[Cite as *State v. Parker*, 2004-Ohio-5482.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 82756

STATE OF OHIO

Plaintiff-appellee

vs.

SHANNON M. PARKER

Defendant-appellant

JOURNAL ENTRY

AND

OPINION

DATE OF ANNOUNCEMENT OF DECISION:	OCTOBER 14, 2004
CHARACTER OF PROCEEDING:	Criminal appeal from Common Pleas Court, Case No. CR-427769
JUDGMENT:	AFFIRMED.
DATE OF JOURNALIZATION:	
APPEARANCES:	
For plaintiff-appellee:	WILLIAM D. MASON, ESQ. CUYAHOGA COUNTY PROSECUTOR DREW SMITH, ESQ. Assistant County Prosecutor The Justice Center 1200 Ontario Street, 8th Floor Cleveland, Ohio 44113
For defendant-appellant:	PATRICK P. LENEGHAN, ESQ. LENEGHAN & LENEGHAN 9500 Maywood Avenue Cleveland, Ohio 44102-4800

KARPINSKI, J.:

{¶ 1} Defendant, Shannon Parker, appeals her jury trial conviction for child endangering in violation of R.C. 2919.22. Defendant was employed by Children's House day care center in Broadview Heights, Ohio. She worked in the "toddler one" room, which consisted of children between the ages of 16 or 17 months to around two years. Defendant's method of putting the children into "time out" was to lay them on the floor, face down, in the corner. If the child tried to turn or lift his head, she would push his face back into the carpet or tile. Defendant's coworkers testified that when the other day care workers put a child into a time out, they put the child into a small, child-sized chair in the corner. None of them forced a child face down on the floor.

{¶ 2} A number of defendant's coworkers testified on behalf of the state. According to the testimony of her coworkers, defendant's manner in dealing with the children was "rough." She allegedly bragged to one coworker that she had pushed the face of a child who was around 18 months old into the floor so hard during a time out that the child got a bloody nose. She also bragged she put on rubber gloves and force fed another child.

{¶ 3} On another occasion, when defendant was supervising lunch, one child, who was seventeen months old, tried to stand up and wander around. Defendant pushed him back into his chair so hard that he fell over backwards and struck his head on a changing table. This child was so stunned that he was unable to make a crying sound. A short while after the impact, he then began to scream. A co-worker testified that defendant chuckled and walked away from the incident.

{¶ 4} On another occasion, while supervising children in the gym area, defendant yelled at a toddler who was trying to get onto a moving carousel. She told the child to stop, and when he did not, she grabbed him by his upper arm and flung him against the cinder block wall so hard that her coworker heard his head hit the wall from four or five feet away. The child was so stunned that

when he tried to cry, no sound came out. He eventually was able to cry and scream. He developed a large bump on the back of his head from the impact.

{¶ 5} A coworker who witnessed this incident reported it to the owner of the day care. The owner assured her it would be taken care of and warned her that "[w]hat happens in the center, stays in the center." The worker testified she interpreted this advice to mean, "keep my mouth shut." Tr. at 113-114. That co-worker left the day care shortly after that incident. When she went back to visit a few months later, she was surprised to discover that defendant was still employed there. That evening, she went to dinner with another coworker who was still working there. They discussed defendant's treatment of the children, and the former coworker called child protective services when she got home that night.

{¶ 6} A social worker investigated the charges, and the prosecutor determined that the evidence was sufficient to issue both a search warrant for the day care and an arrest warrant for defendant. The owner of the day care was not cooperative during the search warrant.

{¶ 7} Defendant was indicted on three counts of child endangering, each involving a different child. Her first trial ended in a mistrial because of an error in closing argument. Her second trial, from which this appeal is taken, ended in her conviction on two of the three counts. She was convicted of child endangering for her treatment of the child she force fed and injured by pushing him into a chair that fell over. She was convicted also for her treatment of the child she flung into the concrete wall. Defendant timely appealed, stating three assignments of error. The first two assignments of error, which address the sufficiency of the evidence, will be addressed together:

I. THE JURY'S VERDICT WAS AGAINST THE SUFFICIENCY OF THE EVIDENCE IN VIOLATION OF MS. PARKER'S CONSTITUTIONAL RIGHTS.

II. THE TRIAL COURT ERRED BY FAILING TO GRANT MS. PARKER'S CRIMINAL RULE 29 MOTION FOR ACQUITTAL.

{¶ 8} Defendant argues that the state failed to prove all the elements of the crime as listed in her indictment. Each indictment stated that defendant "did administer corporal punishment or other physical disciplinary measure against [the victim], a child under eighteen, *** in a cruel manner or for a prolonged period, which punishment, discipline, or restraint was excessive under the circumstances and created a substantial risk of serious physical harm to [each child], in violation of section 2919.22 of the Ohio Revised Code."

{¶ 9} R.C. 2919.22 states in pertinent part:

> **(a) (B) No person shall do any of the following to a child under eighteen years of age or a mentally or physically handicapped child under twenty-one years of age:**
>
> **{¶ 10}** ***
>
> **(a) (3) Administer corporal punishment or other physical disciplinary measure, or physically restrain the child in a cruel manner or for a prolonged period, which punishment, discipline, or restraint is excessive under the circumstances and creates a substantial risk of serious physical harm to the child**.

{¶ 11} The elements required to prove this crime, therefore, are (1) (a) corporal punishment or (b) other physical disciplinary measure or (c) physical restraint (i) in a cruel manner or (ii) for a prolonged period **and** (2) that the punishment, discipline, or restraint be excessive under the circumstances **and** create a substantial risk of serious physical harm to the child.

{¶ 12} Defendant disputes that her discipline involved cruelty or prolonged periods of restraint. She also disputes that anything she did posed a risk of serious physical harm to the children.

{¶ 13} When a reviewing court addresses a sufficiency of the evidence question, "the test is whether after viewing the probative evidence and inferences reasonably drawn therefrom in the light most favorable to the prosecution, any rational trier of fact could have found all the essential elements of the offense beyond a reasonable doubt. The claim of insufficient evidence invokes an inquiry about due process. It raises a question of law, the resolution of which does not allow the court to weigh the evidence." *State v. Martin* (1983), 20 Ohio App.3d 172, 175. Here, the testimony of defendant's coworkers presented sufficient evidence to prove, if believed, all of the elements of the crime.

{¶ 14} The element of cruelty is demonstrated by the manner in which defendant prevented the child from getting on the carousel. Flinging a small child into a concrete wall with sufficient force to knock the wind out of him and raise a large bump on his head certainly qualifies as cruel, as does force feeding a child. Finally, pushing a child so hard that he strikes his head and has the wind knocked out of him also demonstrates cruelty. Defendant's response - bragging about the actions and chuckling - indicates a heartlessness. This attitude, moreover, contrasts with the remorse naturally attendant to the discovery one has caused an injury by accident. The state presented enough evidence to prove the element of cruelty and, therefore, did not need to prove the element of a prolonged period of punishment.

{¶ 15} Defendant also disputes that her actions posed a risk of serious physical harm to the children. Serious physical harm is defined as:

> **(a)** **Any mental illness or condition of such gravity as would normally require hospitalization or prolonged psychiatric treatment**;
>
> **(b)** ***Any physical harm that carries a substantial risk of death***;
>
> **(c)** **Any physical harm that involves some permanent incapacity, whether partial or total, or that *involves some temporary, substantial incapacity***;
>
> **(d)** **Any physical harm that involves some permanent disfigurement or that involves some temporary, serious disfigurement**;
>
> **(e)** **Any physical harm that involves acute pain of such duration as to result in substantial suffering or that involves any degree of prolonged or intractable pain. (Emphasis added.)**

{¶ 16} The testimony revealed that the child defendant flung into the wall hit with such force that the blow was audible from a distance away. The child also received a large bump on his head from the impact. This blow qualifies as serious physical harm under several of the definitions found in the statute. It qualifies under (c), temporary substantial incapacity, because the child had trouble breathing and was unable to cry for a period of time after the blow. Also, the blow was severe enough to cause acute pain resulting in substantial suffering and thus qualifies under subsection (e).

{¶ 17} Additionally, defendant's actions posed a risk of serious physical harm to the child because he could have suffered a skull fracture, a broken neck, or some other injury as he landed from being flung into the wall. That the child did not suffer a serious physical injury does not mean that he was not at risk of a serious injury including a fatal one, as described in section (a).

{¶ 18} The second child was also in danger of serious physical injury, when defendant pushed him so hard that he struck his head on the changing table. Defendant also put him in danger

of serious physical injury when she force fed him. If he had struck his head the wrong way, he too could have suffered a fracture or a concussion. When defendant force fed him, moreover, she risked causing him to choke, and thus put him in risk of serious physical harm, including a risk of death. We conclude that the state provided sufficient evidence to support a finding "substantial risk of serious physical harm."

{¶ 19} Although defendant does not raise a claim that her discipline was not excessive, we find that this element of the crime was also proven. Defendant did not need to fling the child into the wall; she merely needed to remove him from the area. She also did not need to force feed the other child or to push him back into his chair with such force that he hit a table. Such actions are excessive.

{¶ 20} The state presented sufficient evidence to support a conviction. Accordingly, this assignment of error is without merit.

{¶ 21} For her third assignment of error, defendant states:

{¶ 22} THE VERDICT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶ 23} Defendant claims that even if the state presented enough evidence to avoid acquittal, the manifest weight of the evidence did not support a conviction. When evaluating a manifest weight argument, "'[t]he court, 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 reversed and a new trial ordered. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the

conviction.'" *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

{¶ 24} Contrary to defendant's claim, all the evidence at trial supports her conviction. The testimony was, moreover, consistent, credible, and unrefuted.

{¶ 25} Defendant claims that the witnesses were unreliable because they could not remember the exact dates that the incidents of abuse occurred. Also, defendant claims that the testimony at trial was confusing and that the evidence was not clear. She claims that the trial court admitted such, but fails to cite where in the transcript the court allegedly made this statement.

{¶ 26} Although the witnesses were not clear on the exact dates of the incidents, they were consistent concerning the time frame in which the incidents occurred. It is not surprising that someone would not remember the exact date or week of an event from a year earlier. A review of the testimony shows that the witnesses were consistent on the important facts concerning defendant's specific treatment of the children but hazy on the peripheral ones such as the exact time of each event, as one might expect when recounting events from a year earlier.

{¶ 27} Defendant's conviction is not against the manifest weight of the evidence. This assignment of error is without merit.

Affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Common Pleas Court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

TIMOTHY E. MCMONAGLE, J., CONCURS.

MICHAEL J. CORRIGAN, A.J., CONCURS IN JUDGMENT ONLY.

DIANE KARPINSKI
JUDGE

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).