[Cite as *State v. Kohr*, 2009-Ohio-5297.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

	:	JUDGES:
STATE OF OHIO	:	Sheila G. Farmer, P.J.
	:	John W. Wise, J.
Plaintiff-Appellee	:	Julie A. Edwards, J.
	:	
-vs-	:	Case No. 2008 CA 00147
	:	
	:	
KEITH KOHR	:	O P I N I O N
Defendant-Appellant		

CHARACTER OF PROCEEDING:	Criminal Appeal from Licking County Court of Common Pleas Case No. 08 CR 128
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	October 2, 2009

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
TRACY VANWINKLE Assistant Prosecuting Attorney 20 South Second Street Fourth Floor Newark, Ohio 43055	ANDREW T. SANDERSON Burkett & Sanderson, Inc. 21 East Church Street Suite 201 Newark, Ohio 43055

Edwards, J.

{¶1} Appellant, Keith Kohr, appeals a judgment of the Licking County Common Pleas Court convicting him of three counts of endangering children in violation of R.C. 2919.22(B)(1) and three counts of endangering children in violation of R.C. 2919.22(A). Appellee is the State of Ohio.

STATEMENT OF FACTS AND CASE

{¶2} The victim [the child] is the natural daughter of appellant and M.S. [the mother]. On February 11, 2008, the mother's mother and stepfather picked up the mother and the child to take the mother to a job interview at Texas Roadhouse. The child was 28 days old at the time. While the mother was at her job interview, the grandparents and the child went to Dickey's, a restaurant across the street from Texas Roadhouse, for lunch.

{¶3} The mother and the child returned to the apartment they shared with appellant around 3:00 p.m. Later that evening, the mother called paramedics because the child was having difficulty breathing. The child was transported to Licking Memorial Hospital where Dr. Scott Jolly saw her in the emergency room. The child had been prescribed an antibiotic earlier in the week when she presented at the emergency room with cellulitis on her nose caused by a scratch from the family dog. On February 11, 2008, no history of trauma was provided by the parents and the baby was not in distress at the emergency room. She was observed for approximately 90 minutes and discharged.

{¶4} Later the same night, paramedics were again dispatched to appellant's apartment because the child was having difficulty breathing and displayed twitching on

the left side of her body. This time paramedics noted the baby was unresponsive and her eyes were rolled back in her head. She was breathing approximately eight times a minute, below the normal rate for her age of 25-40 times a minute.

{¶5} The child was again transported to Licking Memorial Hospital. On this visit she was seen by Dr. Jolly and also by Dr. Robert Seese, a pediatrician. The child was having seizures isolated to her left side. A CT scan revealed a subdural hematoma. Doctors observed an external hemorrhage of her left eye. Emergency room personnel also observed a bruise on her buttock. The injuries were consistent with a shaking episode or an impact injury. Dr. Seese notified the mother and appellant that the child would be transported to Nationwide Children's Hospital (hereinafter Children's) in Columbus, and that law enforcement and Children's Services had been notified due to the suspected intentional nature of the injuries to the child. Appellant told Dr. Seese that the family dog may have picked the child up by the nose and shaken her. According to Dr. Seese, the injuries were not consistent with being shaken by a dog because more tearing of tissue would be present had a dog picked up the baby by the soft tissue of her nose and shaken her.

{¶6} The child could not be life-flighted to Children's because of snow. She was transported by ambulance.

{¶7} At Children's, the child was diagnosed with an acute subdural hematoma, laceration of her liver and a fractured wrist. Dr. Phillip Scribano, Medical Director of the Center for Child and Family Advocacy Center at Children's, evaluated the child. He determined that the hematoma showed layering without soft tissue swelling, which is normally caused by a shaking type of mechanism. He believed the injury occurred zero

to four or five days before the child presented at the hospital. His best guess as to the timing of the bleeding on the child's brain was 24 hours prior to the time she came to the hospital. The liver laceration may have been part of a shaking episode depending on hand placement, and could have been sustained by squeezing. The broken wrist showed no signs of healing and therefore was zero to seven days old. Dr. Jonathan Gomer, a pediatric surgeon at Children's who treated the child, found her broken wrist to be a "buckle break," meaning it was more likely caused by someone pulling on an extremity rather than falling on it, particularly because, at her age, a baby will not put a hand out to stop a fall.

{¶8} Appellant was interviewed by Detective Robert Huffman of the Newark Police Department. Appellant initially offered no explanation as to how the injuries to the child might have occurred. Later he told Det. Huffman that he had dropped the child out of her swing and she landed partially on her diaper bag. The mother also reported that the child had slipped out of her hands in the bathtub and hit her head on the tub.

{¶9} Detective Huffman later supervised controlled calls between appellant and the mother. In these calls, appellant admitted to bouncing the child on his knee and squeezing her to try to get her to stop crying.

{¶10} The child was released from the hospital on February 20, 2008, into the custody of the mother's father and stepmother, where she currently resides. The child recovered from her injuries but continues to see several doctors and the long-term effects of her injuries are not yet known.

{¶11} On March 3, 2008, prior to the indictment but while incarcerated for the injuries to the child, appellant sent out what is commonly known as a "kite," asking to

speak to Detective Brock Harmon of the Licking County Sheriff's Department. Appellant admitted to Det. Harmon that on one occasion he was angry with the mother, who forgot to wake him up to look for a job, and became frustrated. He shook the child several times while screaming at her. He admitted that on another occasion he was angry because the mother kept the baby out too late and the baby did not sleep. He picked up the baby, shook her, and tossed her in her crib while screaming at her. He also admitted to squeezing the baby when he was angry with the mother. He maintained that he never intended to hurt the child.

{¶12} Appellant was indicted by the Licking County Grand Jury with three counts of endangering children in violation of R.C. 2919.22(B)(1) and three counts of endangering children in violation of R.C. 2919.22(A). The case proceeded to jury trial in the Licking County Common Pleas Court. Appellant was convicted of all charges. The court merged the three convictions of R.C. 2919.22(A) into the three convictions of R.C. 2919.22(B)(1) and sentenced appellant to two years incarceration on each of the three counts, to be served consecutively. Appellant assigns three errors in his brief:

{¶13} "I. THE DEFENDANT-APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF TRIAL COUNSEL THROUGH THE FAILURE OF TRIAL COUNSEL TO OBJECT TO THE CONTINUAL REFERENCES THROUGHOUT THE TRIAL TO A "SAFETY PLAN."

{¶14} "II. THE CONVICTIONS OF THE DEFENDANT-APPELLANT REST ON INSUFFICIENT EVIDENCE TO SUSTAIN THE SAME.

{¶15} "III. THE TRIAL COURT COMMITTED HARMFUL ERROR IN SENTENCING THE DEFENDANT-APPELLANT TO CONSECUTIVE TERMS OF IMPRISONMENT."

{¶16} On June 29, 2009, this Court granted appellant leave to supplement his brief. Appellant raises the following supplemental assignment of error:

{¶17} "IV. THE TRIAL COURT LACKED SUBJECT MATTER JURISDICTION IN THIS CASE."

I

{¶18} In his first assignment of error, appellant argues that counsel was ineffective for failing to object to repeated references to a safety plan.

{¶19} A properly licensed attorney is presumed competent. *State v. Hamblin* (1988), 37 Ohio St.3d 153, 524 N.E.2d 476. Therefore, in order to prevail on a claim of ineffective assistance of counsel, appellant must show counsel's performance fell below an objective standard of reasonable representation and but for counsel's error, the result of the proceedings would have been different. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Bradley* (1989), 42 Ohio St.3d 136. In other words, appellant must show that counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result. Id.

{¶20} The mother's mother and the child's grandmother, testified that, at Children's Hospital, the parents and grandparents agreed to sign a "safety plan" which provided that until investigators could figure out what was going on with the child, neither parent would be with the child without one of the four grandparents present in

the room. Tr. 159. The mother's stepfather testified similarly as to the safety plan. Tr. 199. The mother's father and a child abuse investigator for Children's Services also testified to the existence of the plan. Tr. 223, 385. The mother's stepmother testified that initially the plan provided that the mother and/or appellant could only be in the critical care unit with the child if one of the four grandparents were present. Tr. 375. She testified that at some point the plan changed and neither appellant nor the mother could be in the hospital. Tr. 376. Counsel for appellant did not object to any of this testimony regarding the safety plan.

{¶21} Appellant argues that this evidence provided the jury with the "stamp of approval" from the investigating authorities for appellant's guilt because it identified him as a person from whom the child needed protection. Appellant argues the evidence was irrelevant and unfairly prejudicial.

{¶22} We disagree. Appellant has not shown a reasonable probability of a change in the outcome had counsel objected to this evidence. Assuming arguendo that the evidence was irrelevant, it was not prejudicial in light of all the evidence presented in the case. The evidence of the safety plan demonstrated that the mother was also prohibited from being alone with the child during the investigation. Appellant therefore was not singled out as the only possible suspect. Appellant and the mother were the primary caretakers of the child. There was no evidence that anyone other than appellant, the mother and the mother's mother and stepfather had contact with the child during the hours immediately prior to her presentation at the hospital with traumatic injuries, and the grandparents' contact with the child took place at a public restaurant for lunch.

{¶23} Further, the jury was presented with evidence that appellant gave several explanations for the child's injuries which were rejected by medical personnel as possible causes of her injuries, and evidence that appellant eventually admitted to Detective Harmon that in anger and frustration he squeezed the child, shook her and tossed her in her crib while yelling at her. Appellant has not demonstrated that counsel was ineffective for failing to object to evidence of the safety plan.

{¶24} The first assignment of error is overruled.

II

{¶25} In his second assignment of error, appellant argues that the evidence was insufficient to convict him. Specifically, appellant argues that there is no evidence to directly identify him as the perpetrator of the offense, and the jury was therefore required to stack inference upon inference to reach the conclusion that appellant was the person who committed the acts leading to the child's injuries.

{¶26} An appellate court's function when reviewing the sufficiency of the evidence is to determine 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* (1991), 61 Ohio St. 3d 251, paragraph two of the syllabus.

{¶27} Appellant was convicted of child endangering pursuant to R.C. 2919.22(A) and (B)(1):

{¶28} "(A) No person, who is the parent, guardian, custodian, person having custody or control, or person in loco parentis of a child under eighteen years of age or a mentally or physically handicapped child under twenty-one 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. It is not a violation of a duty of care, protection, or support under this division when the parent, guardian, custodian, or person having custody or control of a child treats the physical or mental illness or defect of the child by spiritual means through prayer alone, in accordance with the tenets of a recognized religious body.

{¶29} "(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:

{¶30} "(1) Abuse the child;"

{¶31} Appellant was charged with causing serious physical harm to the child, thus elevating the degree of the offense of which he was convicted and sentenced to a second degree felony pursuant to R.C. 2919.22(E)(1)(d).

{¶32} Appellant argues that his conviction is based on an impermissible stacking of inferences. He argues that based on the known injuries, it can be inferred that the child was injured by being held and shaken, and that based on the medical evidence, it can be inferred that she was injured zero to four days prior to her presentation at the hospital. He argues that when stacked, these inferences lead to the circumstantial conclusion that appellant, who had access to the child during this time frame, committed the acts which led to her harm.

{¶33} We disagree with appellant's argument. There was direct evidence presented that he admitted to the mother in the controlled phone calls that he bounced the child and squeezed her tightly to get her to stop crying. He further admitted to Detective Harmon that he had thrown the child in the crib, squeezed her and shaken her

on several occasions when he was angry and frustrated. While he did not place a specific time frame on those acts, from his admission to committing acts of the type which the medical experts testified were the type of acts most likely to cause the specific injuries sustained by the child, the jury could find that appellant was the person who abused the child.

{¶34} The second assignment of error is overruled.

III

{¶35} Appellant argues that the court erred in sentencing him consecutively on all three convictions because they are allied offenses of similar import and there was no demonstration that the acts were committed with a separate animus.

{¶36} R.C. 2941.25 defines allied offenses of similar import:

{¶37} "(A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.

{¶38} "(B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them."

{¶39} In determining whether offenses are of similar import pursuant to R.C. 2941.25(A), courts are required to compare the elements of the offenses in the abstract without considering the evidence in the case, but are not required to find an exact alignment of the elements. *State v. Cabrales*, 118 Ohio St. 3d 54, 886 N.E. 2d 181,

2008-Ohio-1625, at syllabus 1. “Instead, if, in comparing the elements of the offenses in the abstract, the offenses are so similar that the commission of one offense will necessarily result in the commission of the other, then the offenses are allied offenses of similar import.” Id. The court then proceeds to the second part of the two-tiered test and determines whether the two crimes were committed separately or with a separate animus. Id. at 57, citing *State v. Blankenship* (1988), 38 Ohio St. 3d 116, 117. If the court finds that the crimes were committed separately or with a separate animus for each crime, the defendant may be convicted of both offenses. Id.

{¶40} Appellant was convicted and sentenced consecutively on each of three convictions of R.C. 2919.22(B)(1). Because he was convicted under the same statute for all three offenses, the offenses are clearly allied offenses of similar import and we move directly to the question of whether the crimes were committed separately or with a separate animus as to each.

{¶41} R.C. 2941.25(A) prohibits duplication of convictions where both crimes are motivated by a single purpose and where both convictions rely upon identical conduct and the same evidence. *State v. Hamblin* (August 22, 1990) Vinton App. No. 458, unreported, citing *State v. Donald* (1979), 57 Ohio St. 2d 73, 75. In any particular case, it is a question of fact whether a separate animus has been established or whether the offenses have been committed separately. *State v. Hunt* (November 24, 1982), Summit App. No. 10632, unreported. Where there is substantial evidence supporting the court’s findings, we cannot substitute our judgment for that of the judge. Id., citing *State v. Kent* (1980), 68 Ohio App. 2d 151, 154. See also *Hamblin*, supra (the record contained

sufficient evidence to support the court's ruling that the two crimes were committed with a separate animus).

{¶42} The indictment recites the language of the statute without specifying the conduct the state relies on for each of the counts. However, the Bill of Particulars provides as to the violations of R.C. 2919.22(B)(1):

{¶43} "Between the 15th day of January through the February [sic] the 12th day of February of 2008, the Defendant, on three separate occasions, did recklessly abuse the child, a child under eighteen years of ago (sic) and this abuse resulted in serious physical harm, to wit: shaking the baby in an abusive manner, squeezing the baby in an abusive manner and tossing the baby in an abusive manner, said baby being approximately a one month old baby, and said abuse resulting in serious physical harm, including but not limited to bi-lateral hemorrhages of the brain, a fractured right ulna, fractured ribs and a laceration of the liver."

{¶44} Therefore, the three counts resulted from three acts allegedly committed by appellant: squeezing, shaking and tossing. The evidence also reflects three types of serious physical harm to the child as a result of the abuse: a subdural hematoma, a fractured ulna, and a lacerated liver. Appellant admitted to Det. Harmon that on one occasion he was angry with the mother for forgetting to wake him up to look for a job and became frustrated. He shook the child several times while screaming at her. He admitted that on another occasion he was angry because the mother kept the baby out too late and the child then did not sleep. He picked up the baby, shook her and tossed her in her crib while screaming at her. He also admitted to squeezing the baby when he was angry with the mother.

{¶45} The state did not rely on the same criminal conduct to support any of the three counts of which appellant was convicted. While appellant committed several of these acts in the same time frame when he was angry, each of the three acts of tossing, squeezing and shaking the child is a separate act of abuse under R.C. 2919.22(B)(1), and the state therefore did not rely on the same conduct to support each of the three convictions.[1] There was evidence to support the court's finding that appellant committed the crimes separately. Further, there is evidence to support a finding that each of the three acts independently caused physical harm to the child. Dr. Scribano testified that the subdural hematoma was caused by a shaking mechanism. Tr. 314. He testified that the liver laceration could have been caused by squeezing the child. Tr. 324. He also testified that throwing the child into her bassinet with a degree of force that any reasonable caregiver would say is highly inappropriate for an infant could have caused her broken wrist. Tr. 327-28. There was sufficient evidence from which the court could have found that appellant committed three separate acts of child endangering, each causing serious physical harm.

{¶46} The third assignment of error is overruled.

IV

{¶47} Appellant argues that the court lacked jurisdiction over his case because the juvenile court had exclusive jurisdiction over the charges of which he was convicted. While appellant did not raise this issue in the trial court, the question of subject matter jurisdiction is so basic that it can be raised at any stage before the trial court or any

[1] The state did rely on the same conduct to support Counts 4 through 6 of the indictment alleging a violation of R.C. 2919.22(A), as it relied on to support Counts 1 through 3, and these counts were properly found to be allied to Counts 1 through 3 and merged.

appellate court, or even collaterally in subsequent and separate proceedings. *State v. Williams* (1988), 53 Ohio App.3d 1, 4.

{¶48} R.C. 2153.26(A)(6) provides:

{¶49} "(A) The juvenile court has exclusive original jurisdiction under the Revised Code as follows:

{¶50} "(6) To hear and determine all criminal cases in which an adult is charged with a violation of division (C) of section 2919.21, division (B)(1) of section 2919.22, section 2919.222, division (B) of section 2919.23, or section 2919.24 of the Revised Code, provided the charge is not included in an indictment that also charges the alleged adult offender with the commission of a felony arising out of the same actions that are the basis of the alleged violation of division (C) of section 2919.21, division (B)(1) of section 2919.22, section 2919.222, division (B) of section 2919.23, or section 2919.24 of the Revised Code;"

{¶51} Appellant concedes that he was charged with the commission of three felonies pursuant to R.C. 2919.22(A), arising out of the same actions that were the basis of the alleged violations of R.C. 2919.22(B)(1). The statute, therefore, does not confer exclusive jurisdiction on the juvenile court under the facts of this case.

{¶52} Appellant argues that because the charges pursuant to R.C. 2919.22(A) were allied offenses, "the filing of the subsection (A) offenses was merely subterfuge, a way for the State to divest the juvenile court of its rightful jurisdiction." The record does not support this contention. If the jury found the evidence did not establish beyond a reasonable doubt that appellant was the perpetrator of the abuse on the child, the jury

could have found under subsection (A) that he violated a duty of care, protection or support of the child.

{¶53} The fourth assignment of error is overruled.

{¶54} The judgment of the Licking County Court of Common Pleas is affirmed.

By: Edwards, J.

Farmer, P.J. and

Wise, J. concur

JAE/r0805

[Cite as *State v. Kohr*, 2009-Ohio-5297.]

{¶55} The fourth assignment of error is overruled.

{¶56} The judgment of the Licking County Court of Common Pleas is affirmed.

By: Edwards, J.

Farmer, P.J. and

Wise, J. concur

JAE/r0805