

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	
	:	No. 09AP-360
v.	:	(C.P.C. No. 08CR04-2386)
	:	
Beth A. Neff,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellant.	:	

---

D E C I S I O N

Rendered on December 24, 2009

---

*Ron O'Brien*, Prosecuting Attorney, and *Seth L. Gilbert*, for appellee.

*Yeura R. Venters*, Public Defender, and *John W. Keeling*, for appellant.

---

APPEAL from the Franklin County Court of Common Pleas

KLATT, J.

{¶1} Defendant-appellant, Beth A. Neff, appeals from a judgment of conviction and sentence entered by the Franklin County Court of Common Pleas. Because her convictions are not against the manifest weight of the evidence, we affirm that judgment.

{¶2} Around 4:00 p.m. on October 25, 2006, appellant called 911 to report that Kylee Tolber, her boyfriend's daughter, was having an allergic reaction. Kylee was

almost 14-months old. Columbus Fire Department paramedics arrived at appellant's house<sup>1</sup> and found Kylee unconscious and wedged into a cushion on a couch. A paramedic picked Kylee's body up and she appeared to posture, which is a reaction indicative of traumatic injury. The paramedics began to examine Kylee and quickly determined that the child was not suffering an allergic reaction. One paramedic observed Kylee's eyes and noticed that one pupil did not react to light, an indication of possible brain injury. The paramedics quickly placed Kylee in the ambulance and drove her and appellant to Nationwide Children's Hospital.

{¶3} At the hospital, a scan of Kylee's head revealed a significant amount of subdural hematoma, or blood in the head between the brain and the skull. As blood accumulates in that area, it puts pressure on and compresses the brain. Doctors performed surgery to remove the blood and to place a pressure monitor in her head. After surgery, Kylee was brought to the intensive care unit on a ventilator because she could not breathe on her own. She was not moving and not responsive. Unfortunately, medical personnel were never able to decrease the pressure on her brain. As a result, Kylee died two days later on October 27, 2006.

{¶4} On October 28, 2006, Dr. William Cox, a forensic pathologist and neuropathologist with the Franklin County Coroner's Office, performed an autopsy of Kylee's body. His autopsy identified numerous healing bruises on Kylee's head, torso, and lower body. Dr. Cox concluded that blunt force trauma caused the bruises. Based on the coloration of the bruises, Dr. Cox concluded that the bruises were all inflicted within the same period of time, two to three days before death. Dr. Cox also noted a

---

<sup>1</sup> Appellant lived with her parents at the time.

small area of maceration on Kylee's brain. Maceration occurs when the skull is driven into the brain, likely from a blow, causing it to impact the surface of the brain.

{¶5} Ultimately, Dr. Cox determined that Kylee died as the result of cardiorespiratory arrest due to brain swelling caused by blunt force trauma. Specifically, Dr. Cox opined that blunt force trauma to Kylee's head caused severe swelling of the brain, which compressed the brain and shut down the brain's control centers for breathing and cardiac activity.

{¶6} Detectives of the Columbus Police Department interviewed appellant about Kylee's death. Appellant told the police that after Kylee's father left the house on the 25th, she was alone with Kylee. She tried to feed Kylee some mashed potatoes but Kylee would not eat. Appellant put Kylee down for a nap and went upstairs to take a shower. After the shower, appellant found Kylee gasping for air and having a difficult time breathing. She then called 911.

{¶7} As a result of Kylee's death, a Franklin County Grand Jury indicted appellant with one count of murder in violation of R.C. 2903.02, one count of felonious assault in violation of R.C. 2903.11, and two counts of endangering children in violation of R.C. 2919.22. Appellant entered a not guilty plea to those charges and proceeded to a trial.

{¶8} At her trial, the state presented evidence that appellant was the only person that could have caused Kylee's injuries. Specifically, Dr. Cox testified that the maceration on Kylee's brain would have caused an immediate loss of consciousness. He testified that a baby that sustained such an injury would not be sitting, eating, or talking. Kylee's father, Louis Tolber, testified that he left Kylee alone with appellant around 2:30 or 3:00

p.m. on October 25, 2006. Tolber testified that Kylee was awake and eating food when he left. Similarly, appellant's step-father testified that he left the house that day around the same time, and Kylee was lying on the couch, not unconscious. After those people left, Kylee and appellant were the only people in the house. However, by the time paramedics arrived at appellant's house, shortly after 4:00 p.m., Kylee was unconscious and wedged in between cushions on the couch. Thus, the state's timeline established that appellant was the only person with Kylee when she would have sustained her injuries.

{¶9} Appellant attempted to show that Tolber was responsible for Kylee's injuries. Tolber testified that on the morning of the 25th, he fell asleep on the couch at appellant's home with Kylee on his lap. He woke up and found Kylee crying on the floor. He testified that the couch was about two feet high. Tolber picked Kylee up and determined that she was fine. Tolber then left to pick up food for everyone. He brought the food back to appellant's house, and ate lunch with appellant and Kylee. After lunch, he left for work, leaving Kylee with appellant. Within two hours, paramedics found Kylee unconscious.

{¶10} Appellant presented two e-mails from Tolber's e-mail address delivered to appellant's e-mail address. In those e-mails, the writer implied that it was the writer's fault that Kylee died and tried to take the blame off of appellant. Tolber denied writing either e-mail.

{¶11} Appellant also presented her own expert witness, Dr. Joye Carter, the chief forensic pathologist in the Marion County Coroner's Office. Based on her review of the autopsy report and medical records, she disagreed with Dr. Cox's conclusion that the

brain injury Kylee sustained would have rendered her immediately unconscious. She concluded that Kylee's injuries were likely inflicted anywhere from one hour to 24 hours before manifestation of her symptoms. She also disagreed with Dr. Cox's conclusion regarding the dating of bruises on Kylee's body. Dr. Carter testified that the bruises could have been inflicted during multiple periods of time.

{¶12} The jury found appellant guilty of one count of murder and one count of endangering children but was unable to come to a verdict on the felonious assault charge.<sup>2</sup> The trial court sentenced appellant accordingly.

{¶13} Appellant appeals and assigns the following error:

THE TRIAL COURT ERRED WHEN IT ENTERED JUDGMENT AGAINST THE DEFENDANT ON THE CHARGE OF MURDER WHEN THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN THE CONVICTION AND THE CONVICTION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE WHEN THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT THE DEFENDANT INFLICTED THE INJURIES THAT LED TO THE DEATH OF THE CHILD.

{¶14} In appellant's sole assignment of error, she argues that her conviction is against the manifest weight of the evidence.<sup>3</sup> The weight of the evidence concerns the inclination of the greater amount of credible evidence offered to support one side of the issue rather than the other. *State v. Brindley*, 10th Dist. No. 01AP-926, 2002-Ohio-2425, ¶16. When presented with a challenge to the manifest weight of the evidence, an

---

<sup>2</sup> The other child endangering count was not submitted to the jury.

<sup>3</sup> Appellant does not challenge the sufficiency of the evidence supporting her conviction. Accordingly, we will not specifically address whether her conviction is supported by sufficient evidence. *State v. Bailey*, 10th Dist. No. 04AP-553, 2005-Ohio-4068, ¶14, fn.1 (citing *Dickenson v. Hartwig*, 6th Dist. No. L-03-1085, 2004-Ohio-1330, ¶21); *State v. Graves*, 9th Dist. No. 08CA009397, 2009-Ohio-1133, ¶15. We do note, however, that a finding that a conviction is supported by the manifest weight of the evidence necessarily includes a finding of sufficiency. *State v. Sowell*, 10th Dist. No. 06AP-443, 2008-Ohio-3285, ¶89.

appellate court, after " '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 [trier of fact] 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* (1997), 78 Ohio St.3d 380, 387 (quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175). An appellate court should reserve reversal of a conviction as being against the manifest weight of the evidence for only the most " 'exceptional case in which the evidence weighs heavily against the conviction.' " *Id.*

{¶15} 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 trier of fact is free to believe or disbelieve all or any of the testimony. *State v. Jackson* (Mar. 19, 2002), 10th Dist. No. 01AP-973; *State v. Sheppard* (Oct. 12, 2001), 1st Dist. No. C-000553. 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. Consequently, an appellate court must ordinarily give great deference to the fact finder's determination of the witnesses' credibility. *State v. Covington*, 10th Dist. No. 02AP-245, 2002-Ohio-7037, ¶28; *State v. Hairston*, 10th Dist. No. 01 AP-1393, 2002-Ohio-4491, ¶74.

{¶16} Appellant claims her conviction is against the manifest weight of the evidence because: (1) Dr. Cox's expert testimony was not credible,<sup>4</sup> and (2) Louis Tolber was the more likely cause of Kylee's injuries when she fell from his lap.<sup>5</sup> We disagree.

{¶17} In light of the timeline established by the evidence, one particular aspect of the expert testimony was critical. Dr. Cox testified that Kylee's injuries would have rendered her immediately unconscious.<sup>6</sup> It was undisputed that when Tolber and appellant's step-father left the house, Kylee was alive and functioning normally. Appellant was alone with Kylee from, at the latest, 3:00 p.m. until the paramedics came to her house around 4:00 p.m. and found Kylee unconscious. If Dr. Cox's testimony is believed, appellant must have caused Kylee's head injury because appellant was the only person present with Kylee during the critical period. Alternatively, Dr. Carter testified that Kylee's injuries would not have rendered her immediately unconscious. Rather, Dr. Carter testified that the onset of Kylee's symptoms would likely have occurred from one hour to 24 hours from her injuries. Dr. Carter's testimony would support the conclusion that Kylee may have sustained her injuries before Tolber and appellant's father left the house. Therefore, someone other than appellant could have caused Kylee's injuries.

---

<sup>4</sup> Appellant also claims that Dr. Cox did not rely upon any objectively verifiable or medically supported data to use as a foundation for his opinion. Appellant did not object to Dr. Cox's testimony on this ground, nor has she assigned this issue as error.

<sup>5</sup> Appellant also makes a number of arguments in this assignment of error based on evidence not before the trial court. We will not consider such arguments but refer appellant to Ohio's statutory postconviction relief process, R.C. 2953.21, which provides a basis to attack a conviction based on evidence outside the record.

<sup>6</sup> Appellant argues that Dr. Cox's testimony conflicted with Kylee's treating physician, Dr. Kahn, who testified that Kylee's symptoms would manifest themselves within one to 24 hours from the injury. However, Dr. Kahn's testimony in this regard referred to Kylee's subdural hematoma, not the maceration on the brain. Thus, Dr. Kahn's testimony does not conflict with Dr. Cox's testimony in this regard.

{¶18} A conviction is not against the manifest weight of the evidence simply because inconsistent evidence was presented at trial. *Raver*. Neither is a conviction against the manifest weight of the evidence because the trier of fact believed the state's version of events over the appellant's version. *State v. Gale*, 10th Dist. No. 05AP-708, 2006-Ohio-1523, ¶19; *State v. Williams*, 10th Dist. No. 08AP-719, 2009-Ohio-3237, ¶17. Here, the jury obviously believed Dr. Cox's testimony that Kylee's injuries immediately rendered her unconscious and, therefore, only appellant could have caused those injuries. Such a determination is within the province of the trial court, as the trier of fact, and we will not second guess that determination. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus.

{¶19} Moreover, the jury did not lose its way by finding Dr. Cox's expert opinion more credible than Dr. Carter's opinion. Dr. Cox performed the autopsy of Kylee's body and personally examined her brain. Dr. Carter based her testimony only on the autopsy reports and medical records. She did not examine Kylee's brain, nor did she review any microscopic samples or slides. Additionally, the determinative issue at trial concerned Kylee's brain injuries. While both doctors are board certified in forensic pathology, Dr. Cox is also board certified in neuropathology, a specialty which deals specifically with the brain. Dr. Carter is not so certified.

{¶20} Additionally, Dr. Cox testified that a fall from the couch such as one that Tolber described would not generate sufficient energy to cause the injuries Kylee sustained. Instead, Dr. Cox concluded that the injuries were more likely sustained from blunt force trauma. Although appellant points to incriminatory e-mails sent from Tolber's

e-mail address to appellant, Tolber denied writing the e-mails. The jury was free to believe or disbelieve those denials.

{¶21} In light of the conflicting evidence presented at trial, the jury did not clearly lose its way in finding appellant guilty. Accordingly, appellant's convictions are not against the manifest weight of the evidence. Appellant's lone assignment of error is overruled, and we affirm the judgment of the Franklin County Court of Common Pleas.

*Judgment affirmed.*

McGRATH and CONNOR, JJ., concur.

---