[Cite as *State v. Davis*, 2010-Ohio-5279.]

IN THE COURT OF APPEALS OF CLARK COUNTY, OHIO

STATE OF OHIO	**:**	
Plaintiff-Appellee	**:**	**C.A. CASE NO. 08CA0117**
vs.	**:**	**T.C. CASE NOS.08CR0832 08CR0805**
MICHELLE DAVIS	**:**	**(Criminal Appeal from Common Pleas Court)**
Defendant-Appellant	**:**	

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O P I N I O N

Rendered on the 29th day of October, 2010.

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GRADY, J.:

{¶ 1} Defendant, Michelle Davis and her husband, Chris Grieve, resided at 547 Villa Road, in Springfield. Defendant's one year old son, Christian Wiseman, lived with them.

{¶ 2} On January 13, 2007, at some time between 4:00 p.m. and

7:00 p.m., Andy and April Bustos arrived at the Villa Road residence to visit with Chris Grieve. They observed that Christian Wiseman, who was running about, appeared healthy.

{¶ 3} At around 9:30 p.m., Serena Unangst and her boyfriend, Cody Ryman, arrived at the Villa Road residence. Grieve was on the phone when they arrived, and remained on the phone the entire time Unangst and Ryman were there.

{¶ 4} Defendant Davis arrived home at around 10:00 p.m. She did not check on her son, who was in his bedroom, and instead left again to go to the store. When Defendant returned, she and the others sat down to smoke marijuana and watch a movie.

{¶ 5} Defendant's son soon began to cry. The baby would scream, then moan. According to Unangst, the baby sounded like he was in severe pain. Defendant, followed by Grieve, went to check on her son. A little while later, Unangst went in the room and saw the baby lying in Defendant's arms. The baby was unresponsive to touch and just laid there, limp and moaning.

{¶ 6} Defendant and Grieve tried unsuccessfully for ten to fifteen minutes to wake the baby by touching him and talking to him. Grieve acted edgy and very nervous during this time. After Grieve told Ryman and Unangst that they needed to cut the evening short, they left Defendant's home around 10:30 to 10:45 p.m. Unangst assumed that Defendant would call 911 or seek medical assistance for her son.

{¶ 7} Shortly before 11:00 p.m., Matthew Dewey called Grieve and heard the baby screaming. It was unlike any scream he had ever heard before. Dewey offered to help in any way he could. It was not until 7:00 a.m. the next morning that Defendant sought medical attention for her son.

{¶ 8} At 7:50 a.m. on January 14, 2007, while Ellen Guenther was working as a nurse in the emergency room at Mercy Medical Center in Springfield, a man walked through the doors carrying a "lifeless baby," who was Defendant's son, Christian Wiseman. The man told Guenther the baby was fine when he was put to bed, that he had been moaning and crying out after his mother arrived home, but that he was okay until that morning, when he appeared to be worse. Guenther was not able to get a straight answer on how long the baby had been in that condition.

{¶ 9} A decision was made to transfer Defendant's son to Children's Medical Center in Dayton, where he remained on life support for several days. Dr. Lori Vavul-Roediger examined Defendant's son and reviewed the x-rays. She concluded that the baby had suffered a forceful violent trauma to the head that caused hemorrhaging and swelling of the brain, which resulted in lack of oxygen and ultimately brain death. Dr. Roediger testified that delay in getting medical care highly increases the odds of a negative outcome or death. Dr. Patricia Abboud testified that had Defendant's son received rapid medical attention, he would

have lived.

{¶ 10} On January 16, 2007, while Defendant's son remained on life support, Springfield Detective Keith McConnell interviewed Defendant and Chris Grieve. Grieve admitted inflicting trauma on Defendant's son. On January 18, 2007, Defendant's son was removed from life support and died. An autopsy determined that the cause of death was blunt force trauma to the head.

{¶ 11} On August 21, 2007, Defendant was indicted in Clark County Case No. 07-CR-0805 on one count of involuntary manslaughter, R.C. 2903.04(A), and one count of child endangering, R.C. 2919.22(A). On October 6, 2008, Defendant was re-indicted on those same charges in Case No. 08-CR-0832. Defendant filed a motion to suppress statements she made to police. The trial court overruled that motion following a hearing. A jury trial commenced on October 20, 2008. Defendant was found guilty of both charges. The trial court merged the charges and sentenced Defendant to ten years in prison.

{¶ 12} Defendant timely appealed to this court from her conviction and sentence.

FIRST ASSIGNMENT OF ERROR

{¶ 13} "THE TRIAL COURT ERRED IN OVERRULING THE DEFENDANT'S MOTION TO SUPPRESS."

{¶ 14} Defendant argues that the trial court erred in overruling her Crim.R. 12(C)(3) motion to suppress statements she made to

police because her statements were the products of custodial interrogation and she was not given the required *Miranda* warnings. In *State v. Hatten*, 186 Ohio App.3d 286, 2010-Ohio-499, at ¶49-50, we wrote:

{¶ 15} "Police are not required to give warnings pursuant to *Miranda v. Arizona* (1966), 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, to every person they question, even if the person being questioned is a suspect. *State v. Biros* (1997), 78 Ohio St.3d 426, 440, 678 N.E.2d 891. Instead, Miranda warnings are required only for custodial interrogations. Id. 'The determination of whether a custodial interrogation has occurred requires an inquiry into "how a reasonable man in the suspect's position would have understood his situation." [*Berkemer v. McCarty* (1984), 468 U.S. 420, 442, 104 S.Ct. 3138, 82 L.Ed.2d 317.] " '[T]he ultimate inquiry is simply whether there is a "formal arrest or restraint on freedom of movement" of the degree associated with formal arrest.' " ' *Estepp,* 1997 WL 736501, quoting *Biros,* 78 Ohio St.3d at 440, 678 N.E.2d 891, in turn quoting *California v. Beheler* (1983), 463 U.S. 1121, 1125, 103 S.Ct. 3517, 77 L.Ed.2d 1275.

{¶ 16} "In reaching this determination, neither the subjective intent of the officer, nor the subjective belief of the defendant is relevant. *Estepp,* 1997 WL 736501, citing *State v. Hopfer* (1996), 112 Ohio App.3d 521, 546, 679 N.E.2d 321, discretionary appeal not allowed, 77 Ohio St.3d 1488, 673 N.E.2d 146. Instead, we have

considered factors such as the location of the interview and the defendant's reason for being there, whether the defendant was a suspect, whether the defendant was handcuffed or told he was under arrest or whether his freedom to leave was restricted in any other way, whether there were threats or intimidation, whether the police verbally dominated the interrogation or tricked or coerced the confession, and the presence of neutral parties. *Estepp* at *4."

{¶ 17} Detectives spoke with both Defendant and Grieve at Children's Medical Center in Dayton on January 16, 2007, and asked them if they would be willing to come to Springfield Police headquarters and provide statements regarding what had happened to Defendant's son, Christian Wiseman. At no time did police tell Defendant that she or Grieve were under arrest or that they had to come to police headquarters. Detectives drove them there because they had information indicating that Defendant and Grieve did not have a car. Detectives told them that if they came to police headquarters, they would be brought back to the hospital. Defendant and Grieve voluntarily went with detectives and rode together in the back seat of an unlocked, unmarked detective car.

{¶ 18} Upon arrival at the police station, Defendant and Grieve were placed in separate interview rooms, which is standard procedure. Defendant was never locked in the interview room, and neither was she handcuffed. Detective McConnell advised Grieve of his *Miranda* rights because he was a suspect. McConnell did

not advise Defendant of her *Miranda* rights because she was not a suspect.

{¶ 19} Defendant was not physically or verbally intimidated or threatened, and was not tricked or coerced into making incriminating statements. Defendant could have left the interview room to use the restroom or smoke had she asked to. At no time did Defendant ask to leave the police station or to return to the hospital. After the interviews concluded, Defendant was allowed to speak with Grieve, who had been placed under arrest. Defendant was returned to the hospital, as promised.

{¶ 20} We agree with the trial court that the totality of the facts and circumstances demonstrate the non-custodial character of Defendant's interrogation. Considered objectively, a reasonable person in Defendant's position would not have believed, under all of these circumstances, that she was under arrest or its functional equivalent. *Hatten*. Defendant was not in custody and *Miranda* warnings were not required.

{¶ 21} Defendant's first assignment of error is overruled.

SECOND ASSIGNMENT OF ERROR

{¶ 22} "DEFENDANT WAS DENIED HER CONSTITUTIONALLY GUARANTEED RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL THROUGH COUNSEL'S FAILURE TO LODGE APPROPRIATE OBJECTIONS AT TRIAL REGARDING THE PROSECUTOR'S REPEATED USE OF LEADING QUESTIONS WITH HIS OWN WITNESSES."

{¶ 23} Counsel's performance will not be deemed ineffective

unless and until counsel's performance is proved to have fallen below an objective standard of reasonable representation and, in addition, prejudice arose from counsel's performance. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. To show that a defendant has been prejudiced by counsel's deficient performance, the defendant must affirmatively demonstrate to a reasonable probability that were it not for counsel's errors, the result of the trial would have been different. *Id.*; *State v. Bradley* (1989), 42 Ohio St.3d 136. Further, the threshold inquiry should be whether a defendant was prejudiced, not whether counsel's performance was deficient. *Strickland*.

{¶ 24} As examples of the prosecutor's improper use of leading questions with his witnesses, Defendant cites multiple instances during the prosecutor's redirect examination of three State's witnesses: Aileen Joseph (T. 309), Dr. James Duffee (T. 345-346), and Matt Dewey (T. 505). These questions were put to the witnesses on redirect-examination to clarify testimony each had already given. Even had defense counsel objected, the prosecutor could have simply re-phrased the question.

{¶ 25} In *State v. Jefferson*, Greene App. No. 2002-CA-26, 2002-Ohio-6377, at ¶9, we stated:

{¶ 26} "Evidence Rule 611(C) provides that '[l]eading questions should not be used on the direct examination of a witness except as may be necessary to develop his testimony.' This broad exception

places the decision of whether to allow leading questions within the sound discretion of the trial court. *State v. Jackson,* 92 Ohio St.3d 436, 449, 751 N.E.2d 946, 2001-Ohio-1266, citations omitted; *State v. Coy* (March 22, 1995), Montgomery App. No. 14415, citations omitted. As a result, the Ohio Supreme Court has held that the failure to object to leading questions does not constitute ineffective assistance of counsel. *Jackson, supra,* at 449; *Coy, supra,* citing *State v. Campbell,* 69 Ohio St.3d 38, 52-53, 1994-Ohio-492, 630 N.E.2d 339. This is because the failure of counsel to object may have been the result of trial strategy. *Coy, supra; State v. Lloyd* (March 31, 1999), Montgomery App. No. 15927."

{¶ 27} More recently, in *State v. Jones*, Montgomery App. No. 20349, 2005-Ohio-1208, at ¶28, we stated:

{¶ 28} "Furthermore, the failure to object to leading questions will almost never rise to the level of ineffective assistance of trial counsel. There is no reason to object to leading questions that are intended to elicit routine or undisputed facts. These facts are clearly going to be established in any event, and leading questions may simply expedite the proceedings. Even if the testimony elicited involves disputed or controversial facts, experienced trial counsel may reasonably decide not to object. The effect of leading questions on the responses elicited is something familiar to most jurors; it is within the ken of everyday experience. Many lay jurors will understand, intuitively, at least,

that testimony elicited without the aid of leading questioning is more impressive, and trial counsel may reasonably conclude that forcing opposing counsel to ask non-leading questions will just make a witness's adverse testimony more impressive to the jury, and hence more damaging."

{¶ 29} Even if the prosecutor's questions to some of his witnesses were objectionable because they were leading, Defendant fails to demonstrate that she was prejudiced as a result; that is, that the outcome of the trial likely would have been different had defense counsel objected. *Strickland*. Ineffective assistance of counsel is not demonstrated.

{¶ 30} Defendant's second assignment of error is overruled.

THIRD ASSIGNMENT OF ERROR

{¶ 31} "THE TRIAL COURT ERRED IN ITS ADMISSION OF CERTAIN TESTIMONY OF CODY RYMAN, THROUGH THE USE OF LEADING QUESTIONS, AS IT CONSTITUTED HEARSAY NOT WITHIN ANY RECOGNIZED EXCEPTION."

{¶ 32} Cody Ryman testified on direct examination by the State that on the night of January 13, 2007, he and Serena Unangst went to Defendant's house to hang out, smoke marijuana, and watch a movie. Defendant arrived home shortly after Ryman and Unangst arrived, but she left again to go to the store. It was not until after Defendant returned that they started smoking marijuana. Ryman also testified that when the baby started crying it was at first screams, then moans; not a sound you normally hear coming

from a baby. Defendant got the baby and brought him out into the living room. The baby was unresponsive to touching of his head or rubbing of his arms and feet.

{¶ 33} On cross-examination it was established that Ryman had told Detective McConnell the day after the baby died that he and the others had smoked marijuana and watched a movie, but that Defendant had arrived home a half-hour later, and that Ryman had not told Detective McConnell that Defendant brought the baby out into the living room or that the baby was not responsive to touch. It was also established on cross-examination of Ryman that he and Serena Unangst talked the night before they testified at trial. Defense counsel repeatedly questioned Ryman concerning whether he and Unangst discussed the case or the fact they both would be testifying the next day. The questioning suggested that Ryman's version of the events changed after he talked with Unangst, which explains the differences between Ryman's trial testimony and his earlier statements to police, and implies recent fabrication.

{¶ 34} On redirect examination, and over Defendant's objection, the prosecutor attempted to rebut the implied charge of recent fabrication by questioning Ryman, sometimes with the use of leading questions, about prior statements Ryman had made to the prosecuting attorney during an interview in preparation for Chris Grieve's trial, statements which were consistent with Ryman's trial testimony. Those prior consistent statements included the fact

that when the baby started crying and Defendant got him and brought him out, the baby was limp and his arms and his legs were dangling, and that Defendant kept touching the baby but he did not respond or move.

{¶ 35} Defendant argues that the trial court abused its discretion because the prosecutor used leading questions to interrogate Ryman on redirect examination, and that Ryman's responses were hearsay evidence. Evid.R. 611(C) states that leading questions should not be used on direct examination, which reasonably also applies to redirect examination of a witness. Evid.R. 801(D)(1)(b) provides that an out-of-court statement to which a witness testifies is not hearsay if the declarant testifies at trial and is subject to cross-examination concerning the statement, and the statement is "consistent with the declarant's testimony (at trial) and is offered to rebut an express or implied charge against (the) declarant of recent fabrication or improper influence or motive."

{¶ 36} All of the prerequisites for admitting Ryman's prior statements to the prosecutor under Evid.R. 801(D)(1)(b) were satisfied in this case, and Defendant has not identified any limitations on the types of statements that may be admitted pursuant to that provision. With respect to Defendant's complaint that the State elicited Ryman's prior statements using leading questions, to the extent Ryman was asked whether or not he made

the prior statement the questions were not leading. In any event, as we pointed out, the trial court has broad discretion in allowing the use of leading questions. The trial court properly admitted Ryman's prior statements pursuant to Evid.R. 801(D)(1)(b), and no abuse of discretion has been demonstrated.

{¶ 37} Defendant's third assignment of error is overruled.

FOURTH ASSIGNMENT OF ERROR

{¶ 38} "THE TRIAL COURT ERRED BY OVERRULING DEFENDANT'S MOTION TO STRIKE TESTIMONY AND MOTION FOR MISTRIAL."

{¶ 39} Defendant argues that the trial court abused its discretion when it overruled her motion to strike Detective McConnell's testimony about a statement Defendant made during a recorded jail phone call with her husband, Chris Grieve, in which she disparaged police, and further abused its discretion when it overruled Defendant's motion for a mistrial.

{¶ 40} The grant or denial of a motion for mistrial is a matter within the sound discretion of the trial court. *State v. Garner*, 74 Ohio St.3d 49, 1995-Ohio-168. Mistrials should be declared only when the ends of justice require it and a fair trial is no longer possible. *Id.* The admission or exclusion of evidence is likewise a matter within the trial court's sound discretion, and we review the trial court's decision under an abuse of discretion standard. *State v. Sage* (1987), 31 Ohio St.3d 173.

{¶ 41} Detective McConnell testified on direct examination that

two days after he interviewed Defendant and Chris Grieve, he conducted a warrant-authorized search of Defendant's home. Detective McConnell did not find any drugs or drug paraphernalia during that search. Later, in preparation for the trial of Chris Grieve, Detective McConnell listened to numerous recorded jail phone calls between Grieve and Defendant. Detective McConnell testified that during one of those calls, Defendant implied that the police had missed something during their search of Defendant's home when Defendant said: "The stupid cops missed . . ." Defendant's counsel objected before the witness completed the sentence.

{¶ 42} Defendant objected to McConnell's testimony, claiming that she had not been made aware of this recorded statement by her as part of the discovery she requested. The trial court did not rule on Defendant's objection, but instead merely asked the prosecutor, "did you turn it over to her?" The prosecutor responded that Detective McConnell could explain that the State did not have possession of the tape. At that point, the trial court permitted the State to continue with Detective McConnell's testimony.

{¶ 43} Following McConnell's testimony, the parties discussed the matter further outside the presence of the jury. Defendant elaborated upon her objection that her recorded statement about the "stupid cops," not having been provided to her during discovery,

should not have been admitted through the testimony of Detective McConnell, and argued that she was prejudiced as a result because the statement portrays Defendant as a bad person. Although Defendant did not clearly and specifically move for a mistrial, Defendant did request that the jurors be instructed to disregard McConnell's testimony regarding what Defendant said during the recorded jail phone call. The trial court declined to give any curative instruction, finding that any discovery violation in failing to turn over the recorded phone call was harmless because there was other evidence already in the record that marijuana had been present in Defendant's home.

{¶ 44} Subsequently, during Defendant's case-in-chief, the trial court sua sponte revisited the issue and offered further support for its conclusion that any error was harmless. The court stated that it had since been reminded that another witness, Serena Unangst, testified that when she and Defendant were cleaning out Defendant's apartment they found a box of marijuana, and that Defendant laughed and commented that the police had missed it. Concerned about whether the trial court learned about this other testimony as a result of some ex parte communication, defense counsel asked the trial court who had reminded the court about this other testimony. The court replied, "Well, I'm not here to be questioned by you, Ms. Cushman."

{¶ 45} Crim.R.16(B)(1)(a)(i) requires the State to permit a

defendant to inspect and copy all relevant written or recorded statements made by the defendant which are available to the State, the existence of which is known or by the exercise of due diligence may become known to the State. The Clark County Sheriff routinely tapes an inmate's phone calls, and the prosecutor routinely reviews those tapes in preparation for trial. The existence of any statement by a defendant that was recorded must be disclosed pursuant to Crim.R.16(B)(1)(a)(i). Moreover, to prove the content of a recording, the best evidence rule, Evid.R. 1002, requires introduction of the original recording. Other evidence of the contents of the recording may be introduced upon proof that "[a]ll originals are lost or have ben destroyed, unless the proponent lost or destroyed them in bad faith." Evid.R. 1004(1).

{¶ 46} The failure to disclose Defendant's statement recorded during a jail phone call with her husband violated Evid.R.16(B)(1)(a)(i). Furthermore, the State's excuse for failing to turn over Defendant's recorded statement, that because there are so many of these jail phone calls it would have required an unreasonable amount of effort to find this one, "like finding a needle in a haystack," is unacceptable. It was wholly improper for the State to introduce Defendant's recorded statement through the testimony of Detective McConnell, believing that it did not have and could not locate the original recording, not having laid a foundation for finding that Defendant's recorded statement was

unavailable, Evid.R. 1002, giving notice of that fact to Defendant to allow her to object. Instead, the State argued that the disk with that particular phone call on it contains many, many phone calls, and it would take a long time, and an unreasonable amount of effort, to find this one. Both Crim.R. 16(B)(1)(a)(i) and Evid.R. 1002 were violated in this case.

{¶ 47} Furthermore, the issue of prejudice is not limited to whether marijuana was found in Defendant's home. Defendant's statement about "the stupid cops missed . . .," about which Detective McConnell testified, vilifies Defendant and portrays her as a scofflaw. The error in admitting Defendant's statement entitled her to the curative instruction she requested. The trial court's admission of Defendant's statement and its refusal to give the requested instruction is not, on this record, error which is harmless beyond a reasonable doubt. Accordingly, Defendant's conviction will be reversed and this cause remanded to the trial court for a new trial.

{¶ 48} Defendant's fourth assignment of error is sustained.

FIFTH ASSIGNMENT OF ERROR

{¶ 49} "THE TRIAL COURT ERRED BY OVERRULING DEFENDANT'S MOTION FOR ACQUITTAL SINCE THE STATE FAILED TO SUPPLY SUFFICIENT EVIDENCE AS TO ALL THE ELEMENTS NECESSARY TO SUPPORT THE CHARGES AGAINST THE DEFENDANT."

{¶ 50} Defendant argues that the trial court erred in not

granting her Crim.R. 29 motion for acquittal because the evidence presented by the State was legallly insufficient to support her conviction for felony child endangering, from which her conviction for involuntary manslaughter likewise arises, because that evidence fails to prove that Defendant recklessly created a substantial risk to the health or safety of her child by violating a duty of care, protection or support.

{¶ 51} When considering a Crim.R. 29 motion for acquittal, the trial court must construe the evidence in a light most favorable to the State and determine whether reasonable minds could reach different conclusions on whether the evidence proves each element of the offense charged beyond a reasonable doubt. *State v. Bridgeman* (1978), 55 Ohio St.2d 261. The motion will be granted only when reasonable minds could only conclude that the evidence fails to prove all of the elements of the offense. *State v. Miles* (1996), 114 Ohio App.3d 738.

{¶ 52} A Crim.R. 29 motion challenges the legal sufficiency of the evidence. A sufficiency of the evidence argument challenges whether the State has presented evidence on each element of the offense alleged to allow the case to go to the jury or sustain the verdict as a matter of law. *State v. Thompkins,* (1997), 78 Ohio St.3d 380. The proper test to apply to such an inquiry is the one set forth in paragraph two of the syllabus of *State v. Jenks* (1991), 61 Ohio St.3d 259:

{¶ 53} **"An appellate court's 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."**

{¶ 54} **Defendant was convicted of felony child endangering in violation of R.C. 2919.22(A), which provides:**

{¶ 55} **"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."**

{¶ 56} **Defendant was also convicted of involuntary manslaughter in violation of R.C. 2903.04(A), which provides:**

{¶ 57} **"No person shall cause the death of another or the unlawful termination of another's pregnancy as a proximate result of the offender's committing or attempting to commit a felony."**

{¶ 58} **The culpable mental state of recklessness applies to felony child endangering in violation of R.C. 2919.22(A), and the**

issue is whether Defendant recklessly created a substantial risk to the health or safety of her child by violating that duty of care, protection or support. The State's theory was that Defendant violated her duty when she failed to promptly seek medical care for her child, waiting until some hours after her child exhibited obvious signs of medical distress.

{¶ 59} Recklessness is defined in R.C. 2901.22(C):

{¶ 60} "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."

{¶ 61} Defendant claims that the State failed to prove that she recklessly created a substantial risk to the health or safety of her child by violating a duty of care, protection or support. According to Defendant, it was her husband, Chris Grieve, acting alone, who created the substantial risk to the health and safety of her child by causing the child's injuries. To argue that Defendant created the same risk by merely failing to recognize in a timely fashion her child's medical condition and distress, when there was no evidence that Defendant knew at that time what her husband had done to the child, criminalizes merely poor

judgment.

{¶ 62} Defendant's argument misses the point. Defendant created a substantial risk to the health or safety of her child, not by actually causing his injuries but by failing to promptly seek medical attention for her child at a time when it was obvious that her child was in severe medical distress and needed medical attention. *State v. Hill*, Stark App. No. 2001CA00395, 2002-Ohio-6285; *State v. Allen* (Nov. 1, 1995), Summit App. No. 17017. An omission to act may be the basis of a R.C. 2919.22(A) violation. *State v. Elliott* (1995), 104 Ohio App.3d 812.

{¶ 63} The State presented evidence that the delay in getting prompt medical treatment very likely contributed to the death of Defendant's son. Furthermore, Defendant was clearly on notice and should have known that her son needed immediate medical attention. Both Serena Unangst and Cody Ryman witnessed Defendant with her child on the evening of January 13, 2007. Both witnesses described the child as screaming and moaning, and that he was unresponsive to touch and lay limp in Defendant's arms with his head back and feet and arms dangling. Matthew Dewey testified that the child was screaming unlike any child's scream he ever heard before. It was apparent to no less than three people that Defendant's child was not acting normally and needed immediate medical help. Yet, Defendant chose not to act promptly even though it was obvious that her child was in extreme distress and needed

medical assistance.

{¶ 64} The evidence, when viewed in a light most favorable to the State, is sufficient to permit a rational trier of facts to find beyond a reasonable doubt all of the essential elements of felony child endangering; that Defendant recklessly created a substantial risk to the health or safety of her child by violating a duty of care, protection or support. Defendant's conviction is supported by legally sufficient evidence, and the trial court properly overruled her Crim.R. 29 motion for acquittal.

{¶ 65} Defendant's fifth assignment of error is overruled.

SIXTH ASSIGNMENT OF ERROR

{¶ 66} "THE JURY'S VERDICTS SHOULD BE REVERSED AS THEY WERE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶ 67} A weight of the evidence argument challenges the believability of the evidence and asks which of the competing inferences suggested by the evidence is more believable or persuasive. *State v. Hufnagle* (Sept. 6, 1996), Montgomery App. No. 15563. The proper test to apply to that inquiry is the one set forth in *State v. Martin* (1983), 20 Ohio App.3d 172, 175:

{¶ 68} "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 lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and

a new trial ordered." Accord: *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52.

{¶ 69} The credibility of the witnesses and the weight to be given to their testimony are matters for the trier of facts to resolve. *State v. DeHass* (1967), 10 Ohio St.2d 230. In *State v. Lawson* (Aug. 22, 1997), Montgomery App.No. 16288, we observed:

{¶ 70} "Because the factfinder ... has the opportunity to see and hear the witnesses, the cautious exercise of the discretionary power of a court of appeals to find that a judgment is against the manifest weight of the evidence requires that substantial deference be extended to the factfinder's determinations of credibility. The decision whether, and to what extent, to credit the testimony of particular witnesses is within the peculiar competence of the factfinder, who has seen and heard the witness."

{¶ 71} This court will not substitute its judgment for that of the trier of facts on the issue of witness credibility unless it is patently apparent that the trier of facts lost its way in arriving at its verdict. *State v. Bradley* (Oct. 24, 1997), Champaign App. No. 97-CA-03.

{¶ 72} Defendant argues that her convictions for felony child endangering and involuntary manslaughter are against the manifest weight of the evidence because there is no evidence that she recklessly created a substantial risk to the health or safety of her child by violating a duty of care, protection or support.

{¶ 73} As we discussed in the previous assignment of error, Defendant ignored the obvious signs that her child was in extreme distress and needed immediate medical assistance, and she delayed for several hours getting medical assistance for her child. That failure to act and seek prompt medical treatment for her child recklessly created a substantial risk to the health or safety of Defendant's child as a result of Defendant violating a duty of care, protection or support, and constitutes child endangering in violation of R.C. 2919.22(A). The jury did not lose its way in choosing to believe the State's witnesses, which it had a right to do. *DeHass*.

{¶ 74} Reviewing this record as a whole, we cannot say that the evidence weighs heavily against a conviction, that the jury lost its way in choosing to believe the State's version of the events, or that a manifest miscarriage of justice has occurred. Defendant's convictions are not against the manifest weight of the evidence.

{¶ 75} Defendant's sixth assignment of error is overruled.

{¶ 76} Having sustained Defendant's fourth assignment of error, Defendant's conviction and sentence will be reversed and the cause remanded to the trial court for a new trial.

DONOVAN, P.J., And FROELICH concur.

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