[Cite as *State vs. Nesbitt,* 2018-Ohio-4222.]

COURT OF APPEALS
STARK 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-	:	
	:	Case No. 2017CA00234
	:	
DIANE NESBITT	:	
	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Canton Municipal Court, Case No. 2017 CRB 4607
JUDGMENT:	AFFIRMED
DATE OF JUDGMENT ENTRY:	October 15, 2018

APPEARANCES:

For Plaintiff-Appellee:	For Defendant-Appellant:
BEAU D. WENGER Canton Law Department 218 Cleveland Ave. SW Canton, OH 44702	AARON KOVALCHIK 116 Cleveland Ave. SW, Suite 808 Canton, OH 44702

Delaney, J.

{¶1} Appellant Diane Nesbitt appeals from the Judgment Entry of the Canton Municipal Court dated December 13, 2017. Appellee is the state of Ohio.

FACTS AND PROCEDURAL HISTORY

{¶2} Jane Doe, age 8, is appellant's daughter. This case arose on September 7, 2017, when Jane told her teacher about "itchy" marks on her neck. The teacher gave her permission to go to the school nurse.

{¶3} The school nurse on duty was Colleen Newell. Jane Doe's hair was in a ponytail and Newell observed bright purple marks on her neck that looked like fingerprints. Newell asked where the marks came from and Jane said she didn't know. Another nurse was present in the office and the two asked to see Jane's back. The nurses were concerned to find additional marks—"lines"—across the lower portion of Jane's back.

{¶4} Newell alerted the principal and told him what she observed required further examination of the child. Newell and the school secretary took Doe into the bathroom and Doe pulled her pants down a little. Newell observed multiple bruises, red marks, and welts on Jane's hips and buttocks. Newell testified that Jane was silent as the women observed this, until Newell asked, "What's going on?" and Jane began to cry.

{¶5} Newell did not question Jane further but left the bathroom to alert the school principal. When alone, Jane told the school secretary, Bonnie Offenberger, that her mother did this to her because she brought the wrong folder home. Jane told Offenberger her mother put her hands on Jane's neck and hit her on her bottom with a board.[1]

[1] Other witnesses described the "board" as a wooden paddle.

{¶6} Victor Johnson is the principal of Sandy Valley Elementary. Jane also told him that the marks on her neck were made by her mother because Jane didn't bring the right folder home the night before.[2] Johnson called Child Protective Services ("CPS").

{¶7} Pamela Spencer is a forensic interviewer with the Stark County Department of Job and Family Services. She interviewed Jane at the Children's Network on September 27, 2017, and the video of the interview was played at trial as appellee's Exhibit 7. Jane disclosed to Spencer that her mother held her by the neck and "smacked" her twice on her bottom.

{¶8} Dr. Nirali Patel examined Jane at Akron Children's Hospital pursuant to the school's referral for an evaluation of suspected child abuse. Dr. Patel spoke to a CPS social worker and to Jane, who stated she got in trouble over a folder and her mother held her by the neck and spanked her.

{¶9} Appellee's Exhibits 1 through 5 are photos of Jane taken by CPS. Dr. Patel testified that Jane had bruising around her left ear, neck, left buttock, and right hip. Dr. Patel was shown the photos and testified the injuries shown are consistent with the description provided by Jane. Upon cross-examination, the doctor was asked whether the injuries could be the result of a fall and responded, "You don't fall and bruise your neck."

{¶10} Deputy Von Spiegel of the Stark County Sheriff's Department was contacted by the school resource officer at Sandy Valley Elementary. Von Spiegel viewed

[2] At trial, Johnson explained that a "yellow card" was part of the school's disciplinary system; children start on green, progress to yellow if the teacher had to talk to them about a problem, and to red if the child had a "bad day." The "red folder" would have been Jane's take-home folder containing items she was supposed to bring home for the evening.

the photos and suspected physical abuse. He interviewed appellant at the Sheriff's Department when she voluntarily came in for an interview.

{¶11} The video of the interview was admitted as appellee's Exhibit 6. In the interview, appellant admitted she spanked Jane because she brought home a yellow card. Appellant stated she bent Jane over the side of the couch, and smacked her quickly twice on the buttocks with a plastic spoon. Appellant denied using a wooden paddle but admitted the family owned such a paddle which was actually a tool for stirring jambalaya. Von Spiegel confronted appellant with the photos of Jane and appellant denied making the marks on her neck. She said she smacked Jane twice on the buttocks, not on her hip or back, and denied holding Jane down by her neck.

{¶12} Jane testified at trial and said she was there "because of the marks on [her] neck." Jane claimed at first not to know how the marks appeared; she said she was at a birthday party at Chuck E. Cheese when a family member noticed the marks and asked about them. Jane then testified that she got a yellow card at school that day, and forgot her binder, and "then Mommy was giving [her] a smack." She couldn't remember why she got the yellow card but stated she usually gets a "smack" if she brings home a yellow card.

{¶13} Upon cross-examination, Jane said she loved her mother and didn't want to answer questions. She testified that her mother was upset about the yellow card and smacked her with a paddle, on her bottom, and she was squirming to avoid another "smack." Jane testified that she had red marks on the right and left sides of her neck, but she didn't remember how she got them. She didn't remember appellant touching her

neck. She also testified that she sometimes rides in a Go-Kart with her cousin. Appellee's Exhibits A through D are photos of the Go-Kart and of Jane in it, seated behind her cousin.

{¶14} Several family members testified at trial on appellant's behalf. Brittany Harton stated that the family was at a birthday party at Chuck E. Cheese and she noticed "three finger marks, like nail marks" on either side of Jane's neck. Jane told Brittany she didn't know how the marks got there, but she also said her neck itched and Brittany thought the marks were possibly from scratching. Other witnesses testified that Jane rides in the Go-Kart and wrestles on the trampoline, and that they did not notice any unusual behavior by Jane at the party.

Criminal charges, trial, conviction and acquittal

{¶15} Appellant was charged by criminal complaint with one count of domestic violence pursuant to R.C. 2919.25(A), a misdemeanor of the first degree [Count I], and one count of child endangering pursuant to R.C. 2919.22(A) and (B)(1), a misdemeanor of the first degree [Count II].

{¶16} The "to-wit" section of the domestic violence complaint states the following:

> THE SUSPECT THE MOTHER OF THE VICTIM WHILE SPANKING HER DAUGHTER WITH A WOODEN PADDLE DID LEAVE BRUISES ON THE VICTIMS (*sic*) BUTTOCKS, LOWER BACK, AND RIGHT SIDE. THE SUSPECT ALSO WHILE GRABBING THE VICTIM BEHIND HER NECK DURING THE SPANKING DID LEAVE CHOKE TYPE MARKS ON EITHER SIDE OF HER NECK. (Emphasis in original.)

{¶17} The "to-wit" section of the child endangering complaint states the following:

> THE SUSPECT THE MOTHER OF THE VICTIM WHILE DISCIPLINING FOR GETTING A YELLOW CARD AT SCHOOL DID SPANK THE VICTIM OVER THE ARM OF THE COUCH WITH A WOODEN PADDLE LEAVING BRUISES ON HER BUTTOCKS, RIGHT SIDE, AND LOWER BACK. THE SUSPECT ALSO LEFT MARKS ON EITHER SIDE OF THE VICTIMS (*sic)* NECK FROM GRABBING THAT AREA. (Emphasis in original.)

{¶18} Appellant entered pleas of not guilty and filed, e.g., motions to determine the competency of Jane Doe and to exclude the testimony of the forensic interviewer. The motions proceeded to oral hearing on December 10, 2017. Pursuant to a Judgment Entry of December 11, 2017, the trial court found Jane Doe competent to testify and took the forensic-interviewer issue under advisement to the extent that counsel could not reach an agreement on the terms of her testimony.

{¶19} The matter proceeded to trial by jury. Appellant moved for judgment of acquittal pursuant to Crim.R. 29(A) at the close of appellee's evidence and at the close of all of the evidence; the motions were overruled. Appellant was found not guilty upon Count I, domestic violence, and guilty upon Count II, child endangering. The trial court sentenced appellant to a jail term of 180 days with all but 10 suspended on the condition that appellant comply with probation terms for two years.

{¶20} Appellant appeals from the judgment entry of her conviction and sentence dated December 13, 2017.

{¶21} Appellant raises four assignments of error:

ASSIGNMENTS OF ERROR

{¶22} "I. THE TRIAL COURT ERRED WHEN IT ALLOWED APPELLANT TO BE CONVICTED OF ENDANGERING CHILDREN WHEN THE JURY RETURNED AN INCONSISTENT VERDICT FOR DOMESTIC VIOLENCE."

{¶23} "II. THE TRIAL COURT ERRED IN ALLOWING TESTIMONY OF PRIOR BAD ACTS."

{¶24} "III. APPELLANT WAS DENIED [HER] SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL."

{¶25} "IV. APPELLANT'S CONVICTION WAS AGAINST THE MANIFEST WEIGHT AND SUFFICIENCY OF THE EVIDENCE."

ANALYSIS

I.

{¶26} In her first assignment of error, appellant argues the jury's verdict was inconsistent because she was convicted of child endangering but acquitted of domestic violence, and both offenses were charged for the same conduct. We disagree.

{¶27} Appellant was convicted of one count of child endangering pursuant to R.C. 2919.22(A), which states in pertinent part:

> No person, who is the parent * * * 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.

* * * *.[3]

{¶28} Appellant was acquitted of one count of domestic violence pursuant to R.C. 2919.25(A), which states, "No person shall knowingly cause or attempt to cause physical harm to a family or household member."

{¶29} Appellant argues the verdicts were inconsistent because each charge corresponded to the same alleged conduct: holding Jane down, spanking her, and causing bruises and red marks.

{¶30} The apparent inconsistency in convicting appellant upon one count and acquitting her upon another, for the same conduct, does not create a fatally "inconsistent verdict." We have previously cited the Ohio Supreme Court's decision in *State v. Lovejoy*, 79 Ohio St.3d 440, 683 N.E.2d 1112 (1997) at paragraph one of the syllabus, holding that "several counts of an indictment containing more than one count are not interdependent and an inconsistency in a verdict does not arise out of inconsistent responses to different counts, but only arises out of inconsistent responses to the same count." *State v. Kelley*, 5th Dist. Delaware No. 2006CA00371, 2007-Ohio-6517, ¶ 24 [inconsistent responses to different counts do not create an inconsistency in the verdicts]. The instant case does not present inconsistent responses to the same count.

{¶31} The jury may well have compromised in its decision. "An inconsistent verdict may very well be a result of leniency and compromise by the jurors, rather than being caused by jury confusion." *State v. Fraley,* 5th Dist. Perry No. 03CA12, 2004-Ohio-

[3] The complaint charges appellant with one count of child endangering pursuant to R.C. 2919.22(A) and (B)(1), but we find no further reference in the record to subsection (B)(1) and the jury instructions and judgment entry of conviction reference only R.C. 2919.22(A).

4898, ¶ 15, citing *United States v. Powell*, 469 U.S. 57, 105 S.Ct. 471, 83 L.Ed.2d 461 (1984).

{¶32} The contradictory jury verdicts in the instant case do not affect the validity of appellant's conviction. In *City of Brecksville v. Malone*, 8th Dist. Cuyahoga No. 75466, 2000 WL 193232, *1 (Feb. 17, 2000), appeal not allowed, 89 Ohio St.3d 1451, 731 N.E.2d 1139 (2000), the Eighth District Court of Appeals summarized Ohio's approach to inconsistent verdicts:

> It is well settled that the validity of a conviction does not depend on consistency between verdicts on various counts of a multiple count indictment when a jury finds the defendant guilty of one or more offenses and not guilty on others even though the difference in the verdicts cannot rationally be reconciled. *United States v. Powell*, [469 U.S. 57, 105 S.Ct. 471, 83 L.Ed.2d 461 (1984)]; *Dunn v. United States*, [284 U.S. 390, 52 S.Ct. 189, 76 L.Ed. 356 (1932)]; *Browning v. State*, [120 Ohio St. 62, 165 N.E. 566 (1929)] (inconsistency does not arise out of inconsistent responses to different count, but only arises out of inconsistent responses to the same count). In declining to vacate seemingly inconsistent verdicts, the Ohio Supreme Court reasoned that the defendant received the benefit of the jury's mistake, compromise or lenity with regard to the acquittal, and it is not unreasonable for the defendant to accept the burden of the jury's conviction. *Id.*

{¶33} In the instant case, we therefore decline to vacate appellant's conviction simply because the jury acquitted her of domestic violence. See, *State v. King*, 5th Dist. Guernsey No. 09 CA 000019, 2010-Ohio-2402, ¶ 34 [inconsistent verdicts do not render conviction against manifest weight of evidence]; *State v. Norman*, 10th Dist. Franklin No. 10AP-680, 2011-Ohio-2870, ¶ 14 [defendant convicted of domestic violence but acquitted of assault, but inconsistency does not warrant reversal of conviction]; *State v. Burnett*, 5th Dist. Stark No. 2016CA00007, 2016-Ohio-7502, ¶ 18, motion for delayed appeal denied, 148 Ohio St.3d 1441, 2017-Ohio-1427, 72 N.E.3d 656, citing *State v. Gardner*, 118 Ohio St.3d 420, 2008–Ohio–2787 [verdict convicting defendant of one crime but acquitting him of another may not be disturbed merely because the two findings are irreconcilable]; see also, *State v. Wofford*, 5th Dist. Stark No. 2013CA00186, 2014-Ohio-3122, ¶ 50, appeal not allowed, 141 Ohio St.3d 1474, 2015-Ohio-554, 25 N.E.3d 1080.

{¶34} Appellant's first assignment of error is overruled.

II.

{¶35} In her second assignment of error, appellant argues the trial court erred in "allowing" testimony of prior bad acts. We disagree.

{¶36} Prior to trial, defense counsel moved to exclude any evidence of prior acts including allegations of domestic violence and/or abuse. The trial court granted the motion. When appellee's Exhibit 7--the video of the forensic interview--was played, the parties redacted references to past allegations.

{¶37} Appellant now points to the following instance in arguing the trial court improperly permitted testimony of prior bad acts during the testimony of principal Victor Johnson:

* * * *.

[PROSECUTOR]: Just continue through your day and until next (WORD INAUDIBLE).

[WITNESS]: --I mean there's a lot of the dialogue that's now missing, but [Jane] did come into my office along with Colleen Newell, the nurse. We were sitting together. She stated that the marks on her neck were—were from Mom and it was because she did not bring her folder home the night before.

[PROSECUTOR]: Okay.

[WITNESS]: She also mentioned during that time that this was not—this is not kind of—

[DEFENSE COUNSEL]: Ob-, objection, Your Honor.

THE COURT: Okay, so these statements are made by [Jane Doe], so the objection will be overruled.

[PROSECUTOR]: Please continue.

[WITNESS]: Yeah, she stated to me directly that this was not the first time that she'd had physical abuse—

[DEFENSE COUNSEL]: Objection, You Honor.

THE COURT: Yeah, the objection, um, will be sustained. Let's ask another question. Jurors to disregard the last response. And let me give you a limiting instruction. The—the—this is being shown not for the truth of the matter asserted but to show why the principal continued with the investigation. Okay, go ahead.

> [PROSECUTOR]: Um, so Mr. Johnson, barring any statements about past events * * * what then proceeded to happen? * * * *.
>
> T. II, 164-165.

{¶38} In the instant case, appellant immediately objected upon Johnson's spontaneous statement that Jane said she had been abused before. The trial court sustained the objection and immediately instructed the jury to disregard the statement. Appellant did not move for a mistrial and the trial court did not sua sponte grant a mistrial, but these circumstances do not require a mistrial.

{¶39} It was not unreasonable, arbitrary, or unconscionable for the trial court to admonish the jury to ignore the stricken testimony rather than grant a mistrial. Curative instructions are presumed to be an effective way to remedy errors that occur during trial. *State v. Treesh*, 90 Ohio St.3d 460, 480, 2001-Ohio-4, 739 N.E.2d 749. In *State v. Ahmed*,103 Ohio St.3d 27, 42, 2004-Ohio-4190, 813 N.E.2d 637, the Ohio Supreme Court noted the following in determining a trial court properly failed to sua sponte declare a mistrial:

> The determination of whether to grant a mistrial is in the discretion of the trial court. *State v. Glover*, [35 Ohio St.3d 18, 19, 517 N.E.2d 900 (1988)]; *State v. Brown*, 100 Ohio St.3d 51, 2003-Ohio-5059, 796 N.E.2d 506, ¶ 42. "[T]he trial judge is in the best position to determine whether the situation in [the] courtroom warrants the declaration of a mistrial." *Glover*, 35 Ohio St.3d at 19, 517 N.E.2d 900; see, also, *State v. Williams*, [73 Ohio St.3d 153,

167, 652 N.E.2d 721 (1995)]. This court will not second-guess such a determination absent an abuse of discretion.

{¶40} We find the same to be true here. See, *State v. Pryor*, 5th Dist. Stark No. 2013CA00016, 2013-Ohio-5693 , ¶ 48, appeal not allowed, 138 Ohio St.3d 1494, 2014-Ohio-2021, 8 N.E.3d 964. "The trial judge in this case gave a short, authoritative instruction to the jury * * * that sufficed to remedy any possible error regarding the struck testimony." *State v. Allen*, 5th Dist. Delaware No. 2009-CA-13, 2010-Ohio-4644, ¶ 250, appeal not allowed, 127 Ohio St.3d 1535, 2011-Ohio-376, 940 N.E.2d 987. "A trial jury is presumed to follow the instructions given to it by the judge." *Beckett v. Warren*, 124 Ohio St.3d 256, 2010–Ohio–4, 921 N.E.2d 624, ¶ 18.

{¶41} The trial court did not abuse its discretion in sustaining appellant's objection and giving the jury a curative instruction. Appellant's second assignment of error is overruled.

III.

{¶42} In her third assignment of error, appellant argues she received ineffective assistance of trial counsel. We disagree.

{¶43} To succeed on a claim of ineffectiveness, a defendant must satisfy a two-prong test. Initially, a defendant must show that trial counsel acted incompetently. *See*, *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984). In assessing such claims, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered

sound trial strategy.'" *Id.* at 689, citing *Michel v. Louisiana*, 350 U.S. 91, 101, 76 S.Ct. 158 (1955).

{¶44} "There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." *Strickland,* 466 U.S. at 689. The question is whether counsel acted "outside the wide range of professionally competent assistance." *Id.* at 690.

{¶45} Even if a defendant shows that counsel was incompetent, the defendant must then satisfy the second prong of the *Strickland* test. Under this "actual prejudice" prong, the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland,* 466 U.S. at 694.

{¶46} First, appellant argues defense trial counsel was ineffective in failing argue the verdicts were inconsistent and in failing to move for a mistrial upon Victor Johnson's reference to prior bad acts. In light of our disposition of appellant's first and second assignments of error, we find counsel did not err in either case because neither argument would have been successful. Where counsel had no basis to object or make a motion for mistrial, appellant has not established either deficient performance or prejudice. See*, State v. Noling*, 98 Ohio St.3d 44, 2002-Ohio-7044, 781 N.E.2d 88, ¶ 113, citing *State v. Tibbetts,* 92 Ohio St.3d 146, 155, 749 N.E.2d 226 (2001) [there is no ineffective assistance where none of the challenged statements would warrant reversal].

{¶47} Finally, appellant argues counsel was ineffective because counsel "did not let her testify at her own trial." (Appellant's brief, 11). Appellant did not testify and there is no evidence in the record supporting her claim that she wanted to testify but counsel

prevented her from doing so. "A defendant's right to remain silent is inviolate: by not testifying at his trial, a defendant is prevented from incriminating himself." *State v. Miller*, 8th Dist. Cuyahoga No. 79975, 2002 WL 472303, * 3 (March 28, 2002). Not allowing a defendant to testify, therefore, is a common defense tactic. *Id.* Allowing the defendant to testify, on the other hand, is a trial tactic taken with great caution because it opens the defendant up to cross-examination. *Id.*

{¶48} The advice provided by a criminal defense lawyer to his or her client regarding the decision to testify is "a paradigm of the type of tactical decision that cannot be challenged as evidence of ineffective assistance." *State v. Winchester*, 8th Dist. Cuyahoga No. 79739, 2002-Ohio-2130, ¶ 12, appeal not allowed, 96 Ohio St.3d 1512, 2002-Ohio-4950, 775 N.E.2d 855, citing *Hutchins v. Garrison*, 724 F.2d 1425, 1436 (C.A.4, 1983), cert. denied, 464 U.S. 1065, 104 S.Ct. 750, 79 L.Ed.2d 207 (1984) and *Jones v. Murray*, 947 F.2d 1106, 1116 (C.A.4, 1991), fn. 6; see also, *State v. Essinger*, 3rd Dist. Hancock No. 5-03-15, 2003-Ohio-6000, ¶ 41, appeal not allowed, 102 Ohio St.3d 1409, 2004-Ohio-1763, 806 N.E.2d 561.

{¶49} Appellant can point to no affirmative evidence in the record that trial counsel prevented her from testifying, or gave her erroneous advice in that regard. *State v. Scott*, 5th Dist. Stark No. 2001CA0004, 2001-Ohio-7053, *6 (Dec. 28, 2001). This fact is sufficient to defeat the claim of ineffective assistance counsel. *Id.* However, we also note pursuant to the second prong of *Strickland*, appellant cannot show there is a reasonable probability that but for counsel's alleged unprofessional errors, the result of the proceeding would have different. *Id.* Had appellant testified, we cannot discern how the

outcome of the trial would have been different in light of appellant's admissions on videotape.

{¶50} Appellant did not receive ineffective assistance of defense trial counsel and her third assignment of error is overruled.

IV.

{¶51} In her fourth assignment of error, appellant argues her conviction upon one count of child endangering is against the manifest weight and sufficiency of the evidence. We disagree.

{¶52} The legal concepts of sufficiency of the evidence and weight of the evidence are both quantitatively and qualitatively different. *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52, 678 N.E.2d 541, paragraph two of the syllabus. The standard of review for a challenge to the sufficiency of the evidence is set forth in *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991) at paragraph two of the syllabus, in which the Ohio Supreme Court held, "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."

{¶53} In determining whether a conviction is against the manifest weight of the evidence, the court of appeals functions as the "thirteenth juror," and after "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 overturned and a new trial ordered." *State v. Thompkins*, supra, 78 Ohio St.3d at 387. Reversing a conviction as being against the manifest weight of the evidence and ordering a new trial should be reserved for only the "exceptional case in which the evidence weighs heavily against the conviction." *Id.*

{¶54} Appellant was convicted upon one count of child endangering pursuant to R.C. 2919.22(A), *supra*.[4] Appellant argues appellee presented insufficient evidence that she violated a duty of care, protection, or support of Jane Doe, and "expects * * * [appellee] will rely on photos that depict injuries that were described by [Jane.]" Indeed, we have viewed the photos and find them to be compelling evidence of appellant's guilt when coupled with her own admissions on videotape.

{¶55} In *State v. Stewart,* 5th Dist. No. 2007–CA–00068, 2007-Ohio-6177, 2007 WL 4105597, ¶ 59, we noted:

> R.C. 2919.22(A) is aimed at preventing acts of omission or neglect when the breach results in a substantial risk to the health or safety of a child. See, e.g., *State v. Sammons*, [58 Ohio St.2d 460, 391 N.E.2d 713 (1979)], appeal dismissed, [444 U.S. 1008, 100 S.Ct. 655, 62 L.Ed.2d 637 (1980)]; *State v. Kamel*, [12 Ohio St.3d 306, 308, 466 N.E.2d 860 (1984)]; Committee comment to R.C. 2919.22.

[4] As stated supra in fn. 3, the complaint charges appellant with one count of child endangering pursuant to R.C. 2919.22(A) and (B)(1), but we find no further reference in the record to subsection (B)(1) and the jury instructions and judgment entry of conviction reference only R.C. 2919.22(A).

{¶56} The parties do not dispute that appellant is the mother of Jane, a minor child, and the jury could reasonably conclude that the first element of R.C. 2919.22(A) was satisfied beyond a reasonable doubt. *State v. Lewis*, 192 Ohio App.3d 153, 2011-Ohio-187, 948 N.E.2d 487, ¶ 42 (5th Dist.).

{¶57} The jury could have found the next element of R.C. 2919.22(A) satisfied. As a parent, appellant clearly had a duty to care for and protect her daughter. *Lewis*, supra at ¶ 43.

{¶58} Although not stated in R.C. 2919.22, recklessness is the culpable mental state for the crime of child endangering. *Lewis*, supra at ¶ 44, citing *State v. O'Brien*, 30 Ohio St.3d 122, 508 N.E.2d 144 (1987); additional citations omitted. Recklessness is defined in R.C. 2901.22(C): 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.

{¶59} To satisfy the second element of a violation of R.C. 2919.22(A), appellant's recklessness must create a "substantial risk" to the health and safety of the child. *Lewis*, supra at ¶ 46. A "substantial risk" is "a strong possibility, as contrasted with a remote or significant possibility, that a certain result [or circumstance] may occur * * *." R.C. 2901.01(H).

{¶60} The evidence in the instant case consists of photos of Jane Doe illustrating significant bruising to her hip, lower back, and buttocks. The evidence also includes a video of appellant admitting to law enforcement that she struck Jane in those areas, in

the manner described by Jane: over the edge of the couch. Additional photos demonstrate vivid nail gouges on Jane's neck, which appellant denies making. Whether or not the jury believed appellant caused the injuries to Jane's neck, appellant's own admissions to law enforcement, coupled with the evidence of the extent of the injuries she caused, amply demonstrate the substantial risk appellant created to Jane's health and safety.

{¶61} Our function, when reviewing the sufficiency of the evidence to support a criminal conviction, is to examine the evidence admitted at trial to determine "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." (Emphasis sic.) *Lewis*, supra, at ¶ 49, citing *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

{¶62} After viewing the evidence in the light most favorable to the prosecution, the reviewing court must determine whether this evidence, so viewed, is adequate to allow "*any* rational trier of fact [to find] the essential elements of the crime beyond a reasonable doubt." (Emphasis sic.) *Jackson,* 443 U.S. at 319.

{¶63} In the instant case, viewing the evidence in the light most favorable to appellee, we conclude that a reasonable person could have found beyond a reasonable doubt that appellant recklessly created a substantial risk to Jane's health or safety by holding her down and striking her on her hips, lower back, and buttocks strongly enough to cause the injuries documents in appellee's exhibits 1 through 5. Appellant told law enforcement she used a plastic spoon; Jane told witnesses she used a wooden paddle. Either way, the record is replete with evidence in support of appellant's conviction. We

find, therefore, that appellee met its burden of production regarding the crime of child endangering and there was sufficient evidence to support appellant's conviction.

{¶64} Appellant further argues there were inconsistencies in the testimony of several of the witnesses. The jury was free to accept or reject any and all of the evidence offered by the parties and assess the witnesses' credibility. "While the jury may take note of the inconsistencies and resolve or discount them accordingly * * * such inconsistencies do not render defendant's conviction against the manifest weight or sufficiency of the evidence." *State v. McGregor,* 5th Dist. Ashland No. 15–COA–023, 2016-Ohio-3082, ¶ 10, citing *State v. Craig,* 10th Dist. Franklin No. 99AP–739, 2000 WL 297252 (Mar. 23, 2000). Indeed, the jurors need not believe all of a witness' testimony, but may accept only portions of it as true. *Id.* Our review of the entire record reveals no significant inconsistencies or other conflicts in appellee's evidence that would demonstrate a lack of credibility of appellee's witnesses.

{¶65} As to the essential facts of the child endangering offense, Jane's testimony was corroborated by the testimony of other witnesses, including school personnel, a social worker, and a doctor. Her account was also corroborated by the physical evidence of the injuries to her neck, lower back, hip, and buttocks. Appellant thus has not shown that "a miscarriage of justice" occurred or that the jury "lost its way" when it found her guilty of child endangering.

{¶66} After reviewing the evidence, we cannot say that this is one of the exceptional cases in which the evidence weighs heavily against the convictions. The jury did not create a manifest injustice by concluding that appellant was guilty of child

endangering. The jury heard the witnesses, evaluated the evidence, and was convinced of appellant's guilt.

{¶67} Appellant's fourth assignment of error is overruled.

CONCLUSION

{¶68} Appellant's four assignments of error are overruled and the judgment of the Canton Municipal Court is affirmed.

By: Delaney, J.,

Wise, John, P.J. and

Baldwin, J., concur.