[Cite as *State v. Wright*, 2010-Ohio-243.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92594

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

WILLIAM WRIGHT

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-508029

BEFORE: Dyke, J., Rocco, P.J., and Kilbane, J.
RELEASED: January 28, 2010

JOURNALIZED:

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ANN DYKE, J.:

{¶ 1} Defendant William Wright appeals from his convictions for four counts of endangering children. For the reasons set forth below, we affirm in part, reverse in part, and remand for a new sentencing hearing at which the state may elect which allied offense it will pursue against the defendant.

{¶ 2} On March 14, 2008, defendant was indicted for four counts of endangering children, two counts of felonious assault, and one count of domestic violence, in connection with alleged incidents involving the eight year-old daughter of his girlfriend, V.W. Defendant pled not guilty and the matter proceeded to a jury trial on November 24, 2008.

{¶ 3} As the case commenced, the state dismissed the domestic violence charge and the trial court determined that V.W. was competent to testify.

{¶ 4} V.W.'s teacher testified that on February 21, 2008, V.W. hid the classes' lunches on another floor. The teacher sent her to the "reflection room" pending further discipline. The teacher determined that V.W. would miss recess for that day. She also telephoned the girl's mother and left a phone message about the incident. The following day, V.W. gave her teacher a letter of apology, and the class separated into groups of two for peer-assisted learning that was overseen by the teacher and a skills teacher. During this time, the skills teacher directed V.W.'s teacher to look at the girl's arm. The teacher asked V.W. to step out into the hall where she examined

the girl's arm and asked her what had happened to it.

{¶ 5} The teacher called V.W.'s mother. She then checked V.W.'s leg and observed a thin U-shaped mark. The teacher contacted her "Buddy Teacher" from across the hall to be present while the teacher further examined V.W. in the cloak room. At this point, the teacher observed U-shaped stains on the girl's shirt, scabbed-over wounds on the girl's thighs, red welts and a bruise on the girl's chest, bruises on her back, red marks on her arms and back and red wounds on her legs.

{¶ 6} V.W. was taken to the principal's office where her wounds were photographed. According to the teacher, photographs offered into evidence fairly and accurately depict the injuries to V.W. The school nurse examined the girl and observed welts on her body and a bruise the size of a quarter. At this time, the girl stated that she was in pain. The nurse deemed the injuries to be suspicious, and school officials summoned social workers from the county. After the girl's mother arrived, the group had a series of meetings and ultimately determined that V.W. could not go home. The state's witnesses conceded, however, that it was not necessary to call 9-1-1, and that the girl returned to her classes for a portion of the day.

{¶ 7} County officials got V.W. something to eat, and later that night, at approximately 9:40 p.m., they brought her to University Hospitals for an examination in connection with emergency placement with foster parents.

{¶ 8} V.W. testified that she and her mother lived with her mother's boyfriend, the defendant. On the day of the incident, she got into trouble for "being sneaky and lying" at school. Defendant became angry with her and said that he was going to the store and was then "going to get" her. When he returned, he got a white extension cord and dragged her into the bedroom. He locked the door and told her to take off her shirt. He then struck her with the cord on her back, legs, arms, and chest. V.W. stated that she yelled and moved during the beating, and defendant told her to stop moving and to shut up. The girl further testified that the injuries burned. Afterward, defendant had V.W. write a letter of apology to her teacher and told her what to write.

{¶ 9} The next day, when a classmate asked about the marks on her arm, V.W. stated that she fell onto some bricks. She also stated that she initially lied to her teacher about how she had gotten the marks, but she stated that she did so because she was afraid. The teacher instructed her to tell the truth and she then reported that her mother's boyfriend struck her with an extension cord after hearing the phone message that the teacher had left for the girl's mother.

{¶ 10} During cross-examination, V.W. stated that defendant helped her with homework and learning how to read, and also washed and cooked for them.

{¶ 11} The girl's foster mother testified that county social workers made an emergency placement of V.W. with her. She put clean sheets on a bed for V.W., but when the girl awoke the next morning, the foster mother observed blood stains. The foster mother also stated that the girl still has a few scars from the incident.

{¶ 12} County social worker Lyndsy Nemeth testified that she made notes about the girl's injuries and also took pictures of bruises and marks on her body. According to Nemeth, the girl's injuries were worse than shown in the pictures. Specifically, a mark above V.W.'s knee and an older mark on her calf were worse than depicted, but the remaining photographs accurately depict the marks on the girl. Nemeth separately interviewed V.W. and her mother, and following an emergency meeting, decided that the county would take emergency custody of the girl.

{¶ 13} The girl's mother testified that she suffers from bipolar disease and schizophrenia. She and her daughter moved in with defendant when the mother sustained a foot injury. At the time of the incident, the mother was depressed and still recovering from her foot injury, so defendant assumed the care for V.W. When they learned that V.W. had gotten into trouble at school, the mother discussed spanking the girl, then changed her mind and decided that she would talk to the girl's teacher. The defendant stated that he was tired of V.W.'s conduct and he ordered her to take off her clothes, then pulled

her into the bedroom. The mother heard the girl screaming and crying. Afterward, defendant instructed the girl to write a letter to her teacher, apologizing for getting into trouble.

{¶ 14} The next day, the girl's teacher called and asked what had happened. The mother testified that she was afraid because she had given permission for defendant to discipline the girl, but she did not know that he would hit her with an extension cord, and she did not consent to the girl being abused. Following the meeting at school with social workers, the mother indicated that she was not willing to leave defendant, so the girl was placed in foster care. Later, the police executed a search warrant at the home. The mother was charged in this matter and pled guilty to one count of endangering children. As part of her plea agreement, she was required to testify truthfully in this matter, and she is facing a sentence of one to five years imprisonment.

{¶ 15} Rapid care pediatrician Amy Grube testified that the girls' medical condition was urgent but not an emergency. She further testified that she observed multiple linear red markings that appeared as images of a looped cord. Some of the marks appeared to have opened the skin, but Dr. Grube did not describe them as "open wounds" in her report because they did not require sutures. Dr. Grube provided an antibiotic ointment for the wounds and also performed a strep test that was determined to be negative.

{¶ 16} Cleveland Police Det. Georgia Hussein testified that she took pictures of the marks on V.W. approximately four days later. According to Det. Hussein, these photographs accurately depict the girl's injuries. Hussein also executed a search warrant at defendant's home and found an extension cord in his room.

{¶ 17} DNA analysis revealed a profile that is a mixture consistent with contributions from defendant and an unknown individual. Cuttings from the shirt revealed a profile consistent with V.W.

{¶ 18} Defendant was subsequently convicted of all charges of child endangering. Over defense protestations that the endangering children counts should merge, the trial court sentenced him to an eight-year term on Count One and concurrent four-year terms on the remaining three counts. He now appeals and assigns two errors for our review.

{¶ 19} Defendant's first assignment of error states:

{¶ 20} "The trial court committed reversible error by admitting into evidence photographs which failed to accurately depict the injuries sustained by the victim contrary to Evid.R. 901."

{¶ 21} Within this assignment of error, defendant complains that some of the photographs taken in this matter were erroneously admitted into evidence because there was testimony that they do not accurately depict V.W.'s injuries. The admission or exclusion of evidence rests within the sound

discretion of the trial court, *State v. Haines,* 112 Ohio St.3d 393, 2006-Ohio-6711, 860 N.E.2d 91, and absent an abuse of discretion, an appellate court will not disturb a trial court's ruling. *State v. Martin* (1985), 19 Ohio St.3d 122, 483 N.E.2d 1157. An abuse of discretion connotes more than an error of law or judgment; it implies that the courts attitude was unreasonable, arbitrary, or unconscionable. *State v. Wolons* (1989), 44 Ohio St.3d 64, 68, 541 N.E.2d 443.

{¶ 22} Evid.R. 901 governs the authentication of evidence and states:

{¶ 23} "(A) General provision

{¶ 24} "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."

{¶ 25} With regard to photographs, a witness with personal knowledge of the subject of the photographs may authenticate them by testifying that they fairly and accurately depict the subject at the time the photographs were taken. *State v. Hannah* (1978), 54 Ohio St.2d 84, 88, 374 N.E.2d 1359.

{¶ 26} Moreover, in *State v. Meranda* (Feb.17, 1987), Brown App. Nos. CA86-04-008 and CA86-04-009, the court refused to conclude that the trial court erred in admitting photographs where the proponent stated that the injuries were actually worse than the photographs depicted.

{¶ 27} In accordance with the foregoing, we find no abuse of discretion,

as there was sufficient evidence that the photographs in question fairly and accurately depicted the marks on V.W.'s body. Although soical worker Lyndsy Nemeth testified that the marks above the girl's knee were actually worse than depicted, and there were older marks on her calf, other witnesses established that the photographs fairly and accurately depicted the girl's injuries, and it was established that the photographs depicted what the proponent claimed. To the extent that they minimized two of the marks in this matter, it benefitted the defense and did not result in prejudice to him.

{¶ 28} The first assignment of error is overruled.

{¶ 29} Defendant's second assignment of error states:

{¶ 30} "Appellant's four convictions of child endangerment with findings of serious physical harm are not supported by sufficient evidence in violation of due process of law."

{¶ 31} In evaluating a claim that there was insufficient evidence to sustain a conviction, the "inquiry is, 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.

{¶ 32} In this matter, defendant was convicted of violating R.C. 2919.22(A) and (B)(1)-(3) which state:

{¶ 33} "(A) No person, who is the parent, guardian, custodian, person

having custody or control, or person in loco parentis of a child under eighteen years of age or a mentally or physically handicapped child under twenty-one years of age, shall create a substantial risk to the health or safety of the child, by violating a duty of care, protection, or support. * * *

{¶ 34} "(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:

{¶ 35} "(1) Abuse the child;

{¶ 36} "(2) Torture or cruelly abuse the child;

{¶ 37} "(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[.]"

{¶ 38} Pursuant to R.C. 2919.22(E)(2)(a), violations of R.C. 2919.22(A) and R.C. 2919.22(B)(1) are misdemeanor offenses of the first degree unless the violation results in serious physical harm. If the violation results in serious physical harm, the violation is a felony of the second degree. R.C. 2919.22(E)(2)(d). Pursuant to R.C. 2919.22(E)(3), if the offender violates division (B)(2), (3), (4), endangering children is a felony of the third degree, but if the violation results in serious physical harm to the child involved,

endangering children is a felony of the second degree.

{¶ 39} In this matter, the evidence demonstrated that defendant was in loco parentis to the child because he supported her, she lived at his home, and he had disciplined her in the past. Cf. *Cleveland v. Kazmaier*, Cuyahoga App. No. 84290, 2004-Ohio-6420. The undisputed evidence further demonstrates that defendant whipped the girl with an extension cord as punishment for her misbehavior at school, and that the beating rose to the level of abuse.

{¶ 40} Defendant additionally maintains that his convictions are not supported by sufficient evidence because the state failed to establish that his conduct resulted in "serious physical harm." "Serious physical harm" is defined in R.C. 2901.01 to include any of the following:

{¶ 41} "(a) Any mental illness or condition of such gravity as would normally require hospitalization or prolonged psychiatric treatment;

{¶ 42} "(b) Any physical harm that carries a substantial risk of death;

{¶ 43} "(c) Any physical harm that involves some permanent incapacity, whether partial or total, or that involves some temporary, substantial incapacity;

{¶ 44} "(d) Any physical harm that involves some permanent disfigurement or that involves some temporary, serious disfigurement;

{¶ 45} "(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."

{¶ 46} In this matter, the record clearly indicates that V.W. had bruising and numerous welts. Welts in the image of a looped cord were on her legs, arms, back and chest. Further, the record indicates that V.W. reported pain to her legs the following evening and her foster mother testified that the girl still has some scars from the incident. We find this evidence sufficient to establish that the offense resulted in serious physical harm.

{¶ 47} Nonetheless, we are compelled to note that defendant was convicted of four counts of endangering children that all arise from a single incident in which defendant, according to the state's witnesses, grabbed V.W., pulled her into the bedroom, and beat her with an extension cord, causing bruising and numerous welts about her body.

{¶ 48} R.C. 2941.25 provides:

{¶ 49} "(A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.

{¶ 50} "(B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate

animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them."

{¶ 51} R.C. 2941.25 implements the protections of the Double Jeopardy Clause of the Fifth Amendment to the Constitution of the United States and Section 10, Article I of the Ohio Constitution and prohibits a second punishment for the same offense. *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, 895 N.E.2d 149.

{¶ 52} In *State v. Brown*, supra, the Ohio Supreme Court held that where a criminal "statute sets forth two means of committing the same offense both of which serve the same purpose-preventing physical harm to persons-we conclude that the General Assembly did not intend them to be separately punishable when the offenses result from a single act undertaken with a single animus."

{¶ 53} The *Brown* Court explained:

{¶ 54} "In *State v. Botta* (1971), 27 Ohio St.2d 196, 201, 56 O.O.2d 119, 271 N.E.2d 776, we acknowledged that R.C. 2941.25 is a legislative attempt to codify the judicial doctrine of merger, i.e., the principle that 'a major crime often includes as inherent therein the component elements of other crimes and that these component elements, in legal effect, are merged in the major crime.' See also *State v. Roberts* (1980), 62 Ohio St.2d 170, 172-173, 16 O.O.3d 201, 405 N.E.2d 247; *State v. Thomas* (1980), 61 Ohio St.2d 254, 15

O.O.3d 262, 400 N.E.2d 897; *State v. Logan* (1979), 60 Ohio St.2d 126, 14 O.O.3d 373, 397 N.E.2d 1345. Therefore, the proper disposition of matters involving allied offenses of similar import committed with a single animus is to merge the crimes into a single conviction."

{¶ 55} We must further note that "[t]he fact that there were several wounds does not automatically mean that a separate animus attaches to each injury." *State v. Carter*, Cuyahoga App. No. 90504, 2009-Ohio-5961. The *Carter* Court explained:

{¶ 56} "In determining whether a separate animus exists, courts have examined case-specific factors such as whether the defendant at some point broke "a temporal continuum started by his initial act" [citing *State v. Williams*, Cuyahoga App. No. 89726, 2008-Ohio-5286]; whether, at some point, the defendant created a "substantial independent risk of harm" [id.]; whether facts appear in the record that "distinguish the circumstances or draw a line of distinction that enables a trier of fact to reasonably conclude separate and distinct crimes were committed" [citing *State v. Hines*, Cuyahoga App. No. 90125, 2008-Ohio-4236]; and whether a "significant amount of time passed between the beginning of the felonious assault and the end of the attack [citing *State v. Chaney*, Stark App. No.2007CA00332, 2008-Ohio-5559]."

{¶ 57} In this matter, the offenses were all committed in the same

temporal continuum started by his initial act, there was no independently identifiable risk of harm connected to each alleged offense. There are no facts in the record to distinguish the circumstances or draw a line of distinction that enables a trier of fact to reasonably conclude separate and distinct crimes were committed. Further, no significant amount of time between the alleged offenses.

{¶ 58} Cf. *State v. Johnson*, Hamilton App. No. C-0801568, 2009-Ohio-2568 (applying R.C. 2941.25 and the "same conduct" analysis to three convictions for endangering children).

{¶ 59} Thus, the trial court erred in sentencing defendant for all of the allied offenses. Cf. *State v. Whitfield*, ___ Ohio St. 3d ___, 2010-Ohio-2. Moreover, although the court ran the sentences concurrently, running counts concurrent is not the equivalent of merging them. *State v. Baker*, 119 Ohio St.3d 1441, 2008-Ohio-4487; *State v. Reid*, Cuyahoga App. No. 89006, 2007-Ohio-5858. We therefore remand for a new sentencing hearing at which the state must elect which allied offense it will pursue against the defendant.

{¶ 60} Defendant additionally advances three assignments of error in a pro se brief filed months out of rule and without leave of court. In an abundance of caution, however, we have reviewed the brief and determined that the pro se assignments of error lack merit.

{¶ 61} First, the claim that defendant has been tried outside the speedy trial deadline set forth in R.C. 2945.72 rests upon the contention that defendant did not consent to continuances noted in the record to be "at defendant's request." Since this claim presents matters dehors the record, we must reject it herein. *State v. Stone* (March 26, 1991), Scioto App. No. 89CA1825; *State v. Boyer* (Feb. 22, 1990), Franklin App. No. 89AP-658. Moreover, the motions pertaining to competency and for independent analysis of the evidence tolled the time and were clearly for the benefit of defendant. The first pro se assignment of error is therefore not well-taken.

{¶ 62} Second, with regard to the claim that the indictment is void since it was not issued upon an oath or affidavit, we note that Crim.R. 6(C) requires that the grand jury foreman sign the indictment. In this case, the grand jury returned a "True Bill" that was signed by the foreman of the grand jury and the prosecutor, thus meeting the requirements of R.C. 2939.20. Further, under R.C. 2941.29, any claimed defect should have been raised prior to trial. This assignment of error is therefore without merit.

{¶ 63} As to the third pro se assignment of error, that the indictment fails to properly charge defendant with the offense of endangering children since it does not set forth a mens rea, we note that the indictment alleged that defendant "recklessly" committed the offense of endangering children and therefore properly set forth the requisite mens rea of "recklessly." See

State v. O'Brien (1987), 30 Ohio St.3d 122, 508 N.E.2d 144; *State v. McGee*, 79 Ohio St.3d 193, 1997-Ohio-156, 680 N.E.2d 975. Therefore this assignment of error is without merit.

{¶ 64} Defendant's convictions are affirmed, the sentences are reversed, and the the matter is remanded for a new sentencing hearing at which the state must elect which allied offense it will pursue against the defendant.

It is ordered that appellee and appellant split the 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.

ANN DYKE, JUDGE

KENNETH A. ROCCO, P.J., and
MARY EILEEN KILBANE, J., CONCUR