[Cite as *State v. English*, 2011-Ohio-6189.]

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

State of Ohio	Court of Appeals No. WD-10-051
Appellee	Trial Court No. 2009CR0418
v.	
Barbi English	**DECISION AND JUDGMENT**
Appellant	Decided: December 2, 2011

* * * * *

Paul A. Dobson, Wood County Prosecuting Attorney, Heather M. Baker and Jacqueline M. Kirian, Assistant Prosecuting Attorneys, for appellee.

Deborah Kovac Rump, for appellant.

* * * * *

SINGER, J.

{¶ 1} Appellant, Barbi English, appeals from her conviction in the Wood County Court of Common Pleas for endangering children with a specification of serious physical harm. Because we conclude that there was insufficient evidence that appellant acted recklessly, we reverse.

{¶ 2} The facts giving rise to this appeal are as follows. Appellant is the mother of a son, J.R, and a daughter, A.E. J.R. and A.E. are half-siblings. In 1996, when J.R. was

approximately 13 years old and A.E. was approximately six years old, appellant found J.R. sexually abusing A.E. Appellant reported the incident to Wood County Children's Services. She even testified against her son at his adjudication hearing for gross sexual imposition. J.R. was ultimately removed from appellant's home and placed in foster care for five years where he received sex offender treatment and counseling.

{¶ 3} Sometime after J.R. turned 18, around 2001-2002, appellant allowed J.R. to move back into her home with A.E. In 2007, A.E. alleged that J.R. had raped her in the home. Appellant was indicted for endangering children in violation of R.C. 2919.22(A) and (E)(2)(c). The indictment stated in part that appellant had violated "a duty of care, protection, or support, and the said violation resulted in serious physical harm to [A.E.]."

{¶ 4} On May 12, 2010, a jury found appellant guilty. She was sentenced to four years of community control which included a 180 day jail sentence. Appellant now appeals setting forth the following assignments of error:

{¶ 5} "I. English's conviction for child endangering is legally insufficient because the state did not prove she acted 'recklessly' and created 'a substantial risk to the health or safety of the child by violating a duty of care, protection, or support.'

{¶ 6} "II. English's conviction was against the manifest weight of the evidence thereby creating a manifest miscarriage of justice.

{¶ 7} "III. The trial court erred by admitting hearsay evidence that English's son was convicted, 2 years after the allegations in this case, for rape. And otherwise

improperly admitted prejudicial evidence that was not introduced with the proper foundation.

{¶ 8} "IV. The trial court ignored English's acquittals on 2 of the 3 charged counts, made contrary findings of fact, and otherwise abused its discretion with the sentence imposed."

{¶ 9} In her first assignment of error, appellant contends that record contains insufficient evidence to establish that she acted recklessly.

{¶ 10} "Sufficiency" of the evidence is a question of law as to whether the evidence is legally adequate to support a jury verdict as to all elements of the crime. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386. When reviewing the sufficiency of the evidence to support a criminal conviction, an appellate court must 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." *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus. A conviction that is based on legally insufficient evidence constitutes a denial of due process, and will bar a retrial. *Thompkins,* supra, at 386-387.

{¶ 11} At appellant's trial, Louise Brown testified that she was a social worker in 1996 with the Wood County Department of Human Services when J.R. was in their custody for abusing A.E. She testified that during the time she worked with him, J.R.

made "some progress" in his treatment and that appellant was sometimes unsure whether she wanted to pursue reunification with J.R. Brown identified the case plans for J.R. and the semi-annual reviews of his progress that were introduced into evidence. The documents reflected the five years he was in the agency's custody. Among other things, the documents, throughout the five years, repeatedly noted that: "[Appellant] is concerned about [J.R.'s] sisters and wants to protect them." The documents also reported that in 2000, J.R. completed a sex offender treatment program.

{¶ 12} Retired Perrysburg Township Police Officer Robert D. Gates testified that on February 26, 2007, he was called to Penta County High School to investigate an alleged sexual assault involving A.E. When he interviewed A.E. at her school, she told him she had been sexually assaulted by J.R. Gates testified that he then called appellant and asked her to take A.E. to the hospital so she could be examined by a sexual assault nurse examiner. After appellant and A.E. arrived at the hospital, A.E. refused to submit to a rape kit. Gates testified that appellant told him that A.E. did not want to see J.R. get in trouble.

{¶ 13} Officer Rachel Bernhard of the Perrysburg Township Police Department testified that in 2007, she was the school resource officer assigned to the school attended by A.E. On February 26, 2007, A.E. approached her to discuss the allegations she had made against J.R. Bernhard testified that A.E. was very upset and that she wanted the abuse to stop but she did not want J.R. to go to jail. She told Bernhard that the reason she

did not have a rape kit done when she went to the hospital was because she did not want J.R. to go to jail and because her mother, appellant, did not want her to.

{¶ 14} A.E. testified that on February 26, 2007, she wrote and signed a voluntary statement for the Perrysburg Township Police Department wherein she described years of sexual abuse at the hand of J.R. and specifically cited the date of February 24, 2007, as the last time he had sexually abused her. She testified that in February 2009, she went to the Perrysburg Township Police Department to speak with Sergeant James Gross. There, she told Sergeant Gross that the allegations she made against J.R. in 2007 were true.

{¶ 15} On cross-examination, A.E. testified that J.R. never sexually abused her and that she only accused him of it because she was mad at J.R. and she wanted him out of the house. She also testified that she did not want a rape kit done in 2007 because she had lied about being abused by J.R.

{¶ 16} Jennifer Bender, an investigator for Wood County Children's Services, identified state's exhibit No. 7 as a letter she sent to appellant on March 23, 2007. The letter indicates that Wood County Children's Services has closed the investigation of appellant's family following A.E.'s allegation of rape. In the letter, Bender recommends that the family seek counseling. She identifies the risk of A.E. remaining in appellant's home as low to moderate. She testified that she made no attempt to remove A.E. from the home based on her rape allegation.

{¶ 17} Appellant testified that in 1995, she witnessed J.R. sexually abusing A.E. As a result, she contacted children's services. She testified against him at his adjudication

hearing and he was removed from the home. Appellant agreed with his removal because she wanted to protect her daughters. She and her daughter received counseling and J.R. remained out of the home for five and one-half years. During this time, he was in foster care where he received sex offender treatment and individual counseling. While in foster care, J.R. was allowed to visit the home and there were no incidents. Appellant testified that she believed that J.R. successfully completed sex offender treatment based on the fact that her brother was granted custody of J.R. shortly before his eighteenth birthday.

{¶ 18} Appellant testified that when J.R. returned to live in her home in 2001, she believed he had been rehabilitated. As a condition to his return home, appellant required J.R. to abide by certain rules such as never entering the bathroom when someone else is in there and never entering A.E.'s or her sister's bedroom. The rules were posted on his bedroom door and on the bathroom door. She testified that from 2001 until 2007 she had no indication that J.R. had reoffended. She testified that if the girls had told her he had touched them she would have gone right to the police. She testified that when she took A.E. to the hospital in 2007, she did not advise her to forego a rape kit. She confronted J.R. regarding A.E.'s allegation and he denied it. Appellant and her husband then decided that J.R. could remain in the home. In April 2007, appellant testified that A.E. told her that the February allegation against J.R. was false. Appellant testified that she felt comfortable allowing J.R. to remain in the house because the girls were now 17 years old and it had been five and one-half years since J.R. sexually abused A.E. She also testified

that she did not believe J.R. had sexually abused A.E. in 2007 and if she did believe it was true, she would not lie to protect her son.

{¶ 19} The elements of R.C. 2919.22(A) and (E)(2)(c), endangering children, are as follows:

{¶ 20} "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. * * *

{¶ 21} "If the offender violates division (A) or (B)(1) of this section, endangering children is one of the following * * *

{¶ 22} "If the violation is a violation of division (A) of this section and results in serious physical harm to the child involved, a felony of the third degree * * *."

{¶ 23} "[T]he 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* (1997), 79 Ohio St.3d 193, 195. "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." R.C. 2901.22(C).

{¶ 24} The record in this case shows that as soon as appellant became aware, in 1996, that J.R., a thirteen year old, had abused A.E., she took action. Appellant notified the proper authorities and cooperated in J.R.'s removal from the home. The documents

detailing J.R.'s five year placement with Wood County Children Services repeatedly state that appellant wanted to protect her other children from J.R. Throughout his five year placement, J.R. was permitted short visits to appellant's home with his other siblings. There is no evidence of any abusive conduct on J.R.'s part during these visits. When appellant allowed J.R. back into the home in 2001, she believed him to be rehabilitated. She trusted "the system" to which she had relinquished her son in 1996. Nevertheless, when J.R. returned to the home, appellant instituted specific rules as to where J.R. was allowed to be in the home. Approximately six years went by before there were any allegations of abusive conduct on the part of J.R. in appellant's home. It is significant that, following an investigation into A.E.'s 2007 allegations, Wood County Children's Services declined to get involved.

{¶ 25} To reverse a conviction for insufficient evidence, we must be persuaded, after viewing all the evidence in the light most favorable to the prosecution, that no rational trier of fact could have found all the elements of the crime proved beyond a reasonable doubt. *State v. Waddy* (1992), 63 Ohio St.3d 424, 430. In deciding whether the evidence was sufficient, we neither resolve evidentiary conflicts nor assess the credibility of the witnesses, because both functions are reserved for the trier of fact. See *State v. Willard* (2001), 144 Ohio App.3d 767, 777-778.

{¶ 26} Based upon our review of the record, we conclude that there is no evidence that appellant acted with heedless indifference or that she perversely disregarded a known risk that her other children would be harmed. The documents detailing J.R.'s placement

with Wood County Children's Services list the goal of J.R.'s placement as being reunified with his family. Appellant believed that the goal had been successfully met. There were no incidents of abuse on the part of J.R. during the five years he was allowed short visits with his family and he lived in the home for six years before the allegations which led to this case were made. Accordingly, appellant's first assignment of error is found well-taken.

{¶ 27} Because of our resolution of the first assignment of error, appellant's remaining assignments of error are now moot.

{¶ 28} On consideration whereof, the judgment of the Wood County Common Pleas Court is reversed. Appellant is ordered discharged. Appellee is ordered to pay the costs of this appeal 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.

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE