[Cite as *State v. Maitlen*, 2019-Ohio-859.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
Plaintiff-Appellee	:	Hon. Craig R. Baldwin, J.
	:	Hon. Earle E. Wise, Jr., J.
-vs-	:	
	:	
JOSEPH MAITLEN	:	Case No. 18-CA-46
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Common Pleas Court Case No. E2018-004
JUDGMENT:	Affirmed
DATE OF JUDGMENT:	March 11, 2019

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
NATALIE NOYES 20th South Second Street Fourth Floor Newark, Ohio 43055	JERMAINE COLQUITT 33 West Main Street Suite 106 Newark, Ohio 43055

Wise, Earle, J.

{¶ 1} Defendant-Appellant Joseph Maitlen appeals the May 3, 2018 judgment of conviction and sentence of the Licking County, Ohio Court of Common Pleas Juvenile Division finding him guilty of one count of contributing to the unruliness of a minor. Plaintiff-Appellee is the state of Ohio.

FACTS AND PROCEDURAL HISTORY

{¶ 2} V.M is the child of Mandy Schnebeli and Joseph Maitlen. On January 19, 2018 a complaint was filed in the Licking County Juvenile Court alleging parents had violated section 2919.24(B)(2) of the Ohio Revised Code, contributing to the unruliness of a child. The complaint alleged that parents acted in a way tending to cause 10 year-old V.M to become an unruly child as defined in R.C. 2151.022(B). Specifically, the complaint alleged that parents allowed V.M to be absent from school without a legitimate excuse for 30 or more consecutive hours, 42 or more hours within a month, or 72 or more hours within the 2017-2018 school year.

{¶ 3} A joint trial was held on April 4, 2018. Kristopher Gladstone, a Licking County Attendance Officer, testified for the state. He indicated that students are referred to him by a student's school after they have missed 30 or more consecutive hours unexcused, 42 hours unexcused within a month, or 72 hours unexcused within a year. V.M is a student at Heath Middle School in Licking County, Ohio. His case was referred to Gladstone by the school in November of 2017, after it was reported to Gladstone that V.M had missed 42 hours unexcused. The school provided Gladstone with documentation of this fact via a shared computer program.

{¶ 4} On November 5, 2017, Gladstone attempted to contact parents by telephone to schedule an absence intervention meeting with them, himself, and V.M's principal. One phone number he attempted was invalid. At the second number, Gladstone reached only a voice mailbox and left a message. On November 6, 2017, Gladstone unsuccessfully attempted to contact parents by phone again. He therefore sent a letter to parents advising them that the intervention meeting was scheduled for November 13, 2017. Parents failed to show for the meeting, and V.M was not in school that day.

{¶ 5} The same day, Gladstone went to the family's residence at approximately 10:30 a.m. and found parents and V.M home. V.M was sleeping. Parents advised Gladstone that V.M hated school and that there were issues between themselves and school staff. Gladstone made parents aware of the intervention plan and went over the plan with them. Parents declined Gladstone's offer to make any changes to the plan. Parents were then provided with a copy of the intervention plan and advised that if V.M missed 30 consecutive hours without an excuse or 42 hours within the following month, the matter would be turned over to the juvenile court. V.M's attendance did not improve.

{¶ 6} Gladstone testified at trial, however, that he does not personally track a student's attendance. Rather, this information is compiled by the school, and then shared with Gladstone through a shared computer program. Gladstone has no personal knowledge as to whether the attendance record is accurate. When Gladstone met with parents, however, they did not challenge the stated absences, nor did parents challenge the absences at trial.

{¶ 7} Juvenile Probation Officer Jordan Gallegos also testified for the state. Gallegos met with V.M's parents on December 18, 2017 when they appeared in juvenile

court to file unruly charges on V.M. They were provided with the appropriate paperwork for both children. Gallegos spoke with the family for approximately 30 minutes, however, parents ultimately decided against filing the complaint.

{¶ 8} William Ward is a Licking County Juvenile Court Officer and was the state's final witness. Ward was assigned to parent's case during the pendency of parent's case and was to monitor V.M's attendance. Parents never denied V.M's failure to attend school and told Ward they were unable to get V.M to attend school because he had an "aversion" to going to school.

{¶ 9} At the conclusion of state's evidence, the trial court excluded state's exhibit D, V.M's school attendance record. The court found the state had failed to establish the document was "in fact a certified copy of the attendance record and how it was formed…." Given this ruling, parents moved to dismiss the matter as the state had failed to prove the requisite number of hours missed.

{¶ 10} The trial court granted the motion in part, agreeing that without exhibit D, the state had produced no evidence that V.M was absent for 30 or more consecutive hours, nor that he had missed 72 or more hours in a school year. The court denied the motion, however, as it pertained to 42 hours missed in one month. The court found the state had presented a prima fascia case that V.M missed 42 or more hours in one month, specifically, from October 2, 2017 to November 2, 2017.

{¶ 11} Parents then each testified on their own behalf. Father does not work, and mother did not work until November 21, 2017, thereby being home with V.M full time between October 2, 2017 and November 2, 2017. Parents alleged that V.M would not go to school because a teacher had embarrassed him and he's a very sensitive child. They

claimed they asked to have his class changed, but that never took place. However, parents never met with the teacher that V.M allegedly had this issue with. Parents had their own transportation and could take V.M to school. There is also a school bus available to take V.M, but V.M frequently missed the bus. According to mother, V.M dislikes the crowd and the noise of the bus that early in the morning.

{¶ 12} Parents alleged they missed the scheduled absence intervention meeting because they never received the letter advising of the meeting and never received a phone call. Neither, however, denied that V.M was not attending school prior to Gladstone's visit. Parents stated they considered sending V.M to a school counselor, but since that did not work for their older child, they decided it would not work for V.M and took no action. Although parents testified they tried grounding V.M and taking away video games as punishment for not going to school, the first concrete action parents took to find help getting V.M to attend school did not take place until December 18, 2017 when parents went to the juvenile court to file unruly charges, but then did not follow through. According to parents, it was Gallegos who recommended they refrain from filing the charges.

{¶ 13} At the conclusion of evidence, the trial court found it was undisputed that parents were aware that V.M was missing a great deal of school, but took no corrective action until late December of 2017, and never contacted the teacher that allegedly caused this behavior in V.M. The trial court found, therefore, that parents were guilty of contributing to the unruliness of a minor between October 2, 2017 and November 2, 2017. Parents were sentenced to 30 days in jail, suspended and placed on 24 months community control.

{¶ 14} Father filed an appeal, and the matter is now before this court for consideration. He raises three assignments of error:

I

{¶ 15} "THE TRIAL COURT'S GUILTY FINDING FOR CONTRIBUTING TO THE UNRULINESS OF A MINOR WAS AGAINST THE MANIFEST WEIGHT AND SUFFICIENCY OF THE EVIDENCE "

II

{¶ 16} "TRIAL COUNSEL WAS INEFFECTIVE AND TRIAL COUNSEL'S INEFFECTIVENESS PREJUDICED THE APPELLANT WHEN COUNSEL FAILED TO OBJECT TO THE ADMISSION OF STATE'S EXHIBIT C."

III

{¶ 17} "THE FACT FINDER COMMITTED PLAIN ERROR BY ADMITTING AND RELYING UPON STATE'S EXHIBIT C, WHEN IT'S ADMISSION INTO EVIDENCE VIOLATED THE OHIO RULES OF EVIDENCE."

I

{¶ 18} Father first argues his conviction is against the sufficiency and manifest weight of the evidence. Specifically, he argues the state failed to prove he acted recklessly. We disagree.

{¶ 19} On review for sufficiency, a reviewing court is to examine the evidence at trial to determine whether such evidence, if believed, would support a conviction. *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991). "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." *Jenks* at paragraph two of the syllabus, following *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). 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.

{¶ 20} Father was charged with one count of contributing to the unruliness of a minor pursuant to R.C. 2919.24(B)(2). That section states that no parent shall act in a way tending to cause a child to become an unruly child as defined in R.C. 2151.022(B). To prove the charge, the state was required to prove father acted in such a way as to cause V.M to become and unruly child.

{¶ 21} As father notes, a conviction under R.C. 2919.24 requires proof of recklessness. *State v. Moody*, 104 Ohio St.3d 244, 2004-Ohio-6395, 819 N.E.2d 268. “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).

{¶ 22} Ample evidence was presented to demonstrate father acted recklessly. Gladstone testified that children are not referred to him until they have missed a significant amount of school – enough to constitute unruly proceedings against a child. T. 11. Father

is not employed and is therefore home and well aware V.M was not regularly attending school. Father was also aware that the alleged problem was that V.M had a conflict with a teacher, yet he never spoke with that teacher in order to rectify the problem or find out if one actually existed. T. 111, 124. Father also testified that V.M often missed the bus because he was still doing homework, and the reason he had so much homework was because he had missed so many days of school. T. 128. While father stated he punished V.M by grounding him and taking away video games, the fact remains he did nothing to attempt to enlist help, or remedy the alleged cause of the situation until late December when he and mother showed up in the juvenile court to file unruly charges. Standing by and doing nothing, allowing V.M to stay home and fall behind in his studies constitutes recklessness. The state thereby produced sufficient evidence to support father's conviction, and further, the trial court's finding of guilt is not against the manifest weight of the evidence.

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

II

{¶ 24} Father next argues his trial counsel rendered ineffective assistance when he failed to object to state's exhibit C because it contained hearsay. We disagree.

{¶ 25} To prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate: (1) deficient performance by counsel, i.e., that counsel's performance fell below an objective standard of reasonable representation, and (2) that counsel's errors prejudiced the defendant, i.e., a reasonable probability that but for counsel's errors, the result of the trial would have been different. *Strickland v. Washington*, 466 U.S. 668, 687–688, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Bradley*, 42 Ohio St.3d 136,

538 N.E.2d 373 (1989), paragraphs two and three of the syllabus. “Reasonable probability” is “probability sufficient to undermine confidence in the outcome.” *Strickland* at 694, 104 S.Ct. 2052.

{¶ 26} Even if father could establish his counsel should have objected to state's exhibit C, he still could not establish the outcome of the trial would have been any different. The state was not required to demonstrate that V.M had missed a specific number of days of school. Rather, the state was required to show that father acted in such as to cause V.M to become and unruly child. *State v. Gans*, 168 Ohio St. 174, 151 N.E. 709 (1958). We therefore find state's exhibit C in no way prejudiced father.

{¶ 27} The second assignment of error is overruled.

III

{¶ 28} In his final assignment of error, father argues the trial court committed plain error when it admitted and relied upon state's exhibit C because it contained hearsay. We disagree.

{¶ 29} Father failed to object to the admission of exhibit C. An error not raised in the trial court must be plain error for an appellate court to reverse. *State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804 (1978) at paragraph one of the syllabus; Crim.R. 52(B). In order to prevail under a plain error analysis, appellant bears the burden of demonstrating that the outcome of the trial clearly would have been different but for the error. *Id*. at paragraph two of the syllabus. Notice of plain error "is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *Id*. at paragraph three of the syllabus.

{¶ 30} First, while father points out the trial court noted exhibit C contained a hearsay statement that V.M had missed 45 days in one month, we note that Gladstone testified a child is not referred to him until such a time as they have missed a significant amount of school. Second, as we found in father's second assignment of error, the state was not required to prove V.M was unruly, nor that he missed a specific number of days or hours of school. Father cannot, therefore, demonstrate that the outcome of his trial would have been any different had the trial court not admitted or considered state's exhibit C.

{¶ 31} The final assignment of error is overruled.

{¶ 32} The Judgement of the Licking County Court of Common Pleas Juvenile Division is affirmed.

By Wise, Earle, J.

Gwin, P.J. and

Baldwin, J. concur.

EEW/rw