

[Cite as *State v. Moore*, 2011-Ohio-454.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94446

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

MARVA MOORE

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-522820

BEFORE: Celebrezze, J., Blackmon, P.J., and Jones, J.

RELEASED AND JOURNALIZED: February 3, 2011

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FRANK D. CELEBREZZE, JR., J.:

{¶ 1} Defendant-appellant, Marva Moore, appeals her conviction and sentence for endangering children. After a thorough review of the record and apposite case law, we affirm appellant’s conviction.

{¶ 2} At all times relevant to this appeal, appellant was employed as a preschool teacher at Nickilodeon’s Child Care Center (“the daycare”) in Cleveland, Ohio. On March 19, 2009, the victim, who also attended a special needs school part-time, was dropped off at the daycare in the afternoon. According to appellant’s own testimony, she was serving her students a snack around 3:15 p.m., when the victim began throwing a temper tantrum and

rolling around on the ground. Fearing the victim would roll into a nearby bookshelf and injure himself, appellant grabbed the victim and “tossed” him. A surveillance video from the daycare shows the child going airborne and landing several feet away from appellant. Appellant testified that she only intended to move the victim out of harm’s way, she used too much force in attempting to move him, and she never intended to hurt him.

{¶ 3} Zenobia Cummings and Judy Cuff, co-owners of the daycare, also testified. According to Cummings, she was sitting in the daycare’s office when she heard a child crying in a nearby bathroom. Cummings called out and asked what happened. Someone yelled back that the victim fell and hit his head. Appellant then carried the victim into the office, and Cummings realized that he was bleeding and his face was swollen. Cummings, Cuff, and Tiarra Dudley, who worked at the daycare at the time, all testified that appellant told them the victim fell off her lap and landed on his head. Cuff contacted the victim’s foster mother, Melissa Mitchell, who arrived at the daycare moments later.¹

{¶ 4} Mitchell testified that when she first arrived at the daycare, she was told her child had fallen off of a teacher’s lap and injured his head. Upon seeing the extent of the child’s injuries, Mitchell immediately took him

¹According to the trial testimony, at one point, appellant also said that she had cookies in her hand when she attempted to pick up the victim. The victim, who was having a temper tantrum,

to the hospital where he was treated for a contusion, bruising, and swelling. As she was leaving the hospital, Mitchell was contacted by Cuff and told that a surveillance video showed what had occurred at the daycare earlier that day. Mitchell returned to the daycare and viewed the video, which showed appellant picking up the victim and tossing him several feet. Mitchell immediately called the police.

{¶ 5} Appellant was charged in a one-count indictment with endangering children in violation of R.C. 2919.22(B)(2). After a jury trial, appellant was convicted of endangering children in violation of R.C. 2919.22(B)(1), a lesser-included offense. She was sentenced to 180 days in jail. The court’s sentencing entry also stated, “[d]ue to defendant’s conviction in this case for child endangering[,] she is no longer permitted to serve in any capacity in a daycare/childcare setting.”

{¶ 6} Appellant filed this timely appeal arguing there was insufficient evidence to support her conviction and her conviction is against the manifest weight of the evidence, the trial court erred in imposing the maximum sentence without considering the purposes of misdemeanor sentencing and the mandatory sentencing factors, and the trial court exceeded its authority in prohibiting appellant from working in a daycare.

Law and Analysis

continued to “buck” in her arms and fell.

{¶ 7} In her first and second assignments of error, appellant argues that her conviction was based on insufficient evidence and was against the manifest weight of the evidence. The weight to be given the evidence and the credibility of the witnesses are primarily for the trier of fact to determine. *State v. DeHass* (1967), 10 Ohio St.2d 230, 231, 227 N.E.2d 212. When deciding whether a conviction was based on sufficient evidence, the appellate court must determine, after viewing the evidence in a light most favorable to the prosecution, whether 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, 273, 574 N.E.2d 492; *Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct.2781, 61 L.Ed.2d 560.

{¶ 8} The United States Supreme Court recognized the distinction in considering a claim based upon the manifest weight of the evidence as opposed to sufficiency of that evidence. The Court held in *Tibbs v. Florida* (1982), 457 U.S. 31, 45, 102 S.Ct. 2211, 72 L.Ed.2d 652, that, unlike a reversal based upon the insufficiency of the evidence, an appellate court's disagreement with the jurors' weighing of the evidence does not require special deference accorded verdicts of acquittal. *Id.* at 43. Upon application of the standards enunciated in *Tibbs*, the court in *State v. Martin* (1983), 20 Ohio App.3d 172, 485 N.E.2d 717, has set forth the proper test to be utilized when addressing the issue of manifest weight of the evidence. The *Martin*

court stated that “[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.” Id. at 175.

{¶ 9} Appellant was convicted of endangering children in violation of R.C. 2919.22(B)(1), which prohibits an individual from abusing a child who is under the age of 18. Appellant first argues that the state failed to show that she abused the victim, claiming that “[a]s unfortunate as this incident was, [the victim]’s injuries were the result of an accident, not a substantial risk at the creating of Appellant.” We disagree.

{¶ 10} R.C. 2919.22 does not define the term “abuse.” Nonetheless, R.C. 2151.031(D) defines an abused child as one who, “[b]ecause of the acts of his parents, guardian, or custodian, suffers physical or mental injury that harms or threatens to harm the child’s health or welfare.” The 1972 Legislative Service Commission’s comment to R.C. 2919.22 provides that “[t]his section is aimed at * * * child abuse which causes, or poses a serious risk to the mental or physical health or safety of the victim.” Finally, child abuse has also been defined as “[a]n act or failure to act that presents an imminent risk of serious physical harm to a child.” Black’s Law Dictionary (9 Ed.2009).

{¶ 11} The evidence showed that appellant picked the victim up by his arms or shoulders and “tossed” him across the room. The victim landed several feet away from where appellant was standing. He was bleeding, and his face was swollen and bruised as a result of appellant’s actions.

{¶ 12} Appellant testified that the event was an accident, and she never intended to hurt the victim. Mitchell testified, however, that appellant apologized for the event and blamed the daycare, claiming it was understaffed and that she was overwhelmed and tired on the date in question. Cummings, Cuff, and Dudley all testified that appellant initially lied about how the victim sustained his injuries, and it was not until they viewed the surveillance video that the truth behind the incident was revealed.

{¶ 13} The jury had the opportunity to listen to the testimony and view the video of the event. After considering this evidence, the jury exercised its power and found appellant guilty of endangering children in violation of R.C. 2919.22(B)(1) as a lesser-included offense of R.C. 2919.22(B)(2). This decision was within the purview of the jury, and appellant has not put forth any evidence that causes us to question the validity of that decision. We cannot find that the jury lost its way or that a manifest miscarriage of justice occurred. Appellant’s conviction was supported by sufficient evidence and was not against the manifest weight of the evidence. Her first and second assignments of error are overruled.

Sentencing

{¶ 14} In her third assignment of error, appellant claims the trial court erred in imposing “the maximum penalty without consideration of the overriding purposes of misdemeanor sentencing or the mandatory sentencing factors.” Trial courts enjoy broad discretion in imposing sentences for misdemeanors. *State v. Hughley*, Cuyahoga App. Nos. 92588 and 93070, 2009-Ohio-5824, ¶7, citing *Cleveland v. Jurco*, Cuyahoga App. No. 88702, 2007-Ohio-4305, ¶18. The trial court’s decision in this regard will not be disrupted absent an abuse of discretion. *Id.*, citing *State v. Frazier*, 158 Ohio App.3d 407, 2004-Ohio-4506, 815 N.E.2d 1155, ¶15. To constitute an abuse of discretion, the ruling must be unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 450 N.E.2d 1140.

{¶ 15} R.C. 2929.21 and 2929.22 set forth considerations and factors a trial court must evaluate in imposing a sentence. It is the trial court’s failure to express which factors it considered that gives rise to appellant’s third assignment of error. Despite appellant’s assertions, the sentencing entry in this case indicates that “[t]he court considered all required factors of the law.” Nonetheless, the court is not required to iterate exactly which factors warranted appellant’s sentence. So long as the sentence is within the statutory range, and absent a showing to the contrary, we must presume the

trial court considered the statutory factors. *Hughley* at ¶14; *State v. Hunter*, Cuyahoga App. No. 87750, 2006-Ohio-6440, ¶1.

{¶ 16} Appellant was convicted of a first-degree misdemeanor, which carries a maximum sentence of 180 days in jail. R.C. 2929.24(A)(1). Since appellant was sentenced to 180 days in jail, her sentence falls squarely within the statutory range. She has presented no affirmative evidence to support her claim that the trial court failed to consider the purposes and factors listed in R.C. 2929.21 and 2929.22. In fact, when sentencing appellant, the trial judge noted her concern with appellant's crime and appellant's apparent indifference to the victim's physical safety. We cannot find that the trial judge abused her discretion in imposing appellant's sentence. Appellant's third assignment of error is overruled.

{¶ 17} In her fourth assignment of error, appellant argues the trial judge abused her discretion in prohibiting her from working in a daycare as a condition of her sentence. We disagree.

{¶ 18} R.C. 5104.012 provides that "no child day-care center * * * shall employ * * * as a person responsible for the care, custody, or control of a child if the person previously has been convicted of or pleaded guilty to any of the violations described in division (A)(9) of section 109.572 of the Revised Code."

A review of R.C. 109.572(A)(9) reveals that it includes a violation of R.C. 2919.22. It is clear that the relevant Revised Code sections in this case apply

only to the state of Ohio. As such, appellant, by operation of law, is not permitted to work in a daycare facility in Ohio. The fact that the trial judge did not specify that the breadth of R.C. 5104.012 is confined to Ohio is a harmless error. We cannot find that the trial judge abused her discretion in prohibiting appellant from working in the daycare industry. Appellant's fourth assignment of error is overruled.

Conclusion

{¶ 19} A review of the record in this case clearly demonstrates that appellant's conviction was support by sufficient evidence and was not against the manifest weight of the evidence. Appellant is unable to demonstrate that the trial court failed to consider the required statutory factors when imposing the maximum sentence. As specified under R.C. 5104.012, appellant is prohibited from working in the childcare industry in the state of Ohio as a matter of law.

Judgment affirmed.

It is ordered that appellee recover of appellant 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.

FRANK D. CELEBREZZE, JR., JUDGE

PATRICIA ANN BLACKMON, P.J., and
LARRY A. JONES, J., CONCUR