[Cite as *State v. Willis,* 2010-Ohio-4404.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2009-10-270
	:	O P I N I O N
- vs -		9/20/2010
	:	
ZACARIAH WILLIS,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR2009-03-0512

Robin N. Piper III, Butler County Prosecuting Attorney, Gloria J. Sigman, Government Services Center, 315 High Street, 11th Fl., Hamilton, Ohio 45011, for plaintiff-appellee

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BRESSLER, P.J.

{¶1} Defendant-appellant, Zacariah Willis, appeals his conviction in the Butler County Court of Common Pleas for child endangering. For the reasons outlined below, we affirm appellant's conviction.

{¶2} On April 1, 2009, appellant was indicted on two second-degree felony counts of endangering children in violation of R.C. 2919.22(B)(1). The state alleged that on March 20, 2009, appellant broke the right femur of his 11-week-old son, G.W. The state further alleged that during the period of February 27, 2009 through March 14,

2009, appellant fractured several of G.W.'s ribs.[1]

{¶3} On August 14, 2009, following a three-day jury trial, appellant was convicted of the first count regarding the femur fracture. The jury also made a special finding with regard to count one that appellant's actions resulted in serious physical harm to G.W. Appellant was acquitted of the second count involving the rib fractures.

{¶4} On August 27, 2009, appellant filed a motion for acquittal. Following a hearing on September 23, 2009, the trial court overruled appellant's motion and sentenced him to four years in prison.

{¶5} Appellant appeals his conviction, raising a single assignment of error for our review:

{¶6} "THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT WHEN IT OVERRULED HIS MOTION FOR ACQUITTAL."

{¶7} In his sole assignment of error, appellant contends that the trial court erred in overruling his Crim.R. 29(C) motion for acquittal because the evidence presented at trial regarding G.W.'s femur fracture was "identical" to the evidence relating to the rib fractures in count two, of which the jury found appellant not guilty.

{¶8} Crim.R. 29(C) permits a trial court, upon motion, to set aside a guilty verdict and enter a judgment of acquittal. The trial court applies the same standard in ruling on a motion for acquittal presented either at trial or made after judgment is rendered. *State v. Sanders*, Butler App. No. CA2003-12-311, 2004-Ohio-6320, ¶32.

{¶9} The purpose of a motion for acquittal is to test the sufficiency of the evidence presented at trial. *State v. Terry,* Fayette App. No. CA2001-07-012, 2002-Ohio-4378, ¶9, citing *State v. Williams*, 74 Ohio St.3d 569, 576, 1996-Ohio-91. "'In

1. The indictment was subsequently amended pursuant to Crim.R. 7(D) to correct the spelling of appellant's first name from "Zacarial" to "Zacariah."

essence, sufficiency is a test of adequacy. Whether the evidence is legally sufficient to sustain a verdict is a question of law.'" *Barberton v. Jenney*, 126 Ohio St.3d 5, 2010-Ohio-2420, ¶14, quoting *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52. In reviewing a sufficiency challenge, an appellate court examines the evidence in order to determine whether such evidence, if believed, would support a conviction. *Thompkins* at id.; *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus. 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.'" *Jenney* at id., quoting *State v. Diar*, 120 Ohio St.3d 460, 2008-Ohio-6266, ¶113.

{¶10} Appellant was convicted of child endangering under R.C. 2919.22(B)(1), which provides, in pertinent part: "No person shall do any of the following to a child under eighteen years of age * * *: [a]buse the child[.]" The child endangering count was accompanied by a specification that appellant's conduct had caused his son to suffer serious physical harm.[2] See R.C. 2919.22(E)(2)(d).

{¶11} Although not stated in R.C. 2919.22, recklessness is the culpable mental state for the offense of child endangering. *State v. O'Brien* (1987), 30 Ohio St.3d 122, 123. "Reckless" is defined in R.C. 2901.22(C) as follows:

{¶12} "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

2. R.C. 2901.01(A)(5) defines "serious physical harm" as any of the following: "(a) Any mental illness or condition of such gravity as would normally require hospitalization or prolonged psychiatric treatment; (b) Any physical harm that carries a substantial risk of death; (c) Any physical harm that involves some permanent incapacity, whether partial or total, or that involves some temporary, substantial incapacity; (d) Any physical harm that involves some permanent disfigurement or that involves some temporary, serious disfigurement; (e) Any physical harm that involves acute pain of such duration as to result in substantial suffering or that involves any degree of prolonged or intractable pain."

circumstances when, with heedless indifference to the consequences, he perversely disregards a known risk that such circumstances are likely to exist."

{¶13} According to testimony at trial, in the early morning hours of March 20, 2009, appellant was tending to G.W. at his home in Hamilton. Appellant shared the residence with several other people, including G.W.'s mother, Lauren Bonner, and appellant's mother. Appellant stated that at approximately 12:30 a.m., G.W. woke up and was "fussing a little." As was his routine each evening while Bonner slept, appellant took G.W. out of the bedroom to feed and change him. After feeding G.W. one bottle, appellant noticed that he was still alert and awake. Appellant stated that he returned to the kitchen to prepare an additional bottle to "try to get him to fall asleep."

{¶14} Appellant testified that while holding G.W. on his hip, he sat down on a couch in the family room with the second bottle in hand. According to appellant, as he sat down, G.W.'s leg became lodged between his leg and the arm of the couch. Appellant testified: "I leaned down to get [G.W.] on the arm of the couch, * * *. And when I leaned down, I had him on my side, and I'm shaking his bottle, and I made sure that I kind of went down and so he would have support under him. And when I did, I could tell like I had to move, because I was on his legs." Appellant testified that when he sat down he heard a "popping noise." He removed the blanket around G.W. and noticed that he was not moving his right leg.

{¶15} Appellant was concerned and woke up his mother for assistance. His mother testified that she observed a "knot" on G.W.'s leg, and told appellant that he and Bonner needed to take the baby to the hospital.

{¶16} After arriving at Cincinnati Children's Hospital, G.W. was examined by Dr. Kathi Makoroff, a pediatrician at the Mayerson Center for Safe and Healthy Children. The Mayerson Center is a child-advocacy unit of the hospital that evaluates children

who are suspected victims of abuse. Dr. Makoroff conducted a physical examination of G.W. and testified that he was "fussy" when she moved his right leg. Dr. Makoroff testified that an x-ray of his right leg revealed a femur fracture. Additional x-rays indicated that G.W. had six rib fractures which were in the "healing stage" and appeared to be at least seven to ten days old. Dr. Makoroff also testified that she obtained G.W.'s medical and family history from appellant and Bonner, and consulted with other physicians at the hospital, but did not discover any medical condition that would cause G.W.'s bones to be weak and fracture easily. The state introduced the radiographs into evidence, which were referenced by Dr. Makoroff during her testimony.

{¶17} Dr. Makoroff testified, to a reasonable degree of medical certainty, that G.W.'s femur injury was not consistent with an adult placing their weight on his leg while it was positioned between the adult and the arm of a couch. She testified that she did not believe a fracture of that nature would result from that type of "mechanism" because of the "torque" necessary to cause a child's femur to fracture. Dr. Makoroff explained: "It's not a squishing mechanism. * * * So I wouldn't expect that mechanism of getting a leg in between an adult male, even a large adult male and the arm of the couch to cause a fracture like this or to cause any fracture." Rather, Dr. Makoroff concluded, to a reasonable degree of medical certainty, that the injury to G.W.'s femur was "inflicted" and was consistent with someone holding G.W.'s leg around the calf area and pushing it out from his body. Dr. Makoroff testified that G.W. was hospitalized as a result of his injury, and was placed in a harness for several weeks while his femur healed.

{¶18} The state also introduced the testimony of Detective Mark Nichols, a police officer with the city of Hamilton. Detective Nichols was assigned to investigate the case after receiving a referral from children's services, and interviewed appellant at the hospital. Nichols testified that during his interview, appellant completed a written

statement, in which he recounted the incident and maintained that he sat on G.W.'s leg. The statement was read into evidence by Detective Nichols and admitted as a state exhibit.

{¶19} Nichols testified that he asked appellant to demonstrate how he was holding G.W. at the time the leg injury occurred. According to Nichols, upon further questioning, appellant told him that he had not been truthful about how G.W.'s leg injury occurred. Based upon appellant's response, Nichols asked him to complete a second written statement. Nichols testified that appellant asked him to prepare the statement on his behalf. After the statement was completed, appellant read it out loud and signed it. The second statement was also read into the record by Nichols and admitted as a state exhibit. In the statement, appellant remarked as follows:

{¶20} "I was sitting on the couch in the living room with [G.W.]. He had eaten the first bottle, but seemed like he was still hungry. I made him a second bottle but he was not taking it. I t[ri]ed sitting him down, but he would start fussing and crying. I would pick him up and try the bottle again. I was getting frustrated. I [had] been feeling like I [had] not had any time to spend with [Bonner] or [G.W.].

{¶21} "* * *

{¶22} "[G.W.] was sitting on the couch in front of me. I was holding his right leg around his calf area. I pushed his leg outward and heard a pop. I thought his knee was hurt. I did not purposely want to hurt him; I was just frustrated. He was wrapped in a blanket. I'm not sure how far out I pushed his leg."

{¶23} Based upon our review of the record, we find that the state presented ample evidence from which the jury could conclude that the essential elements of the offense of child endangering were proven beyond a reasonable doubt. There was sufficient evidence to establish that appellant abused G.W. by breaking his femur, and

that the injury resulted in serious physical harm. Dr. Makoroff's testimony and appellant's second written statement, if believed by the jury, was sufficient to establish that appellant acted recklessly in pushing G.W.'s leg away from his body. Although appellant argues that the verdicts were inconsistent based upon the evidence presented at trial, our review of the record indicates that the state's evidence focused primarily on G.W.'s leg injury. As a result, we find that there was no inconsistency of verdicts in this case.

{¶24} Nevertheless, even if we were to find that the verdicts were inconsistent, the Ohio Supreme Court has determined that inconsistent verdicts on different counts in a multi-count indictment do not justify overturning a verdict of guilt. *State v. Gapen*, 104 Ohio St.3d 358, 2004-Ohio-6548, ¶138. "The several counts of an indictment containing more than one count are not interdependent and an inconsistency in a verdict does not arise out of inconsistent responses to different counts, but only arises out of inconsistent responses to the same count." *State v. Brown*, Butler App. No. CA2006-10-247, 2007-Ohio-7070, ¶41, quoting *Gapen* at id. In addition, it is not for an appellate court to speculate as to why the jury decided as it did, as "[c]ourts have always resisted inquiring into a jury's thought processes." Id., quoting *United States v. Powell* (1984), 469 U.S. 57, 67, 105 S.Ct. 471.

{¶25} Based on the foregoing, we conclude that the trial court did not err in overruling appellant's motion for acquittal. Appellant's sole assignment of error is not well taken and is overruled.

{¶26} Judgment affirmed.

POWELL and RINGLAND, JJ., concur.