[Cite as *State v. Jackson*, 2015-Ohio-1694.]

IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
SENECA COUNTY

STATE OF OHIO,

PLAINTIFF-APPELLEE, **CASE NO. 13-14-30**

v.

KENYAHA L. JACKSON, **O P I N I O N**

DEFENDANT-APPELLANT.

Appeal from Tiffin-Fostoria Municipal Court
Trial Court No. CRB 1401137

Judgment Reversed and Cause Remanded

Date of Decision: May 4, 2015

APPEARANCES:

James M. Ruhlen **for Appellant**

Richard Palau **for Appellee**

WILLAMOWSKI, J.

{¶1} Defendant-appellant Kenyaha Jackson ("Jackson") brings this appeal from the judgment of the Tiffin-Fostoria Municipal Court finding him guilty of child endangerment. Jackson alleges that the conviction was not supported by sufficient evidence and was against the manifest weight of the evidence. Jackson also alleges that the trial court erred by proceeding to trial without a waiver of counsel. For the reasons set forth below, the judgment is reversed.

{¶2} On September 5, 2014, a complaint was filed alleging that Jackson had left a one year old child that he was supposed to be watching with another. Doc. 1. When this was investigated, the officer learned that Jackson had allegedly been smoking marijuana with the child with him and had subjected the child to the smoke. *Id*. Jackson was arraigned the same day that the criminal complaint was filed. Doc. 3. The form filed by the court that day does not indicate that Jackson waived counsel at that time. *Id*. A bench trial was held on October 3, 2014. Following the conclusion of the trial, the trial court found Jackson guilty of the offense charged.[1] Doc. 13. Jackson was ordered to serve 180 days in jail with 90 days suspended and placed on community control for three years. *Id*. Jackson appeals from this judgment and raises the following assignments of error.

[1] Interestingly, the trial court never stated what the charge was, just that it "finds the Defendant guilty of the charges [sic] stated in the complaint." Additionally, the journal entry does not indicate the level of the misdemeanor of which Jackson was convicted. Doc. 13.

First Assignment of Error

> **The record contained insufficient evidence to support a conviction of endangering children in violation of [R.C. 2919.22(A)].**

Second Assignment of Error

> **The conviction was against the manifest weight of the evidence.**

Third Assignment of Error

> **The trial court erred in proceeding to trial in this matter and then sentencing [Jackson] to jail depriving [Jackson] of his right to counsel under the Sixth and Fourteenth Amendments of the United States Constitution and Section 10, Article 1 of the Ohio Constitution; and Criminal Rule 44.**

We will address the assignments of error out of order.

{¶3} In the third assignment of error, Jackson argues that the trial court erred by proceeding to trial without a waiver of counsel from Jackson. This court initially notes that the journal entry filed at the time of arraignment does not indicate that Jackson waived counsel. Doc. 3. However, the identical form filed and completed after trial indicated that counsel was waived. Doc. 13. This court also notes that the judge who presided over the arraignment was not the same judge as the one who presided over the trial. The record clearly indicates that no written waiver of counsel was obtained and does not indicate that any waiver of counsel occurred at the arraignment until the judgment entry of conviction and sentence. The transcript does not show that any discussion concerning the waiver

of counsel occurred prior to the trial. Additionally, since Jackson was charged with an offense for which jail time was a possibility, he was entitled to counsel. Crim.R. 44(B).

{¶4} A valid waiver of the right to counsel is not presumed from a silent record. *State v. Wellman*, 37 Ohio St.2d 162, 309 N.E.2d 915 (1974). "Courts are to indulge in every reasonable presumption against the waiver of a fundamental constitutional right including the right to be represented by counsel. * * * [T]he waiver must affirmatively appear in the record. * * * The state has the burden of overcoming presumptions against a valid waiver." *State v. Vordenberge*, 148 Ohio App.3d 488, 2002-Ohio-1612, ¶ 9, 774 N.E.2d 278 quoting *State v. Dyer*, 117 Ohio App.3d 92, 95, 689 N.E.2d 1034 (1996).

> **In determining whether a defendant has knowingly, intelligently, and voluntarily waived his right to counsel, the trial court is required to undertake a two-part inquiry: (1) whether the defendant is competent to waive the right to counsel if it has reason to doubt the defendant's competency, and (2) whether the waiver is knowing and voluntary. For the waiver to pass constitutional muster, the defendant must have "some sense of the magnitude of the undertaking and the hazards inherent in self-representation." For the trial court to provide an effective waiver of counsel, it should candidly and thoroughly discuss with the defendant "'the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter.'" Further, the trial court must inform the defendant that "he will be required to follow the same rules of procedure and evidence which**

> **normally govern the conduct of a trial." Whether the waiver is knowing and voluntary must be decided on a case-by-case basis.**

Id. at ¶ 12.

{¶5} At the beginning of the trial, the trial court did not even address the fact that Jackson did not have counsel, but proceeded without any inquiry. The first time at trial that the issue of counsel was raised was during sentencing and that was done by Jackson.

> **Mr. Jackson: Today, I didn't even know I was going to trial. Like I wasn't prepared for this or nothing.**
>
> *** * ***
>
> **Mr. Jackson: I didn't even know I was going to have to represent myself. I know none of this.**

Tr. 42. The State argues that Jackson waived counsel at the arraignment hearing and failed to supply a transcript of that hearing, thus he validly waived his right to counsel at trial.[2] However, even if that were true, this is a matter that is more suited for inquiry at the time of trial. "The 'cattle call' nature of arraignment proceedings does not lend itself to the judge or magistrate conducting an inquiry sufficient to pass constitutional muster." *Vordenberge* at ¶ 13. "Thus, we hold that even if a defendant waives his right to counsel during arraignment, that waiver

[2] The State is correct that the transcript was not provided and we do not know what was said at that hearing. However, the initial judgment entry following the arraignment does not indicate that counsel was waived. The first indication in the record that counsel was waived at the arraignment comes from the journal entry finding Jackson guilty and imposing sentence which indicates that counsel was waived at arraignment. No explanation for this inconsistency is provided. This court also notes that the judge presiding over the arraignment was not the same judge presiding over the trial, so the trial judge was not acting from memory and the record does not indicate a waiver occurred.

is effective for that proceeding only. The trial court, before proceeding to trial, must make an independent inquiry into whether a defendant's waiver of counsel at trial is knowingly, voluntarily, and intelligently made." *Id*. at ¶ 14. The record in this case indicates that Jackson clearly did not understand what was expected of him at trial and did not understand the effect of proceeding without an attorney, or that he would be required to proceed without counsel. At no time before beginning the trial did the trial court inquire into whether Jackson had counsel, wanted counsel, or was waiving counsel. Given the facts of this case, including the inconsistency in the journal entries regarding when or if counsel was waived and the different judges which precluded the trial judge from relying on his memory of the waiver of counsel, this court does not find that a knowing, intelligent, and voluntary waiver of counsel for trial was made by Jackson before the trial. Thus, the trial court erred by proceeding to trial without inquiring as to a waiver of counsel. The third assignment of error is sustained.

{¶6} The fact that no valid waiver of counsel was obtained in this case would normally require that the case be remanded for a new trial. However, in this case, Jackson raises a question in the first assignment of error as to whether the trial court's judgment was supported by sufficient evidence. A claim of sufficiency of the evidence raises a due process question concerning whether the evidence is legally sufficient to support the verdict as a matter of law. *State v.*

Lang, 129 Ohio St.3d 512, 2011-Ohio-4215, ¶219, 954 N.E.2d 596 (citing *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52, 678 N.E.2d 541). "On review of the sufficiency of the evidence to support a criminal conviction, 'the relevant question is whether, after viewing 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. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, ¶34, 840 N.E.2d 1032 (quoting *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560).

{¶7} In this case, Jackson alleges that the State failed to prove venue. This court has previously addressed the necessity of proving venue in a case.

> **"Venue is not a material element of any crime but, unless waived, is a fact that must be proven at trial beyond a reasonable doubt." *State v. Barr*, 158 Ohio App.3d 86, 2004-Ohio-3900, 814 N.E.2d 79, ¶ 14.**
>
> **The Ohio Constitution establishes the right of the accused to have a "trial by an impartial jury of the county in which the offense is alleged to have been committed." Section 10, Article I, Ohio Constitution. R.C. 2901.12 guarantees that right by requiring that a criminal trial shall be held in a court with subject matter jurisdiction in the "territory of which the offense or any element thereof was committed." Crim.R. 18 provides that the venue of a case shall be that as set by law.**
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> **Therefore, unless the prosecution proves beyond a reasonable doubt that the crime alleged was committed in the county where the trial was held or the defendant waives this right, the defendant cannot be convicted. *State v. Headley* (1983), 6 Ohio St.3d 475, 477, 6 OBR 526, 528, 453 N.E.2d 716, 718-19; *124 *State v. Draggo* (1981), 65 Ohio St.2d 88, 90, 19 O.O.3d 294, 295,**

> **418 N.E.2d 1343, 1345; and *State v. Nevius* (1947), 147 Ohio St. 263, 34 O.O. 210, 71 N.E.2d 258, paragraph three of the syllabus. Ideally, the prosecutor will directly establish venue. However, venue need not be proven in express terms. The Supreme Court of Ohio has permitted venue to be established by the totality of the facts and circumstances of the case. *State v. Headley*, supra; *State v. Gribble* (1970), 24 Ohio St.2d 85, 89-90, 53 O.O.2d 222, 224, 263 N.E.2d 904, 906-907; and *State v. Dickerson* (1907), 77 Ohio St. 34, 82 N.E. 969, paragraph one of the syllabus. The trial court has broad discretion to determine the facts which would establish venue. Therefore, the court's decision should not be overturned on appeal unless it is contrary to the manifest weight of the evidence. *State v. Giles* (1974), 68 O.O.2d 142, 322 N.E.2d 362.**

State v. Gonzalez, 188 Ohio App.3d 121, 2010-Ohio-982, ¶ 4, 934 N.E.2d 948 (3d Dist.) quoting *Toledo v. Taberner*, 61 Ohio App.3d 791, 793, 573 N.E.2d 1173 (6th Dist. 1989). "Not having been called to the attention of the trial court, 'the failure to demonstrate venue' may not be 'noticed' unless it was plain error affecting a substantial right." *State v. Gardner*, 42 Ohio App.3d 157, 158, 536 N.E.2d 1187 (1st Dist. 1987). Since in Ohio venue must be established beyond a reasonable doubt, like all other elements of the criminal conduct, a conviction fails if it is not proven. *Id*. Thus, it affects a substantial right and is subject to review for plain error. *Id*.

{¶8} Here, a review of the record indicates that the only evidence presented as to where the offense occurred was the testimony of the landlord that the property was located at "346 Elm." Tr. 6. There was no evidence presented as to

the village, city, township, or county where this address was located.[3] There are numerous places throughout Ohio that have this address and most are obviously not located within the jurisdiction of the trial court. The State does not argue in its scant brief that there was any other evidence whatsoever to support the finding of venue and we find none after a review of the record before this court. The evidence in the record simply is not sufficient to prove venue beyond a reasonable doubt. Therefore, the conviction is not supported by sufficient evidence and the first assignment of error is sustained. "[A] conviction based on legally insufficient evidence constitutes a denial of due process. " *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52, 678 N.E.2d 541. When a conviction is found to not be supported by sufficient evidence, jeopardy has attached and the defendant may not be retried. *Id*. at 388 (citing *Tibbs v. Florida*, 457 U.S. 31, 41-43, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982)).

{¶9} In the second assignment of error, Jackson argues that his conviction was against the manifest weight of the evidence. Having found that the conviction was not supported by sufficient evidence, this assignment of error is moot and need not be addressed by this court. App.R. 12(A)(1)(c).

[3] The only witnesses to testify for the State were the landlord and the mother of the child, who was the tenant. The State could easily have asked for a more detailed address regarding the location of the property, but failed to do so. The only other witness to testify at the trial was the defendant who also did not testify as to where the offense occurred.

{¶10} Having found error prejudicial to the appellant, the judgment of the Tiffin-Fostoria Municipal Court is reversed and the matter is remanded for entry of a judgment of dismissal.

Judgment Reversed and
Cause Remanded

SHAW and PRESTON, J.J., concur in Judgment Only.

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