[Cite as *State v. Snell*, 2003-Ohio-975.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
Plaintiff-Appellee	:	Hon. Sheila G. Farmer, J.
	:	Hon. John W. Wise, J.
-vs-	:	
	:	Case Nos. 2002CA00181
BEN SNELL	:	2002CA00190
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Canton Municipal Court, Case Nos. 2002CRB02073 & 2002CRB00496
JUDGMENT:	Affirmed in part, reversed in part and remanded
DATE OF JUDGMENT ENTRY:	March 3, 2003

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
TAMMIE M. OSLER 218 Cleveland Avenue, SW P.O. Box 24218 Canton, OH 44701-4218 Canton, OH 44702	JAMES SILVIO MANELLO 200 West Tuscarawas Street Suite 200

Farmer, J.

{¶1} On February 1, 2002 and May 14, 2002, appellant, Ben Snell, was charged with one count of domestic violence in violation of R.C. 2919.25 and one count of child endangering in violation of R.C. 2919.22, respectively. Said charges arose from an incident involving appellant's four year old son, Jalen Roby.

{¶2} A jury trial commenced on June 3, 2002. The jury found appellant guilty of child endangering and not guilty of domestic violence. By judgment entry filed June 4, 2002, the trial court sentenced appellant to one hundred eighty days in jail.

{¶3} Appellant filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶4} "APPELLANT WAS DEPRIVE OF HIS RIGHTS TO DUE PROCESS OF LAW AND A FAIR TRIAL BY THE TRIAL COURT'S REFUSAL TO INSTRUCT THE JURY THAT, TO ESTABLISH AN AFFIRMATIVE ACT OF ABUSE PURSUANT TO R.C. 2919.22(B)(1) CHILD ENDANGERING, THE STATE MUST PROVE BEYOND A REASONABLE DOUBT THAT THE APPELLANT COMMITTED AN ACT THAT INFLICTS SERIOUS PHYSICAL HARM OR CREATES A SUBSTANTIAL RISK OF SERIOUS PHYSICAL HARM TO THE HEALTH OR SAFETY OF THE CHILD IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE 1, SECTION 10 OF THE OHIO CONSTITUTION."

II

{¶5} "APPELLANT WAS DEPRIVED OF HIS RIGHTS TO A FAIR TRIAL AND DUE PROCESS OF LAW BY THE TRIAL COURT'S REFUSAL TO INSTRUCT THE JURY ON THE ISSUE OF PARENTAL DISCIPLINE IN VIOLATION OF THE FOURTEENTH

AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE 1, SECTION 10 OF THE OHIO CONSTITUTION."

III

{¶6} "THE TRIAL COURT FAILED TO PROPERLY RULE THAT THE FOUR YEAR OLD CHILD WAS NOT CAPABLE OF UNDERSTANDING HIS RESPONSIBILITY TO BE TRUTHFUL AND TO ACCURATELY RECALL AND RECOUNT THE EVENTS IN VIOLATION OF R.C. 2317.01 AND EVID.R. 601."

IV

{¶7} "THE JURY VERDICT IS AGAINST THE MANIFEST WEIGHT AND SUFFICIENCY OF THE EVIDENCE THEREBY VIOLATING THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 OF THE CONSTITUTION OF THE STATE OF OHIO."

V

{¶8} "THE MISCONDUCT OF THE PROSECUTOR IN MANIPULATING AND MISSTATING THE EVIDENCE AND IN CLOSING ARGUMENT WAS NOT HARMLESS ERROR AND SO INFECTED THE TRIAL WITH UNFAIRNESS AS TO MAKE THE APPELLANT'S CONVICTION A DENIAL OF DUE PROCESS AND A FAIR TRIAL IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, ARTICLE I, AND SECTION 10 OF THE OHIO CONSTITUTION."

VI

{¶9} "THE APPELLANT WAS DENIED A FAIR TRIAL, DUE PROCESS OF LAW AND HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED

STATES CONSTITUTION AND ARTICLE I, SECTIONS 10 AND 16 OF THE OHIO CONSTITUTION."

I, II

{¶10} Appellant claims the trial court erred in denying his two requests for specific jury instructions, an instruction on serious physical harm and recklessness and an instruction on parental discipline. We agree in part.

{¶11} Although the trial court alluded to the fact that the requested instructions were untimely (T. at 263), we find the instructions were filed in writing on June 4, 2002, prior to the jury charge. Therefore, the filing was timely pursuant to Crim.R. 30(A) which states "[a]t the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests."

{¶12} The giving of jury instructions is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *State v. Martens* (1993), 90 Ohio App.3d 338. In order to find an abuse of discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217. Jury instructions must be reviewed as a whole. *State v. Coleman* (1988), 37 Ohio St.3d 286. It is the duty of the trial court to conform the jury instructions to the evidence presented at trial. *State v. Nelson* (1973), 36 Ohio St.2d 79.

{¶13} Appellant requested an instruction on child endangering, including the definition of serious physical harm as follows:

{¶14} "Serious Physical harm. 'Serious physical harm to persons' means any of the following:

{¶15} "(1) Any mental illness or condition of such gravity as would normally require hospitalization or prolonged psychiatric treatment;

{¶16} "(2) Any physical harm which carries a substantial risk of death;

{¶17} "(3) Any physical harm which involves some permanent incapacity, whether partial or total, or which involves some temporary, substantial incapacity;

{¶18} "(4) Any physical harm which involves some permanent disfigurement, or which involves some temporary, serious disfigurement;

{¶19} "(5) Any physical harm which involves acute pain of such duration as to result in substantial suffering, or which involves any degree of prolonged or intractable pain." See, Request for Jury Instructions: Child Endangering/Recklessly filed June 4, 2002.

{¶20} Child endangering as charged in the May 14, 2002 complaint as a misdemeanor of the first degree is defined as follows in R.C. 2919.22(B)(1):

{¶21} "(B) No person shall do any of the following to a child under eighteen years of age or a mentally or physically handicapped child under twenty-one years of age:

{¶22} "(1) Abuse the child;"

{¶23} The element of serious physical harm is absent from said definition and only becomes an element of the offense when charged as a felony of the second degree. R.C. 2919.22(E)(2)(d).

{¶24} We base our analysis on the plain wording of the statute and conclude it is clear from the language "child abuse" can be something less than serious physical harm. Further, other appellate courts have found child endangering and felonious assault not to be allied offenses within the meaning of R.C. 2941.25. *State v. Anderson* (1984), 16 Ohio App.3d 251.

{¶25} We must now address whether the definition of "child abuse" given by the trial court was correct. The trial court told the jury "[a]buse means any act which causes

physical or mental injury, that harms or threatens to harm the child's health or welfare." T. at 304.

{¶26} We find the trial court properly defined child abuse by using the language of R.C. 2151.031(D) and restricting the harm to "physical or mental injury" because the offense charged was a misdemeanor. We further note that within the statute defining child abuse, R.C. 2151.031, child endangering as defined in R.C. 2919.22 is included. R.C. 2151.031(B).

{¶27} Appellant also argues the trial court erred in not giving his specific instruction on parental discipline:

{¶28} "Ordinarily, a person may not cause physical harm to another person. However, the law provides that a parent or person in loco parentis may administer corporal punishment or other physical disciplinary measure to a child. Corporal punishment means punishment of the body. A child does not have any legally protected interest which is invaded by proper and reasonable discipline. The privilege to administer corporal punishment is not without limitation. No person may administer corporal punishment or other physical disciplinary measure, or physically restrain a child in a cruel manner or for a prolonged period, which punishment, discipline, or restraint is excessive under the circumstances and creates a substantial risk of serious physical harm to the child. 'Serious physical harm' is defined in Ohio Revised Code Section 2901.01(E).

{¶29} "'Reasonable' means the degree of care that would be used by an ordinary person of sound judgment in the same or similar circumstances to avoid injury to himself or others. O.J.I. 2250.01(3)." See, Request for Jury Instruction filed June 4, 2002.

{¶30} We concur if evidence establishes the use of parental discipline, such is a defense to a charge of child endangerment. R.C. 2151.031(C); R.C. 2919.22(B)(3). The

question that remains is whether the evidence sub judice supported the request for an instruction on parental discipline.

{¶31} Appellant testified he was correcting Jalen for wetting his pants:

{¶32} "Ahh, they was in the living room, or whatever, and I made some phone calls, I was on the phone and Jalen came up to me at a point in time and said that he had to use the bathroom, and upstairs, we only have one bathroom, my father was in there taking a bath, or whatever, so I told him, he was going to have to wait for a while till my dad got out, so maybe five minutes later he comes back and he's holding himself, jumping up and down and he starts peeing on his self, so I grabbed him by the back of his shirt and I guided him to the steps and I said, go upstairs and take your clothes off, 'cause he had peed on himself, so after that, I get his clothes, I put a pair of my brother's boxer shorts on him until I got his clothes clean, or whatever, and I put 'em down in the washer.

{¶33} "***

{¶34} "Q. Did you choke him?

{¶35} "A. I grabbed him by the back of his shirt.

{¶36} "Q. Did you grab him with your hand and squeeze?

{¶37} "A. No, I did not. No I did not.

{¶38} "Q. Did you pull his shirt?

{¶39} "A. Well, when I grabbed his shirt he was doing some struggling and I maybe took five steps like that and he got to the steps and I told him to go upstairs and take his clothes off and that was it.

{¶40} "Q. Was he crying at the time?

{¶41} "A. He was more or less pouting like kinda light crying, he wasn't crying like he usually does though, 'cause I didn't, you know, grab him like with all my force and make

him burst out in tears, but I grabbed him and he started kicking, I said go upstairs and change your clothes and that was it.

{¶42} "Q. Okay, did you whoop him at that point?

{¶43} "A. Nope, not that I can recall. I know when he was going up the steps I mighta popped him on his bottom or something and made him go upstairs, but I did not do all that to him." T. at 192-193 and 200-201, respectively.

{¶44} There was considerable testimony by the child's grandmother and appellant that Jalen stated he fell out of bed during the night and/or was struck in the face with the basement door while playing with his brother. T. at 180, 193-194, 196. Appellant presented the expert testimony of Mark Feingold, M.D., who testified the child's injuries were consistent with being squeezed around the neck:

{¶45} "Q. What do those injuries suggest to you?

{¶46} "A. It looks to me like he had some showers of Petechiae from an episode of forcefully crying, wretching, vomiting, perhaps and possibly from the history that was combined with some compression of the neck, maybe both at the same time.

{¶47} "Q. Now when you say compression of the neck, what do you mean?

{¶48} "A. Just that, any squeezing around the neck, it doesn't have to be life threatening, just tight.

{¶49} "Q. Okay, grabbing someone by the collar –

{¶50} "A. That could do it.

{¶51} "Q. – and marching them forward could cause those injuries?

{¶52} "A. Right, especially if that were combined with protests from the patient who started to cry, the combination could very readily cause this sort of injury." T. at 239-240.

{¶53} The state presented the expert testimony of Richard Steiner, D.O., who testified the child's injuries were consistent with "blows to the face as well as a

strangulation injury around his neck." T. at 92. Dr. Steiner explained "the medical record indicates that there was subconjunctival hemorrhage and that coupled with the bruising on the neck leads me to conclude that the only possible way for those two injuries to occur was the strangulation, was forceful gripping of the neck." T. at 93.

{¶54} Given the conflicting evidence and the dispute between the two experts, we find the trial court should have been given the instruction on parental discipline. It is within the province of the jury alone to decide which is the credible theory or explanation.

{¶55} Assignment of Error I is denied; Assignment of Error II is granted.

III

{¶56} We will address this assignment of error as it has a direct bearing on the retrial of the case. Appellant claims the trial court erred in finding Jalen, four years old, competent to testify. We disagree.

{¶57} Evid.R. 601 governs competency. Subsection (A) states as follows:

{¶58} "Every person is competent to be a witness except:

{¶59} "(A) Those of unsound mind, and children under ten years of age, who appear incapable of receiving just impressions of the facts and transactions respecting which they are examined, or of relating them truly."

{¶60} In *State v. Frazier* (1991), 61 Ohio St.3d 247, 251, the Supreme Court of Ohio discussed the following factors for determining competency:

{¶61} "In determining whether a child under ten is competent to testify, the trial court must take into consideration (1) the child's ability to receive accurate impressions of fact or to observe acts about which he or she will testify, (2) the child's ability to recollect those impressions or observations, (3) the child's ability to communicate what was observed, (4) the child's understanding of truth and falsity and (5) the child's appreciation of his or her responsibility to be truthful."

{¶62} The trial court conducted a hearing on competency on April 9, 2002. Jalen testified he understood if you lied you went to jail (T. at 7); it was important to tell the truth (T. at 7-8, 15); if you lie you get punished (T. at 9, 19-20); and he would tell the truth when asked questions in court. T. at 15-16.

{¶63} The trial court also engaged in a dialogue with the child about his cousins, toys and schoolmates. T. at 9-14, 18-19. It is very difficult to ascertain the way Jalen was responding via a written transcript. The demeanor and attitude of the child can only be judged by the individuals who were present. The trial court did caution the mother about coaching. T. at 8.

{¶64} Based upon the responses of the child, we find the trial court did not err nor abuse its discretion in finding Jalen competent to testify.

{¶65} Assignment of Error III is denied.

IV, V, VI

{¶66} Because of our ruling in Assignment of Error II, the matter is reversed and remanded for new trial. The issues raised under these assignments of error are moot.

{¶67} The judgment of the Canton Municipal Court of Stark County, Ohio is hereby affirmed in part, reversed in part and remanded.

By Farmer, J.

Gwin, P.J. and

Wise, J. concur.

Topic: Jury instructions; child competency.