

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

City of Toledo

Court of Appeals No. L-10-1123

Appellee

Trial Court No. CRB-09-09371

v.

Lawrence Hancock, Sr.

DECISION AND JUDGMENT

Appellant

Decided: January 28, 2011

* * * * *

John T. Madigan, Special Prosecutor, for appellee.

Martin J. McManus, for appellant.

* * * * *

HANDWORK, J.

{¶ 1} Appellant, Lawrence Hancock, Sr., appeals from a judgment by the Toledo Municipal Court denying his Crim.R. 29 motion for judgment of acquittal. For the reasons that follow, we affirm the judgment of the trial court.

{¶ 2} On June 12, 2009, a complaint for endangering children pursuant to Toledo Municipal Code 537.07 was filed against appellant, in connection with injuries suffered by his then four-year-old son. The matter proceeded to a bench trial on January 20, 2010.

{¶ 3} The evidence adduced at the trial, by the city of Toledo, was as follows. L.J.'s maternal grandmother, Tempie McConnell, testified that on several occasions during the second half of April 2009, when she picked up L.J. from appellant's house for court-ordered visitations, she noticed bruising on L.J.'s body. Specifically, between the dates of April 21 and April 30, 2009, McConnell noticed bruises on L.J.'s backside, thighs, arm, and back, and, most seriously, in his groin area.

{¶ 4} On April 24, 2009, McConnell notified L.J.'s guardian ad litem of her grandson's bruised condition. A week later, she took L.J. to the doctor, because he was bothered by a painful swelling in his thighs. McConnell stated that she observed that L.J. was not able to climb steps very well, and that he was not able to run as fast as before.

{¶ 5} Sara Magoun, M.D., L.J.'s doctor, testified that upon examination of L.J., she noticed bruising over the areas of his left thigh, his mid lower back and his groin area, and an abrasion on his right arm. According to Dr. Magoun, the pattern of L.J.'s injuries was consistent with his being hit by a belt. She stated that he had a significant groin injury which left enough bruising to make him uncomfortable for days after the injury was inflicted. She stated that the abrasion on L.J.'s right arm was likewise significant and contributed to her opinion that L.J.'s injuries amounted to serious physical harm.

{¶ 6} Colleen Dooley, L.J.'s guardian ad litem, testified that she spoke to appellant concerning the injuries to his child. He admitted to her that he had used a belt to discipline L.J., and that when striking the child, the belt would wrap around the boy's body and the belt buckle would come in contact with the child's skin.

{¶ 7} At the end of the prosecution's case, counsel for appellant moved for a judgment of acquittal pursuant to Crim.R. 29.

{¶ 8} The trial court denied the motion, after which appellant took the stand and testified as follows. Appellant stated that he hit L.J. to punish him for misbehavior, specifically for lying. He further stated that when he hit L.J., he had the buckle in his hand, and that the only part of the belt that hit the child was the strap. He admitted to using the belt on his son approximately ten times.

{¶ 9} On March 9, 2010, the court issued and filed a written "Finding and Opinion," finding appellant guilty of child endangerment under Toledo Municipal Code 537.07(a). Specifically, the trial court found that "[t]he actions of [appellant] did cause a substantial risk to the health and safety of L.J. by violating a duty of care, protection or support." The court further found that the aforementioned risk, although not rising to the level of serious physical harm, as that term is defined by law, did amount to physical harm.

{¶ 10} In addition, the court found that "[t]he physical harm caused in this case was unwarranted in that it involved, in the Court's opinion, a minor transgression at best. The child, L.J., was four years of age. The whipping with a belt causing the injuries

demonstrated, extending into areas which ought not [to] be involved in appropriate corporal punishment, was excessive under the circumstances."

{¶ 11} Appellant timely filed an appeal, raising the following as his sole assignment of error:

{¶ 12} I. "The trial court committed reversible error in denying appellant's motion for judgment of acquittal pursuant to Criminal Rule 29."

{¶ 13} Under Crim.R. 29(A), a trial court shall enter a judgment of acquittal if the evidence is insufficient to sustain a conviction of the offense. Crim.R. 29(A). The test that an appellate court must apply when reviewing a challenge based on a denial of a motion for acquittal is the same test that is applied when reviewing a challenge based upon the sufficiency of the evidence to support a conviction. *State v. Thompson* (1998), 127 Ohio App.3d 511, 525.

{¶ 14} "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 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} In this case, appellant was charged with endangering children, in violation of Toledo Municipal Code 537.07(a). Toledo Municipal Code 537.07(a) pertinently provides:

{¶ 16} "No person, being the parent * * * of a child under eighteen * * * shall create a substantial risk to the health or safety of such child."

{¶ 17} The offense of endangering children contains an additional element, not found in the ordinance, and that is the culpable mental state of recklessness. See *State v. O'Brien* (1987), 30 Ohio St.3d 122, 125.

{¶ 18} Recklessness is defined at R.C. 2901.22(C), as follows:

{¶ 19} "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."

{¶ 20} Any rational trier of fact could have found that appellant recklessly created a substantial risk to the health or safety of L.J., when, in the course of disciplining his child, he struck L.J. in the groin and other areas of his body, leaving him with bruises and abrasions of such severity that the boy was unable to run or climb stairs for days afterward without experiencing pain. Consequently, appellant's conviction for child endangering must be affirmed.

{¶ 21} Arguing against this conclusion, appellant states that because the harm caused to his son was the result of affirmative acts of punishment, rather than acts of omission or neglect, he cannot be guilty of violating Toledo Municipal Code 537.07(a). We disagree.

{¶ 22} Case law addressing Toledo Municipal Code 537.07(a)'s essentially identical state law counterpart, R.C. 2919.22(A), clearly indicates that affirmative acts of assaultive behavior, and not only acts of abandonment or neglect, are sufficient to support convictions under R.C. 2919.22(A) and, by implication, under Toledo Municipal Code 537.07(a). See *State v. Sommerfeld*, 8th Dist. No. 84154, 2004-Ohio-6101, ¶ 33 (holding that defendant, "[b]y continuing to strike the victim with a heavy board on an already-vulnerable area, [] created a substantial risk to [the victim's] health, thus violating a duty of 'care, protection or support,' as set forth in R.C. 2919.22(A)"); *State v. Gray*, 6th Dist. No. L-04-1126, 2005-Ohio-3861 (upholding denial of Crim.R. 29(A) motion for acquittal, and finding that evidence was sufficient to establish an offense under R.C. 2919.22(A), where the evidence demonstrated, without proof of serious physical harm, that the child was whipped in the back with an extension cord); *State v. Flory*, 3d Dist. No. 15-04-18, 2005-Ohio-2251 (holding that denial of defendant's Crim.R. 29 motion for acquittal was proper, and finding that evidence was sufficient to establish an offense under R.C. 2919.22(A), where, together with evidence of prior serious injuries, the defendant's admissions demonstrated that defendant stepped on the child's leg, dropped

him in his crib, hitting him in the mouth, tripped and fell while carrying the child, squeezing his ribs, rolled on top of him, and bit the child in his sleep.)

{¶ 23} Arguing to the contrary, appellant relies on *State v. Kamel* (1984), 12 Ohio St.3d 306. In *Kamel*, the defendant was found guilty of one count of endangering children, under R.C. 2919.22(A), and one count of involuntary manslaughter, in connection with the death of his two-year-old son. On appeal, the court of appeals found that the evidence against the defendant was insufficient to support a conviction, because it failed to demonstrate that the defendant had personally inflicted the injuries sustained by his son.

{¶ 24} The Ohio Supreme Court, in reversing the court of appeals decision, stated:

{¶ 25} "By [the defendant's] own testimony, [the defendant, who was a physician] personally examined his son in his final hours. Yet, no steps were taken by [the defendant] to secure medical attention for his son or prevent any further injury to him. Certainly, this was not consistent with his parental duty of care." *Id.* at 309-310.

{¶ 26} Thus, the Supreme Court's decision, unlike the one at hand, was clearly based upon evidence of an omission, or failure to act, rather than a commission, or affirmative act. In determining that the evidence in that case was sufficient to support a conviction under R.C. 2919.22(A), the court stated:

{¶ 27} "It is not necessary to show an actual instance or pattern of physical abuse on the part of the accused in order to justify a conviction under R.C. 2919.22(A). Affirmative acts of torture, abuse, and excessive acts of corporal punishment or

disciplinary measures are expressly covered under division (B) of the section. Division (A) is concerned with circumstances of neglect as is indicated by the Committee Comment to R.C. 2912.22. [Footnote omitted.] Manifestly, such neglect is characterized by acts of omission rather than acts of commission. [Citation omitted.] Accordingly, an inexcusable failure to act in discharge of one's duty to protect a child where such failure to act results in a substantial risk to the child's health or safety is an offense under R.C. 2919.22(A)." *Id.* at 308-309.

{¶ 28} We find that the court's analysis in *Kamel* was specifically aimed at justifying a conviction resulting from the defendant's acts of omission in that particular case. We do not read it to mean that R.C. 2919.22(A) only covers acts of omission and cannot, under different circumstances, be used to prosecute acts of commission.

{¶ 29} For all of the foregoing reasons, appellant's assignment of error is found not well-taken, and the judgment of the Toledo Municipal Court is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

JUDGE

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, J.

CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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