[Cite as *State v. Caldwell*, 2018-Ohio-4639.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	Appellate Case No. 27856
	:	
v.	:	Trial Court Case No. 2017-CRB-2292
	:	
BRIAN O. CALDWELL	:	(Criminal Appeal from
	:	Municipal Court)
Defendant-Appellant	:	
	:	

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O P I N I O N

Rendered on the 16th day of November, 2018.

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FROELICH, J.

{¶ 1} After a bench trial in the Kettering Municipal Court, Brian O. Caldwell was found guilty of two counts of domestic violence, one concerning his wife and the other concerning his daughter, and one count of endangering children concerning the same daughter. The trial court sentenced Caldwell to 180 days in jail on each count, of which 150 days were suspended, and to three years of unsupervised probation. The court imposed fines totaling $55 and court costs.[1]

{¶ 2} Caldwell appeals from his convictions, claiming that the State did not prove that he acted recklessly, as required for his convictions for child endangering and for the domestic violence count related to his daughter. Caldwell further claims that his convictions on those two offenses constituted double jeopardy, and these offenses should have been merged as allied offenses of similar import. For the following reasons, Caldwell's conviction for domestic violence against his wife, which is not challenged, will be affirmed. His sentences for domestic violence against his daughter and endangering children will be reversed, and the matter will be remanded for resentencing on those offenses.

I. Sufficiency and Manifest Weight of the Evidence

{¶ 3} In his second assignment of error, Caldwell claims that his conviction for

[1] At sentencing, the trial court stayed the sentences for 30 days pending the filing of an appeal. Caldwell did not, however, seek another stay after filing his notice of appeal. Nevertheless, there is no indication that Caldwell has served his concurrent jail sentences, and the Kettering Municipal Court's online docket reflects that Caldwell has not paid his fines or court costs. Accordingly, this matter is not moot. *See, e.g., State v. Ruley*, 2d Dist. Miami No. 2017-CA-10, 2018-Ohio-3201, ¶ 10; *State v. Dillon*, 2d Dist. Montgomery No. 27603, 2018-Ohio-2421, ¶ 8, fn. 1.

domestic violence as it relates to his daughter and his conviction for child endangering should be "overturned because the prosecution did not prove that [he] acted recklessly, which is an element of both counts." Caldwell's appellate brief discusses the sufficiency of the State's evidence of recklessness; his reply brief asserts that his convictions were against the manifest weight of the evidence because the State did not prove recklessness.

{¶ 4} A sufficiency of the evidence argument disputes whether the State has presented adequate evidence on each element of the offense to sustain the verdict as a matter of law. *State v. Wilson*, 2d Dist. Montgomery No. 22581, 2009-Ohio-525, ¶ 10, citing *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). "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*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus.

{¶ 5} In contrast, "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." *Wilson* at ¶ 12; *see Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, 972 N.E.2d 517, ¶ 19. When evaluating whether a conviction is against the manifest weight of the evidence, the appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider witness credibility, and determine 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." *Thompkins* at 387, citing *State v. Martin*, 20

Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983).

{¶ 6} Because the trier of fact sees and hears the witnesses at trial, we must defer to the factfinder's decisions whether, and to what extent, to credit the testimony of particular witnesses. *State v. Lawson*, 2d Dist. Montgomery No. 16288, 1997 WL 476684 (Aug. 22, 1997). The fact that the evidence is subject to different interpretations does not render the conviction against the manifest weight of the evidence. *Wilson* at ¶ 14. A judgment of conviction should be reversed as being against the manifest weight of the evidence only in exceptional circumstances. *Martin* at 175.

{¶ 7} With respect to his daughter, Caldwell was found guilty of domestic violence in violation of R.C. 2919.25(B), which states: "No person shall recklessly cause serious physical harm to a family or household member." He also was found guilty of endangering children in violation of 2919.22(A), which states: "No person, who is the parent * * * 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." To establish child endangering under R.C. 2919.22(A), the State must prove that the defendant acted recklessly. *State v. McGee*, 79 Ohio St.3d 193, 195, 680 N.E.2d 975 (1997); *State v. Hardy*, 2017-Ohio-7635, 97 N.E.3d 838, ¶ 57 (2d Dist.). "A person acts recklessly when, with heedless indifference to the consequences, the person disregards a substantial and unjustifiable risk that the person's conduct is likely to cause a certain result or is likely to be of a certain nature." R.C. 2901.22(C).

{¶ 8} The State called Caldwell's wife, their daughter, and Kettering Police Officer Shiloh Colon, an evidence technician, to testify at trial. The State's evidence established the following facts.

{¶ 9} In September 2017, Caldwell and his wife resided in a two-bedroom apartment in Kettering with their daughter, then age nine, and their son, age six. On Friday, September 1, Caldwell contacted his wife at work, saying that he needed to go to his studio that evening, and he wanted to know if he could leave the children with anyone. Caldwell's wife responded that he should contact her parents. Caldwell had his daughter contact her grandparents, and the children stayed with their grandfather until their mother could pick them up after work. When Caldwell's wife retrieved the children around 9:00 p.m., the grandfather expressed concern to her that Caldwell did not contact the grandparents directly and, instead, had the nine-year-old daughter arrange for her own babysitting. Caldwell's wife decided to talk to her husband about the issue.

{¶ 10} At approximately 9:30 a.m. the next morning, the couple talked about the babysitting arrangements. When the conversation began, Caldwell and his wife were in their bedroom, and the children were in the living room watching television. The conversation turned into an argument, and it continued through multiple rooms of the apartment, including the living room and the kitchen. Eventually, Caldwell's wife walked from the kitchen into the living room, heading away from Caldwell and toward her children, who were on a nearby couch. As Caldwell's wife did so, Caldwell picked up a metal stand by the kitchen doorway and threw it at her. Caldwell's wife described the metal stand as being waist-high and having curved metal legs and a small, six-inch diameter glass table on top for holding keys and other items. Hearing the jiggling of the glass plate, Caldwell's wife turned around and saw the stand flying toward her. The stand came very close to Caldwell's wife, but missed her. However, the stand hit the Caldwells' daughter, who was sitting on the couch approximately two feet from the kitchen doorway.

{¶ 11} Initially, Caldwell's wife yelled at Caldwell, while their son comforted his sister. Caldwell's wife then took their daughter to the bathroom to wash the wound and try to stop the bleeding. Caldwell's wife concluded that the daughter needed to go the emergency room. Caldwell and his wife argued again, because she did not want Caldwell to go to the hospital with them and Caldwell would not give her the car keys. Caldwell eventually gave his wife the keys.

{¶ 12} While waiting at the hospital, Caldwell's wife took a photo of her daughter's injury. The daughter subsequently received more than 20 stitches. Officer Colon came to the hospital to take photographs; the daughter had already received the stitches. The daughter now has a scar. Photographs of the daughter's laceration both before and after receiving stitches were admitted into evidence.

{¶ 13} Caldwell and his grandfather testified for the defense. Caldwell's grandfather expressed his opinion that Caldwell was not a violent person, and that he (the grandfather) had not known Caldwell to be violent toward his (Caldwell's) wife and children. Caldwell testified about the argument with his wife. With respect to the stand, Caldwell stated that he "just knocked the stand over just out of anger[.] * * * I flipped the stand." Caldwell denied that he had "gripped" the stand or thrown it. He stated, "I did not grab the stand physically and push it towards anywhere[.]" Caldwell testified that he simply knocked over the stand, it bounced off the wood floor, and then a foot of the stand hit his daughter. Caldwell described it as "a freak accident." Caldwell stated that he was "mortified" when the stand hit his daughter and that he did not intend to hurt either his wife or his daughter. He said that he simply was angry and trying to "reliev[e] some stress."

{¶ 14} Construing the evidence in the light most favorable to the State, we find sufficient evidence that Caldwell acted recklessly when he caused his daughter's injury. A defendant may be convicted based on direct evidence, circumstantial evidence, or both. *State v. Donley*, 2017-Ohio-562, 85 N.E.3d 324, ¶ 178 (2d Dist.). Circumstantial evidence has the same probative value as direct evidence. *Jenks*, 61 Ohio St.3d 259, 272, 574 N.E.2d 482, citing *State v. Nicely*, 39 Ohio St.3d 147, 529 N.E.2d 1236 (1988); *State v. Bennett*, 2d Dist. Montgomery No. 24576, 2012-Ohio-194, ¶ 11. In fact, in some cases, "circumstantial evidence may be more certain, satisfying, and persuasive than direct evidence." *State v. Jackson*, 57 Ohio St.3d 29, 38, 565 N.E.2d 549 (1991).

{¶ 15} Although Caldwell's wife did not see Caldwell throw the stand, she testified that it "was already in the air" when she turned around, and that the stand was headed "straight towards the living room towards * * * the kids and myself." Caldwell's wife's testimony supported a conclusion that Caldwell threw the stand at his wife and, given his daughter's location on the couch in the living room, that he acted recklessly with respect to his daughter's physical well-being.

{¶ 16} We also cannot conclude that Caldwell's convictions were against the manifest weight of the evidence. In reaching its verdict, the trial court, as the trier of fact, was free to believe all, part, or none of the testimony of each witness and to draw reasonable inferences from the evidence presented. *State v. Baker*, 2d Dist. Montgomery No. 25828, 2014-Ohio-3163, ¶ 28. It was the province of the factfinder to weigh the evidence and determine whether the State had proven, beyond a reasonable doubt, whether Caldwell committed endangering children and domestic violence against his daughter. Upon review of the record, we cannot conclude that the trial court "lost its

way" in crediting the version of events presented by the State and in finding Caldwell guilty of the offenses.

{¶ 17} Caldwell's second assignment of error is overruled.

II. Allied Offenses of Similar Import

{¶ 18} In his first assignment of error, Caldwell claims that the trial court erred in failing to merge the child endangering count with the domestic violence count concerning his daughter.

{¶ 19} As an initial matter, the parties disagree whether Caldwell raised the allied-offense issue in the trial court. The transcript reflects that, during sentencing, defense counsel asked the court to merge the two counts of domestic violence as allied offenses of similar import. The court denied the request because the two domestic violence offenses related to two separate victims. The court was not asked to merge a domestic violence offense with the endangering children offense. Accordingly, Caldwell has waived this allied-offense argument, except for plain error. *See State v. Rogers*, 143 Ohio St.3d 385, 2015-Ohio-2459, 38 N.E.3d 860, ¶ 3. Therefore, Caldwell's alleged error is not reversible error unless it affected the outcome of the proceeding and reversal is necessary to correct a manifest miscarriage of justice. *Id*. A trial court's failure to merge allied offenses of similar import is plain error. *E.g., State v. Shoecraft*, 2d Dist. Montgomery No. 27860, 2018-Ohio-3920, ¶ 56.

{¶ 20} Ohio's allied offense statute, R.C. 2941.25, provides that:

> (A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be

convicted of only one.

(B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them.

{¶ 21} The State questions whether R.C. 2941.25 applies to misdemeanor offenses, but acknowledges that other appellate districts have applied the statute to misdemeanor cases. We also have applied R.C. 2941.25's framework when considering whether multiple misdemeanor offenses should be merged as allied offenses. *See State v. Glenn*, 2d Dist. Montgomery No. 26776, 2016-Ohio-4887. *Accord State v. Kent*, 1st Dist. Hamilton Nos. C-840320 and C-840321, 1985 WL 9323, * 2 (Feb. 13, 1985), fn. 1 ("We have held that [R.C. 2941.25] applies to misdemeanors even though it does not mention 'complaints' (it mentions only 'indictment' and 'information'). * * * So has the Ninth District Court of Appeals. *State v. Fisher* (9th Dist. 1977), 52 Ohio App. 2d 133, 368 N.E.2d 324.").

{¶ 22} When determining whether multiple offenses are allied offenses of similar import, courts must ask three questions: " '(1) Were the offenses dissimilar in import or significance? (2) Were they committed separately? and (3) Were they committed with separate animus or motivation? An affirmative answer to any of the above will permit separate convictions. The conduct, the animus, and the import must all be considered.' " *State v. Earley*, 145 Ohio St.3d 281, 2015-Ohio-4615, 49 N.E.3d 266, ¶ 12, quoting *State v. Ruff*, 143 Ohio St.3d 114, 2015-Ohio-995, 34 N.E.3d 892, ¶ 31.

{¶ 23} As to the question of import and significance, "two or more offenses of dissimilar import exist within the meaning of R.C. 2941.25(B) when the defendant's conduct constitutes offenses involving separate victims or if the harm that results from each offense is separate and identifiable." *Ruff* at ¶ 23. In regard to animus, " '[w]here an individual's immediate motive involves the commission of one offense, but in the course of committing that crime he must, [a] priori, commit another, then he may well possess but a single animus, and in that event may be convicted of only one crime.' " *State v. Ramey*, 2015-Ohio-5389, 55 N.E.3d 542, ¶ 70 (2d Dist.), quoting *State v. Logan*, 60 Ohio St.2d 126, 131, 397 N.E.2d 1345 (1979).

{¶ 24} We agree with Caldwell that his endangering children offense should have merged with the domestic violence offense related to his daughter. Both offenses are based on a single action – Caldwell threw a metal stand, which hit his daughter, injuring her. The record reflects a single animus: he was angry at his wife, and he acted recklessly in throwing the metal stand at her. The harm that resulted from both offenses was identical; we find nothing to suggest that the offenses have dissimilar import. *Accord State v. Turner*, 8th Dist. Cuyahoga No. 101506, 2015-Ohio-685 (defendant's offenses of domestic violence (R.C. 2919.25(B)) and endangering children (R.C.2919.22(A)), both of which were based on defendant's placing his 18-month-old daughter in hot bathwater, should have merged).

{¶ 25} Caldwell's first assignment of error is sustained.

III. Conclusion

{¶ 26} Caldwell's conviction for domestic violence against his wife will be affirmed. His sentences for domestic violence against his daughter and endangering children will

be reversed, and the matter will be remanded for resentencing on those offenses.

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HALL, J. and TUCKER, J., concur.

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