[Cite as *State v. Martin*, 2004-Ohio-4309.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BROWN COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2003-09-011
	:	O P I N I O N
- vs -		8/16/2004
	:	
RANDY MARTIN,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM BROWN COUNTY COURT OF COMMON PLEAS
Case No. 2002-2220

Thomas F. Grennan, Brown County Prosecuting Attorney, Mary McMullen, 200 East Cherry Street, Georgetown, Ohio 45121, for plaintiff-appellee

Elizabeth E. Agar, 1208 Sycamore Street, Olde Sycamore Square, Cincinnati, Ohio 45210, for defendant-appellant

VALEN, J.

{¶1} Defendant-appellant, Randolph Martin, appeals his convictions in Brown County Court of Common Pleas for child endangering and involuntary manslaughter in the death of his infant daughter. We affirm the decision for the reasons outlined below.

{¶2} Appellant called 911 dispatch on November 1, 2002, to

report that his three-month-old daughter ("E.M") was not breathing and that he was performing cardio-pulmonary resuscitation ("CPR"). Appellant told dispatch that the infant had ingested water while he was giving her a bath and that he had dropped her on the floor when removing her from the bath.

{¶3} Appellant told this version of the events to all of the emergency personnel responding to the scene, as well as to the medical personnel at Brown County General Hospital and, finally, to personnel at Children's Hospital Medical Center in Cincinnati ("CHMC"), where the infant had been airlifted.

{¶4} The child was removed from life support and pronounced dead on November 3, 2002. Among the child's injuries found at autopsy were subdural hemmorhages in the brain, retinal and optic nerve sheath hemorrhages, and hemorrhaging in and dislocation between cervical vertebra. The pathologist who performed the autopsy opined that the cause of death was diffuse brain and spinal injury due to blunt impact or shaking to the head and neck.

{¶5} On November 6, appellant gave a taped statement to police concerning how E.M. was injured. In this statement, appellant told police that he was playing with E.M. on the couch when she fell from the couch onto the carpet. Appellant indicated that he picked up the child and shook her several times when she would not respond.

{¶6} Appellant was charged with felony child endangering with a specification of serious physical harm, and involuntary

manslaughter while committing felony child endangering. Appellant waived a jury and was tried in a bench trial.

{¶7} The state presented a number of witnesses over the course of the trial. Appellant presented no witnesses. After both sides had rested, but before closing arguments the next morning, the trial court indicated its belief that the "standard" for the two charges was not strict liability. The trial court stated that, "recklessness is the degree of criminal culpability that would be required" for both charges. Both trial counsel indicated that was their understanding.

{¶8} On the morning of September 18, 2003, the state moved to amend the two-count indictment under Crim.R. 7(D). The state indicated on the record that it realized that morning that the indictment listed the culpable mental state for both charges as "knowingly."[1]

{¶9} Appellant objected to the amendment, arguing that the case was defended on the indictment as written. The trial court granted the motion to amend after finding that the amendment did not change the name or identity of the crime charged. The trial court did determine that the amendment was an amendment made to the substance of the indictment. The trial court asked appellant whether he was requesting a discharge of the trier of fact or requesting that the trial be declared a "nullity" under Crim.R. 7(D). Appellant did not make any such request.

{¶10} The trial court then stated the following: "To permit

this trial to now be decided by this Court on a lesser standard of recklessness and not knowingly would entail at least a substantial risk of prejudice * * * to the Defendant and his counsel in the preparation for this, so I don't believe that I have any alternative but to declare this proceeding to be, essentially, a nullity, * * *. This matter will be rescheduled for trial at the earliest possible opportunity."

{¶11} However, the trial court issued an entry a few days later setting the date for closing arguments in the trial. In its entry, the trial court indicated that after researching the issue, it found that the "ends of public justice" did not justify continuing a trial and retrying appellant when appellant had not so requested.

{¶12} At the subsequent hearing, appellant objected to proceeding with closing arguments and objected to the trial court's failure to journalize its decision as stated from the bench at the conclusion of the evidence on September 18. Appellant again was asked whether he was requesting a continuance or discharge of the trier of fact. Appellant indicated that he was not requesting a continuance or discharge, but was continuing to object to the amendment and to the trial court failing to journalize its September 18 decision from the bench.

{¶13} The trial preceded to its conclusion and appellant was found guilty of both counts. After appellant was sentenced, he instituted the instant appeal, presenting two assignments of

1. The state also indicated the mental state of "knowingly" for the

error.

{¶14} Assignment of Error No. 1:

{¶15} "THE TRIAL COURT ERRED IN PERMITTING THE STATE TO AMEND THE INDICTMENT AFTER BOTH SIDES HAD RESTED, AND IN PROCEEDING TO CONVICT DEFENDANT OF THE AMENDED CHARGE WITHOUT REOPENING THE CASE OR OBTAINING A NEW JURY WAIVER."

{¶16} Crim.R. 7(D) deals with the amendments of indictments. Crim.R. 7(D) states: "The court may at any time before, during, or after a trial amend the indictment, information, complaint, or bill of particulars, in respect to any defect, imperfection, or omission in form or substance, or of any variance with the evidence, provided no change is made in the name or identity of the crime charged. If any amendment is made to the substance of the indictment, information, or complaint, or to cure a variance between the indictment, information, or complaint and the proof, the defendant is entitled to a discharge of the jury on the defendant's motion, if a jury has been impanelled, and to a reasonable continuance, unless it clearly appears from the whole proceedings that the defendant has not been misled or prejudiced by the defect or variance in respect to which the amendment is made, or that the defendant's rights will be fully protected by proceeding with the trial, or by a postponement thereof to a later day with the same or another jury. Where a jury is discharged under this division, jeopardy shall not attach to the offense charged in the amended indictment, information, or

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involuntary manslaughter count in its Bill of Particulars.

complaint. No action of the court in refusing a continuance or postponement under this division is reviewable except after motion to grant a new trial therefor is refused by the trial court, and no appeal based upon such action of the court shall be sustained nor reversal had unless, from consideration of the whole proceedings, the reviewing court finds that a failure of justice resulted."

{¶17} Appellant argues under his first assignment of error that the original indictment, which described the requisite mental state of "knowingly," described offenses other than the offenses named in the indictment and could not be cured by amendment.

{¶18} The indictment reads, in part, as follows: Count I, [appellant] "did knowingly abuse E.M., a child, to-wit: three months of age, in violation of Section 2919.22(B)(1) of the Ohio Revised Code * * *, and for Count II, appellant "did knowingly cause the death of E.M., as a proximate result of * * * committing or attempting to commit felony, to wit: endangering children, a violation of Section 2919.22(B)(1) O.R.C. * * * in violation of

* * * Section 2903.04(A) * * *."

{¶19} First, we note that a "person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature." R.C. 2901.22(B). "A person has knowledge of circumstances when he is aware that such circumstances probably

exist." Id.

{¶20} The indictment indicated that appellant's conduct violated R.C. 2919.22. This is the code section for child endangering. The culpable mental state of "recklessness" is an essential element of the crime of endangering children. State v. McGee, 79 Ohio St.3d 193, 195, 1997-Ohio-156.

{¶21} "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." R.C. 2901.22(C).

{¶22} R.C. 2903.04, as listed in the indictment, is the code section for involuntary manslaughter. The criminal intent of involuntary manslaughter is supplied by the criminal intent to do the underlying unlawful act of which the homicide is a consequence. State v. Losey (1985), 23 Ohio App.3d 93, 97; Stanley v. Turner (C.A.6, 1993), 6 F.3d 399, 402.

{¶23} After reviewing the record, we disagree with appellant's assertions that the indictment charges offenses other than child endangering and involuntary manslaughter. Despite the error in the mental states on the indictment, we agree with the trial court when it found that the amendment did not change the name and identity of the offenses of child endangering and involuntary manslaughter in the indictment. See, e.g., State v.

Gondek (Jan. 26, 2000), Medina App. No. 2928-M, appeal not allowed, 88 Ohio St.3d 1513 (inclusion of "recklessly" in an indictment that clearly charged defendant with felonious assault was in the nature of an "internal inconsistency" that was appropriately amended).

{¶24} In addition, the amendment did not change the penalty or degree of the offenses. See State v. Davis, Clark App. No. 2002-CA-43, 2003-Ohio-4839, at ¶80. The grand jury indicted appellant for child endangering and involuntary manslaughter. The amendment stated the correct culpable mental state. Therefore, we find that the amendment was an available cure under the facts of this case.

{¶25} Appellant next argues that once the trial court found that appellant was prejudiced by the trial under the defective indictment, it could not constitutionally proceed under the amended indictment without taking action to cure the prejudice and obtaining a new written jury waiver.

{¶26} The Ohio Supreme Court case of State v. O'Brien, which was cited by both parties, states that an indictment that does not contain all the essential elements of an offense may be amended to include the omitted element, if the name or identity of the crime is not changed, and the accused has not been misled or prejudiced by the omission of such element from the indictment. State v. O'Brien (1987), 30 Ohio St.3d 122, paragraph two of syllabus.

{¶27} We agree that the trial court indicated from the bench

that there was a substantial risk of prejudice to appellant with the amendment. However, the trial court did not journalize these comments, and a court speaks through its journalized entries. State v. Early, Franklin App. No. 01AP-1106, 2002-Ohio-2590, at ¶16, citing Brackmann Communications, Inc. v. Ritter (1987), 38 Ohio App.3d 107,109.

{¶28} There is no dispute that appellant objected to the amendment, arguing that he was prejudiced by the amendment to the indictment. Appellant would later argue that he might not have waived his right to a jury trial if "recklessly" had been the mental state alleged in the indictment.

{¶29} We agree that considerations should be made of whether the amendment was misleading to or prejudiced appellant. However, we are not persuaded by appellant's bare assertions of prejudice. Appellant did not delineate how he would have handled the evidentiary portion of the trial differently.

{¶30} Further, both counsel agreed with the trial court's comments at the close of evidence that the mental state for the offenses was recklessness. It seems reasonable that if appellant had been misled throughout the trial about the mental state, he would have brought that issue to the trial court's attention at that time.

{¶31} It is also apparent that the trial court took action to cure any alleged prejudice to appellant. The amendment in the indictment took place before closing arguments in this bench trial. The trial court indicated in its entry that the

continuance of several days from the conclusion of the evidentiary portion of the trial would permit both parties to "give appropriate consideration" to issues involving the amended mental state. The trial court stated that it believed this continuance would "afford adequate protection to the Defendant's rights."

{¶32} The trial court further indicated that appellant was free to still seek discharge of the trier of fact or a continuance.[2] Appellant was given that opportunity when the trial resumed, but declined to do so.

{¶33} The trial court afforded appellant every opportunity to address the issues raised by the amendment, even though the trial court decided that it would not sua sponte declare the trial a nullity.

{¶34} This court also does not agree with appellant's assertions that the trial court erred by not reopening the case or obtaining a new jury waiver from appellant.

{¶35} We note that appellant never sought to reopen the evidentiary portion of the trial. Appellant did not indicate that he had any witnesses to call or recall for cross-examination as a result of the amendment.

{¶36} It was also not necessary that a new jury waiver be executed. The trial court continued this case over several days.

2. The Fifth Appellate District noted that Crim.R. 7(D) provides that the accused is entitled to a discharge of the jury or a continuance if there is no jury impaneled, unless he has not been misled or prejudiced by the defect that has been amended. State v. Roberts (Oct. 23, 1996), Licking App. No. 96CA38.

It was not a new trial. Unlike appellant's cited authority of State v. McGee (1998), 128 Ohio App.3d 541, the instant case did not involve a new trial on remand from an appellate reversal.

{¶37} Accordingly, we cannot say that the trial court erred by not reopening the case or not obtaining a new jury waiver. We also cannot find that the trial court abused its discretion in permitting an amendment of the indictment and proceeding to the conclusion of the trial. See State v. Brumback (1996), 109 Ohio App.3d 65, 81 (because amendment is allowed under Crim.R. 7[D] in the court's discretion, our review is for abuse of discretion).

{¶38} Considering the entire proceedings, we do not find a failure of justice warranting a reversal of the conviction. Crim.R. 7(D); see State v. Chapman (Mar. 17, 2000), Portage App. No. 98-P-0075.

{¶39} Appellant's first assignment of error is overruled.

{¶40} Assignment of Error No. 2:

{¶41} "THE TRIAL COURT ERRED TO DEFENDANT'S PREJUDICE WHEN IT DENIED COUNSEL'S MOTIONS FOR A VERDICT OF ACQUITTAL, AND AGAIN WHEN IT ACCEPTED AND JOURNALIZED VERDICTS OF GUILTY WHICH WERE NOT SUPPORTED BY RELEVANT AND CREDIBLE EVIDENCE."

{¶42} We interpret appellant's assignment of error to contest both the sufficiency and manifest weight of the evidence.

{¶43} Appellant moved for judgment of acquittal at the close of the state's case and at the conclusion of his case, when he presented no additional evidence. Under Crim.R. 29(A), a motion for acquittal may be granted "if the evidence is insufficient to sustain a conviction of such offense or offenses."

{¶44} In resolving the sufficiency of the evidence argument, the relevant question is whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Jenks (1991), 61 Ohio St.3d 259, paragraph two of syllabus.

{¶45} The essential element disputed by appellant is the mental state involved. Appellant argues that he told police in his statement that he had shaken E.M. too hard in a panicked attempt to revive her and that all of his training as a police officer was forgotten. Appellant argues that this could hardly be found to be reckless beyond a reasonable doubt.

{¶46} We have previously indicated that "recklessly" is defined as heedless indifference to the consequences, where one perversely disregards a known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature.

{¶47} Appellant told police that he shook the child more than once during the incident, "[a]nd I know I shook her hard, shook her too hard." "Then I was shaking her some more and she threw up." When asked if he shook E.M. hard enough to cause her head to bounce back and forth, appellant responded, "Yeah, her, yeah, her head, her head and her limbs, everything was *** shaking."

{¶48} Appellant responded to questions by police, stating, "Oh, I lost all sense of anything good." When asked if appellant thought he had "lost it," appellant replied, "[y]eah, complete, yeah." Appellant added to that comment, "And all I had was all

these different thoughts of worried and scared about what my wife would say, scared about what everybody else was gonna think."

{¶49} Appellant told police that he was mad at himself for playing with E.M. on the couch in such a manner. Appellant told police that he would not play games with E.M. while the child's mother (appellant's wife) was present. Appellant indicated that he and his wife would have discussions about gently handling the infant, stating, "*** I just didn't, I didn't feel the need to handle her [E.M], I guess as, as easy as my wife did. *** I couldn't believe that this had happened because I was horsing around with her playing stupid games."

{¶50} The involuntary manslaughter statute states, in part, that no person shall cause the death of another as a proximate result of the offender's committing or attempting to commit a felony. R.C. 2903.04(A).

{¶51} The essential elements of child endangering, as charged in this case, indicate that no person shall recklessly abuse a child under the age of 18, with the specification that the abuse resulted in serious physical harm.[3] Serious physical harm is defined in R.C. 2901.01(A)(5), in part, as any physical harm that carries a substantial risk of death; any physical harm that involves some permanent incapacity, whether partial or total, or that involves some temporary, substantial incapacity.

{¶52} We have reviewed the record in this case and the essen-

3. The accompanying Legislative Service Commission comments indicate that an act that causes or poses a serious risk to the mental or physical health

tial elements of both offenses. We find that, construing the evidence most favorably for the state on both charges against appellant, reasonable minds could find all the essential elements of the crimes, including the mental state, proven beyond a reasonable doubt.

{¶53} We turn next to appellant's argument regarding the weight of the evidence. Weight of the evidence concerns the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other. State v. Thompkins, 78 Ohio St.3d 380, 387, 1997-Ohio-52. The court, 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. Id.

{¶54} The state presented in its case in chief the child's mother, the 911 dispatcher, four emergency medical or police personnel who responded to the home, an emergency department nurse for Brown County General Hospital, a teacher with the peace officer training program from which appellant graduated, the sister of appellant's mother-in-law, the physician pathologist who performed the autopsy on E.M., a physician at Cincinnati Children's Hospital Medical Center who received specialized training in child abuse cases and was involved in the treatment

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or safety of a child is child abuse. See 1974 Committee Comments to R.C.

team for E.M., an emergency room social worker with Children's Hospital, and a police captain from the Brown County Sheriff's Office who obtained the taped statement from appellant.

{¶55} The child's mother testified that E.M. was born six weeks prematurely on July 21, 2002. E.M.'s mother indicated that she taught at Brown County Counseling during the day and that appellant was a police officer with the Village of Georgetown who predominately worked nights. The mother indicated that E.M. was responding normally and had no injuries when she left the child in appellant's care on the morning of the incident.

{¶56} A witness who taught at the peace officer academy from which appellant graduated testified that CPR training and first aid were required teaching at the academy, and that appellant would have received that training before graduating.

{¶57} The trial court heard testimony from the emergency medical technician ("EMT"), who was first on the scene of the incident at appellant's home. The EMT testified that he saw no evidence that cardio-pulmonary resuscitation had been performed on E.M. Appellant had indicated to the 911 dispatcher that he had been "working on her [E.M.]" for 10 minutes before he could get to a phone to call 911.

{¶58} The pathologist testified that E.M.'s injuries were the type of injuries he would expect to see in a "fall from a great height" or in an automobile accident where "a great amount of force is applied to the body." The pathologist also testified

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2919.22.

that marks found on E.M.'s back were "consistent with fingers of a hand" and were applied to the skin with "some degree of force."

{¶59} There was testimony that appellant gave more than one version of events related to E.M.'s injuries. Testimony was presented that appellant retracted his explanation about the bathing incident and admitted to shaking E.M. only after appellant realized that E.M.'s injuries were not consistent with his earlier version of events and questions were being raised about the inconsistencies.

{¶60} The trier of fact heard appellant's taped statement relating that he had sought assistance from a physician before this incident because appellant felt he was having problems bonding with E.M. Appellant indicated that the infant always wanted her mother, and "I would try to make her take the bottle from me, holding onto her, telling her, 'You're you're going to take it from Daddy, *** you have to get used to me being here with you [in a caretaking role].'"

{¶61} The state presented testimony from the sister of appellant's mother-in-law. This witness testified that, upon appellant's request, the two women came to appellant's home in December so that he could tell them his changed version of the events in question. The witness testified that appellant told them how he had piled cushions on the couch to serve as a ramp for play with E.M. Two police officers who responded to appellant's home on the day in question testified that they did not observe the couch cushions out of order or piled up on the

couch.

{¶62} The trial court also heard testimony on cross-examination of appellant's wife that although appellant had at times displayed a temper, appellant had never threatened her and was never physical toward her during their 15 years together, and had never shown anger toward the infant.

{¶63} The first responding EMT at the scene also admitted on cross examination that he could not say that appellant had not attempted to administer CPR before emergency personnel arrived.

{¶64} Also upon cross-examination, the police captain who took appellant's statement acknowledged that appellant could have rearranged the couch cushions before emergency personnel arrived in an attempt to conceal the source of injuries from appellant's wife, instead of the possible inference from undisturbed cushions that the couch incident did not occur.

{¶65} Appellant has argued throughout his appeal that his panicked attempt to revive his child could not form the requisite basis for conviction. However, we note that the trier of fact was in the best position to judge the credibility of the witnesses. The trier of fact could choose to believe all, some, or none of appellant's versions of the events as recounted in his statement or by other witnesses. See State v. Antill (1964), 176 Ohio St.2d 61, 67.

{¶66} We have reviewed the record in this case under the appropriate standard. We cannot say that 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.

{¶67} Appellant's second assignment of error is overruled.

Judgment affirmed.

POWELL, P.J., and WALSH, J., concur.