[Cite as *State v. Isaac*, 2016-Ohio-8249.]

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. John W. Wise, P.J.
Plaintiff - Appellee	:	Hon. Patricia A. Delaney, J.
	:	Hon. Craig R. Baldwin, J.
-vs-	:	
	:	
AMANDA ISAAC	:	Case No. 16CA19
	:	
Defendant - Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Richland County Court of Common Pleas, Case No. 2015-CR-805
JUDGMENT:	Affirmed
DATE OF JUDGMENT:	December 15, 2016

APPEARANCES:

For Plaintiff-Appellee

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Richland County Prosecuting Attorney

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For Defendant-Appellant

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Baldwin, J.

{¶1} Appellant Amanda Isaac appeals a judgment of the Richland County Common Pleas Court convicting her of two counts of endangering children (R.C. 2919.22(A)) and one count of falsification (R.C. 2921.13(A)(3)), and sentencing her to an aggregate term of 60 months incarceration. Appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} Appellant gave birth to a child on December 16, 2014. Appellant and the baby resided in Mansfield with the child's father, Benjamin Deems, and appellant's two children from a prior relationship. On December 20, 2014, Dr. Charles Shaw, a pediatrician, examined the baby and found that he was doing well. At a second checkup on December 31, 2014, the pediatrician also noted that the baby was doing well. A third checkup was scheduled for February 10, 2014.

{¶3} Appellant and Deems called Dr. Shaw's office on January 27, 2015, to report that the baby's testicles were swollen. A nurse advised them to apply ice and call back with an update. They did not call back.

{¶4} On February 5, 2015, appellant and Deems called Dr. Shaw's office to report that the baby was constipated. They did not mention that the baby's stomach was swollen. A nurse advised them to start the baby on Pedialax suppositories and pear juice.

{¶5} Deems called Dr. Shaw's office on February 10, 2015, to report that he would be late to the baby's checkup that day. The office rescheduled the appointment for February 23, 2015.

{¶6} On February 13, 2015, appellant left the baby in Deems's care when she went to work at 6:30 a.m. Later in the morning, appellant contacted Dr. Shaw's office

after Deems called her at work to report that the baby was vomiting and having difficulty breathing. Appellant was advised to take the baby to the emergency room immediately.

{¶7} Rachel Petty and Amber Litt, who were nurses at MedCentral hospital in Mansfield, observed the baby when he arrived at the emergency room. He was non-responsive, had a severely distended stomach, eyes that deviated left, a rapid heartbeat, cool extremities, labored breathing, and no bowel sounds. Dr. Gregory Escue, the emergency room doctor, believed the deviating eyes were symptoms of seizures, and ordered x-rays and a CAT scan. The emergency room staff believed the baby was at a substantial risk of death.

{¶8} The nurses and the doctor spoke with appellant regarding the baby's condition in order to diagnosis the baby and determine a course of treatment. Appellant advised all three of them that she had contacted Dr. Shaw multiple times about the baby's swollen stomach, that he attributed the swelling to constipation, and that he told her the baby was doing fine.

{¶9} The x-rays taken of the baby revealed multiple rib fractures on both sides, at various stages of healing. The CAT scan revealed a large amount of blood and fluid inside his abdomen. Because an infant's ribs are more flexible and harder to break than an adult's ribs, a significant amount of force would be required to break a baby's ribs. Therefore, Dr. Escue suspected the baby had been abused. Due to the life-threatening nature of the baby's injuries, he was transported to Akron Children's Hospital by helicopter. The amount of swelling of the baby's stomach made it difficult for the hospital staff to fit him inside the incubator used for transport.

{¶10} Wanda Witman from Richland County Children's Services came to the hospital and spoke to appellant. Appellant repeated her claims that she had contacted Dr. Shaw multiple times regarding the baby's stomach, and had been advised not to worry about him.

{¶11} Deems agreed to an interview with Detective Matthew Loughman of the Mansfield Police Department. He told the detective that while feeding the baby, the baby began choking and turning blue, and he struck the baby repeatedly in the back and abdomen after he began choking. He also stated that he had dropped the baby on several occasions. However, the multiple rib fractures were not consistent with Deems's explanation, and the baby had no visible bruises or marks.

{¶12} Det. Loughman arrested Deems on February 13, 2015, and procured a urine sample. Drug testing at the Ohio State Highway Patrol Crime Lab confirmed the presence of marijuana in an amount more than five times the legal limit under R.C. 4511.19, and the presence of oxycodone.

{¶13} Deems called appellant from the Richland County Jail on February 20, 2015, while she was visiting the baby at Akron Children's Hospital. Appellant ended the phone call when Det. Loughman arrived to speak with her and check on the baby's condition. Appellant falsely advised Det. Loughman that Deems had not contacted her.

{¶14} On March 3, 2015, Deems contacted appellant from the jail. Appellant advised Deems that she found a joint in the couch cushion when she was cleaning. Deems responded that he lost the joint before his arrest, and asked if she found his sack of marijuana hidden in one of the lights. Deems referred to himself and appellant as being "fucked up" on pills, to which appellant responded that they weren't that bad.

{¶15} Appellant was interviewed by Det. Loughman on March 9, 2015. She admitted to Loughman that she smoked marijuana, but denied taking pills.

{¶16} Deems was convicted of five counts related to his abuse of the baby, and his conviction was upheld by this Court on August 22, 2016. *State v. Deems,* 5th Dist. Richland No. 15CA101, 2016-Ohio-5608. He was sentenced to nineteen years incarceration.

{¶17} Appellant was indicted by the Richland County Grand Jury with two counts of endangering children and one count of falsification. Count One of endangering children referred to appellant violating a duty of care to the baby by leaving him in the care of Deems when she knew he used drugs. The second count of endangering children referred to appellant lying to hospital personnel about previously seeking treatment for the child's swollen stomach.

{¶18} The case proceeded to a jury trial in the Richland County Common Pleas Court. Prior to trial, appellant filed a motion in limine regarding the jail calls between appellant and Deems. Following a hearing, the court allowed portions of the telephone calls to be played, specifically including the March 3, 2015 call as it related to their discussion of their drug use.

{¶19} Following trial, appellant was convicted as charged. She was sentenced to 30 months incarceration on counts one and two of child endangering, and six months incarceration on falsification. The trial court ordered that the sentences on counts one and two run consecutively to each other and concurrently to the sentence on count three, for an aggregate term of sixty months.

{¶20} Appellant assigns three errors:

{¶21} "I. THE TRIAL COURT ERRED IN OVERRRULING THE APPELLANT'S MOTION FOR ACQUITTAL PURSUANT TO OHIO CRIMINAL RULE OF PROCEDURE RULE 29A.

{¶22} "II. THE VERDICT OF THE JURY FINDING THE APPELLANT GUILTY ON COUNT II, ENDANGERING CHILDREN WAS AGAINST THE MANFIEST WEIGHT OF THE EVIDENCE.

{¶23} "III. THE TRIAL COURT ERRED IN ADMITTING AS EVIDENCE, CALLS FROM THE RICHLAND COUNTY JAIL BETWEEN THE APPELLANT AND MR. BEN DEEMS SR."

I.

{¶24} In her first assignment of error, appellant argues that her conviction on count one of endangering children is not supported by sufficient evidence, as there was no evidence that Deems was under the influence of drugs when the incidents of abuse occurred, there was no evidence that appellant was aware of the amount of marijuana metabolite in his system when she left the baby in his care, and there was no evidence of a history of abuse between appellant and Deems.

{¶25} 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*, 61 Ohio St. 3d 259, 574 N.E.2d 492, paragraph two of the syllabus (1991).

{¶26} Appellant was convicted of endangering children in violation of R.C. 2919.22(A), which provides:

> 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.

{¶27} The existence of the culpable mental state of recklessness is an essential element of the crime of endangering children under R.C. 2919.22(A). *State v. McGee*, 79 Ohio St.3d 193, 1997-Ohio-156, 680 N.E.2d 975 (1997).

> 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. R.C. 2901.22.

{¶28} The state presented as evidence the recording of the telephone call from the jail on March 3, 2015, in which appellant discussed finding a “big ass half a joint” in

the couch, Deems admitted losing the joint the night before the baby was taken to the hospital in critical condition. Deems asked appellant if she found the sack of marijuana he had hidden in a light. Deems admitted that he and appellant were "fucked up" on pills, and appellant advised Deems that they were not that bad. Appellant stated that she would "freak the fuck out" when she smoked marijuana. During the discussion, appellant did not express surprise or anger at Deems's drug use. From this evidence, a rational trier of fact could find that appellant acted recklessly with regards to Deems's drug usage when she left the baby alone in his care.

{¶29} Appellant argues that the State failed to present evidence that Deems used drugs at the time the incident occurred. However, the evidence presented at trial showed multiple rib fractures at various stages of healing, not a single isolated incidence of abuse. Further, Deems's urine collected on the same day the baby was brought to the hospital contained more than five times the legal limit of marijuana, and tested presumptively positive for oxycodone. Because appellant worked a 6.00 a.m. to 2:30 p.m. shift, Deems served as the baby's caregiver on a daily basis, and the baby was in his care on the day he tested positive for drugs.

{¶30} Appellant also argues there was no evidence of a history of abusive or violent behavior between appellant and Deems. Det. Loughman testified that she told him there was one incident where Deems was drunk and "something happened," but she did not go into detail. Further, the medical evidence showed that the baby's rib fractures were in various stages of healing, indicating an ongoing pattern of abuse of the baby of which Deems had been convicted.

{¶31} Finally, appellant argues she did not know Deems had marijuana metabolite in his system when she left the baby in his care. However, the statute only requires that appellant act recklessly with regards to that fact. See *McGee, supra.* The evidence presented by the State of the phone conversation between appellant and Deems demonstrated that appellant knew Deems used marijuana and pills, and despite that knowledge, allowed Deems to care for the baby while she was at work. Their conversation further reflected that they abused drugs together and suffered negative effects from their drugs use.

{¶32} The judgment convicting appellant of count one of endangering children is supported by sufficient evidence. The first assignment of error is overruled.

II.

{¶33} In her second assignment of error, appellant argues that her conviction on the second count of endangering children is against the manifest weight of the evidence. She specifically argues that she was not present at the time the incident that brought the child to the emergency room occurred, and there was no evidence that she had knowledge of the child's rib fractures. She also argues there was no evidence that the statements made by her concerning the phone calls to Dr. Shaw in any way misled, delayed, or changed the way the child was treated at the emergency room.

{¶34} In determining whether a verdict is against the manifest weight of the evidence, the appellate court acts as a thirteenth juror and "in reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses, and determines whether in resolving conflicts in 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.'" *State v. Thompkins*, 78 Ohio St. 3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541, quoting *State v. Martin*, 20 Ohio App. 3d 172, 175, 485 N.E.2d 717 (1983).

{¶35} Appellant was convicted of endangering children in violation of R.C. 2919.22(A), which provides:

> 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.

{¶36} Dr. Gregory Escue and nurses Rachel Petty and Amber Litt testified that appellant told them she called Dr. Shaw's office multiple times about the baby's swollen stomach and was told the baby was fine. However, Dr. Shaw testified that his office logs all calls, and she had not contacted him regarding the baby's swollen stomach. He testified that had he been advised of the swollen stomach, he would have had the baby brought in immediately. Further, the nurses and emergency room doctor all testified that accurate medical histories are important for diagnosing and treating patients, and because the child was an infant, they relied on the information provided by appellant in treating the baby. Amber Litt testified that inaccurate information provided by the parents will change the course of treatment. She further testified that appellant's representations

that she had contacted Dr. Shaw multiple times concerning the baby's swollen stomach lowered her level of concern over his condition. From this evidence, the jury could conclude that appellant's actions in lying to medical staff created a substantial risk of harm to the baby. The jury's finding of guilty on count two of child endangering is not against the manifest weight of the evidence.

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

III.

{¶38} In her final assignment of error, appellant argues that the court erred in admitting the recorded telephone conversation between herself and Deems from March 3, 2015, as admission of the recording violated Evid. R. 403(A).

{¶39} Evidence Rule 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Pursuant to Evidence Rule 403(A), "although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury."

{¶40} The admission or exclusion of relevant evidence lies in the trial court's sound discretion. *State v. Sage,* 31 Ohio St. 3d 173, 510 N.E.2d 343 (1987). In order to find an abuse of that 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,* 5 Ohio St.3d 217, 450 N.E.2d 1140 (1983). Further, the exclusion of relevant evidence under Evid.R. 403(A) is even more of a judgment call than

determining whether the evidence has logical relevance in the first place. *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, 767 N.E.2d 216, ¶ 40 (2002).

{¶41} As discussed in our ruling on appellant's first assignment of error, count one of endangering children concerned whether appellant violated a duty of care by leaving her baby in Deems's care when she knew he used drugs. The recording demonstrated that she knew that Deems used drugs, and knew the negative effect drugs had on their behavior. In the call, she advised Deems that she found a "big ass half a joint" in the couch cushion, and he responded that he had lost the joint the night before his arrest. His statement that he lost the joint the night before was relevant to prove that he smoked marijuana the ngiht before appellant left the baby in his care to go to work at 6:00 a.m. the following morning. Deems asked appellant if she found the sack of marijuana he had hidden in a light, and he admitted that he and appellant were "fucked up" on pills. Appellant advised Deems that they were not that bad, and appellant stated that she would "freak the fuck out" when she smoked marijuana. During the discussion, appellant did not express surprise or anger at Deems's drug use. This telephone call was relevant to the issue of whether appellant violated a duty of care and created a substantial risk of harm to the baby by leaving him in Deems's care, and was probative on the issues before the trier of fact on count one of the indictment. Although evidence concerning her drug use was prejudicial to appellant, the trial court did not abuse its discretion in finding that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice.

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

{¶43} The judgment of the Richland County Common Pleas Court is affirmed. Costs are assessed to appellant.

By: Baldwin, J.

Wise, P.J. and

Delaney, J. concur.