[Cite as *Zanesville v. Angelo*, 2020-Ohio-1264.]

COURT OF APPEALS
MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

CITY OF ZANESVILLE Plaintiff-Appellee -vs- JOSEPH ANGELO Defendant-Appellant	JUDGES: Hon. William B. Hoffman, P.J Hon. Patricia A. Delaney, J. Hon. Craig R. Baldwin, J. Case No. CT 2019-0057 O P I N IO N
CHARACTER OF PROCEEDINGS:	Appeal from the Zanesville Municipal Court, Case No. CRB 19 00136
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	March 23, 2020

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
DAVID J. TARBERT EMILY STRANG TARBERT SCOTT D. EICKELBERGER City of Zanesville, Law Director's Office 401 Market Street, Suite #209 Zanesville, Ohio 43701	ERIC J. ALLEN The Law Office of Eric J. Allen 4200 Regent, Suite #200 Columbus, Ohio 43219

Hoffman, P.J.

{¶1} Defendant-appellant Joseph Angelo appeals his conviction and sentence entered by the Zanesville Municipal Court on one count of child endangering, following a bench trial. Plaintiff-appellee is the city of Zanesville.

STATEMENT OF THE CASE AND FACTS

{¶2} On February 1, 2019, a complaint was filed in the Zanesville Municipal Court, charging Appellant with one count of child endangering, in violation of Zanesville City Ord. 537.07, a misdemeanor of the first degree. Appellant appeared before the trial court on the same day and entered a plea of not guilty to the charge. The trial court released Appellant on his own recognizance. Following a pre-trial hearing on February 20, 2019, the trial court found Appellant indigent and appointed counsel to represent him. The matter proceeded to trial on May 17, 2019.

{¶3} The following evidence was presented at the trial. Patrolman Preston Curtis with the Zanesville Police Department testified he was dispatched to the residence at 818 Larzelere Avenue, Zanesville, Muskingum County, Ohio, on January 31, 2019, in response to a domestic disturbance. Inside the residence, Patrolman Curtis found Teanna Angelo, Appellant's wife, crying. Mrs. Angelo informed Patrolman Curtis Appellant's sister had choked her. Mrs. Angelo explained Appellant had returned to the residence, changed their daughter's diaper, and exited the house with the baby. Mrs. Angelo followed Appellant outside onto the porch and attempted to stop him. The two began to scuffle, placing the baby in the middle of the fray.

{¶4} During his investigation, Patrolman Curtis was told it looked like the baby was being treated like a wishbone, being pulled in different directions. Patrolman Curtis interviewed Mark Offinger, a neighbor, who stated he looked outside and observed

Appellant and Mrs. Angelo on the deck of their home. Mrs. Angelo was pulling on the baby, "almost to the ground pulling on the baby." Transcript at 13. Appellant's sister grabbed Mrs. Angelo by the neck and pulled her away from Appellant. Patrolman Curtis spoke to Appellant's sister, who explained she grabbed Mrs. Angelo by the neck because it was the closest part of her body she could take hold of and she wanted to get Mrs. Angelo away from the baby. Appellant's sister did not want Appellant and Mrs. Angelo pulling on the baby any longer.

{¶5} Patrolman Curtis testified Appellant and Mrs. Angelo both denied pulling on the baby. Appellant and Mrs. Angelo admitted, while they were arguing, Mrs. Angelo's three year old son exited the house. The boy was not wearing shoes. Patrolman Curtis noted there was snow on the ground on the day of the incident and it was very cold outside. On cross-examination, Patrolman Curtis stated the baby was wearing sweatpants, a long sleeve shirt, and socks.

{¶6} Mark Offinger testified, on the morning of January 31, 2019, he heard Appellant hollering for help. He opened the door and observed Appellant and Mrs. Angelo on the deck. Offinger stated Appellant had his arms wrapped around the baby and Mrs. Angelo was pulling on the baby's shoulders. As they were pulling, they were "going down to the ground". Tr. at 37. Offinger saw Appellant's sister run across the street to break them up. Offinger went inside and called the police. Offinger returned to the door and observed Appellant coming across the street, carrying both children. Offinger described January 31, 2019, as "the coldest day of the year." Tr. at 38.

{¶7} Stacey Goddard, an assessment caseworker for the Muskingum County Adult and Child Protective Services, testified she administered drug tests to Appellant

and Mrs. Angelo during the late morning on January 31, 2019. Appellant and Mrs. Angelo both tested positive for methamphetamine. Goddard indicated Appellant and Mrs. Angelo voluntarily submitted to the drug screens. Goddard explained the Forensic Fluids tests she administered to Appellant and Mrs. Angelo will only test positive for methamphetamine. Goddard stated, because Appellant and Mrs. Angelo were arrested that day, the children were removed from the home pursuant to Juvenile Rule 6.

{¶8} Appellant testified on his own behalf. He explained he and Mrs. Angelo had been arguing earlier in the day and he had called the police. Appellant went to Offinger's house and "hung out for a little bit." Tr. at 71. Appellant was still wearing his robe at the time. He returned home in order to shower, eat lunch, and spend time with his daughter before leaving for work that afternoon. When he returned home, he changed the baby and dressed her in a thermal top, sweatpants, a hoodie, and socks. He explained Mrs. Angelo was cleaning the house and he planned to leave with the baby to make it easier for her. Appellant admitted he did not tell Mrs. Angelo about his plan. Mrs. Angelo followed him to the door. As Appellant exited, he stumbled over the threshold. Appellant "did a tuck and roll thing just to make sure [the baby] didn't hit the ground." Tr. at 75. While he was on the ground, he attempted to hand the baby to Mrs. Angelo. Appellant denied Mrs. Angelo was trying to take the baby out of his arms. He also maintained he and Mrs. Angelo did not go to the ground together.

{¶9} Appellant's sister arrived at some point. Appellant testified he did not know what happened right after his sister showed up because he was focused on his step-son who appeared in the doorway, yelled, "Snow!", and made "a bee line for it." Tr. at 76. Appellant scooped up the boy, wrapped him in his robe, and ran over to Offinger's house.

Appellant denied using illegal drugs, but explained he was on prescription medication including Suboxone, Adderall, and Ritalin.

{¶10} Upon conclusion of the evidence, the trial court found Appellant guilty. The trial court unequivocally stated it did not believe Appellant's testimony, finding his version of the event did not "make any sense." Tr. at 88. The trial court sentenced Appellant to 30 days in jail, suspended 20 days on the condition "of no repeat offenses of a similar nature in the next two-year period of time", and imposed a fine of $150 plus costs. Tr. at 126.

{¶11} It is from this conviction and sentence Appellant appeals, raising as his sole assignment of error:

THE CONVICTION FOR CHILD ENDANGERING WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

I.

{¶12} In his sole assignment of error, Appellant challenges his conviction for child endangering as against the manifest weight of the evidence.

{¶13} In determining whether a verdict is against the manifest weight of the evidence, the appellate court acts as a thirteenth juror and "in reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses, and determines whether in resolving conflicts in 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'." *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997), quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1983).

{¶14} "The weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts." *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), at paragraph one of the syllabus. The trier of fact is in the best position to judge the credibility of the witnesses.

{¶15} Appellant was convicted of Zanesville City Ordinance No. 537.07, which provides:

> 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 of safety of the child, by violating a duty of care, protection or support.

{¶16} Appellant contends the state failed to establish his actions created a "substantial risk" to the baby's health or safety. Appellant submits Patrolman Curtis' statement the baby was not dressed appropriately for the cold conditions was "his opinion". Brief of Appellant at 4. Appellant adds Patrolman Curtis arrested him "because the children were outside in the cold." Brief of Appellant at 2.

{¶17} R.C. 2901.01 defines "substantial risk" as "a strong possibility, as contrasted with a remote or significant possibility that a certain result may occur or that certain circumstances may exist."

{¶18} Upon review of the entire record, we find Appellant's conviction was not against the manifest weight of the evidence. The evidence presented at trial established Appellant and Mrs. Angelo were outside on the deck, scuffling in an attempt to extricate the baby from the other's control. Patrolman Curtis was told the baby was being treated like a wishbone. Appellant and Mrs. Angelo were pulling on the baby to the point they were "going down to the ground". Tr. at 37. While the couple was engaged in the tussle over the baby, Mrs. Angelo's three year old son exited the house and ran toward the snow. The boy was not wearing any shoes. Mark Offinger, a neighbor who observed the scuffle, described January 31, 2019, as "the coldest day of the year." Tr. at 38. Patrolman Curtis indicated, "I love cold weather, and it was cold for me that day." Tr. at 20. The baby was wearing only sweatpants, a long sleeve shirt, and socks, which Patrolman Curtis did not feel was sufficient for the weather conditions. Contrary to Appellant's assertion, Patrolman Curtis did not base Appellant's arrest solely "because the children were outside in the cold." The circumstances taken in totality gave rise to the arrest.

{¶19} Appellant's sole assignment of error is overruled.

{¶20} The judgment of the Zanesville Municipal Court is affirmed.

By: Hoffman, P.J.
Delaney, J. and
Baldwin, J. concur