

[Cite as *State v. Trembley*, 2010-Ohio-6528.]

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	
	:	No. 10AP-132
v.	:	(C.P.C. No. 08CR08-5621)
	:	
Marlo L. Trembley,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on December 30, 2010

Ron O'Brien, Prosecuting Attorney, and *Steven L. Taylor*, for appellee.

Robert D. Essex, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶1} Defendant-appellant, Marlo L. Trembley ("appellant"), appeals from the judgment of the Franklin County Court of Common Pleas convicting her of permitting child abuse, in violation of R.C. 2903.15, and endangering children, in violation of R.C. 2919.22, both felonies of the third degree.

{¶2} This cause arises out of injuries sustained by infant K.C., whose date of birth is May 1, 2008. Appellant is K.C.'s mother and Joshua R. Carse ("Carse"), is K.C.'s father. Appellant and Carse were jointly indicted on August 1, 2008. Carse was indicted for three counts of felonious assault and four counts of endangering children, while appellant was indicted for two counts of endangering children and one count of permitting child abuse. The facts surrounding K.C.'s injuries were adduced at trial as follows.

{¶3} Philip V. Scribano, D.O., Medical Director at the Center for Child and Family Advocacy at Nationwide Children's Hospital, testified that K.C. was brought to the hospital the night of July 11, 2008, and that he saw the child the following morning. According to Dr. Scribano, K.C. presented with numerous injuries, including fractures to both femurs just below the hips, multiple rib fractures, a fracture to the jaw, a fracture to the fibula, a neck fracture, bruises to her back and neck, and loss of brain matter. Based on the healing stages of the injuries, Dr. Scribano opined the femur fractures were between zero and seven days old, and the rib fractures were indicative of an age of about two to three weeks. Dr. Scribano testified that the fractures to the jaw and fibula were approximately 10 to 14 days old. According to Dr. Scribano, K.C.'s injuries were caused by excessive force and trauma as they were not the type of injuries seen in infants even in the cases of accidental injury. In Dr. Scribano's opinion, the loss of brain matter was the result of either a shaking injury or malnutrition. K.C. remained hospitalized until August 5, 2008.

{¶4} The patient history Dr. Scribano received from Lori Trembley ("Lori"), K.C.'s grandmother, was that she had been concerned about K.C. in June after K.C. received her immunizations because K.C. had breathing difficulties and bruising. A trip to the hospital at that time resulted in a diagnosis of an upper respiratory infection. According to

Lori, after she returned from work on July 11, 2008, she brought K.C. to Children's Hospital because K.C. was "more fussy than usual." (Tr. 61.) The medical records indicated that Lori's chief complaints were that K.C. was wheezing, crying, and inconsolable.

{¶5} The history obtained from appellant was that, on July 10, 2008, upon hearing a "yelping" sound, appellant went into the room to see Carse with his hands over K.C.'s throat. Appellant told physicians that K.C. started vomiting immediately after Carse picked K.C. up by the neck while she was sitting on Carse's lap.

{¶6} Columbus Police Detective Russell Weiner was at the hospital at approximately 1:00 a.m. the morning of July 12, 2008, and spoke with appellant, Lori, Carse, and Carse's mother, Sharon Carse ("Sharon"). Detective Weiner was told Carse was K.C.'s primary caregiver, and that, on July 10, 2008, appellant saw Carse choking K.C., and that K.C. started "vomiting violently" immediately afterwards. (Tr. 125.) Appellant told Detective Weiner that she "smacked" Carse and asked what he was doing. Appellant then proceeded to finish getting ready and left for work. Appellant denied ever abusing K.C., but said she had noticed bruising on K.C. about a week prior to her being taken to Children's Hospital.

{¶7} Columbus Police Detective Trent Taylor spoke with appellant on the telephone and a recording of the phone call was played for the jury. (State's Exhibit 6.) Appellant told Detective Taylor that there had been physical abuse between her and Carse, and that Carse had choked her on three prior occasions. According to appellant, the most recent time Carse choked her was earlier that week when Carse choked her to the point that she could not breathe. Appellant also told Detective Taylor that, on July 3,

2008, she noticed that K.C. had a scab on her neck and two "gashes" on her shoulder, as well as two bruises on her chin and cheek. Appellant said that, prior to seeing Carse choke K.C. on July 10, 2008, she had not previously seen Carse hurt K.C., other than to occasionally "roughly" flip the child over. Appellant described the choking incident to Detective Taylor and stated K.C.'s face was purple and she was vomiting as Carse held her by her neck a couple of inches off of the couch.

{¶8} Just after the choking incident, appellant said she hit Carse in the head, and said, "what the fuck are you doing?" (Tr. 180.) Appellant told Detective Taylor she was too shocked by the choking incident to think of calling the police and that she continued to get ready for work. Appellant returned home from work at 9:45 p.m., and said K.C. did not appear different other than being more uncomfortable than usual at her diaper change. During the telephone call with Detective Taylor, appellant stated a number of times that she had "messed up" by not calling the police after seeing Carse choke K.C. On July 14, 2008, appellant was interviewed at Columbus police headquarters. The interview was recorded and played for the jury. (State's Exhibit 7.) During the interview, appellant again recounted the choking incident and gave a similar account of events.

{¶9} The defense called Rachel A. Rosenfeld, M.D., a pediatrician at Children's Hospital, who saw K.C. on June 18, 2008 for a routine visit. Dr. Rosenfeld testified K.C. had a normal physical examination that day, though she was "a little concerned" that K.C.'s weight gain was slower than the expected curve. (Tr. 247.)

{¶10} Appellant and Carse were indicted by a Franklin County Grand Jury on August 1, 2008. Appellant was indicted for two counts of endangering children and one count of permitting child abuse. The matter proceeded to a jury trial that commenced on

December 15, 2009. After deliberations, the jury returned a verdict of guilty of permitting child abuse and guilty of one of the endangering children counts. Appellant was found not guilty of the second count of endangering children. Due to the convicted offenses being allied offenses of similar import, the state elected to proceed on the permitting child abuse conviction for sentencing. At a sentencing hearing held January 13, 2010, appellant was sentenced to a three-year term of incarceration and awarded 61 days of jail-time credit.

{¶11} This appeal followed, and appellant brings the following three assignments of error for our review:

FIRST ASSIGNMENT OF ERROR: The Court erred in overruling Appellant's Motion to Set Aside Verdict in that the evidence was legally insufficient to support appellant's convictions for Endangering Children and Permitting Child Abuse.

SECOND ASSIGNMENT OF ERROR: The Court erroneously overruled appellant's motions for acquittal pursuant to Criminal Rule 29.

THIRD ASSIGNMENT OF ERROR: Appellant's convictions were against the manifest weight of the evidence.

{¶12} Since they are interrelated, we address appellant's assignments of error together. Together these assigned errors challenge both the sufficiency and weight of the evidence, and contend the trial court erred in denying appellant's motion for acquittal pursuant to Crim.R. 29.

{¶13} " Pursuant to Criminal Rule 29(A), a court shall not order an entry of judgment of acquittal if the evidence is such that reasonable minds can reach different conclusions as to whether each material element of a crime has been proved beyond a

reasonable doubt.'" *State v. Seiber* (1990), 56 Ohio St.3d 4, 13, quoting *State v. Bridgeman* (1978), 55 Ohio St.2d 261, syllabus. In ruling on a Crim.R. 29 motion, a trial court must construe the evidence in a light most favorable to the state. *State v. Busby* (Sept. 14, 1999), 10th Dist. No. 98AP-1050. The standard of review applied to a denied motion for acquittal, pursuant to Crim.R. 29, is virtually identical to that employed in a challenge to the sufficiency of the evidence. *State v. Turner*, 10th Dist. No. 04AP-364, 2004-Ohio-6609, ¶8, appeal not allowed, 106 Ohio St.3d 1547, 2005-Ohio-5343, citing *State v. Ready* (2001), 143 Ohio App.3d 748, 759.

{¶14} When reviewing the sufficiency of the evidence, an appellate court must:

[E]xamine 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.

State v. Jenks (1991), 61 Ohio St.3d 259, paragraph two of the syllabus.

{¶15} This test raises a question of law and does not allow the court to weigh the evidence. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52; *State v. Thomas* (1982), 70 Ohio St.2d 79, 80. Rather, the sufficiency of the evidence test "gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson v. Virginia* (1979), 443 U.S. 307, 319, 99 S.Ct. 2781, 2789. Consequently, when reviewing the sufficiency of the evidence, an appellate court must accept the fact finder's determination with regard to the credibility of the witnesses. *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, ¶79; *State v. Worrell*, 10th Dist. No. 04AP-410, 2005-Ohio-

1521, ¶41 ("In determining whether a conviction is based on sufficient evidence, we do not assess whether the evidence is to be believed, but, whether, if believed, the evidence against a defendant would support a conviction.").

{¶16} As opposed to the concept of sufficiency of the evidence, "[t]he weight of the evidence concerns the inclination of the greater amount of credible evidence offered in a trial to support one side of the issue rather than the other." *State v. Brindley*, 10th Dist. No. 01AP-926, 2002-Ohio-2425, ¶35. In order for a court of appeals to reverse the judgment of a trial court on the basis that the verdict is against the manifest weight of the evidence, the appellate court must disagree with the fact finder's resolution of the conflicting testimony. *Thompkins* at 387. 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 created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction. *Id.*, citing *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

{¶17} A defendant is not entitled to a reversal on manifest weight grounds merely because inconsistent evidence was presented at trial. *State v. Raver*, 10th Dist. No. 02AP-604, 2003-Ohio-958, ¶21. The determination of weight and credibility of the evidence is for the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230. The rationale is that the trier of fact is in the best position to take into account inconsistencies, along with the witnesses' manner and demeanor and determine whether the witnesses' testimony is credible. *State v. Williams*, 10th Dist. No. 02AP-35, 2002-Ohio-4503, ¶58;

State v. Clarke (Sept. 25, 2001), 10th Dist. No. 01AP-194. The trier of fact is free to believe or disbelieve all or any of the testimony. *State v. Jackson*, 10th Dist. No. 01AP-973, 2002-Ohio-1257; *State v. Sheppard* (Oct. 12, 2001), 1st Dist. No. C-000553. Consequently, although an appellate court must act as a "thirteenth juror" when considering whether the manifest weight of the evidence requires reversal, it must give great deference to the fact finder's determination of the witnesses' credibility. *State v. Covington*, 10th Dist. No. 02AP-245, 2002-Ohio-7037, ¶22; *State v. Hairston*, 10th Dist. No. 01AP-1393, 2002-Ohio-4491, ¶17.

{¶18} Appellant was charged with endangering children in violation of R.C. 2919.22, which provides that "[n]o 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 * * * shall create a substantial risk to the health or safety of the child, by violating a duty of care, protection, or support." R.C. 2919.22(A). If the violation of R.C. 2919.22(A) results in serious physical harm to the child involved, it is considered a felony of the third degree.

{¶19} Appellant was also charged with permitting child abuse in violation of R.C. 2903.15, which provides that "no parent, guardian, custodian, or person having custody of a child under eighteen years of age * * * shall cause serious physical harm to the child, or the death of the child, as a proximate result of permitting the child to be abused." R.C. 2903.15(A). Whoever violates this section is guilty of permitting child abuse, and if the violation causes serious physical harm to the child, permitting child abuse is a felony of the third degree.

{¶20} As defined by R.C. 2901.01(A)(5)(c) and (e) respectively, serious physical harm to persons includes "[a]ny physical harm that involves some permanent incapacity, whether partial or total, or that involves some temporary, substantial incapacity" and "[a]ny physical harm that involves acute pain of such duration as to result in substantial suffering or that involves any degree of prolonged or intractable pain."

{¶21} Appellant's sufficiency and manifest weight challenges are directed solely to the "serious physical harm" element of her convictions; therefore, our discussion focuses likewise. Appellant does not suggest that K.C. did not suffer serious physical harm, rather, it is appellant's contention that because Dr. Scribano estimated the femur fractures were anywhere from zero to seven days old, it was pure speculation for the jury to find the injuries occurred after appellant witnessed the July 10, 2008 choking incident.

{¶22} Indeed, the serious physical harm for which appellant is being held responsible is alleged to have occurred after the time appellant saw Carse holding K.C. by her neck. Dr. Scribano testified the femur fractures were "acute" fractures, meaning they are estimated to have occurred between zero and seven days prior to the x-rays being taken. According to Dr. Scribano, infants with femur fractures will not move the involved leg(s) because "[a]ny movement will create accentuation of pain," and, therefore, in his opinion, K.C.'s injuries would have been noticeable to a lay observer. (Tr. 91.) Dr. Scribano testified that upon arrival to the hospital, K.C. was described as "very irritable" and although her grandmother was able to console the child, K.C. "[began] to cry with virtually any movement." (Tr. 99.) The history given to the medical staff by Lori, K.C.'s grandmother, was that K.C. was brought to the hospital at that time because K.C. "seemed to be more fussy than usual." (Tr. 61.)

{¶23} During the phone interview with Detective Taylor, appellant stated that when she returned from work the night of July 10, 2008 after the choking incident, K.C. cried when her diaper was changed and seemed "more uncomfortable" than she previously had. (State's Exhibit 6.) Appellant also said, "we're thinking he [Carse] broke her legs on Thursday." (State's Exhibit 6.) Also, during the interview at police headquarters, appellant described that, on July 10, 2008, Carse was lifting K.C. by her neck a few inches off of the couch. When asked if it was K.C.'s head or feet hanging down toward the couch as Carse held K.C. by the neck, appellant stated it was "her butt." (State's Exhibit 7.) This indicates K.C.'s legs would have been parallel to the couch, suggesting K.C. still had mobility of her legs at that time and the lack of fractures to the femurs. All of this being further evidence that the femur fractures occurred after appellant saw Carse choking K.C.

{¶24} Viewed in a light most favorable to the prosecution, we cannot find that this evidence is insufficient to support either the serious physical harm element of the convicted offenses or the finding that the serious physical harm occurred after appellant saw Carse choking K.C. Therefore, we find appellant's convictions are supported by sufficient evidence. Furthermore, this is not a case in which the jury clearly lost its way such that reversal on manifest weight grounds is required. The jury, as fact finder, was in the best position to weigh the evidence presented, along with the demeanor of the witnesses, in order to determine credibility. Given the great deference that must be provided to the fact finder's determination regarding credibility, we cannot say that the verdict in this case was against the manifest weight of the evidence.

{¶25} Although no other aspect of the convictions was challenged, a further review of the record leads us to conclude that appellant's convictions are not otherwise supported by insufficient evidence or against the manifest weight of the evidence. Consequently, we overrule appellant's three assigned errors.

{¶26} Having overruled appellant's three assignments of error, the judgment of the Franklin County Court of Common Pleas is hereby affirmed.

Judgment affirmed.

TYACK, P.J., and BRYANT, J., concur.
