[Cite as *State v. D'Ostroph*, 2018-Ohio-232.]

COURT OF APPEALS
COSHOCTON COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
Plaintiff-Appellee	:	Hon. William B. Hoffman, J.
	:	Hon. Earle E. Wise, Jr., J.
-vs-	:	
	:	
NATHAN D'OSTROPH	:	Case No. 2017CA0003
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Court of Common Pleas, Case No. 15 CR 0113
JUDGMENT:	Affirmed
DATE OF JUDGMENT:	January 18, 2018

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
JASON W. GIVEN Prosecuting Attorney 318 Chestnut Street Coshocton, OH 43812	DAN GUINN P. O. Box 804 New Philadelphia, OH 44663

Wise, Earle, J.

{¶ 1} Defendant-Appellant Nathan D'Ostroph appeals the March 6, 2017 judgment of conviction and sentence of the Court of Common Pleas of Coshocton County, Ohio. Plaintiff-Appellee is the state of Ohio.

FACTS AND PROCEDURAL HISTORY

{¶ 2} Kimberly Brestle and Derek Tanner are the parents of Raylei Tanner, born January 18, 2015. Raylei was 7-months-old at the time of the events herein.

{¶ 3} In September 2015, Brestle and Tanner were both working and in need of child care for Raylei. Appellant lived nearby with his wife, Angel, and their two children, age 3 and 2. Brestle and Tanner met appellant and Angel through family members, and the four later became friends. In September of 2015, they had known them for approximately two years. They hired appellant to watch Raylei while they worked.

{¶ 4} At seven months old, Raylei was a healthy child and was just becoming mobile – not quite crawling, but able to scoot. She was able to support her head, sit up, and hold her own bottle.

{¶ 5} Appellant watched Raylei approximately four times in September of 2015. On September 5, 2015, when Tanner and Brestle dropped Raylei off, she was in good health and had no marks on her body. When they picked her up, however, Raylei had a fever and there was a bruise on her temple.

{¶ 6} Brestle immediately took Raylei to the Coshocton County Memorial Hospital emergency room. Raylei was triaged, given Tylenol, and returned to the waiting room. After four hours of waiting to see a doctor, Raylei's fever had subsided and Brestle

decided to leave. Before she did, Brestle spoke with a nurse who in turn spoke with a doctor. She was advised to re-administer Tylenol if Raylei's fever spiked again.

{¶ 7} Over the following two days, Raylei's fever remained low and Brestle did not feel the need to return to the hospital. By September 8, the next day that Raylei was in appellant's care, her fever was gone.

{¶ 8} On the morning of September 8, Raylei was happy and smiling. Tanner and Brestle dropped Raylei off at appellant's apartment between 3:30 and 3:45 a.m. Appellant answered the door and Tanner carried Raylei into the living room in her car seat, setting her down on the floor still in the seat. Angel was present, but asleep on a mattress on the living room floor. Brestle gave Raylei a bottle of juice. Raylei held the bottle and fed herself, drinking about 3 ounces of the juice. She was still holding the bottle and drinking when Brestle and Tanner left.

{¶ 9} Angel woke up at 8:30 a.m. When she did, appellant was on the mattress with her, and their two children were in their room. Because she had an appointment, Angel went into her and appellant's bedroom to get a change of clothing. When she did, appellant wanted to know what she was doing in there and seemed concerned that she was in the bedroom. Angel grabbed clothing to change into in the bathroom. While in the bedroom, Angel noticed that Raylei was on the floor, but did not approach her or touch her. Appellant told her Raylei went to sleep around 6:00 a.m, that he did not get any sleep because she was up, and that this made him angry.

{¶ 10} Angel left the apartment at 9:00 a.m. and returned at approximately 11:00 a.m. She noted that appellant had returned the mattress to their bed and Raylei was on the bed asleep. At some point during the morning, Angel texted Brestle and asked if

Raylei was still sick because she was sleeping so much. Brestle responded that perhaps Raylei still had a fever or was teething.

{¶ 11} Angel made lunch for her children before she left for a second appointment. While she was preparing lunch, appellant came into the kitchen and got an ice cube. When Angel asked why, appellant said Raylei was teething. Angel followed appellant into the bedroom and saw him applying ice to a bruise on Raylei's jaw. She also noted that appellant had Raylei swaddled and that her face was flushed. Angel turned on the air conditioner thinking Raylei was flushed because the room was too hot. She then left the apartment at 12:30 p.m. for her second appointment.

{¶ 12} While Angel was gone, appellant's friend Steve Eckelberry stopped by. He walked into the apartment to find appellant giving Raylei a bath in the bathtub. Appellant told Eckelberry Raylei had spit up and he was rinsing her off. Eckelberry left within ten minutes, and had no physical contact with Raylei.

{¶ 13} Angel returned to the apartment around 2:00 p.m. She found Raylei on the bed, no longer swaddled, and wearing just a diaper. Angel asked appellant what he did while she was gone and he said he gave Raylei a bath to try to wake her up and cool her down because she was so warm.

{¶ 14} Angel thought she should try to feed Raylei. She sat in a chair by the air conditioner and appellant brought Raylei to her after he had first swaddled her once again. Angel had to support Raylei's head, and Raylei took very little from the bottle over a 30-minute period. What she did take dribbled out of her mouth.

{¶ 15} Brestle and Tanner arrived to pick Raylei up between 4 and 4:30 p.m. When they got there, appellant was out on the porch. He had his head down, seemed angry,

avoided eye contact with Brestle, and would not talk to Tanner. This was unusual as appellant was usually talkative. Tanner stayed outside and Brestle went inside.

{¶ 16} Brestle walked inside to see Raylei propped up on the sofa with a pillow behind her back and head. There was a blanket across her chest and her arms were positioned on top of the blanket. Raylei's eyes were half open. Brestle thought she was sleeping. When Raylei did not wake up, Brestle picked her up. When she did, Raylei's arms dangled and her head lolled backwards.

{¶ 17} Brestle and Tanner rushed Raylei to the Coshocton County Memorial Hospital. From there, Raylei was transported via helicopter to Akron Children's Hospital where she was admitted shortly before midnight. Raylei had sustained a brain injury, which was causing her brain to swell. Approximately seven hours after her admission to Children's Hospital, when the swelling could not be controlled through more conservative treatments, pediatric neurosurgeon Dr. Gwyneth Hughes preformed a hemicraniectomy on Raylei. This surgery involves the removal of half the skull to permit the brain to swell unrestricted.

{¶ 18} During the surgery Dr. Hughes observed injury to Raylei's brain which included a subdural bleed and a torn sagittal sinus – a vein that runs between the hemispheres of the brain. Raylei's brain was extremely swollen and very pale, which indicated a high level of injury to the brain and a subsequent lack of blood flow due to swelling and constricted by the skull. Based on what she observed, Dr. Hughes knew Raylei's chances of survival were very low.

{¶ 19} Following the surgery, Raylei was placed on life support. When it became apparent that Raylei would never recover, Tanner and Brestle made the decision to remove Raylei from life support. She died on September 11, 2015.

{¶ 20} Dr. Lisa Kohler of the Summit County Coroner's Office preformed Raylei's autopsy. Externally, Kohler observed multiple abrasions and bruising to Raylei's head, indicating blunt force was applied to multiple areas of Raylei's head. Internally, Kohler noted subarachnoid and subdural brain bleeds as well as retinal and optic nerve sheath hemorrhages. It appeared there were two injuries – one occurring on September 8, 2015, and one before that, although Kohler could not say with specificity when the first injury occurred.

{¶ 21} According to Kohler, the force needed to cause Raylei's most recent injuries had to be significant. The kind of force that would cause an observer to immediately seek help for the child. Additionally, after receiving an injury of the magnitude Raylei displayed, it would be immediately obvious to an observer that she was no longer encountering the world as she had beforehand. She would likely be unconscious, appearing to sleep, be unable to sit up unaided, and would have difficulty taking a bottle. While Raylei may have been able to swallow a little bit, she would not have been able to vigorously suck a bottle, nor hold the bottle to feed herself.

{¶ 22} Kohler ruled Raylei's cause of death hypoxic-ischemic encephalopathy due to craniocerebral blunt force trauma. In other words, brain damage due to a lack of oxygen flow to the brain. Kohler ruled the manner of death as homicide.

{¶ 23} Detective Wesley Wallace of the Coshocton County Sheriff's Office investigated Raylei's death and developed appellant as a suspect. Appellant was

interviewed several times and denied any wrongdoing. He did agree that he took Raylei from her parents on the morning of September 8, that Raylei took a bottle from Brestle before she and Tanner left for work, and that Raylei held the bottle and fed herself. He denied Angel could have any responsibility for Raylei's injuries and sought to blame Tanner and Brestle.

{¶ 24} After two interviews with appellant, Wallace asked Angel to wear a recording device and engage her husband in conversation about Raylei. Angel agreed. During her conversation with appellant, he told Angel he "hit that kid in the fucking face," "hit her with a ball," and "was mean to her." He further stated he "fucked up" and "did not purposely kill Raylei." Appellant told Angel not to blame herself and to be strong for her own children if he had to "go away for this."

{¶ 25} After listening to the conversation between appellant and Angel, Wallace spoke with appellant a third time. Confronted with his own statements, appellant continued to deny any wrongdoing.

{¶ 26} On October 16, 2015, the Coshocton County Grand Jury returned an indictment charging appellant with one count of felony murder in violation of R.C. 2903.02(B). A three-day jury trial began on February 28, 2017. Appellant was found guilty as charged. The trial court subsequently sentenced appellant to incarceration for 15 years to life.

{¶ 27} Appellant now brings this appeal, raising the following three assignments of error:

I

{¶ 28} "THE COURT ERRED IN NOT GRANTING APPELLANT'S CHALLENGE FOR CAUSE WITH REGARDS TO PROSPECTIVE JUROR WILLIAM J. HAMILTON.

II

{¶ 29} "THE COURT ERRED IN NOT ALLOWING APPELLANT'S EVIDENCE REGARDING DERREK TANNER AND ANGEL D'OSTROPH TO BE ADMITTED."

III

{¶ 30} "APPELLANT'S CONVICTION FOR MURDER WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

I

{¶ 31} In his first assignment of error, appellant argues the trial court erred when it failed to dismiss juror Hamilton for cause. We disagree.

{¶ 32} Crim.R. 24(C)(9) and R.C. 2945.25(B) provide that a person called as a juror may be challenged for cause when:

> * * *the juror is possessed of a state of mind evincing enmity or bias toward the defendant or the state; but no person summoned as a juror shall be disqualified by reason of a previously formed or expressed opinion with reference to the guilt or innocence of the accused, if the court is satisfied, from the examination of the juror or from other evidence, that the juror will render an impartial verdict according to the law and the evidence submitted to the jury at the trial.

{¶ 33} Trial courts have discretion in determining a juror's ability to be impartial. *State v. Williams*, 6 Ohio St.3d 281, 288, 6 OBR 345, 351, 452 N.E.2d 1323 (1983). " * * *However, a 'ruling on a challenge for cause will not be disturbed on appeal unless it is manifestly arbitrary* * *so as to constitute an abuse of discretion.' *State v. Tyler*, 50 Ohio St.3d 24, 31, 553 N.E.2d 576 (1990). Accord Williams, 79 Ohio St.3d at 8, 679 N.E.2d at 654." *State v. Nields*, 93 Ohio St.3d 6, 20, 2001-Ohio-1291, 752 N.E.2d 859.

{¶ 34} In order to find an abuse of discretion, we must determine the trial court's decision was unreasonable, arbitrary, or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 450 N.E.2d 1140 (1983).

{¶ 35} During voir dire in this matter, the trial court addressed general questions to all 58 prospective jurors. T. 42. That questioning included the following at T. 46:

> Do any of you know of any reason why you could not serve as a fair and impartial juror in this case and return your verdict based upon the evidence presented and the law as it is given to you by the court? No hands.
>
> It is your duty to follow the law and the instructions as I give them to you, regardless of whether you agree. Will each of you follow the law and the instructions I give to you, even if you don't agree with them? Will you do that? I see acknowledgements and no opposition. Is there anyone who will not do this? I see no hands there.

{¶ 36} Later, juror Hamilton was questioned individually at T. 119 -122:

[The State]: * * * Mr. Hamilton, were you able to hear all the questions that myself and [defense counsel] asked of the jury?

Hamilton: Yes, sir.

[The State]: Any of those questions raise an issue in your mind that you think we need to be aware of?

Hamilton: No sir.

* * *

[The State]: Anything about this case or the things that you have heard that make it so you do not believe that you can be an objective and impartial juror in this case?

Hamilton: If I'm going to be honest, it would be hard for me to see myself having an objective about it because I couldn't see myself being in that position as far as being in a situation entirely. I wouldn't find myself being put in a situation where there was a dead 7-month-old baby. I couldn't find myself in a situation like that.

[The State] So, I don't want to put words in your mouth, are you saying that that fact, that reason would make it so you could not listen to the evidence, objectively weight the evidence, and deliberate and try to come to a decision?

Hamilton: It would be in the back of my mind. I couldn't say with 100 percent certainty I would be able to weigh the cause without that just being in my mind.

* * *

[Counsel for Appellant]: Just to follow up with what you mentioned just right now. Do you believe you can be fair and impartial?

Hamilton: I don't believe so.

* * *

[Counsel for Appellant] The defense would challenge for cause in regards to Mr. Hamilton.

The Court: Let me inquire of Mr. Hamilton. * * * Mr. Hamilton, you sat back there and the court asked you – the court asked you would you follow the law as the court gives it to you, even if you do not agree with it? And you did not respond. That's an affirmative, isn't it?

Hamilton: Yeah.

The Court: You would follow the law?

Hamilton: Yeah.

The Court: You are a law-abiding citizen?

Hamilton: Correct.

The Court: You recognize that this is the United States of America and there is a constitution which sets up certain rules that we must follow when we have a trial; is that correct?

Hamilton: Correct.

The Court: You would agree that that's very important to make sure that the constitution is adhered to?

Hamilton: Absolutely.

The Court: Very good. I'm sure that Mr. Hamilton will make an excellent juror. The challenge for cause is denied. * * *.

{¶ 37} In *State v. Group*, 98 Ohio St.3d 248, 2002-Ohio-7247, 781 N.E.2d 980, ¶ 66, the Supreme Court of Ohio stated:

> [W]here a prospective juror gives contradictory answers on voir dire, the trial judge need not accept the last answer elicited by counsel as the prospective juror's definitive word. See *State v. White* (1999), 85 Ohio St.3d 433, 439, 709 N.E.2d 140, citing *State v. Scott* (1986), 26 Ohio St.3d 92, 97–98, 26 OBR 79, 497 N.E.2d 55. Rather, “it is for the trial court to determine which answer reflects the juror's true state of mind.” *State v. Jones* (2001), 91 Ohio St.3d 335, 339, 744 N.E.2d 1163.

{¶ 38} Moreover, "[d]eference must be paid to the trial judge who sees and hears the juror." *State v. Nields*, 93 Ohio St.3d 6, 21, 2001-Ohio-1291, 752 N.E.2d 859.

{¶ 39} Upon review of the above portions of voir dire, we are unable to find the trial court abused its discretion in seating juror Hamilton. Hamilton ultimately agreed he would

follow the law as provided by the court. The trial court was free to accept Hamilton's assurance he would do just that.

{¶ 40} The first assignment of error is overruled.

II

{¶ 41} In his second assignment of error, appellant argues the trial court erred when it excluded evidence of Tanner's prior misdemeanor convictions for domestic violence and child endangering, as well as evidence that appellant's own child suffered injuries after he no longer had access to the child and while the child was in the sole custody of Angel D'Ostroph. We disagree.

{¶ 42} In regard to Tanner's prior misdemeanor convictions, at trial, counsel for appellant mentioned the convictions during opening statement. The state objected and the court addressed the matter outside the hearing of the jury. Counsel for appellant indicated he intended to introduce these convictions during his cross-examination of Tanner and Brestle. The trial court excluded the evidence pursuant to Evid.R. 608(B) and Evid.R. 609. T. 159-161.

{¶ 43} Here, appellant argues exclusion was improper as he sought to introduce the evidence of these convictions to support his theory that Tanner caused Raylei's injuries, and that he specifically sought to do so based on the fact that Tanner was convicted of child endangering with Raylei as the victim.

{¶ 44} Next, again during opening argument, counsel for appellant advised the jury that there would be testimony to show Angel lost custody of her children after appellant was incarcerated. Following the state's objection, the trial court addressed the matter outside the hearing of the jury. T. 170

{¶ 45} Counsel for appellant indicated that Angel lost custody of her and appellant's children due to dependency, neglect and abuse, after appellant was incarcerated for the instant offense. Counsel further indicated that one of the children, Zoee, had suffered a head injury. Counsel intended to introduce this evidence through a case worker from Job and Family Services.

{¶ 46} Counsel for the state responded that Angel was never charged with a crime, and that another individual had confessed to committing the assault on Zoee. Moreover, Zoee did not suffer the same head injury as Raylei. T. 172-175. Based on this information the trial court excluded the evidence pursuant to Evid.R. 404(B), finding that the evidence could not be offered for proof of motive, opportunity, preparation, plan, knowledge, identity, or absence of mistake or accident. T. 175-176.

{¶ 47} Here appellant argues he should have been able to present this evidence to show that Angel could have been the perpetrator in this matter.

{¶ 48} The admission or exclusion of other acts evidence under Evid. R. 404(B) rests within the trial court's sound discretion. *State v. Morris*, 132 Ohio St.3d 337, 2012-Ohio-2407, 972 N.E.2d 528. The admission or exclusion of relevant evidence rests within the trial court's sound discretion. *State v. Sage*, 31 Ohio St.3d 173, 510 N.E.2d 343 (1987). In order to find an abuse of that discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 450 N.E.2d 1140 (1983).

{¶ 49} Evid. R. 404(B) states: “Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive,

opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." In *State v. Broom*, 40 Ohio St.3d 277, 533 N.E.2d 682 (1988), the Supreme Court held in addition to the reasons listed in the Rule, evidence of other bad acts may be admissible to prove identity.

{¶ 50} Evid.R. 608 provides:

> (A) Opinion and Reputation Evidence of Character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.
>
> (B) Specific Instances of Conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's character for truthfulness, other than conviction of crime as provided in Evid.R. 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if clearly probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness's character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The giving of testimony by any witness, including an accused, does not operate as a waiver of the witness's privilege against self-incrimination when examined with respect to matters that relate only to the witness's character for truthfulness.

{¶ 51} Evid.R. 609 provides:

(A) General Rule. For the purpose of attacking the credibility of a witness:
(1) subject to Evid.R. 403, evidence that a witness other than the accused has been convicted of a crime is admissible if the crime was punishable by death or imprisonment in excess of one year pursuant to the law under which the witness was convicted.
(2) notwithstanding Evid.R. 403(A), but subject to Evid.R. 403(B), evidence that the accused has been convicted of a crime is admissible if the crime was punishable by death or imprisonment in excess of one year pursuant to the law under which the accused was convicted and if the court determines that the probative value of the evidence outweighs the danger of unfair prejudice, of confusion of the issues, or of misleading the jury.
(3) notwithstanding Evid.R. 403(A), but subject to Evid.R. 403(B), evidence that any witness, including an accused, has been convicted of a crime is admissible if the crime involved dishonesty or false statement, regardless of the punishment and whether based upon state or federal statute or local ordinance.

{¶ 52} First, the record reveals the child endangering charge against Tanner resulted from an incident that took place five months before Raylei was injured. Further, the charge stemmed from the fact that Raylei was present during a domestic violence incident between Tanner and Brestle, not that she was the victim of any physical injury at the hands of Tanner. T. 162.

{¶ 53} Next, neither misdemeanor domestic violence, nor misdemeanor child endangering involve dishonesty or false statement, and neither is punishable by death or imprisonment in excess of one year. Additionally, Tanner's convictions fit none of the exclusions set forth in Evid.R. 609. We find the trial court properly excluded evidence of Tanner's prior misdemeanor convictions pursuant to the rules of evidence.

{¶ 54} Finally, as to evidence of injury to appellant's child, according to the record, the injury was not the same as that suffered by the victim in this matter, and someone besides appellant's wife confessed to causing the injury. The trial court therefore properly excluded this evidence as well.

{¶ 55} The second assignment of error is denied.

III

{¶ 56} In his final assignment of error, appellant argues his conviction is against the manifest weight of the evidence. We disagree.

{¶ 57} On review for manifest weight, a reviewing court is to examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine "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." *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983). See also, *State v. Thompkins*, 78 Ohio St.3d 380, 678 N.E.2d 541 (1997). The granting of a new trial "should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." *Martin* at 175.

{¶ 58} Appellant argues Raylei's parents or Angel could be responsible for Raylei's injuries.

{¶ 59} As appellant notes, the time of Raylei's injury is important. The record demonstrates that Raylei was in good health when she was left with appellant and Angel on the morning of September 8, 2015. By all accounts, including appellants, when Raylei's parents left for work, she was able to take, hold, and feed from a bottle by herself. T.194, 224, 346.

{¶ 60} When Tanner and Brestle returned that afternoon, however, Raylei was fatally injured. The only two people who had physical contact with Raylei after her parents left were appellant and Angel.

{¶ 61} According to Dr. Kohler, given the magnitude of damage to Raylei's brain, it would have been immediately apparent upon the injury that Raylei was no longer encountering the world as she had before the injury. She would likely have been unconscious, appearing to sleep, and would have been unable to sit up unaided, reach, grab, hold her bottle or feed herself, and would have difficulty eating at all. T. 414-417. Thus Raylei's injury took place sometime after her parents left her with appellant and Angel.

{¶ 62} When Angel woke up on the morning of September 8, 2015, appellant was awake and Raylei was in their bedroom on the floor. Appellant told Angel he had not slept

because Raylei would not go to sleep, and that this had angered him. When Angel went into the bedroom to get a change of clothing, appellant was concerned and guarded about her being in the room. T. 255-256. When Angel did handle Raylei later in the day, appellant swaddled Raylei before handing her to Angel in an attempt to conceal the fact that Raylei no longer had control of her limbs. T. 254.

{¶ 63} Appellant told Officer Wallace that Angel was not responsible for Raylei's injuries. Then, while speaking with Angel while Angel was wearing a recording device, appellant admitted to assaulting Raylei and further told Angel not to blame herself for what he had done. T. 264-265, 319, 349, 354, State's Exhibits 6, 7, and 8.

{¶ 64} Based on the forgoing, the jury did not lose its way in finding appellant guilty of felony murder. The final assignment of error is overruled.

By Wise, Earle, J.

Gwin, J. and

Hoffman, J. concur.

EEW/rw