[Cite as *State v. Hickle*, 2004-Ohio-5250.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
OTTAWA COUNTY

State of Ohio — Court of Appeals No. OT-03-034

Appellee — Trial Court No. 02-CR-112

v.

Daniel A. Hickle — **DECISION AND JUDGMENT ENTRY**

Appellant — Decided: September 30, 2004

* * * * *

Mark E. Mulligan, Ottawa County Prosecuting Attorney, and
Lorrain R. Croy, Assistant Prosecuting Attorney, for appellee.

Michael W. Sandwisch, for appellant.

* * * * *

SINGER, J.

{¶ 1} This is an appeal from a judgment of conviction and sentence for involuntary manslaughter entered following a jury trial in the Ottawa County Court of Common Pleas. For the reasons that follow, we affirm.

{¶ 2} Appellant is Daniel A. Hickle. On the evening of September 19, 2002, appellant and a friend began a bout of chess and beer drinking in the Port Clinton home appellant shared with his wife and two children. The chess and drinking continued until approximately 4:00 a.m. on September 20, 2002, when a self-admittedly heavily-intoxicated appellant went to bed. His friend slept on a living room couch.

{¶ 3} Between 8:00 and 8:30 a.m., appellant's wife went to work, leaving appellant, his friend and appellant's two-year-old and nine-month-old girls asleep. According to appellant, at some point in the morning he was awaked by the children playing, but, because he had been up so late, appellant went back to sleep. Sometime after noon, appellant was reawakened by his two-year-old calling him to the bathroom. There he found his nine-month-old daughter, Chastity, face down in a bathtub full of hot water.

{¶ 4} Appellant removed Chastity from the tub and, while his friend performed CPR on the child, called 9-1-1. When emergency medical technicians responded, they found the girl severely burned and unable to breathe on her own. Chastity was eventually life-flighted to a Toledo hospital where she died two days later. The coroner concluded that the child succumbed to thermal burns that covered 90 percent of her body.

{¶ 5} On October 7, 2002, the Ottawa County Grand Jury handed down a two-count indictment, charging appellant with involuntary manslaughter and reckless homicide. Appellant pled not guilty to both counts and the matter proceeded to a jury trial. Appellant was found guilty as charged. A subsequent motion for acquittal, pursuant to Crim.R. 29, was denied.

{¶ 6} At sentencing, the trial court concluded that the two counts on which appellant was tried were crimes of similar import and sentenced appellant only on the more serious offense of involuntary manslaughter. For this offense, the court imposed a sentence of nine years imprisonment.

{¶ 7} From this judgment of conviction and sentence, appellant now brings this appeal, setting forth the following six assignments of error:

{¶ 8} "1) The failure of the State to file a Bill of Particulars, after request by the defendant, was prejudicial and denied the Defendant a fair trail.

{¶ 9} "2) The Trial Court erroneously failed to charge the jury with the proper elements of child endangering, and by improperly instructing the jury that the Defendant was responsible for the natural foreseeable consequences and the results that follow in the ordinary course of events, from the act or failure to act, all to the prejudice of the Defendant denying the Defendant a fair trail.

{¶ 10} "3) The Trial Court erred to the prejudice of the Defendant in communicating with the jury, outside the presence of the Defendant, by explaining the prior instructions and receiving additional questions from the jurors which were never communicated to the Defendant or to either counsel.

{¶ 11} "4) The Sentence imposed upon the Defendant was improper, excessive, and not supported by the evidence or the criteria required by Statute to be considered at sentencing, and thus, the sentence is contrary to law.

{¶ 12} "5) The ruling of the Trial Court denying the Defendant's Motion for Acquittal was erroneous and the verdict of the Jury was against the manifest weight of the evidence.

{¶ 13} "6) The Defendant was denied effective assistance of counsel to his prejudice and which denied the Defendant a fair trial."

I. Bill of Particulars

{¶ 14} In his first assignment of error, appellant complains that he was denied a fair trial because the state failed to respond to his request for a bill of particulars.

{¶ 15} A defendant who has requested a bill of particulars waives error by proceeding to trial without receiving the bill or requesting a continuance. *State v. Sinclair*, 2d Dist. No. 2002-CA-33, 2003-Ohio-3246, at ¶ 56; *State v. Houser* (May 30, 1996), 8th Dist. No. 69639. In this matter, there is nothing in the record to show that appellant moved to compel issuance of the bill or in any other way brought to the court's attention its omission prior to trial. Moreover, appellant has not brought to our attention what additional useful information a bill of particulars would have afforded him. Accordingly, appellant's first assignment of error is not well-taken.

Jury Instructions

{¶ 16} Appellant, in his second assignment of error, contends that he was prejudiced by two portions of the jury charge. The first involved the findings necessary to establish child endangerment, the offense predicate to involuntary manslaughter in this matter. The court instructed the jury that:

{¶ 17} "The underlying offense is endangering children. Before you can find the defendant committed the offense of endangering children, you must find beyond a reasonable doubt that on or about the 20th day of September, 2002, and in Ottawa County, Ohio, the defendant being the parent of a child, created a substantial risk to the health or safety of the child, by violating a duty of care, protection, or support."

{¶ 18} Appellant insists that because R.C. 2919.22, the statute defining child endangerment, states that, "No person, who is the parent, guardian, custodian, person

having custody or control, or person in loco parentis of a child * * *" shall do or not do certain things, the trial court erred in failing to instruct that the defendant must be both the child's parent and the person in "custody and control" of the child.

{¶ 19} Appellant cannot prevail on this issue. First, he failed to object or offer alternative language at trial. Absent plain error, a failure to object to a jury instruction during trial constitutes a waiver of any error attached to the instruction. *State v. Twyford* (2002), 94 Ohio St.3d 340, 349. Second, a fair reading of R.C. 2919.22 indicates that the list of persons enumerated in the sentence to which appellant directs our attention is intended to be read in the disjunctive. It would make no sense to require an actor to be all of the things listed. See, also, 4 Ohio Jury Instructions (2003) 518, Section 519.22(1)(A).

{¶ 20} Appellant also objects to the trial court's instruction concerning natural consequences in causation. In its written charge, the court instructed:

{¶ 21} "**CAUSE**. The state charges that the act or failure to act of the defendant caused death to Chastity Hickle. Cause is an essential element of the offense. Cause is an act or failure to act which in a natural and continuous sequence directly produces the death of another, and without which it would not have occurred.

{¶ 22} "**NATURAL CONSEQUENCES**. The defendant's responsibility is not limited to the immediate or most obvious result of the defendant's act or failure to act. The defendant is also responsible for the natural and foreseeable consequences and results that follow, in the ordinary course of events, from the act or failure to act."

{¶ 23} Similar instructions were repeated both in the written charge and the oral charge to the jury. Appellant insists that telling the jury that a defendant "is" responsible

for consequences sets up an improper presumption which shifts the burden of proof from the prosecution.

{¶ 24} Again, appellant did not object to the instruction at issue so, absent plain error, error is waived. *State v. Twyford*, supra. Moreover, in the context of the whole charge, we cannot read this instruction as appellant would have us. The section of which appellant complains does not set up a presumption, it merely explains and expands upon the section which proceeds it. Moreover, the instruction is in perfect conformity with 4 Ohio Jury Instructions (2003) 64, Section 409.55.

{¶ 25} Accordingly, appellant's second assignment of error is not well-taken.

Jury Contact

{¶ 26} During jury deliberations, on two occasions, the panel submitted written questions to the court. Both times the court met with counsel and agreed to a response. In each instance, with the express consent of appellant's counsel, the court went into the jury room to convey the response rather than call the jury back into the courtroom.

{¶ 27} On the second visit into the jury room, one of the jurors sought clarification, but the court reiterated its response to the original question.

{¶ 28} In his third assignment of error, appellant contends that the court erred by failing to obtain the consent of appellant himself to enter the jury room and that the court behaved improperly in failing to advise appellant that a second question was asked in the jury room on the second visit. In support of his argument, appellant cites *States v. Abrams* (1974), 39 Ohio St.2d 53, for the proposition that a criminal defendant has a right

to be present when, during jury deliberations, the trial judge communicates with the jury about the charge. Id. at paragraph one of the syllabus.

{¶ 29} Like most rights, the right of a defendant to be present during deliberative communications with the jury is waivable. Here, appellant's counsel expressly waived that right. Appellant presents no authority that a defendant's trial counsel cannot speak for the defendant in this regard.

{¶ 30} Moreover, with respect to the court's failure to advise counsel of the juror question it refused to answer, if there is error it is harmless error. Accordingly, appellant's third assignment of error is not well-taken.

Sentencing

{¶ 31} In his fourth assignment of error, appellant maintains that the nine-year prison term imposed upon him is excessive.

{¶ 32} Appellant was convicted of involuntary manslaughter, a first degree felony which carries a presumption of imprisonment, R.C. 2929.13(D), with allowable terms of imprisonment of between three and ten years. R.C. 2929.14(A). R.C. 2929.14(B) directs that if a court imposes imprisonment on an offender, the court, "* * * shall impose the shortest prison term authorized * * *," unless the court finds, inter alia, that such a sentence will, "* * * demean the seriousness of the offender's conduct or will not adequately protect the public from future crimes * * *." Only if the court elects to impose the maximum sentence provided by law must the court enter further findings. R.C. 2929.14(B).

{¶ 33} In this matter, the court did not impose the maximum sentence. With respect to exceeding the minimum sentence, the court found that a lesser sentence would demean the seriousness of the offense and would not adequately protect the public. Moreover, the court explained the reasoning by which it made these findings. The court's findings are supported by the record. Accordingly, appellant's fourth assignment of error is not well-taken.

Crim.R. 29

{¶ 34} Appellant insists that the state failed to prove that he was in the "custody or control" of his daughter, omitting proof of an essential element of child endangerment. Additionally, appellant asserts, there was no evidence that he expected harm to come as the consequence of his action; therefore, the state failed to prove that he acted "recklessly." The absence of proof of these elements means the trial court erred in overruling his post-verdict Crim.R. 29 motion for acquittal and that the verdict was against the weight of the evidence.

{¶ 35} Appellant confuses the weight of the evidence with the sufficiency of the evidence. In a sufficiency of the evidence analysis, the court must determine whether the evidence submitted is legally sufficient to support all of the elements of the offense charged. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386-387. Specifically, the court must determine whether the state has presented evidence which, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The test is, viewing the evidence in a light most favorable to the prosecution, could any rationale trier of fact have found the essential elements of the crime proven beyond a reasonable

doubt. Id. at 390 (Cook, J., concurring); *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus. The standard is the same for a Crim.R. 29 motion. *State v. Collins*, 6th Dist. No. H-03-022, 2004-Ohio-3160, at ¶ 15.

{¶ 36} As we noted in our discussion of appellant's second assignment of error, it is not required that the state prove that a defendant is both a "parent" and "in custody or control" of a child to satisfy the elements of the offense.

{¶ 37} As regards the recklessness element, appellant attempts to pit the court's comments during sentencing that appellant did not expect to cause harm against the jury's verdict. It is the jury's duty to determine whether a defendant acted recklessly. What the trial court states during sentencing has no effect on the verdict.

{¶ 38} Accordingly, appellant's fifth assignment of error is not well-taken.

Ineffective Assistance of Counsel

{¶ 39} In his remaining assignment of error, appellant insists that he was denied effective assistance of counsel.

{¶ 40} "A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction * * * has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. * * * Unless a defendant makes both showings, it cannot be said that the conviction * * * resulted from a breakdown in the adversary

process that renders the result unreliable." *Strickland v. Washington* (1984), 466 U.S. 668, 687. Accord *State v. Smith* (1985), 17 Ohio St.3d 98, 100.

{¶ 41} Scrutiny of counsel's performance must be deferential. *Strickland v. Washington* at 689. In Ohio, a properly licensed attorney is presumed competent and the burden of proving ineffectiveness is the defendant's. *State v. Smith*, supra. Counsel's actions which "might be considered sound trial strategy," are presumed effective. *Strickland v. Washington* at 687. "Prejudice" exists only when the lawyer's performance renders the result of the trial unreliable or the proceeding unfair. Id. Appellant must show that there exists a reasonable probability that a different verdict would have been returned but for counsel's deficiencies. See id. at 694. See, also, *State v. Lott* (1990), 51 Ohio St.3d 160, for Ohio's adoption of the *Strickland* test.

{¶ 42} In support of this assignment, appellant enumerates ten instances that he urges constitute deficient performance by trial counsel: the first four of which are the purported counsel mistakes discussed in Assignments of Error Nos. 1, 2, 3 and 5. With respect to

{¶ 43} these, although we have found many of these purported errors were waived by trial counsel's failure to object or request a particular action, we have also concluded that in each of these an objection or request would not have been substantively supported. Therefore, we cannot find deficient performance in these areas.

{¶ 44} Appellant also complains that trial counsel made statements during voir dire, in his opening statement and in his closing argument which appear to shift the burden of proof to the defendant or otherwise serve him disadvantageously.

{¶ 45} A jury is presumed to follow the instructions given to it by the trial judge. *State v. Twyford*, supra, at 365. The jury here was specifically instructed as to the correct burden of proof and advised that counsel's remarks during opening and closing were not to be considered as evidence. Appellant has presented nothing to indicate that the jury did not follow the court's instructions.

{¶ 46} Appellant also complains that his trial counsel failed to object to several pieces of damaging testimony and did not call any of the "six (6) or seven (7) witnesses" that he had indicated he would use. A failure to object to damaging testimony may indicate no more than that counsel wishes not to draw attention to such testimony. Absent evidence to the contrary, we will presume this tactic to be trial strategy. The same is true of trial counsel's decision to call or not to call trial list witnesses.

{¶ 47} Finally, appellant contends that trial counsel's failure to move to suppress statements he gave to an investigating officer constituted deficient performance.

{¶ 48} Appellant does not specifically state grounds for suppression other than a possible *Miranda v. Arizona* (1966), 384 U.S. 436, violation. *Miranda* is limited to statements derived from custodial interrogation. *State v. Williams*, 99 Ohio St.3d 493, 503, 2003-

{¶ 49} Ohio-4396, at ¶ 87-88. There is no indication that the statements which appellant now claims should have been suppressed were made in a custodial setting. Moreover, these statements are for the most part cumulative of that to which other witnesses testified. Consequently, a successful motion to suppress would have been unlikely and the statements were not unfairly prejudicial.

{¶ 50} Accordingly, appellant has failed to demonstrate that his trial counsel provided a deficient performance or that appellant was prejudiced by this performance. Appellant's remaining assignment of error is found not well-taken.

{¶ 51} On consideration whereof, the judgment of the Ottawa County Court of Common Pleas is affirmed. Costs to appellant.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4, amended 1/1/98.

Richard W. Knepper, J. _____
JUDGE

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, J. _____
CONCUR.
JUDGE