[Cite as *State v. Webber*, 2015-Ohio-2183.]

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

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	C.A. CASE NO. 2014 CA 10
	:	
v.	:	T.C. NO. 13CR99
	:	
SCOTT A. WEBBER	:	(Criminal Appeal from
	:	Common Pleas Court)
Defendant-Appellant	:	
	:	

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O P I N I O N

Rendered on the ___5th___ day of _ _June___, 2015.

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FROELICH, P.J.

{¶ 1} Scott A. Webber was found guilty at a bench trial in the Darke County Court of Common Pleas of endangering a child and involuntary manslaughter. The victim was Webber's sixteen-month-old daughter. The offenses were merged, and Webber was sentenced on the involuntary manslaughter to three years in prison, to be followed by five

years of mandatory postrelease control.

{¶ 2} For the following reasons, the judgment of the trial court will be affirmed.

{¶ 3} On the evening of February 10, 2013, Webber and his wife gave their 16-month-old daughter adult-formula ZzzQuil, an over-the-counter medication containing diphenhydramine, before putting her to bed in her crib; the crib contained several blankets, stuffed animals, and other items. They checked on their daughter around 1:00 or 2:00 a.m., because she had been coughing. At approximately 9:50 a.m. on February 11, they found their daughter dead in her crib, tangled in a blanket. The primary cause of death was asphyxia.

{¶ 4} Both parents were charged with involuntary manslaughter and child endangering. The State's theory of the case was that the child had been placed in an unsafe sleep environment and that the diphenhydramine contributed to her death by sedating the child such that she was unable to untangle herself from her blankets. Webber's wife and the child's mother, Lauren Jones, entered into a plea agreement with the State. She pled guilty to child endangering and agreed to testify against Webber, in exchange for which the charge of involuntary manslaughter in her case was dropped. Webber was tried to the court in April 2014. He was found guilty and sentenced as described above.

{¶ 5} Webber appeals, raising one assignment of error.

> **The trial court erred because the Appellant acted negligently rather than recklessly, and therefore, the Appellant's convictions for endangering children and involuntary manslaughter are against the sufficiency of the evidence and manifest weight of the evidence.**

{¶ 6} Webber contends that the State failed to prove that he acted recklessly in causing the death of his child and, as such, his convictions are supported by insufficient evidence and are against the manifest weight of the evidence.

{¶ 7} An argument based on the sufficiency of the evidence challenges whether the State has presented adequate evidence on each element of the offense to allow the case to go to the jury or to sustain the verdict as a matter of law. *State v. Thompkins,* 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). Under a sufficiency analysis, an appellate court does not make any determinations regarding the credibility of witnesses. *State v. Goff,* 82 Ohio St.3d 123, 139, 694 N.E.2d 916 (1998), citing *State v. DeHass,* 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraph one of the syllabus. "An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. 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.

{¶ 8} In contrast, when reviewing an argument challenging the weight of the evidence, " '[t]he 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 jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. The discretionary power to grant a new trial should be exercised only in the

exceptional case in which evidence weighs heavily against the conviction.' " *Thompkins* at 387, quoting *State v. Martin,* 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983).

{¶ 9} Where an appellate court determines that a conviction is not against the manifest weight of the evidence, the conviction is necessarily based on legally sufficient evidence. *State v. Million,* 2d Dist. Montgomery No. 24744, 2012-Ohio-1774, ¶ 23; *State v. Combs,* 2d Dist. Montgomery No. 19853, 2004-Ohio-2419, ¶ 12.

{¶ 10} R.C. 2919.22(A) defines the offense of endangering children: "No person, who is the parent, guardian, [or] custodian * * * 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." The Supreme Court of Ohio has held that, under R.C. 2919.22(A), recklessness is an essential element of the crime of endangering children. *State v. McGee*, 79 Ohio St.3d 193, 195, 680 N.E.2d 975 (1997). "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).[1] Where serious physical harm results, as it did in this case, the offense is a felony of the third degree. R.C. 2919.22(E)(1)(c).

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[1] We note that R.C. 2901.22(C) was amended, effective March 23, 2015, as follows: "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. A person is reckless with respect to circumstances when, with heedless indifference to the consequences, the person disregards a substantial and unjustifiable risk that such circumstances are likely to exist." The changes appear to be for clarity but, if anything, lower the standard by substituting a "substantial and unjustifiable risk" in place of a "known risk."

{¶ 11} Involuntary manslaughter is defined as follows: "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). "Cause is an act or failure to act which in a natural and continuous sequence directly produces the [death], and without which it would not have occurred." *See* 4 Ohio Jury Instructions, Section 417.23 (2010); *State v. Scandrick*, 2d Dist. Montgomery No. 23406, 2010-Ohio-2270, ¶ 53. "There may be one or more causes of an event. However, if a defendant's act or failure to act was one cause, then the existence of other causes is not a defense." *See* 4 Ohio Jury Instructions, Section 417.25 (2010). A defendant cannot be held responsible for consequences that no reasonable person could expect to follow from his conduct, but he will be held responsible for consequences that are direct, normal, and reasonably inevitable when viewed in the light of ordinary experience. *State v. Dykas*, 185 Ohio App.3d 763, 2010-Ohio-359, 925 N.E.2d 685, ¶ 27 (8th Dist.); *State v. Wilson*, 182 Ohio App.3d 171, 2009-Ohio-1681, 912 N.E.2d 133, ¶ 26 (8th Dist.), citing *State v. Losey*, 23 Ohio App.3d 93, 95, 491 N.E.2d 379 (10th Dist.1985). It is not necessary that the defendant "be in a position to foresee the precise consequence of his conduct; only that the consequence be foreseeable in the sense that what actually transpired was natural and logical in that it was within the scope of the risk created by his conduct." *Wilson* at ¶ 26, citing *Losey*. Only a reasonably unforeseeable intervening cause will absolve one of criminal liability in this context. *Id.* at ¶ 27, citing *State v. Lovelace*, 137 Ohio App.3d 206, 215, 738 N.E.2d 418 (1st Dist.1999).

{¶ 12} Webber's conviction for involuntary manslaughter, a felony of the first degree, was predicated on his committing the felony of endangering children. R.C.

2903.04(C).

{¶ 13} Webber argues that, at most, the evidence proved only negligence, which is established when, "because of a substantial lapse from due care, the person fails to perceive or avoid a risk that the person's conduct may cause a certain result or may be of a certain nature." R.C. 2901.22(D).

{¶ 14} In reviewing the finding of recklessness, which is the subject of Webber's assignment of error, we begin with a more detailed discussion of the facts and medical evidence, as set forth at trial.

{¶ 15} On the morning of February 11, 2013, Lauren Jones, the child's mother, found the child in the crib, unresponsive, underneath blankets. Jones could not immediately see the child and was unsure whether she was lying face-up or face-down; Jones "had to dig through a whole bunch of blankets" to find her. Jones first found the child's foot, which was "deathly cold," and had to "unwrap" the child to find her head. Jones told Detective Corey Turner that a blue scarf, which had been like a "blankey" to the child, was wrapped around the child's chest and, possibly, her neck, when Jones found her. Jones also testified at trial that the child had been "very tangled" in a red and black "blanket," which was also described as a "comforter." According to Jones, the blanket or comforter had been hanging on the side of the crib, because it was cold and she thought she might need an extra blanket for the child; Jones could not remember whether the red and black blanket or comforter had ever been used to keep the child warm and did not know if Webber might have put it in the crib that night.

{¶ 16} Upon discovering that her daughter was cold and unresponsive, Jones called to Webber and other adults in another part of the home. They called 911, and

Webber was instructed on the administration of CPR while the parents waited for help to arrive. When initial responders arrived, it was "fairly obvious" to them that the child was dead. The parents were distraught and, in Jones's case, "hysterical"; they were removed from the home while the investigation began.

{¶ 17} Jones stated that she had given the child Amoxicillin, which had been prescribed by the child's doctor three days before her death for conjunctivitis (pink eye) and otitis media (ear infection), as well as Tylenol and All Natural Cold and Cough. The parents did not mention any administration of ZzzQuil at the time of their initial interviews with the detective, and no ZzzQuil was found at the house in a search performed after Webber signed a "permission to search" form. Detective Turner, who was one of the first responders, testified that he initially "pretty much took the parents [sic] word" about what medications the child had been given prior to her death. Sheriff's deputies documented and took into evidence various medications that were observed in the house, particularly around the kitchen and bathroom sinks, but it is unclear from the record how thoroughly they searched the house pursuant to Webber's consent.

{¶ 18} The first responders and the coroner's investigator, Joe VanVickle, testified at trial, without objection, about the conditions of the home, generally. It was "very cluttered," with no running water in the bathroom and dirty standing water in the kitchen sink. The home was being heated using the stove. Sergeant Shawn Trissel testified, without objection, that, in his opinion, the living conditions had been "unsafe."

{¶ 19} With respect to the crib in particular, VanVickle testified that the "sleep environment" was "enough to cause suspicion" and was the "worst crib environment" he had seen in 38 years, including working on "a lot of sleep related deaths." By Jones's

own description, the crib was "very disorderly," with "a lot of things in it," including a "boppy," several blankets, a stuffed animal, the blue scarf, a neck pillow, and some toys and clothes. The deputies provided similar descriptions of the items that were located in the crib. The red and black blanket or comforter, in which Jones said that the child had been wrapped, was on the parents' bed when deputies arrived. (The crib was located in the parents' bedroom.)

{¶ 20} Several weeks after the child's death, toxicology tests ordered as part of her autopsy were completed; the toxicology report indicated that diphenhydramine had been present in the child's body at a "significant level."[2] Moreover, the presence of diphenhydramine not only in the heart blood, but also in the brain, liver, and urine, indicated chronic and recent use.

{¶ 21} On May 6, 2013, after the toxicology report was completed, the parents were interviewed again. They insisted that the child had only been given medications recommended or prescribed by her doctor, and they were "baffled" as to why diphenhydramine would have been in the child's system. Webber also claimed to have researched any medication he gave to his children.

{¶ 22} The parents were interviewed for the third time on May 31, 2013. At that time, Webber acknowledged having given his daughter ZzzQuil, which contains diphenhydramine, the night before her death, to help her rest. He stated that he had lied previously because he was "scared of getting into trouble." Detective Turner and Investigator VanVickle testified that Webber made statements that he and Jones were the only ones who administrated medication to the child, and that Jones usually did it under

[2] Diphenhydramine is the generic name of the drug more commonly known by its trade name, Benadryl.

Webber's "supervision." Both parents eventually admitted to administering ZzzQuil to the child; mother estimated that she had done so approximately 10 times, and Webber two times.

{¶ 23} Jones testified that Webber had bought the ZzzQuil, that he also used the ZzzQuil, and that they had been giving it to the child for about two weeks before her death. Jones did not know what had happened to the bottle, which was not found at the home. Jones testified that the usual dosage she had given to the child was one teaspoon, by syringe, that Webber "mostly" decided when to administer it, and that she (Jones) sometimes did not administer it when Webber told her to do so; she "knew it wasn't right," but she "didn't want to start a fight" with Webber. Jones testified that she and Webber had never intended to cause the child's death and that she believed Webber loved both of their children. (The other child had since been placed in the custody of a grandmother.)

{¶ 24} Turner testified that Webber was "definitely the dominating figure in the relationship" with Jones and frequently cut Jones off during interviews. Similarly, VanVickle testified that Webber "took command" during joint interviews with the couple, "posture[d] himself as to being the information source within that group," and frequently claimed to have researched any drug he gave his children to avoid "any harsh chemicals." Because of these dynamics and Webber's claimed supervisory role, Detective Turner believed that Webber was more culpable than Jones in the death of the child. VanVickle testified that Webber was "very adamant about his level of intelligence and the things that he knew" and that he "come[s] across like he knows more than he might know."

{¶ 25} In addition to recounting how Webber's and Jones's stories had changed

over time, Detective Turner testified, without objection, about comments Jones had allegedly made to her sister-in-law, Valerie Brantley. Brantley reported to Turner that Jones had said that she (Jones) and Webber gave the child ZzzQuil because the child "wouldn't shut the f***[3] up and go to sleep."

{¶ 26} The child's primary care physician, Lynn Hawley, testified that she had recently treated the child for the flu, an ear infection, and pink eye, and had prescribed Amoxicillin three days before the child's death. The child's parents had never asked her about the administration of ZzzQuil or other sleep aids, and Dr. Hawley did not "use sleep aids in children generally as a rule." Dr. Hawley also noted that the ZzzQuil bottle "clearly says not to use under the age of 12." Dr. Hawley testified, without objection, that she had the "feeling" that Webber made a lot of the decisions related to the child's care, and that Jones was "apprehensive" and usually wanted to consult with Webber before making decisions.

{¶ 27} Several experts testified for the State: Timothy Kathman, M.D., the Darke County Coroner; Bryan Casto, M.D., Deputy Coroner in the Montgomery County Coroner's Office, and Laureen Marinetti, Ph.D., a forensic toxicologist at the Montgomery County Toxicology Laboratory. Dr. Kathman relied on the autopsy report prepared by Dr. Casto and the toxicology report prepared by Dr. Marinetti in reaching his conclusions as to the cause of death.

{¶ 28} Dr. Kathman testified that, on the child's death certificate, he listed asphyxia as the primary cause of death, as a consequence of an unsafe sleep environment and diphenhydramine toxicity. Dr. Kathman defined his use of the term

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[3] Because our opinions are widely available online, we have chosen to insert asterisks into certain offensive words that appear in the transcript of this case and in other cases.

"toxicity" as something "caus[ing] injury, harm, or potential death." He testified that he believed any level of diphenhydramine in a 16-month-old was "inappropriate" and "toxic." He based this opinion on the facts that there is no recommended dosage of diphenhydramine for a child under the age of 2, that over-the-counter "preparations" of the drug are marked with instructions not to administer to anyone under the age of 12, and that, according to his research, there is no therapeutic level for a 16-month-old child. He further testified that he would consider any diphenhydramine in a 16-month-old to be a "contributor to death" in an unsafe sleep environment. On cross-examination, Dr. Kathman stated that he was not saying the diphenhydramine was lethal, in itself, but that it contributed to the child's death.

{¶ 29} Dr. Marinetti testified about her toxicology report, which was also admitted into evidence. She stated that her conclusion that diphenhydramine had been in the child's body at a "significant level" meant that the level of medication would have caused sedation in an adult. She agreed with Dr. Kathman's conclusion that the level of diphenhydramine had been "toxic," but she stated that, as a toxicologist rather than a medical doctor, she did not state an opinion on cause of death. She stated, however, that the child's diphenhydramine level had been twice that found to have a sedating effect in an adult, and that she believed, to a reasonable degree of scientific certainty, that the infant had been impaired by the sedating effect of diphenhydramine at the time of her death. Dr. Marinetti also testified to the basis for her conclusion that there had been recent and chronic use of the drug: the drug was found not only in the heart blood, but in the brain, liver, and urine.

{¶ 30} Dr. Casto, who conducted the autopsy, testified that he agreed with Dr.

Kathman's "philosophy" about the cause of death, but not his "wording." Dr. Casto explained that he agreed with Dr. Kathman's characterization that "asphyxia, due to (or as a consequence of) unsafe sleeping environment" was the immediate cause of death. Referring to the manner in which Dr. Kathman had completed the death certificate, Dr. Casto noted that Dr. Kathman had listed diphenhydramine toxicity, along with the unsafe sleep environment, as a "condition * * * leading to the immediate cause of death" in Part I of the Certificate of Death; Dr. Casto would have listed the diphenhydramine toxicity under Part II of the Certificate, "other significant conditions contributing to death but not resulting in the underlying cause" of asphyxia. Dr. Casto agreed with Drs. Kathman and Marinetti, to a reasonable degree of scientific or medical certainty, that the diphenhydramine levels in the child's blood contributed to her death; it created "an additional risk factor for a young child to asphyxiate." Dr. Casto did not agree with Dr. Kathman's opinion that any level of diphenhydramine in a young child's blood is "toxic," and he testified that "off-label use of medications happens all the time." However, Dr. Casto agreed with the conclusions of the State's other experts that diphenhydramine contributed to the child's death in this case.

{¶ 31} Dr. Stephen Huffman, an emergency room doctor and the Miami County Coroner, testified for the defense. Dr. Huffman based his opinions on his review of the toxicology report and autopsy report. Dr. Huffman testified that he prescribed diphenhydramine for children one-year-old and older, usually for allergic reactions, but he said that it should not be administered to a young child as a sleep aid. He noted that there was no diagnosis in the child's medical records for which diphenhydramine would have been warranted. Dr. Huffman disagreed with Dr. Kathman's opinion that the level

of diphenhydramine in the child's system was "toxic," stating that it was "not even anywhere in the realm of toxicity." However, in Dr. Huffman's view, the definition of "toxicity" referred to the level of diphenhydramine at which the drug "on its own poisons somebody" and causes physical harm, whereas Dr. Kathman viewed diphenhydramine as toxic at any level in a 16-month-old, and Dr. Marinetti defined toxicity as the drug being present at a level that caused a sedative effect, thus contributing to death by asphyxia. Dr. Huffman expressed his medical opinion that "the child died of asphyxiation;" he did not believe "that the level of Benadryl had a role in the child's death."

{¶ 32} It is evident from the record that there was some divergence of opinion among the expert witnesses for the prosecution and the defense as to the meaning of "toxicity" and as to whether the amount of diphenhydramine in the child's blood contributed to her death. However, the State's witnesses testified, to the requisite degree of medical and scientific certainty, that the diphenhydramine in the child's blood had inhibited her from freeing herself from the excessive bedding in her crib and had thus contributed to her death. All of the experts agreed that it was inappropriate to have given such a drug, in its adult formulation, to a young child. The trial court could have reasonably credited the State's evidence that the diphenhydramine contributed to the child's death.

{¶ 33} As stated above, 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." R.C. 2901.22(C); *McGee*, 79 Ohio St.3d at 196, 680 N.E.2d 975. In contrast, "[a] person acts negligently when, because of a substantial lapse from due care, he fails to perceive or avoid a risk

that his conduct may cause a certain result or may be of a certain nature." *State v. Hawkins*, 2d Dist. Montgomery No. 21691, 2007-Ohio-2979, ¶ 26, fn. 2.

{¶ 34} Webber administered ZzzQuil to the child without consulting a doctor, when that medication was labeled as contraindicated for young children, and then placed the child to sleep in a crib that was very crowded with bedding and other soft objects. Moreover, Webber's initial denials to the sheriff's deputies and coroner's investigator about administration of the drug to the child, because he was "scared of getting into trouble," suggest that he had perceived that there was risk to the child associated with the use of the medication. He also had not consulted with the child's pediatrician about the use of diphenhydramine for any purpose, despite very recent visits to the doctor's office for illnesses. Based on this evidence, the trial court could have reasonably concluded that Webber acted recklessly -- that is, that he perversely disregarded a known risk or was heedlessly indifferent to the consequences of his acts – with respect to the medication and sleeping conditions of his child. As such, the trial court's verdict was neither supported by insufficient evidence nor against the manifest weight of the evidence.

{¶ 35} The assignment of error is overruled.

{¶ 36} The judgment of the trial court will be affirmed.

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FAIN, J. and HALL, J., concur.

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