[Cite as *State v. Edwards*, 2011-Ohio-1752.]

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO,	:	APPEAL NO. C-100200 TRIAL NO. B-0900564
Plaintiff-Appellee,	:	
vs.	:	*D E C I S I O N.*
RICKY EDWARDS,	:	
Defendant-Appellant.	:	

Criminal Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: April 13, 2011

Joseph T. Deters, Hamilton County Prosecuting Attorney, and *Rachel Lipman Curran*, Assistant Prosecuting Attorney, for Plaintiff-Appellee,

Roger W. Kirk, for Defendant-Appellant.

Please note: This case has been removed from the accelerated calendar.

Per Curiam.

{¶1} Defendant-appellant Ricky Edwards appeals the judgment of the trial court convicting him of one count of child endangering. Because we determine that Edwards's arguments on appeal are without merit, we overrule Edwards's five assignments of error, and we affirm the judgment of the trial court.

{¶2} On February 11, 2009, Edwards was indicted for child endangering and felonious assault after Edwards's three-month-old son, S.E., sustained injuries consistent with shaken-baby syndrome while in Edwards's care, including severe retinal hemorrhaging, subdural hematomas, and brain swelling. As a result of S.E.'s injuries, at the time of trial, S.E. was permanently blind, required the use of a breathing tube, and was generally unresponsive to his environment. After a jury trial, Edwards was convicted of child endangering, but was acquitted of felonious assault. The trial court sentenced Edwards to eight years in prison. This appeal followed.

Motion to Suppress Edwards's Statements to Police

{¶3} In Edwards's first assignment of error, he contends that the trial court should have suppressed his statements to police detectives pursuant to *Miranda v. Arizona*[1] because the detectives allegedly continued to question Edwards after he had invoked his rights to counsel and to remain silent. "Appellate review of a ruling on a motion to suppress presents a mixed question of law and fact. When considering a motion to suppress, the trial court assumes the role of the trier of fact. An appellate court must accept the trial court's findings of fact if they are supported by competent,

[1] (1966), 384 U.S. 436, 86 S.Ct. 1602.

credible evidence."[2] An appellate court then must independently apply the law to those facts to determine whether suppression is proper.[3]

{¶4} Edwards was interviewed by police on December 26, 2008, December 30, 2008, and February 11, 2009. With respect to the December 26 interview, the trial court found that the detective did not give Edwards his *Miranda* warnings. "To trigger the need for *Miranda* warnings, a defendant must be subject to a custodial interrogation."[4] "A custodial interrogation is 'questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.' "[5] "Whether a custodial interrogation has occurred depends on how a reasonable person in the suspect's position would have understood the situation."[6]

{¶5} The trial court found that the December 26 interview occurred at Cincinnati Children's Hospital, where S.E. was being treated, and that a reasonable person in Edwards's situation would have felt free to leave at any time. Thus, the trial court determined that Edwards was not in custody for purposes of *Miranda* and denied Edwards's motion to suppress statements from the December 26 interview. Upon review of the record, we cannot disagree with the trial court's decision denying suppression of the December 26 interview.

{¶6} With respect to the December 30, 2008, interview, the trial court found that Edwards went voluntarily to the police station for the interview and that Edwards was read his *Miranda* rights before the interview began. The trial court

[2] *State v. Bush*, 1st Dist. No. C-090291, 2010-Ohio-2874, at ¶6.
[3] *State v. Carr*, 1st Dist. No. C-090109, 2010-Ohio-2764, at ¶17.
[4] *State v. Stafford*, 158 Ohio App.3d 509, 2004-Ohio-3893, 817 N.E.2d 411, at ¶40.
[5] *State v. Rice*, 1st Dist. Nos. C-090071, C-090072, and C-090073, 2009-Ohio-6332, at ¶11 (quoting *Miranda*, 384 U.S. 436, 467-468).
[6] *Stafford*, 2004-Ohio-3893, at ¶40.

found that Edwards repeatedly told detectives, "That's the end of it." But the questioning continued. The trial court found that, by page 131 of the transcribed interview, a reasonable person in Edwards's situation would not have felt free to leave. At page 131, Edwards stated, "This is crazy, man. You want to have me down here all day going back and forth, man, about nothing. I could have put me up there, man, seeing my son right now." The trial court found that by the time Edwards said, "I'm just through with talking, man" on page 137 of the transcribed interview, Edwards had asserted his right to remain silent, and the questioning should have stopped.

{¶7} The Ohio Supreme Court has held that a defendant asserting his or her right to remain silent must do so in a clear or unambiguous manner.[7] The trial court decided to suppress all statements made after page 137 of the transcribed interview, when Edwards, who was subjected to a custodial interrogation at that point, asserted his right to remain silent. We cannot say the trial court erred in its decision.

{¶8} Finally, with respect to the February 11, 2009, interview, the trial court found that Edwards had been indicted at this point and was under arrest. The interview occurred at the police station, and Edwards was read his *Miranda* rights. But the trial court determined that Edwards did not invoke his right to remain silent until page 149, line 3, of the interview transcript, when Edwards said, "That's all I got to say, man." Thus, the trial court suppressed all statements thereafter. Based upon our review of the record, we agree with the trial court's determination. Thus, we overrule Edwards's first assignment of error.

[7] *State v. Jackson*, 107 Ohio St.3d 300, 2006-Ohio-1, 839 N.E.2d 362, at ¶96.

Daubert Hearing

{¶9} In Edwards's second assignment of error, Edwards contends that the trial court erred in allowing Dr. Kathi Makoroff to testify as an expert without conducting a *Daubert*[8] hearing and without giving Edwards's trial attorney an opportunity to voir dire Dr. Makoroff. With respect to Edwards's voir dire argument, before trial, the trial court offered to let Edwards's attorney voir dire any of the state's expert witnesses. The trial court renewed that offer during trial, but Edwards's attorney declined. Thus, Edwards's argument is contradicted by the record.

{¶10} With respect to the *Daubert* hearing, Edwards argues that if a defense attorney requests a *Daubert* hearing, and that request is denied, the defendant's right to a fair trial is violated. Evid.R. 702, which governs expert testimony, provides the following:

{¶11} "A witness may testify as an expert if all of the following apply:

{¶12} "(A) The witness' testimony either relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception common among lay persons;

{¶13} "(B) The witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony;

{¶14} "(C) The witness' testimony is based on reliable scientific, technical, or other specialized information. To the extent that the testimony reports the result of a procedure, test, or experiment, the testimony is reliable only if all of the following

[8] *Daubert v. Merrill Dow Pharmaceuticals, Inc.* (1993), 509 U.S. 579, 113 S.Ct. 2786.

apply: (1) The theory upon which the procedure, test, or experiment is based is objectively verifiable or is validly derived from widely accepted knowledge, facts, or principles; (2) The design of the procedure, test, or experiment reliably implements the theory; (3) The particular procedure, test, or experiment was conducted in a way that will yield an accurate result."

{¶15} "Trial courts have broad discretion in determining the admissibility of expert testimony, subject to review for an abuse of discretion. * * * In general, courts should admit such testimony when material and relevant, in accordance with Evid.R. 702 * * *."[9] Under *Daubert*, the trial court assumes a gatekeeper function and determines whether to permit an expert to testify by assessing the reliability of an expert's principles and methodology and the relevance of the testimony.[10]

{¶16} Edwards takes issue with the reliability of Dr. Makoroff's testimony and argues that the trial court failed to inquire into Dr. Makoroff's methodology and whether that methodology had been accepted in the scientific community. Dr. Makoroff was one of S.E.'s treating physicians at Children's Hospital. Dr. Makoroff noted that S.E. had massive retinal hemorrhages (bleeding in the back of the eyes), subdural hematomas (bleeding around the brain), and brain swelling. Based upon Dr. Makoroff's examination of S.E., the tests performed on S.E., S.E.'s medical history, and interviews with S.E.'s family, Dr. Makoroff used differential diagnosis to conclude that, in her opinion, S.E.'s injuries could only have come from abusive head injury to the exclusion of other possible causes. In another case dealing with abusive head injury, or shaken-baby syndrome, we determined that differential diagnosis "is

[9] *Terry v. Caputo*, 115 Ohio St.3d 351, 2007-Ohio-5023, 875 N.E.2d 72, at ¶16.
[10] *Miller v. Bike Athletic Co.* (1998), 80 Ohio St.3d 607, 611-612, 1998-Ohio-178, 687 N.E.2d 735.

a standard scientific method for determining causation."[11] Therefore, the trial court did not abuse its discretion in finding Dr. Makoroff's testimony reliable under *Daubert* and Evid.R. 702.

{¶17} Edwards also argues that no evidence was presented regarding Dr. Makoroff's expertise in brain trauma. This argument is without merit. Dr. Makoroff testified that she had been a pediatrician with Children's Hospital for 13 years. She was board-certified as a child-abuse pediatrician, and in both her research and her practice, she had developed an area of interest in head injury. Thus, we conclude that the trial court did not abuse its discretion in admitting Dr. Makoroff's expert testimony and denying Edwards's request for a *Daubert* hearing. We overrule Edwards's second assignment of error.

Other-Acts Evidence

{¶18} In his third assignment of error, Edwards contends that the trial court erred in admitting certain "other acts" evidence. First, Edwards contends that the trial court erred in admitting, over defense counsel's objections, the testimony of a Hamilton County Job and Family Services' ("JFS") case worker, Amy Seals, who testified that JFS did not select Edwards to be the sole caretaker for S.E. because JFS determined that Edwards had abused one of his other children. Seals also testified that, as a result of the abusive incident, JFS ordered Edwards to attend anger-management classes, and that Edwards had failed to comply.

{¶19} Pursuant to Evid.R. 404(B) and R.C. 2945.59, "[e]vidence of other acts is admissible if (1) there is substantial proof that the alleged other acts were committed by the defendant, and (2) the evidence tends to prove motive,

[11] *State v. Carr*, 1st Dist. No. C-090109, 2010-Ohio-2764, at ¶27.

opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."[12] Although the standard for admissibility of other-acts evidence is strict, a trial court's evidentiary ruling will not be reversed on appeal unless such ruling is an abuse of discretion amounting to prejudicial error.[13]

{¶20} The trial court permitted the prosecutor to elicit testimony from Seals regarding the abusive incident and the anger-management classes, over Edwards's objection, to explain why JFS did not select Edwards as a sole caretaker. The trial court also determined that Seals's testimony was probative of motive and identity, and thus passed muster under Evid.R. 404(B).

{¶21} We cannot say that the trial court abused its discretion in admitting Seals's testimony. Seals's testimony regarding Edwards's prior abusive incident, which was substantiated by JFS's investigation, and JFS's subsequent order to Edwards to attend anger-management classes could have been probative of Edwards's motive in this case. Motive is defined as "a mental state which induces an act."[14] Furthermore, Seals's testimony could have been probative of Edwards's identity as the person who had caused S.E.'s injuries. Other acts are probative of identity when they involve a "unique, identifiable plan of criminal activity."[15]

{¶22} Second, Edwards objects to the admission of testimony detailing the factual background of the abusive incident involving Edwards's other child. During direct examination of Edwards's aunt, Vivian Lumpkin, Lumpkin testified in detail regarding Edwards's alleged prior abuse, and she denied that any child abuse had

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[12] *State v. Lowe*, 69 Ohio St.3d 527, 530, 1994-Ohio-345, 634 N.E.2d 616.
[13] Id. at 532.
[14] *State v. Curry* (1975), 43 Ohio St.2d 66, 70, 330 N.E.2d 720 (quoting *Shelton v. State* [1922], 106 Ohio St. 243, 248, 140 N.E. 153).
[15] *Lowe*, 69 Ohio St.3d at 531.

occurred. On cross-examination, the prosecutor asked Lumpkin if it were true that Edwards had allegedly injured the other child's arm during a disagreement with the child's mother. The prosecutor could have properly questioned Lumpkin regarding the incident on cross-examination under Evid.R. 611(B), which allowed the prosecutor to impeach Lumpkin's credibility. Therefore, we overrule Edwards's third assignment of error.

Sufficiency and Weight of the Evidence

{¶23} In Edwards's fourth assignment of error, he argues that there was insufficient evidence to support his conviction, and that his conviction was against the manifest weight of the evidence. To reverse a conviction for insufficient evidence, we must determine whether "any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt."[16] In contrast to the sufficiency issue, appellate review of the weight of the evidence puts the appellate court in the role of a "thirteenth juror."[17] Thus, we must review the entire record, weigh the evidence, consider the credibility of the witnesses, and determine whether the jury clearly lost its way and created a manifest miscarriage of justice in finding Edwards guilty.[18]

{¶24} According to the evidence in the record, S.E. was generally a happy, healthy baby boy until December 26, 2008. Edwards and other family members testified that, on Christmas Day of 2008, S.E. behaved like a normal three-month-old. S.E. kicked his legs, smiled at people, and cooed. Vivian Lumpkin, Tammy Gries (S.E.'s mother), and Fatimah Lumpkin (Edwards's sister) testified that they

[16] *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus.
[17] *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541.
[18] Id.

noticed that S.E.'s head appeared larger than normal that day. But the three also testified that they had failed to tell that to detectives or hospital staff in the days following S.E.'s injuries.

{¶25} Edwards was left alone to care for S.E. on Christmas night. Pursuant to JFS's family-safety plan, JFS allowed Edwards to have caretaking responsibilities for S.E. starting November 24, 2008. Originally, JFS had permitted only Vivian and Fatimah Lumpkin, who also lived with Edwards, to have caretaking responsibilities for S.E. Gries was permitted to see S.E. daily, but JFS did not allow Gries to have caretaking responsibilites for S.E.

{¶26} Edwards testified that S.E. had behaved normally on Christmas night and into the early morning hours of December 26. Edwards testified that he went downstairs to do some laundry around 2:30 a.m., and that as he was coming back upstairs, he heard S.E. cry out in an unusual manner. Edwards picked up S.E. and held him, and then S.E. suddenly went limp and stopped breathing. Edwards called the paramedics after he had failed to revive S.E. with CPR. Paramedics testified that when they arrived, S.E. was lying on a recliner, and that no one was in the room with S.E.

{¶27} As we have noted, Dr. Makoroff testified about S.E.'s severe injuries. Dr. Makoroff concluded that S.E.'s injuries were the result of abusive head trauma. Dr. Makoroff further testified that, as result of S.E.'s injuries, S.E. could not breathe on his own, was blind, would never be able to walk, and was unresponsive to his environment.

{¶28} Based upon the evidence in the record, we cannot say that Edwards's conviction for child endangering was against the manifest weight of the evidence or

supported by insufficient evidence. Consequently, we overrule Edwards's fourth assignment of error.

Excessive Sentence

{¶29} Finally, in Edwards's fifth assignment of error, he argues that his eight-year sentence, although within the statutory range for the offense, was excessive. Specifically, Edwards argues that the trial court abused its discretion in sentencing Edwards to the maximum prison term because Edwards was employed and had not been previously sentenced to serve time in prison. "An abuse of discretion is 'more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable.' "[19]

{¶30} Based upon the evidence in the record, the serious physical harm sustained by S.E., and Edwards's past domestic and criminal record, we hold that the trial court did not abuse its discretion in sentencing Edwards to the maximum term of imprisonment of eight years. Thus, we overrule Edwards's fifth assignment of error.

{¶31} Therefore, we affirm the judgment of the trial court.

Judgment affirmed.

DINKELACKER, P.J., HILDEBRANDT and **FISCHER, JJ.**

Please Note:

The court has recorded its own entry this date.

[19] *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, at ¶19 (quoting *Blakemore v. Blakemore* [1983], 5 Ohio St.3d 217, 450 N.E.2d 1140).