[Cite as *Cleveland v. Alexander*, 2009-Ohio-4566.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92282

CITY OF CLEVELAND

PLAINTIFF-APPELLEE

vs.

ANTONIO ALEXANDER

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cleveland Municipal Court
Case No. 2008 CRB 007557

BEFORE: Sweeney, J., Stewart, P.J., and Boyle, J.

RELEASED: September 3, 2009

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) 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(C) 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(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

JAMES J. SWEENEY, J.:

{¶ 1} Defendant-appellant, Antonio Alexander ("defendant"), appeals his child endangerment convictions. After reviewing the facts of the case and pertinent law, we affirm.

{¶ 2} On March 21, 2008, Cuyahoga Metropolitan Housing Authority ("CMHA") Officers William Higginbotham and Brandon Hizak were following up on alleged illegal drug activity at 9500 Wade Park Avenue, Apt. 707, which is defendant's apartment. The officers knocked on the door, and defendant's 11-year-old son answered. There were seven other small children in the apartment as well, between the ages of 11 months and 10 years old, for a total of eight children. When asked who was watching them, the 11 year old stated that nobody was. The officers went into the apartment to "check on the safety and well-being of the children." They found the apartment in a filthy condition, with dirty diapers and dried up food on the floor. Additionally, the windows were open, although there were no screens installed and it was snowing. The officers were there approximately 30-45 minutes before defendant returned.

{¶ 3} On March 25, 2008, defendant was indicted for eight counts of child endangerment, in violation of Cleveland Municipal Code 609.04, which mirrors R.C. 2919.22(A).

{¶ 4} On August 25, 2008, the case was tried to a jury. The court granted defendant's motion to dismiss the count regarding the 11-year-old child. The jury returned a not guilty verdict as to the 10-year-old child, and found defendant guilty of child endangerment as to the remaining six counts.

{¶ 5} On September 26, 2008, the court sentenced defendant to 180 days in jail and a $1,000 fine per count, as well as two years probation. The court suspended a portion of the fine and sentenced defendant to perform 70 hours of community service in lieu of the remainder of the fine. The court also suspended 179 days of jail time per count so that defendant was ultimately sentenced to six days in jail.

{¶ 6} Defendant now appeals and raises two assignments of error for our review. His first assignment of error states:

{¶ 7} "I. The trial court erred in overruling [defendant's] motion to dismiss and [his] Crim.R. 29 motions for acquittal because the element of recklessness was neither charged nor proven."

{¶ 8} We review this assignment of error for both sufficiency and manifest weight of the evidence, as it is unclear from defendant's argument on appeal if he is asking us to review one or the other, or both of these concepts. Additionally, we disregard defendant's argument concerning his motion to dismiss, because defendant fails to identify the portion of the record on which this argument is based and fails to argue the issue separately in his brief, as required under App.R. 16(A) and App.R. 12(A)(2).

{¶ 9} When reviewing sufficiency of the evidence, an appellate court must determine "[w]hether, 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.

{¶ 10} The proper test for an appellate court reviewing a manifest weight of the evidence claim is as follows:

{¶ 11} "The appellate court sits as the 'thirteenth juror' and, reviewing the entire record, weighs all the reasonable inferences, considers the credibility of witnesses and determines whether, in resolving conflicts in 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." *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387.

{¶ 12} Revised Code 2919.22(A) defines endangering children, and it states that no person who is in charge of a child under 18 years old "shall [recklessly] create a substantial risk to the health or safety of the child, by violating a duty of care [or] protection ***."

{¶ 13} In the instant case, defendant argues that the City of Cleveland failed to prove that he acted recklessly. R.C. 2901.22(C) defines the mental state of recklessness: "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. A person is reckless with respect to circumstances when, with heedless indifference to the consequences, he perversely disregards a known risk that such circumstances are likely to exist."

{¶ 14} The following testimony is found in the record: When the officers went into defendant's apartment, they saw "a younger child about four or five years of age jumping off the arm of the couch, and [he] went right into the wall." According to Officer Hizak, he and Officer Higginbotham opened the closed bedroom door in the apartment "and found a child less than one year old, lying face down [sleeping] on the mattress on the floor." Additionally, there were dirty diapers and dried up food on the floor of the apartment, and the windows of this seventh floor unit were wide open, although there were no screens.

{¶ 15} When defendant returned to the apartment, he told the officers that he went to the store to get food for the kids. However, defendant did not have any food with him.

{¶ 16} Defendant testified that he left the 11- and 10- years-olds in charge of the other children while he stepped out to get groceries. However, allegedly there was no money available on his food stamp debit card, so he returned empty handed. When he got home, he found the police there. After a discussion with the police, defendant called his case worker and corrected the problem with his debit card. He then told his neighbor to check in on the kids, left to pick up the groceries, and returned home.

{¶ 17} According to defendant, the officers were still in the lobby of his building when he returned with the groceries. However, both officers testified that they did not see defendant leave the apartment and return with food.

{¶ 18} Furthermore, defendant testified that at the time in question, the windows in his apartment all had screens in them. He also stated that he was unaware of the dried food and dirty diapers on the floor of the apartment when he left the children there.

{¶ 19} It is undisputed from the record that defendant is the father of five of the children in question, the step-father of the other three, and that all eight children were under defendant's care on March 21, 2008. Therefore, we must review whether he (1) violated a duty of care or protection; (2) resulting in a substantial risk to the health or safety of the children; (3) by acting recklessly. We apply these elements to defendant leaving two six-year-olds, a five-year-old, a four-year-old, a two-year-old, and an 11-month-old in the care of a ten- and 11-year-old, for 30-45 minutes in a "filthy" apartment on the seventh floor with open, screenless windows.

{¶ 20} In looking at this evidence in a light most favorable to the City, we conclude that a reasonable trier of fact could have found that the elements of child endangering were met. We are not suggesting a per se rule of law that any child left unsupervised for a certain period of time is sufficient to show child endangerment. The facts of this case are unique in that there were six children left in the care of two children in an apartment, seven floors off the ground, with potentially hazardous windows. This creates a substantial risk of harm to the children and we find it sufficient evidence to convict defendant of child endangerment.

{¶ 21} Turning to the manifest weight of the evidence, we must determine whether, in resolving conflicts in evidence, the jury clearly lost its way. We note the following inconsistencies in the evidence of the case-at-hand. First, the officers testified that there were no screens in the open windows. Defendant, on the other hand, testified that there were screens in the windows. No other evidence was presented about this issue. Defendant testified that he came back to the apartment empty handed because there was a problem with his government-issued debit card. However, the officers testified that defendant did not mention anything about this when they questioned him. Furthermore, defendant testified that the officers saw him return from a second trip to the store with food bags in hand. The officers, however, testified that they did not see defendant return to the apartment again, with or without food.

{¶ 22} While these inconsistencies do not all weigh in favor of, or against for that matter, the elements of child endangerment, they directly reflect upon defendant's credibility. The jury is free to believe all, part, or none of a witness's testimony, and we will not disturb a jury verdict that is based on credible evidence. *State v. Delgado* (Apr. 30, 1992), Cuyahoga App. No. 60574. "The choice between credible witnesses and their conflicting testimony rests solely with the finder of fact and an appellate court may not substitute its own judgment for that of the finder of fact." *State v. Awan* (1986), 22 Ohio St.3d 120, 123, citing *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77; *Henkle v. Salem*

Mfg. Co. (1883), 39 Ohio St. 547. We cannot say that the jury lost its way in convicting defendant in the case sub judice.

{¶ 23} Assignment of Error I is overruled.

{¶ 24} Defendant's second and final assignment of error states as follows:

{¶ 25} II. "The trial court erred in abdicating its responsibility to enforce a defense subpoena for witness to appear at trial in violation of defendant's rights under the U.S. Constitution Amendment VI and the Ohio Constitution §1.10."

{¶ 26} Inherent in Amendment VI to the United States Constitution is a criminal defendant's right to present witnesses in his own defense. "The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law." *Washington v. Texas* (1967), 388 U.S. 14, 19. See, also, Ohio Constitution, Article I, Section 10.

{¶ 27} This right to present witnesses, however, is not unfettered. The accused "must at least make some plausible showing of how [a witness's] testimony would have been both material and favorable to his defense." *U.S. v. Valenzuela-Bernal* (1982) 458 U.S. 858, 867. See, also, *State v. Abdelhaq* (Nov. 24, 1999), Cuyahoga App. No. 74534.

{¶ 28} In the instant case, defendant failed to make a showing that the potential witness's testimony would have benefitted him. It is undisputed that defendant subpoenaed a witness from the Cuyahoga County Department of Children and Family Services (CCDCFS), who failed to appear at trial. However, defendant did not request a continuance to secure the witness. Rather, defense counsel stated, "I just want it noted on the record that the subpoena was never honored by the county."

{¶ 29} The record does not identify who this witness is, what this witness may have testified to, or how this witness would have been favorable to defendant. Furthermore, the subpoena duces tecum that was sent to CCDCFS states to "bring info on investigation for Antonio Alexander, 9500 Wade Park #707 in March, April, May, or June 2008." It is unclear if there were multiple investigations or if an investigation even occurred. Furthermore, investigations subsequent to March 21, 2008 would be immaterial to the case-at-hand.

{¶ 30} When defendant took the stand, he testified that, after investigation, CCDCFS did not take his children away from him. Again, there is no official proffering that this alleged "investigation" had anything to do with the facts underlying this case. Without meeting the requirements of *Valenzuela-Bern*al that a defense witness be both material to the case and favorable to the accused for the witness to be compulsory, we cannot say that defendant was prejudiced because his witness failed to appear.

{¶ 31} Assignment of Error II is overruled.

Judgment affirmed.

It is ordered that appellee recover from 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 Cleveland Municipal 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.

JAMES J. SWEENEY, JUDGE

MARY J. BOYLE, J., CONCURS.

MELODY J. STEWART, P.J., DISSENTS. (SEE ATTACHED DISSENTING OPINION)

DISSENTING OPINION FOR:
CITY OF CLEVELAND v. ANTONIO ALEXANDER
Case No. 92282

MELODY J. STEWART, J., DISSENTING:

{¶ 32} I respectfully dissent from the majority's decision to affirm appellant's convictions for child endangerment.

{¶ 33} To satisfy the second element of a violation of R.C. 2919.22(A), recklessness must create a "substantial risk" to the health and safety of the child. A "substantial risk" is "a strong possibility, as contrasted with a remote or significant possibility, that a certain result or circumstance may occur." R.C. 2901.01(H).

{¶ 34} The city did not show that Alexander perversely disregarded a known risk and created a strong probability that the children might be harmed. None of the children were injured as a result of Alexander's absence and there was no evidence that the children were out of control or subject to any imminent threat of danger or harm. The city offered testimony that the apartment was in disarray and that there were dirty diapers and food on the floor. Of course, if good housekeeping were an element of child endangering, one imagines that many parents in the jurisdiction could be indicted for the crime. Without question, appellant showed poor judgment by leaving that many children alone, even for a short period of time. But there is simply no evidence to show that his actions were criminal, and certainly no evidence to show that he perversely disregarded a known risk that the children were likely to be injured. This was a matter for the department of children and family services, not the criminal courts. I would therefore reverse and vacate the convictions.