earle E. Wise, J. Case No. 16 CA 0106 O P I N I O N

CHARACTER OF PROCEEDING:	Criminal Appeal from the Municipal Court, Case No. 16 CRB 1077
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	September 19, 2017

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
J. MICHAEL KING ASSISTANT LAW DIRECTOR 40 West Main Street, 4th Floor Newark, Ohio 43055	KEVIN J. GALL 73 North 6th Street Newark, Ohio 43055

Wise, John, J.

{¶1} Appellant Crista Mills appeals from her misdemeanor conviction for child endangering in the Municipal Court of Licking County. Appellee is the State of Ohio. The relevant facts leading to this appeal are as follows.

{¶2} During the early morning hours of May 30, 2016, the Memorial Day holiday, appellant and her thirteen-year-old son, A.M., got into an argument at their residence on Watson Road in Heath, Ohio. As a result, A.M. called his paternal grandparents at about 3:00 AM at their home in Newark, Ohio and asked them to come and pick him up., A.M. then went outside the Watson Road apartment, down a nearby hill, to wait for his grandparents.

{¶3} A.M.'s grandparents did not show up.[1] In the meantime, Appellant Mills called the Heath Police Department to report a runaway child. Sergeant Michael Banks arrived at the scene at about 3:18 AM. After locating A.M. outside and speaking with the family for a few minutes, it was agreed that A.M. would remain in the house for the night.

{¶4} However, according to A.M., after the officer left, the mother-son argument resumed. A.M. subsequently testified appellant had alcohol on her breath and "sort of chased" him out of the house, leaving all of the doors locked. Tr. at 61, 67, 69. A.M. also recounted that since he was unable to reenter the house, he walked more than seven miles barefoot to his grandparents' home in Newark. A.M.'s grandparents found him asleep on their front porch at approximately 8:00 AM on May 30, 2016.

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[1] According to subsequent trial testimony by A.M.'s grandmother, appellant called her and warned that "if [they] pulled up into the driveway that she would call 911." Trial Tr. at 123.

{¶5} On June 3, 2016, appellant was charged in the Licking County Municipal Court with one count of child endangering (R.C. 2919.22), a misdemeanor of the first degree. Appellant entered a plea of not guilty to the charge.

{¶6} The case proceeded to a jury trial on November 17, 2016. After considering the evidence and the arguments of counsel, the jury returned a verdict of guilty.

{¶7} On the same day, the trial court sentenced appellant to ninety days in jail, with all days suspended, and placed appellant on community control for a period of one year, with several non-residential sanctions.[2]

{¶8} On December 16, 2016, appellant filed a notice of appeal. She herein raises the following two Assignments of Error:

{¶9} "I. THE CONVICTION OF THE DEFENDANT-APPELLANT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE PRESENTED.

{¶10} "II. THE DEFENDANT-APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF TRIAL COUNSEL."

I.

{¶11} In her First Assignment of Error, appellant contends her conviction for child endangering was against the manifest weight of the evidence. We disagree.

{¶12} Our standard of review on a manifest weight challenge to a criminal conviction is stated as follows: "The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and

[2] Appellant herein has failed to include or attach with her brief a copy of the judgment entry under appeal. *See* Loc.App.R. 9(A). We have nonetheless reviewed the original trial court judgment entry in the record.

created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717. *See also*, *State v. Thompkins* (1997), 78 Ohio St.3d 380, 678 N.E.2d 541. The granting of a new trial "should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." *Martin* at 175, 485 N.E.2d 717.

{¶13} Appellant was convicted of violating R.C. 2919.22(A), which states in pertinent part as follows: "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} 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. Isaac*, 5th Dist. Richland No. 16CA19, 2016-Ohio-8249, ¶ 27, citing *State v. McGee,* 79 Ohio St.3d 193, 1997–Ohio–156, 680 N.E.2d 975 (1997). The pertinent definition of "recklessness" is found in R.C. 2901.22(C), which states:

{¶15} "(C) A person acts recklessly when, with heedless indifference to the consequences, the person disregards a substantial and unjustifiable risk that the person's 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, the person disregards a substantial and unjustifiable risk that such circumstances are likely to exist."

{¶16} Furthermore, for purposes of child endangering cases, a "substantial risk" is defined in R.C. 2901.01(A)(8) as "a strong possibility, as contrasted with a remote or significant possibility, that a certain result may occur or that certain circumstances may exist." *See State v. G.G.,* 10th Dist. Franklin No. 12AP–188, 2012–Ohio–5902, ¶ 8.

{¶17} The evidence in the case *sub judice* showed there were two incidents involving A.M. leaving the residence on May 30, 2016. In the first instance, A.M. left the interior of the home after a dispute with appellant, after calling his grandparents to pick him up. Appellant thereupon called the police and reported that A.M. had run away. Appellant essentially juxtaposes this event with the second incident of A.M. leaving, questioning the State's presentment to the jury that in a short period of time appellant was transformed from a concerned parent, who notified the proper authorities upon learning A.M. had left without her permission, to someone allegedly unconcerned that her teenage child had departed the house at an unusual hour and then locking him out without his shoes. Appellant instead urges that the most credible explanation for what happened is that A.M., having expressed a desire to be with his grandparents, snuck out of the house on the second instance without her knowledge.

{¶18} However, upon review, the jury's implicit determination that appellant did lock her son outside and, under the circumstances, thereby recklessly create a substantial risk of harm to him does not lead us to the conclusion that the verdict resulted in a manifest miscarriage of justice. Even though a manifest weight analysis may involve an appellate court's consideration of credibility (*see State v. Sanders*, 76 N.E.3d 468, 2016-Ohio-7204 (5th Dist.), ¶ 38), the weight to be given to the evidence and the credibility of the witnesses are primarily issues for the trier of fact (*see*, *e.g., State v. Jamison* (1990), 49 Ohio St.3d

182, 552 N.E.2d 180). Therefore, having reviewed the record under the standard of *Martin*, we find no demonstration that appellant's conviction must be reversed and a new trial ordered.

{¶19} Appellant's First Assignment of Error is overruled.

II.

{¶20} In her Second Assignment of Error, appellant contends she was denied the effective assistance of trial counsel. We disagree.

{¶21} Our standard of review for ineffective assistance claims is set forth in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. Ohio adopted this standard in the case of *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373. These cases require a two-pronged analysis in reviewing a claim for ineffective assistance of counsel. First, we must determine whether counsel's assistance was ineffective*; i.e.,* whether counsel's performance fell below an objective standard of reasonable representation and was violative of any of his or her essential duties to the client. If we find ineffective assistance of counsel, we must then determine whether or not the defense was actually prejudiced by counsel's ineffectiveness such that the reliability of the outcome of the trial is suspect. This requires a showing that there is a reasonable probability that but for counsel's unprofessional error, the outcome of the trial would have been different. *Id.*

{¶22} However, trial counsel is entitled to a strong presumption that all decisions fall within the wide range of reasonable professional assistance. *State v. Sallie* (1998), 81 Ohio St.3d 673, 675, 693 N.E.2d 267. In addition, the United States Supreme Court and the Ohio Supreme Court have held that a reviewing court need not determine whether

counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. *See Bradley* at 143, 538 N.E.2d 373, quoting *Strickland* at 697, 104 S.Ct. 2052.

{¶23} Appellant specifically maintains that her trial attorney was ineffective for failing to object to alleged "prior bad acts" evidence during the trial.

{¶24} Evid.R. 404(B) states as follows: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. * * *."

{¶25} We first note it is well-established that "[c]ompetent counsel may reasonably hesitate to object [to errors] in the jury's presence because objections may be considered bothersome by the jury and may tend to interrupt the flow of a trial." *State v. Rogers,* 9th Dist. Summit No. 19176, 1999 WL 239100, citing *State v. Campbell* (1994), 69 Ohio St.3d 38, 53, 630 N.E.2d 339 (internal quotations omitted). We also remain mindful that "[a] defendant is entitled to a fair trial but not a perfect one." *See State v. Bleigh,* Delaware App. No. 09-CAA-03-0031, 2010-Ohio-1182, 2010 WL 1076253, ¶ 133, quoting *Bruton v. United States* (1968), 391 U.S. 123, 135–136, 88 S.Ct. 1620, 20 L.Ed.2d 476 (internal quotations omitted).

{¶26} At issue are three separate instances in which the prosecuting attorney made reference to appellant's prior conduct toward A.M., without objection from defense counsel. The first instance came on cross-examination of appellant when the prosecutor engaged in the following exchange:

{¶27} Mr. King: "You've done it before haven't you?"

{¶28} Defendant Mills: "No, I have not."

{¶29} Mr. King: "You've left him out overnight before, haven't you?"

{¶30} Defendant Mills: "No, I have not."

{¶31} Tr. at 196.

{¶32} The prosecutor thereafter offered rebuttal testimony, via appellant's son, A.M., as to the issue of locking him out of the house:

{¶33} Mr. King: "Has she locked you out before?"

{¶34} A.M.: "Yes."

{¶35} Mr. King: "How long?"

{¶36} A.M.: "How many times?"

{¶37} Mr. King: "No. How long have you been out? Five minutes, ten minutes? Have you ever been out overnight?"

{¶38} A.M.: "Yes."

{¶39} Mr. King: "When was the last time before May the 30th, 2016, that that occurred?"

{¶40} A.M.: "Maybe that month. One time that month."

{¶41} Tr. at 216.

{¶42} The third reference was made in the closing argument made by the prosecutor:

{¶43} Mr. King: "This 13 year old kid was entitled to his mother's protection, care, comfort and we would submit to you that telling him to get out, she knows he's on the

other side of the door, and maybe in prior times he didn't go anywhere, he was going somewhere earlier that day, get out and then locked the door."

{¶44} Tr. at 221.

{¶45} Our review of the record leads us to the conclusion that appellant's defense strategy to challenge the child endangering allegation was to portray the events in question as the case of a headstrong teenager, upset about restrictions on the use of his iPad, voluntarily leaving the house without appellant's permission or awareness, after law enforcement officers had earlier that night implemented a resolution of the mother-son dispute. As such, we first find the State had leeway to try to demonstrate absence of mistake or accident in appellant's decision to keep the doors to the house locked.

{¶46} Furthermore, A.M. testified that he waited outside after the second incident with appellant for twenty to twenty-five minutes and knocked on both the front and back doors before leaving the premises. Tr. at 104. Evidence was presented that A.M. left the house this second time without a phone or his shoes, allowing the jury to infer that he made the pre-dawn decision to walk the seven-plus miles to his grandparents only as a last resort after realizing he could not get back inside.[3] The record also indicates that appellant's case had already been weakened by Officer Bradley Fisher's trial testimony that when he spoke with appellant at her apartment at about 8:00 AM on May 30, 2016, she made several unusual or inconsistent statements. Fisher recounted that appellant, who had the smell of alcoholic beverage on her person, first stated that she hadn't reported A.M. missing because she wasn't aware he was gone, but also because she

[3] Appellant claimed in her trial testimony that she later located a cordless phone and a cell phone at the back of the residence, underneath a snow shovel. Tr. at 189.

believed he had taken the phone. However, she then claimed she had gone out looking for him. Appellant also told the officer she thought A.M. had been possibly kidnapped by her mother-in-law. *See* Tr. at 137-145.

{¶47} Under such circumstances, we find appellant has failed to demonstrate a reasonable probability that the outcome of the trial would have been different had defense counsel objected on the basis of Evid.R. 404(B) to prior instances of A.M. being locked out.

{¶48} Accordingly, we find appellant was not deprived of the effective assistance of trial counsel in violation of her constitutional rights.

{¶49} Appellant's Second Assignment of Error is overruled.

{¶50} For the reasons stated in the foregoing opinion, the judgment of the Municipal Court of Licking County, Ohio, is hereby affirmed.

By: Wise, John, J.

Gwin, P. J., and

Wise, Earle E., J. concur,

JWW/d 0828