

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NOS. C-150178
		C-150179
Plaintiff-Appellee,	:	TRIAL NOS. 14CRB-29638A,B
vs.	:	
		<i>JUDGMENT ENTRY.</i>
RICHARDA A. GOTTENBUSCH,	:	
Defendant-Appellant.	:	

We consider these appeals on the accelerated calendar, and this judgment entry is not an opinion of the court. See S.Ct.R.Rep.Op. 2; App.R. 11.1(E); 1st Dist. Loc.R. 11.1.1.

After a bench trial, Richarda A. Gottenbusch was convicted of two counts of child endangerment, in violation of R.C. 2919.22(A). She now appeals.

Two of Gottenbusch's children were found by a driver on a busy street outside of Gottenbusch's apartment at about 10:45 a.m. on April 28, 2014. One, age two, was naked and in the process of crossing the street. The other, age four, held car keys and was attempting to enter Gottenbusch's car.

When the police arrived to investigate, they knocked on the door of the apartment several times but received no answer. Upon entering, they located Gottenbusch soundly asleep on the couch next to an infant child. The police did not see anyone else in the residence, and Gottenbusch did not suggest that anyone else had been present. Gottenbusch simply told the police that she had fallen asleep next to her fussy baby after

returning home at 7:00 a.m. from working all night, and she expressed anger toward the four year old for taking her car keys and the two year old outside.

Later that same day, the police returned to the apartment, because the older children were throwing items out of an open window on the second floor of the apartment. Gottenbusch was unaware of this conduct, too. She was later charged with child endangerment for failure to supervise the children when they wandered outside the residence.

At trial, Gottenbusch testified in her defense. She claimed that the children's father, Todd Davis, had been watching the children and had remained in the apartment before she fell asleep. Davis, however, did not testify. During closing argument, defense counsel represented to the court that Davis had appeared for trial but had to leave before testifying. When finding Gottenbusch guilty, the trial court stated that it had found Gottenbusch's testimony about Davis's presence incredible, as she had not mentioned that fact to the responding police officers. The court also stated that it would have found her guilty even if Davis had been home.

In her first assignment of error, Gottenbusch argues that her convictions were not supported by sufficient evidence and were against the manifest weight of the evidence. To prove child endangerment, the state had the burden to prove beyond a reasonable doubt that Gottenbusch was the parent of the two young children, that she created a substantial risk to their safety, and that she acted with recklessness. *See State v. Allen*, 140 Ohio App.3d 322, 323, 747 N.E.2d 315 (1st Dist.2000).

Gottenbusch argues that there was insufficient evidence of recklessness because the evidence does not demonstrate how long the children were unsupervised. But the evidence was sufficient on this element where the record demonstrates that Gottenbusch

had fallen soundly asleep while her very young and active children were unsupervised for an indefinite period of time.

We also reject Gottenbusch's argument that the evidence was insufficient to demonstrate that she had created a substantial risk to the safety of the four year old. Although the child had not gained access into Gottenbusch's car, she had had the opportunity to do so before she was discovered attempting to enter with the keys. Moreover, the child was found unsupervised on a busy street.

Gottenbusch also argues that her convictions must be reversed because the trial court applied an incorrect standard for criminal liability, as the court stated it would have found Gottenbusch guilty even if it had believed her testimony that Davis had been present. While we generally agree with Gottenbusch's argument that the trial court misstated the law with respect to the discharge of one's duty to protect, *see State v. Perrine*, 5th Dist. Stark No. 2001CA00338, 2002-Ohio-2898, we decline to reach this issue because the trial court did not believe Gottenbusch's testimony, and the only evidence accepted by the court sufficiently supported the conviction under the applicable law.

In sum, we hold that the trial court had before it sufficient evidence on all the elements of child endangerment. See R.C. 2919.22(A); *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus. Further, we hold that that there is no basis to conclude that the trial court lost its way or committed a manifest miscarriage of justice in resolving the factual issues against Gottenbusch. *See State v. Thompkins*, 78 Ohio St.3d 380, 678 N.E.2d 541 (1997). Accordingly, we overrule the first assignment of error.

In her second assignment of error, Gottenbusch argues that she was denied the effective assistance of trial counsel. To prevail on this claim, Gottenbusch must

demonstrate that counsel's performance was deficient, and that a reasonable probability exists that but for the alleged omissions of her trial counsel, the results of her trial would have been different. See *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989).

Gottenbusch contends counsel was deficient because she allowed Davis to leave before testifying, even though he was under a subpoena, and counsel did not request a continuance, which she argues would have been granted because Davis had been subpoenaed to testify on that date.

But the issue raised by Gottenbusch relies upon an inaccurate factual premise, as the record reflects that defense counsel did not subpoena Davis for the trial. Moreover, we cannot say based on this record that any deficiency by defense counsel was likely outcome determinative. The record reflects that Gottenbusch made no mention to the police that Davis had been there when she fell asleep, and the record does not provide with sufficient specificity the contents of Davis's purported testimony.

Because the error assigned is not demonstrated in the record, we overrule it.

Therefore, we affirm the trial court's judgment.

Further, a certified copy of this judgment entry shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

CUNNINGHAM, P.J., DEWINE and MOCK, JJ.

To the clerk:

Enter upon the journal of the court on January 13, 2016
per order of the court _____.
Presiding Judge