[Cite as *State v. Resor*, 2010-Ohio-397.]

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

State of Ohio — Court of Appeals No. H-08-028

Appellant — Trial Court No. CRI 20070429

v.

Jeffrey A. Resor — **DECISION AND JUDGMENT**

Appellee — Decided: February 5, 2010

* * * * *

Russell V. Leffler, Huron County Prosecuting Attorney, for appellant.

K. Ronald Bailey, for appellee.

* * * * * *

SINGER, J.

{¶ 1} This is a state's appeal from the order of the Huron County Court of Common Pleas, dismissing on double jeopardy grounds an involuntary manslaughter count after a hung jury. For the reasons that follow, we reverse.

{¶ 2} Appellee, Jeffrey A. Resor, met Gwen Herber between Christmas and New Years of 2006. Herber was a 19 year-old mother of a then 8 month-old son, Donovan

Lykins. By January 6, 2007, the two had become inseparable. According to Herber, in late February, she was beginning to move into appellee's apartment.

{¶ 3} Beginning in December 2006, and continuing through January and February 2007, Donovan experienced persistent bouts of projectile vomiting. On February 19, after one such bout, he was admitted to a hospital to remedy dehydration. He was released on February 21.

{¶ 4} On the evening of February 23, appellee and Herber brought Donovan home from a baby sitter. Herber put Donovan to bed, then went to bed herself. Appellee stayed up to watch television. According to Herber, at approximately 1:00 a.m., with Donovan in his arms, appellee awakened her, telling her that the baby had stopped breathing.

{¶ 5} The couple called 9-1-1. Emergency medical technicians responded within minutes. The medics administered oxygen and transported Donovan to a nearby hospital. From there, he was life-flighted to a children's hospital in Akron, where he would die without regaining consciousness.

{¶ 6} A pediatrician at the Akron hospital concluded that Donovan died from shaken baby syndrome. An autopsy revealed both recent and healing brain trauma and other evidence consistent with this cause of death. Appellee told police that he had shaken the baby, but only in an attempt to revive him.

{¶ 7} On April 20, 2007, the Huron County Grand Jury handed down a three count indictment, charging appellee with murder for causing a death while committing

felonious assault on February 24, 2007; involuntary manslaughter for causing a death while recklessly abusing a child on February 24, 2007; and child endangering for abusing a child "between January 6, 2007 and February 22, 2007."

{¶ 8} The matter proceeded to a lengthy jury trial, following which the jury acquitted appellee of the murder and child endangering charges, but was unable to reach a unanimous verdict on the involuntary manslaughter charge.

{¶ 9} On July 22, 2008, appellee moved to dismiss the involuntary manslaughter charge, arguing that further prosecution would constitute double jeopardy under the United States and Ohio Constitutions. When, following a hearing, the trial court granted appellee's motion, the state instituted this appeal. The state sets forth the following single assignment of error:

{¶ 10} "I. Trial court erred in dismissing count II of the indictment foreclosing a retrial on that count upon which a jury hung."

{¶ 11} The Fifth Amendment to the United States Constitution provides that no person shall, "* * * be subject for the same offence to be twice put in jeopardy of life or limb * * *." Section 10, Article I of the Ohio Constitution contains a similar prohibition. The federal and state constitutional protections are coextensive. *State v. Brewer*, 121 Ohio St.3d 202, 2009-Ohio-593, ¶ 14. The clause provides protection from a second prosecution for the same offense after an acquittal, protection against a second prosecution after a conviction and protection against multiple punishments for the same

offense. *U.S. v. DiFrancesco* (1980), 449 U.S. 117, 129, *North Carolina v. Pearce* (1969), 395 U.S. 711, 717.

{¶ 12} Ordinarily, the Double Jeopardy Clause does not bar a retrial after a mistrial, *Richardson v. U.S.* (1984), 468 U.S. 317, 323-324, or following a hung jury, id. at 324, citing *Logan v. U.S.* (1892), 144 U.S. 263, 297-298. Nevertheless, when the issue is successive prosecutions, a constitutional policy of finality accrues to the defendant's benefit. *Brown v. Ohio*, 432 U.S. 161, 165.

{¶ 13} When determining whether two offenses are sufficiently distinguishable to permit cumulative punishment, "[t]he applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Blockburger v. United States* (1932), 284 U.S. 299, 304. The same test is applied for purposes of barring successive prosecutions. *Brown*, supra, 166, citing *In re Nielsen* (1889), 131 U.S. 176, 187-188.

{¶ 14} The test focuses on the statutory elements of the two provisions, "'* * * not upon the evidence proffered in a given case.'" *State v. Zima*, 102 Ohio St.3d 61, 2004-Ohio-1807, ¶ 20, quoting *State v. Thomas* (1980), 61 Ohio St.2d 254, 259, overruled on other grounds in *State v. Crago* (1990), 53 Ohio St.3d 243. If each offense contains an element not contained in the other, they are not the "same offence" and there is no bar to successive prosecution. Id, citing *United States v. Dixon* (1993), 509 U.S. 688, 696.

{¶ 15} Count I of the indictment alleges felony murder in violation of R.C. 2903.02(B). In material part that statute provides:

{¶ 16} "No person shall cause the death of another as a proximate result of the offender's committing or attempting to commit an offense of violence that is a felony of the first or second degree * * *."

{¶ 17} The offense of violence specified is felonious assault, "* * * by knowingly causing serious physical harm to another * * *." The language tracks that found in R.C. 2903.11(A)(1).

{¶ 18} Count II alleges involuntary manslaughter in violation of R.C. 2803.04(A), which provides:

{¶ 19} "No person shall cause the death of another or the unlawful termination of another's pregnancy as a proximate result of the offender's committing or attempting to commit a felony."

{¶ 20} The felony alleged is child endangering, "* * * by recklessly torturing or cruelly abusing a child under eighteen years." This language conforms with that found in R.C. 2919.22(B)(2). Both Count I and Count II are alleged to have occurred on February 24, 2007.

{¶ 21} Count III alleges child endangering, also in violation of R.C. 2919.22(B)(2), but for the period from January 6 until February 22, 2007.

{¶ 22} The jury acquitted appellee on Counts I and III, but was unable to reach a unanimous decision on Count II. The trial court, in determining that Count II should be

dismissed because of double jeopardy stated, "[the court] placed great emphasis on the present status of Count II and Count III. As hereinbefore referred to, the jury found the Defendant not guilty of Child Endangering as charged in Count III and that Child Endangering is also the underlying offense in Count II. When the underlying offenses in Count II (no jury agreement) are the same as those in Count I (not guilty) and in Count III (not guilty) this Court must find for the Defendant in his Motion to Dismiss Count II."

{¶ 23} We fail to share the trial court's conclusion as to the significance of Count III. The acts alleged there were purported to be different than those alleged in Counts I and II and to have occurred in a time frame different than those alleged in the other two counts. There is no allegation that these prior acts contributed to the injury set forth in Counts I and II.

{¶ 24} With respect to Counts I and II, it is apparent that the mental state necessary for the commission of each offense differs from the other. Felonious assault, which underlies the felony murder count, requires an offender to knowingly inflict serious harm on another. Child endangering, the predicate to the involuntary manslaughter charge, requires only that the offender act recklessly. Moreover, child endangering requires that the victim be under age 18, while felonious assault contains no such element. Thus, each provision requires proof of a fact which the other does not and the *Blockburger* test is satisfied.

{¶ 25} Appellee insists that this is not the end of our consideration. Citing *Yeager v. United States* (2009), ___ U.S. ___, 129 S.Ct. 2360, appellee maintains that we must

also examine the counts for which he was acquitted on an issue preclusion basis. Issues of ultimate fact necessarily determined in a judgment of acquittal may not again be litigated in a second trial for a separate offense. Id. ___ U.S. ___, 129 S.Ct. 2366, citing *Ashe v. Swenson* (1970), 397 U.S. 436, 443.

{¶ 26} Count I and Count II, as elucidated in a bill of particulars, both accuse appellee of shaking Donovan Lykins, inducing the shaken baby syndrome injury that caused his death. Whether, indeed, appellee shook Donovan Lykins is an ultimate fact necessary for his acquittal, appellee argues, precluding its relitigation at a second trial. Additionally, appellee suggests that since the state failed to provide a complete transcript of the trial for us to examine this question, we must presume the regularity of the proceedings and affirm the trial court.

{¶ 27} Since resolution of the issues raised are not contingent on the trial transcript, we find no need to engage in presumptions.

{¶ 28} Appellee's argument, in essence, is premised on the "same conduct" double jeopardy exclusion set forth in *Grady v. Corbin* (1990), 495 U.S. 508. The *Grady* test provided that, "if, to establish an essential element of an offense charged in that prosecution, the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted," the second prosecution is barred. Id. at 510. *Grady*, however, was expressly overruled in *United States v. Dixon*, supra, 509 U.S. at 704; *State v. Zima*, supra, 2004-Ohio-1807, ¶ 35. To some extent, however, the "same

conduct" was resurrected in *Yeager*, supra, ___ U.S. at ___, 129 S.Ct. 2371 (Scalia, J, dissenting) as to issue preclusion.

{¶ 29} Under *Dixon*, the analysis of the *Blockburger* test is applied to the elements of the offenses and the result is conclusive. In *Yarger*, the state is barred from relitigating issues of ultimate fact necessary to arrive at an acquittal. As we have stated in this matter, under *Blockburger*, there is no double jeopardy. We also conclude that under *Yarger*, there is similarly no bar.

{¶ 30} The issue of ultimate fact that the jury had to resolve to reach an acquittal for felony murder premised on felonious assault was not whether appellee shook the baby, but whether he knowingly caused physical harm in so doing. The jury could have rationally concluded that the state failed to prove knowing physical harm, even though it proved that appellee shook the baby. Since knowingly caused harm is not an element of involuntary manslaughter with a child endangering predicate, acquittal on Count I does not preclude a retrial on the count on which the jury was unable to agree.

{¶ 31} Accordingly, the state's sole assignment of error is found well-taken.

{¶ 32} On consideration whereof, the judgment of the Huron County Court of Common Pleas is reversed. This matter is remanded to said court for further proceedings consistent with this decision. It is ordered that appellee pay court costs pursuant to App.R. 24.

JUDGMENT REVERSED.

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

Peter M. Handwork, J. _____

JUDGE

Arlene Singer, J. _____

Thomas J. Osowik, P.J. _____ JUDGE
CONCUR.

JUDGE