

[Cite as *State v. Lee*, 2016-Ohio-649.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

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| STATE OF OHIO, |) | CASE NO. 14 MA 120 |
| |) | |
| PLAINTIFF-APPELLEE, |) | |
| |) | |
| VS. |) | OPINION |
| |) | |
| EVAN LEE, |) | |
| |) | |
| DEFENDANT-APPELLANT. |) | |

CHARACTER OF PROCEEDINGS: Criminal Appeal from the Court of
Common Pleas of Mahoning County,
Ohio
Case No. 13CR753

JUDGMENT: Affirmed.

APPEARANCES:

For Plaintiff-Appellee: Atty. Paul J. Gains
Mahoning County Prosecutor
Atty. Ralph M. Rivera
Assistant Prosecuting Attorney
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Youngstown, Ohio 44503

For Defendant-Appellant: Atty. Edward A. Czopur
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JUDGES:

Hon. Carol Ann Robb
Hon. Gene Donofrio
Hon. Mary DeGenaro

Dated: February 11, 2016

[Cite as *State v. Lee*, 2016-Ohio-649.]
ROBB, J.

{¶1} Defendant-Appellant Evan E. Lee appeals his conviction of involuntary manslaughter by the Mahoning County Common Pleas Court. Appellant argues the state failed to present sufficient evidence to support his conviction, alleging the state failed to prove what injuries caused his baby's death and when those injuries occurred. Appellant also contends that his conviction was against the manifest weight of the evidence. For the following reasons, Appellant's conviction is upheld.

STATEMENT OF THE CASE

{¶2} On May 13, 2013, Appellant was at his residence on Woodside Avenue in Youngstown, Ohio with his three-year-old son and four-month-old daughter. Just after 5:00 p.m., Appellant exited his house, yelled for help, and asked to use a phone. A man who was walking down the street stopped to assist. Appellant brought him into the house to see the baby, who did not appear to be breathing. Appellant called the children's mother and told her the baby was not breathing. After Appellant used the phone to call the mother, the man called 911 at 5:07 p.m. He did not initially speak to the dispatcher as his phone experienced some issue; the 911 dispatcher was able to reach the man after calling back twice. He reported what he saw and expressed his belief that the baby was dead.

{¶3} At that time, a woman walked over to see why Appellant was yelling for help. He told the woman his baby was not breathing. She believed he said he had been feeding the baby when she started to choke causing milk to come from her nose and mouth. (Tr. 170, 176). The woman entered the house and saw the baby in a seat (she described as a car seat or a feeder). (Tr. 171). She noticed a little blood on the child's face. (Tr. 176). She said the child was not breathing. (Tr. 181).

{¶4} The ambulance arrived within minutes of receiving the dispatch. (Tr. 51). When the paramedic alighted from the ambulance, Appellant and one or two other people were outside. (Tr. 41). Appellant began to explain the events leading to the call, but the paramedic interrupted him in order to ascertain where the child was located. (Tr. 35, 38). The paramedic found it "odd" that Appellant was not waiting outside with the baby. He noted that in the case of a choking child, they expect to see the patient "right there" when the ambulance arrives. (Tr. 34-35, 41, 49).

{¶15} Appellant led the paramedic through the house to a back room where he found the baby in her seat. (Tr. 35). The baby had no pulse and was not breathing. (Tr. 36, 46). She had a small amount of blood under her nose. (Tr. 41). Her pupils were almost fully dilated, which indicated to the paramedic that she was deceased. (Tr. 54). The paramedic carried the baby to the ambulance where he immediately applied an oxygen mask and then intubated her. He was able to get the baby breathing again and hear a pulse. (Tr. 52). The paramedic did not notice any visible marks on the baby. (Tr. 40).

{¶16} The baby was transported to the local emergency room. The emergency room's notes report no signs of trauma and disclose that Appellant reported he had a bottle propped up when the child started choking. A detective spoke to Appellant at the emergency room, and Appellant reported that the baby just started choking. (Tr. 132). Approximately an hour after arriving at the emergency room, the baby was placed on a life-flight to Akron Children's Hospital in Akron, Ohio.

{¶17} Upon viewing the inside of the baby's eyes, it was discovered that she suffered extensive retinal hemorrhaging. (Tr. 74). A CT scan of her head showed significant brain swelling from a lack of blood carrying oxygen to the brain for a critical period of time. (Tr. 68-69). The scan also showed a subdural hematoma along the cerebral cortex and in the interhemispheric fissure. (Tr. 69). The child was brain dead, and this state was declared the next day, May 14, 2013, at 12:15 p.m.

{¶18} The detective conducted a formal interview on May 15, 2013. Appellant said the baby was perfectly fine the day of her hospitalization but noted she was just getting over a cold. (5/5/13 Tr. 49). He stated that the children's mother left for her first day at a new job prior to 6:45 a.m. (5/5/13 Tr. 28, 30). He believed his sister stopped over that morning while he and the children were sleeping to drop off laundry she washed for them. (5/5/13 Tr. 28). A cousin of the children's mother stopped over around 3:00 p.m. He said that he was awake and the baby was asleep at that time. (5/5/13 Tr. 49-50).

{¶19} Appellant then decided to go to sleep as both children were sleeping. Appellant said the baby could pick up the bottle and feed herself. (5/5/13 Tr. 13). As he anticipated the baby would wake up crying, he put water in a baby bottle and

placed it next to her as she slept in her “bouncy” seat. (5/5/13 Tr. 7, 15). He slept next to her on a mattress on the floor.

{¶10} Appellant claimed that he woke to the sound of the baby choking and gagging. (5/5/13 Tr. 7). He said he lifted the baby by her arms until she was standing and held her in that position with one hand while using the other hand to pat her back. (5/5/13 Tr. 7, 15, 16). Appellant reported that he started shaking the baby because she was unresponsive and her eyes had rolled back into her head. (5/5/13 Tr. 7, 20). He did not know how hard he shook her, but he did see her head go back and forth; he explained that he was panicking and did not shake her to harm her. (5/5/13 Tr. 7, 24, 67-68).

{¶11} At that point, Appellant said he placed the baby on the mattress and started performing CPR. (5/5/13 Tr. 7, 17). He learned CPR in school but not as it related to a baby, and he expressed that he did not think he performed it correctly. (5/5/13 Tr. 17, 62). He breathed into the baby’s mouth and then pressed on her chest three times and performed this sequence three times. (5/5/13 Tr. 17). He said blood started coming out of the baby’s nose. (5/5/13 Tr. 8, 17).

{¶12} When the baby did not start breathing, he put her in her bouncy chair and went outside to get help, adding that he never left the porch. (5/5/13 Tr. 8, 30, 59). Appellant explained that he brought a man into the house to look at the baby and used the man’s phone. Appellant said he could feel the baby’s heart beating at that point but she was still not breathing. (5/5/13 Tr. 8, 59). When the detective questioned how the baby sustained a bruise around her eye, Appellant responded, “I don’t know if I bumped it. I mean, I told you I was panicking.” (5/5/13 Tr. 61).

{¶13} The detective interviewed Appellant again on July 16, 2013. Appellant initially repeated his last version of events. He then added that blood was “pouring out of” the baby’s mouth (as well as her nose) after he picked her up from her chair. (7/16/13 Tr. 5, 12-13, 22). He also added that he walked to the bathroom and the kitchen with the baby while blood was dripping from her. He said he cleaned the blood with baby wipes, so his son did not see it, and placed the wipes in a diaper and in a trash bag in the kitchen. (7/16/13 Tr. 17-18, 23, 35).

{¶14} The detective asked for an explanation of the bruise around the baby's eye, which he said jarred the brain and caused her death; he explained to Appellant that the baby did not die from choking. Appellant initially answered: he did not know what could have caused this; he did not remember if he bumped her head when he heard her choking; and it was a possibility she hit her head. (7/16/13 Tr. 12, 17, 21-22). When the detective asked what the baby would have hit her head on, Appellant answered, "More than likely on the little glass table," which he indicated had been partially overhanging her chair. (7/16/13 Tr. 23, 42). The detective obtained a photograph of the room and noted the table was not near the chair, and Appellant responded he moved the chair later so the paramedic could get through. (7/16/13 Tr. 33, 52, 56, 62, 82).

{¶15} Appellant then disclosed that when he quickly lifted the baby by her hands in order to help her, her head fell back and to the side. (7/16/13 Tr. 26, 41, 43). He believed the baby's forehead/eyebrow/eye area hit a little metal pole or bar on the side of the table. (7/16/13 Tr. 26, 41, 43, 81); (DVD at 10:56, 11:06). He could not provide more details but answered, "I just know she hit." (7/16/13 Tr. 42). He opined this must be what caused the baby to bleed. (7/16/13 Tr. 45). He insisted he did not intentionally hurt the baby or hurt her out of frustration, urging that it was an accident. (7/16/13 Tr. 28, 30).

{¶16} When the detective noted the change in the story, Appellant said he was afraid to tell them she bumped her head. (7/16/13 Tr. 27, 70). Appellant expressed he was honest at the last interview but omitted certain parts of the story. (7/16/13 Tr. 39, 50). The detective insisted that something else must have happened to cause the baby's injury, but Appellant denied the baby could have been hit in any manner other than when he hit her head on the table while trying to save her from choking. (7/16/13 Tr. 88-89, 91, 95).

{¶17} On July 25, 2013, Appellant was indicted on four counts: (1) murder as a proximate result of committing a second-degree felony offense of violence; (2) second-degree felony child endangering in violation of R.C. 2919.22(B)(1), which involves abuse of a child; (3) felonious assault; and (4) third-degree felony child endangering in violation of R.C. 2919.22(A). After a trial to the court in August of

2014, Appellant was found guilty of the fourth count of child endangering, not guilty of the other three counts, but guilty of the lesser included offense of involuntary manslaughter.

{¶18} At the bench trial, the court listened to the 911 call and Appellant's two videotaped statements. The state presented the testimony of the woman who walked over to assist, the paramedic, the detective, a physician from Akron Children's Hospital, and a forensic pathologist from the Summit County Medical Examiner's Office. The physician described bruises on the baby's jaw, cheek, eye, eyelids, forehead, chin, and lips. (Tr. 65, 83). He believed the particular pattern of eyelid bruising suffered by the baby was consistent with cases where an object was compressed against the baby's face via a forced smothering. (Tr. 80, 86).

{¶19} He discussed the CT scan results and expressed his opinion that the location of the subdural hematoma suggests its cause was non-impact, inertial trauma caused by whiplash shaking. The physician discussed that when a baby's head is shaken back and forth, bridging veins can tear causing blood to ooze along the surface of the brain and into the space between the two hemispheres. (Tr. 70-72). He stated that the characteristic appearance of a subdural hematoma caused by an external impact is that it is located under the injury, and he observed no external injury to the area above the hematoma. (Tr. 69, 93). He noted that being hit can also cause whiplash effects on the brain and pointed to the baby's forehead bruise. (Tr. 104, 108).

{¶20} The physician expressed a diagnosis of abusive head trauma and concluded: the baby was struck, as indicated by her bruises; each individual impact did not result in the subdural hematoma; smothering may have contributed to the lack of oxygen to the brain; and whiplash shaking caused the life threatening brain injury. (Tr. 84, 87-90). He pointed out that a four-month old is not mobile and thus injuries to a child of this age are of particular note. (Tr. 65). He expressed that a baby this young could not pick up a bottle and feed herself as Appellant described. (Tr. 66-67). He also opined that the baby's airway defense mechanism would prevent any drowning from drinking and that her injuries could not have been caused by choking. (Tr. 67, 73).

{¶21} The physician noted that part of his evaluation involved a probability analysis and an elimination of other causes of the subdural hematoma and the retinal hemorrhaging. (Tr. 75). He then explained why Terson's syndrome, mentioned in the report of the defense expert, was eliminated here: it is rare in infants; it involves a subarachnoid hematoma, which is deeper in the brain than a subdural hematoma; it results from an aneurysm leaking and/or rupturing; it is caused by a bleeding artery, rather than a vein and has "a clear different appearance on the CT scan." (Tr. 77-79, 99).

{¶22} The state's forensic pathologist, a deputy medical examiner with the Summit County Medical Examiner's Office, presented the results of the autopsy she performed and declared the manner of death a homicide. (Tr. 209-210). She listed bruises to the right side of the forehead, the top of the head, the left side of the head (two), under the chin, around the left eye, the left side of the chest, the right collarbone, the right upper arm, and inside of the lips (with abrasions). It appears three of the bruises to the head were not noticed by the physician.

{¶23} The state's forensic pathologist noted that it takes some time for a bruise to appear on the surface of the skin and a bruise may be non-apparent on the skin of a darkly pigmented person, which is why skin (especially that of an infant) is pulled back during autopsy. (Tr. 207-208, 245). From this procedure, the pathologist found deep bruises under the scalp and elsewhere. (Tr. 202-203, 230). The forehead bruise was described as a contusion complex that went deep into the fat layer of her scalp. (Tr. 199, 203). The bruise under the chin was very deep as it went "all the way to the bone." (Tr. 200-201). The collarbone bruise was considered shallow whereas the chest bruise was deep to the muscle. (Tr. 201-202).

{¶24} The autopsy showed severe hemorrhaging around the eyeballs. (Tr. 206-207). It also revealed bleeding on both sides of the brain, which indicated to the state's forensic pathologist that the baby's brain was shaken within the skull causing the small veins that drain the brain to snap. (Tr. 204). The autopsy report listed the cause of death as complications from blunt impacts to the head. (Tr. 221). She said the bruises appeared to have occurred contemporaneously and she could not separate them medically to say which one caused the brain injury. (Tr. 210, 233).

{¶25} The defense emphasized that the report did not list shaking as the cause. At trial, the state's forensic pathologist explained that shaking of the baby could have been a component or alone could have caused the brain injury. (Tr. 226, 228-229). She reiterated that shaking of the brain can occur from impacts as well and pointed out that the physician treating the child could not have seen all the injuries that were uncovered at the autopsy. (Tr. 229). It was noted that the absence of a skull fracture was not unusual due to the very pliable skull of an infant. (Tr. 209). She concluded that the brain injury had to be the result of an assault. (Tr. 227).

{¶26} The state's forensic pathologist expressed that even vigorous efforts at CPR or medical intervention could not have caused the baby's injuries. (Tr. 210-211). She explained that the bleeding in the brain would not have caused blood to flow from the nose or mouth as Appellant described. She pointed out that the torn frenulum (the tab of skin connecting the gum to the lip) could have caused a small amount of blood (consistent with the paramedic's statement that a small amount of blood was viewed under the nose). (Tr. 212-213).

{¶27} The state's forensic pathologist additionally declared that the baby did not die from choking and that a lack of oxygen from gagging would not cause a subdural hematoma. (Tr. 219, 241, 247). As to Terson's syndrome, the forensic pathologist stated that it described a condition where a person with a ruptured aneurysm also experienced retinal hemorrhaging. (Tr. 216). She opined that a child this young could not pick up a bottle containing liquid and hold it up, noting that she may be able to grasp a bottle against her body. (Tr. 220).

{¶28} The detective testified that, during the first interview on May 13, 2013, Appellant did not mention he was sleeping when the child started choking. (Tr. 132). The detective noted that the table was not where Appellant described it and expressed suspicion of Appellant's claim that he moved items to clear the way for the paramedics. (Tr. 134). The detective did not see blood at the scene and pointed out that Appellant did not mention cleaning up blood until the July 16, 2013 interview. (Tr. 135). He believed Appellant constructed a scenario to fit the injuries.

{¶29} After the state's case was presented, the defense filed a motion for acquittal arguing the state failed to set forth sufficient evidence for the case to

proceed. The trial court denied the motion. Appellant then testified in his own defense. He related: he was twenty-two years old; he was about to obtain a high school degree; and he has never been arrested. (Tr. 250-251). He set forth the following sequence of events: he made the baby a bottle of water and placed it next to her where she could see it as she slept in her pink chair which was positioned partially under a table; he and the children were sleeping; he woke to the baby's choking; he picked her up by her hands; he held her with her head on his chest as he patted her while she gagged; he sat her on his knee and patted her back; he saw her eyes roll back and blood come out of her nose; he panicked and shook her; he ran to the bathroom and kitchen with the child while cleaning up blood with baby wipes; blood and mucous fell from her mouth onto the kitchen floor; he went back to the bedroom and began CPR; he put the baby back in her chair; he put the baby wipes into an old diaper and threw the diaper in a trash bag in the kitchen. (Tr. 252-254, 288).

{¶30} Appellant denied striking the baby or purposely hitting her head against anything. He said he did not know if she hit her head. (Tr. 268). He claimed he fabricated the story about hitting the baby's head on the table because the police scared him and he felt he had to explain her eye injury or be charged with a crime. (Tr. 269-270). Appellant noted that although he told the detective he did not leave his porch while seeking help, he did in fact leave the porch when he approached the man with the phone. He said he called his girlfriend prior to calling 911 because he "wasn't thinking." (Tr. 264). Appellant also testified that the baby could pick up and hold a bottle to drink from it. (Tr. 266).

{¶31} The children's mother testified that Appellant sounded like he was crying when he called her. In the call, he told her the baby stopped breathing and said, "I tried." (Tr. 315). She said the baby was not prone to fussiness or crying. (Tr. 317). She also stated this was not Appellant's first time alone with the children, noting that he took the baby everywhere with him. (Tr. 316-317). She provided a photograph of the baby holding a bottle to her mouth; it was held near/against her chest. She testified the baby could not pick up the bottle but could feed herself if handed the bottle. (Tr. 318).

{¶32} Appellant's sister testified that she stopped over on the morning of the incident before the children's mother left for work. The baby was sleeping at that time. (Tr. 305). The cousin of the children's mother testified that she was the baby's godmother. She stopped at the house at 2:00 or 3:00 p.m. to change clothes. She saw Appellant putting the child to sleep. Before leaving, she kissed the baby, who was asleep in her chair. (Tr. 296). These three witnesses, joined by the maternal grandmother and the maternal uncle, testified that Appellant was patient with the children.

{¶33} The defense expert was a forensic pathologist who held the post of chief medical examiner for Allegheny County, Pennsylvania. He testified that another hypothesis for the brain injury, besides whiplash shaking of the baby or blunt force trauma to the head, was a temporary lack of oxygen from choking which he said could cause an issue with the developing dura membrane of an infant. (Tr. 333-335, 347). He described the old view of the brain as containing subdural space between the dural membrane and the arachnoid membrane and explained that it is actually a single membrane, meaning that the bleeding should be considered to have occurred within the dura itself. (Tr. 360, 367-368). He recognized veins that can rupture in the dura but said they should not be called "bridging" veins as there is not an actual subdural space. (Tr. 360). He opined that the baby's whole brain (as opposed to microscopic slides) should have been preserved for a neuropathologist to study. (Tr. 372).

{¶34} The defense expert criticized the physician's elimination of other causes, noting that the baby had an elevated white blood cell count and liver enzymes, which could have indicated a sick baby. (Tr. 337, 378-379, 414). He pointed out that retinal hemorrhaging is not necessarily caused by violent shaking. (Tr. 338). He expressed that a violent shaking would result in fractured ribs from holding the child while shaking and fractures at the end of arm bones as the arms flail during the shaking. (Tr. 339).

{¶35} He agreed that the eye bruise was caused by blunt force trauma. (Tr. 379). Most cases he has seen of blunt force trauma causing death entailed more obvious signs of trauma than in this case, describing some of the bruises here as

minor. (Tr. 341, 345). He seemed to say that the area of brain hemorrhage “did require some degree of blunt force trauma” and associated it with an area of trauma to the scalp which was half an inch across. (Tr. 357-358). He said the force required for that wound was less than being hit by a baseball bat or being thrown across a room at a wall and then described the amount of required force as minor. (Tr. 359). He later stated that the minor trauma to the head was not easily associated with the subdural hematoma. (Tr. 390).

{¶36} He agreed that the baby did not have an aneurysm as in the case of an article he attached to his report about a child with Terson’s syndrome. (Tr. 403-404). He also said that some of the injuries could be related to resuscitative efforts and noted a pattern to the mouth and chin injuries. (Tr. 346, 350, 391-392). He opined that it was not impossible to choke on water, especially if the child was sick. (Tr. 375-376).

{¶37} At the end of trial, the defense renewed the motion for a judgment of acquittal, which was overruled. (Tr. 415-416). In closing, the state proposed Appellant made up the story of blood pouring from the baby’s nose and mouth because he believed it matched the diagnosis of a brain bleed without realizing that a subdural hematoma does not cause blood to flow out of orifices. (Tr. 431). The defense responded that others saw blood under the baby’s nose. The defense also pointed out that the pathologist did not mention brain shaking in the autopsy report but testified to the theory at trial.

{¶38} The trial court found Appellant guilty of involuntary manslaughter and the predicate offense of child endangering, which merged for purposes of sentencing. Appellant was sentenced to eight years in prison for involuntary manslaughter via an August 27, 2014 sentencing entry. Appellant sets forth two assignments of error on appeal.

ASSIGNMENT OF ERROR NUMBER ONE: SUFFICIENCY

{¶39} Appellant’s first assignment of error provides:

“Appellant’s conviction was based on insufficient evidence as the State failed to prove what injury(ies) caused the death of the child and when said injury(ies) occurred.”

{¶40} A conviction based upon insufficient evidence is a denial of due process. *State v. Thompkins*, 78 Ohio St.3d 380, 386-387, 678 N.E.2d 541 (1997), citing *Tibbs v. Florida*, 457 U.S. 31, 45, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982). Sufficiency of the evidence is a question of law dealing with legal adequacy of the evidence. *Thompkins*, 78 Ohio St.3d at 386. See also *State v. Smith*, 80 Ohio St.3d 89, 113, 684 N.E.2d 668 (1997) (sufficiency of the evidence is the legal standard applied to determine whether the case may go to the jury or whether the evidence is legally sufficient as a matter of law to support the verdict.) A sufficiency review is distinct from an evaluation of the weight or persuasiveness of the evidence. *Id.*

{¶41} In viewing a sufficiency of the evidence argument, the evidence and all rational inferences to be drawn from the evidence are evaluated in the light most favorable to the prosecution. *State v. Goff*, 82 Ohio St.3d 123, 138, 694 N.E.2d 916 (1998). A conviction cannot be reversed on grounds of sufficiency unless the reviewing court determines that no rational juror could have found the elements of the offense proven beyond a reasonable doubt. *Id.* at 138.

{¶42} The pertinent elements of first-degree felony involuntary manslaughter are: causing the death of another as a proximate result of the offender's committing or attempting to commit a felony. R.C. 2903.04(A), (C). The predicate felony here is child endangering whereby a parent creates a substantial risk to the health or safety of the child by violating a duty of care, protection, or support. R.C. 2919.22(A). The offense is elevated to a felony of the third degree where the child suffers serious physical harm. R.C. 2919.22(E)(2)(c).

{¶43} The required mental state for child endangering in violation of R.C. 2919.22(A) is recklessness. *State v. McGee*, 79 Ohio St.3d 193, 195, 680 N.E.2d 975 (1997), citing R.C. 2901.21(B) (when statute does not specify culpability or plainly indicate a purpose to impose strict liability, recklessness is sufficient culpability). "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." R.C. 2901.22(C). "Substantial risk" is defined as "a strong possibility, as

contrasted with a remote or significant possibility, that a certain result may occur or that certain circumstances may exist.” R.C. 2901.01(A)(8).

{¶44} Appellant contends the state failed to prove what injuries caused the child’s death and when these injuries occurred. He argues that there is no proof that he did or failed to do anything relative to the care of the child, urging the state did not show the child was injured while in his care. Appellant believes the following findings made by the trial court on the record as to child endangering support his position that the child’s injuries did not occur under his watch:

The difficulty in these cases is that a judge in this case, or jury, is left to speculate so much as to how and when certain injuries were caused, because no one can say. I don’t know when the injury to her eye occurred. The doctors couldn’t tell me. I don’t know when that abuse occurred. The doctors could not tell me. It’s clear to the doctors, it’s clear to me that an abuse took place. I just don’t know when or where or, quite frankly, with other individuals in the house, who. (Tr. 459).

{¶45} This statement occurred at the conclusion of the court’s review of the evidence presented at trial. (Tr. 450-459). The trial court was referring to the medical opinions and the lack of direct evidence as to when injuries occurred. However, circumstantial and direct evidence possess the same probative value. *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991). Moreover, after making the above statement, the court added:

What I do know, though, beyond a reasonable doubt is that on or about May 13th of 2013, at Mahoning County, Evan Lee did, being the parent or person having custody or control over [the baby], date of birth 12/2/12, a child under 18 years of age, did recklessly create a substantial risk to the health or safety of [the baby] by violating a duty of care, protection, or support, resulting in serious physical harm to [the baby], and therefore find the defendant guilty of child endangering, endangering children in Count Four.

And I additionally find beyond a reasonable doubt in both counts that on or about the 13th day of May, 2013, and in Mahoning County,

that Evan Lee recklessly caused the death of [the baby], as a proximate result of committing endangering children in Count Four, and find the defendant guilty of a lesser included offense of involuntary manslaughter. (Tr. 459-460).

{¶46} Contrary to Appellant's suggestion, the excerpt from the trial court's findings was not a statement on the sufficiency of the evidence. In fact, the trial court had overruled two motions for acquittal, in effect finding that there was sufficient evidence as a matter of law to allow all four original charges to proceed: murder, felonious assault, child endangering by way of abuse, and child endangering by violating a duty. See Crim.R. 29(A) (motion for judgment of acquittal can be granted if the trial court finds the evidence insufficient to sustain a conviction).

{¶47} As for evidence of when the child's injuries occurred, the baby's mother testified that the child had no bruises when she left for work at 6:45 a.m. (Tr. 320). The mother's cousin testified that the baby was smiling as Appellant patted her to sleep when she stopped by briefly at 2:00 or 3:00 p.m. (Tr. 294, 296-297). She gave the child a kiss before she left. (Tr. 296). The baby was solely in Appellant's custody and control from the time the mother left until around 5:00 p.m. when the baby stopped breathing.

{¶48} The physician at Akron Children's Hospital, who is board certified in child abuse pediatrics, observed facial bruising on the child, including her jaw, cheek, eye, eyelid, forehead, chin, and lips. He did not observe an external injury correlating to the subdural hematoma and thus attributed the hematoma to a violent shaking instead of an impact. He also believed she was struck and suffered a compression injury to her face (by way of a forced smothering).

{¶49} The forensic pathologist discovered additional bruises on the child's head, including one on the top of the head and two on the left side of the head. She also reported bruises to the left side of the chest, the right collarbone, and the right upper arm. She pulled back the skin to find bruises that may not have bloomed to the skin yet and/or that were difficult to see on dark skin. She believed the impacts to the child's head caused the brain shaking that caused the hematoma and added that the brain injury was also not incompatible with a violent shaking of the baby.

{¶50} The state points out that circumstantial evidence that a person caused serious brain injuries to an infant can exist where the baby is alone with the defendant during the time when the injury was likely sustained. See, e.g., *State v. Villarreal*, 12th Dist. No. CA2004-02-035, 2005-Ohio-1924, ¶ 2-5, 22 (finding it reasonable to infer that an eleven-month-old child was injured while in the sole custody of the defendant where the mother left the defendant alone with the children on her first day of a new job from 7:30 a.m. until the child was brought to hospital with broken femur at 5:00 p.m.); *State v. Villa-Garcia*, 10th Dist. No. 03AP-384, 2004-Ohio-1409, ¶ 26 (upholding felonious assault, which requires the mental state of knowingly, as well as child endangering). “[I]t is not unusual that evidence of shaken baby syndrome may be primarily circumstantial, especially where a child is in the sole custody of one adult at the time the injuries are sustained.” *State v. Nasser*, 10th Dist. No. 02AP-1112, 2003-Ohio-5947, ¶ 73, citing *State v. Gulertekin*, 10th Dist. No. 97APA12-1607 (Dec. 3, 1998) (sufficient circumstantial evidence to support conviction of child endangering where an infant suffered injuries consistent with shaken baby syndrome while entrusted to the defendant's care) and *State v. Williams*, 10th Dist. No. 91AP-653 (Mar. 5, 1992) (sufficient circumstantial evidence to support child endangering conviction where there was expert testimony that an infant was injured as a result of abuse and where the defendant was the primary caretaker for the infant immediately before infant's injuries manifested). See also *State v. Woodson*, 8th Dist. No. 85727, 2005-Ohio-5691, ¶ 53 (citing the latter two cases for this premise).

{¶51} Here, the evidence permits a reasonable inference that the child suffered life-threatening injuries after the mother left for work while in Appellant's sole care. Bruises were not observed on the child upon arrival at the local emergency room but appeared after the child reached Akron. They were more evident during autopsy. A subdural hematoma was present with significant brain swelling that caused a lack of oxygen to the brain. Retinal hemorrhaging was extensive and multilayer. The subdural hematoma and its accompanying retinal hemorrhage was said to be the result of abuse with the mechanism being a shaken brain, either from a person violently shaking the baby and/or from one or more impacts to the head

causing the brain to shake against the brain case. Appellant was the sole adult responsible for her care for more than ten hours prior to her cessation of breathing and the sole adult who held the child during that time. (There was a three-year-old child in Appellant's care as well.)

{¶52} Notably, in upholding the reckless child endangering and involuntary manslaughter charges, we need not find Appellant intended an injury or even that he was aware his conduct would probably cause a certain result. See R.C. 2901.22(B) (knowingly includes being aware conduct will probably cause a certain result). Rather, the reckless mental state involves a heedless indifference to the consequences where the defendant disregards a substantial and unjustifiable risk. See R.C. 2901.22(C). As with any other element, recklessness can be established by circumstantial evidence. See *State v. Hatfield*, 121 Ohio St.3d 1201, 2009-Ohio-353, 901 N.E.2d 813, ¶ 19–24.

{¶53} Besides the reasonable inferences to be drawn from the testimony outlined supra, Appellant provided police with evidence as to the injuries. He told police the chair she slept in was partially under a glass table. He said he heard the baby choking while she was drinking from her bottle so he quickly picked her up by her arms causing her head to fall back and to hit a metal bar on a glass table. Although he testified at trial that he made this part up at the last interview because police were pressing for an explanation for the bruise on the child's eye, this recantation claim deals with credibility, not sufficiency, of the evidence. Appellant also reported to police in both recorded interviews that he shook the baby causing her head to shake back and forth a few times. He said that he did this because, during her alleged choking and bleeding, the child's eyes rolled back in her head, i.e. he was trying to help her by shaking her. The latter statement also involves weight and credibility rather than sufficiency.

{¶54} Viewing all of the state's evidence and the rational inferences that can be drawn from the evidence in the light most favorable to the prosecution, a reasonable trier of fact could find the essential elements proven beyond a reasonable doubt. One could rationally conclude that Appellant created a substantial risk to the health or safety of his child by violating a duty of care, protection, or support and the

child's death was proximately caused thereby. See R.C. 2919.22(A), (E)(2)(c); R.C. 2903.04(A). It cannot be said that the evidence is insufficient as a matter of law to support a conviction of child endangering for violating a duty and involuntary manslaughter as a result thereof. This assignment of error is overruled.

ASSIGNMENT OF ERROR NUMBER TWO: WEIGHT

{¶155} Appellant's second assignment of error contends:

"Appellant's conviction was against the manifest weight of the evidence thereby requiring reversal."

{¶156} Weight of the evidence deals with the inclination of the greater amount of credible evidence to support one side of the issue over the other. *Thompkins*, 78 Ohio St.3d at 387. The concept is not a question of mathematics but deals with the effect of the evidence in inducing belief. *Id.* In reviewing a manifest weight of the evidence argument, the reviewing court examines 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 trier of fact clearly lost its way and created such a manifest miscarriage of justice that a new trial must be ordered. *Id.*

{¶157} The fact-finder is given less deference in a criminal case than in a civil case. *State v. Wilson*, 113 Ohio St.3d 382, 388, 2007-Ohio-2202, 865 N.E.2d 1264, ¶ 26. In either case, however, the fact-finder is best able to weigh the evidence and judge the credibility of witnesses by viewing their demeanor, voice inflections, eye movements, and gestures. See, e.g., *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1994). Reversal of a criminal conviction on weight of the evidence grounds can be ordered only in exceptional circumstances. *Thompkins*, 78 Ohio St.3d at 387. We therefore generally proceed under the theory that when there are two conflicting but fairly reasonable versions of events, we refrain from adjudicating which version we believe is most credible. *State v. Gore*, 131 Ohio App.3d 197, 201, 722 N.E.2d 125 (7th Dist.1999).

{¶158} Appellant incorporates the factual arguments from his prior assignment of error, urging that the weight of the evidence does not support a finding that the child was injured while he cared for her. He contends that the greater weight of the

evidence supports a finding that the child's death was not the result of any action or inaction by him. He complains the state's experts could not agree if the child's brain injury was caused by blunt force trauma or shaken baby syndrome. He notes that the defense expert proposed a third hypothetical cause and concluded the cause of death should be considered undetermined.

{¶159} Appellant testified at trial. The trial judge occupied the best position to judge his credibility. He said he panicked when his baby seemed to be choking on water. He claimed to have left a baby bottle next to the child so that she could pick it up herself and drink from it if she awoke. In the first recorded interview, he told police that blood was coming from the baby's nose after he tried to stop her choking. In the second recorded interview, he said blood was pouring from the baby's mouth and nose just after he first picked her up. Appellant testified that he cleaned the blood up during the chaos (and later while awaiting the paramedic). (Tr. 253-254). He also told police he quickly picked the baby up by her hands, causing her head to drop back and hit a metal bar on a glass table. He said he had the baby sleeping in a bouncy chair that was located partially under the glass table. At trial, he recanted the portion of his statement that he caused the baby to hit her head when he picked her up.

{¶160} Appellant testified that when the child's eyes seemed to roll back in her head, he began shaking her. He believed he shook her a few times, causing her head to loll back and forth. (Tr. 258). He said he performed CPR with breathing and chest compressions. It was suggested that his unfamiliarity with performing CPR on an infant could have caused some of the bruises discovered on the child. It was also suggested that intubation and other life-saving efforts could have caused some of the bruises. The defense expert believed the mouth and chin injuries showed a pattern that could be related to a medical device. (Tr. 346, 350, 392).

{¶161} The state's forensic pathologist did not believe those injuries were caused by intubation. (Tr. 218, 246-247). She stated the injuries were too severe to have occurred from even vigorous attempts at CPR. (Tr. 210-211). She and the physician from Akron Children's Hospital testified that the child had been abused and that the abuse caused her death. Both saw evidence of physical external trauma to

the child in the form of bruises; the state's forensic pathologist discovered more bruises than were observed by the physician due to the nature of an autopsy. It was emphasized how important bruises are to the evaluation of the case of a four-month-old infant as such a child is not yet mobile.

{¶62} Both of the state's experts agreed the baby's brain showed evidence that it had experienced a shaking. The physician believed this was due to the baby herself being shaken. The forensic pathologist reported that this was due to blunt force impacts to the child's head which caused the brain to bounce in the skull. At trial, she stated that the brain injury could also have been caused by a whiplash shaking of the baby. (Tr. 229).

{¶63} The defense expert did not believe the bruises on the child's head would have taken much force to produce and said they would not have caused the subdural hematoma. (Tr. 341, 390, 412). He introduced a theory of Terson's syndrome but admitted the child did not have an aneurysm, which the state's expert had explained was a component of Terson's syndrome. (Tr. 217, 402-404). The defense expert urged that retinal hemorrhaging was secondary to the subdural hematoma and thus does not itself suggest a shaken baby. (Tr. 338, 400). The state's forensic pathologist agreed that retinal hemorrhaging can have other causes. (Tr. 217).

{¶64} The defense expert proposed a hypothesis that he did not believe was sufficiently ruled out here. He stated there is a theory that a subdural hematoma could be caused by a lack of oxygen due to the developing nature of an infant's dura. (Tr. 334-335, 347). He proposed the original lack of oxygen could have been due to the child being sick, pointing to her elevated white blood cell count, and choking on water. (Tr. 333, 337, 375-376). Yet, the state's forensic pathologist stated a lack of oxygen would not cause a subdural hematoma. (Tr. 247).

{¶65} The court found Appellant not guilty of felonious assault, abusive child endangering, and felony murder. The court convicted Appellant of child endangering (by violating a duty) and involuntary manslaughter (finding the death proximately resulted from the child endangering). The trial court's weighing of the expert opinions did not demonstrate the court lost its way and created a manifest miscarriage of

justice. The infant had various external injuries, and the weight of the evidence supports a finding that they occurred during Appellant's sole care of the child. Likewise, the evidence supports finding that the subdural hematoma occurred while he was the sole adult in control of the infant and that the injury was caused by abusive head injury that shook the baby's brain. See, e.g., *Villarreal*, 12th Dist. No. CA2004-02-035 at ¶ 28-33; *Villa-Garcia*, 10th Dist. No. 03AP-384 at ¶ 29.

{¶66} In fact, Appellant admits he shook the baby. Appellant claims he did so to help her, but this contention does not eliminate a fact-finder's ability to find him reckless in the care of his child. See *State v. Harmon*, 9th Dist. No. 21384, 2003-Ohio-4153, ¶ 10 (felonious assault and child endangering convictions were not against the weight of the evidence where the defendant admitted he shook the baby but argued her injuries could not have occurred during the period of time he was caring for her). Likewise, the trial court could place varying degrees of weight and significance on his testimonial recantation of the statement to police that he hit the baby's forehead/eye area on a metal part of a glass table while yanking her up by the hands or arms. In addition, Appellant's statement that he cleaned up blood that poured from the baby's nose and mouth during the chaos while waiting for the ambulance (when the baby was not breathing) is also a consideration for an inquiring fact-finder. The trial court occupied the best position from which to judge Appellant's credibility in his statements to police and in trial testimony. There is no indication that this case presents exceptional circumstances requiring our intervention in the fact-finder's weighing of the evidence. This assignment of error is overruled.

{¶67} Appellant's conviction is affirmed.

Donofrio, P.J., concur.

DeGenaro, J., concur.