[Cite as *State v. Triplett,* 2018-Ohio-5405.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

WESLEY TRIPLETT,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 17 MA 0128

Criminal Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case No. 17 CR 560

BEFORE:
Carol Ann Robb, Gene Donofrio, Kathleen Bartlett, Judges.

JUDGMENT:
Affirmed.

Atty. Paul J. Gains, Mahoning County Prosecutor, *Atty. Ralph M. Rivera,* Assistant Prosecuting Attorney 21 West Boardman Street, 6th Floor, Youngstown, Ohio 44503 for Plaintiff-Appellee and

Atty. Edward A. Czopur, DeGenova & Yarwood, LTD., 42 N. Phelps Street, Youngstown, Ohio 44503, for Defendant-Appellant.

Dated: December 21, 2018

Robb, P.J.

{¶1} Defendant-Appellant Wesley Triplett appeals after being convicted of domestic violence and child endangering in the Mahoning County Common Pleas Court. He raises issues concerning: reasonable parental discipline; status as a family or household member; the failure to object to a nurse practitioner's definition of a physically abused child; juror unanimity and the lack of specified conduct in multiple charges of the same offense; the nurse practitioner's testimony on the child's hearsay statements for medical treatment; and the failure to object to a police officer's testimony on the child's hearsay statements. For the following reasons, the trial court's judgment is affirmed.

STATEMENT OF THE CASE

{¶2} On May 25, 2017, Appellant was indicted on four counts for injuries suffered by his four-year-old son occurring between December 6, 2016 and April 5, 2017. The first count in the indictment charged Appellant with domestic violence for knowingly causing or attempting to cause physical harm to a family or household member, a felony of the third degree due to two prior domestic violence convictions. *See* R.C. 2919.25(A),(D)(4). In counts two through four, Appellant was charged with child endangering for recklessly abusing a child under 18, a felony of the second degree where there was serious physical harm. *See* R.C. 2919.22(B)(1),(E)(2)(d).

{¶3} At the August 2017 jury trial, an intake caseworker from Children Services Board (CSB) testified she opened a case upon receiving a phone call on March 28, 2017. She went to Appellant's house and informed him of the report she received about his son. She testified Appellant "responded by stating that he did not harm his child, that his child had no injuries to him, that his child had no bruises." (Tr. 104). He stated the child was not present, and he would not provide the mother's last name, phone number, or address. (Tr. 105-106).

{¶4} The caseworker contacted the Child Support Enforcement Agency (CSEA) to determine whether paternity had been established. From CSEA, she learned the child's full name, the child's date of birth, the mother's name, and the mother's last

known address. She also confirmed the father's name and last known address. (Tr. 106-107). It was then learned the mother did not reside at the initial address provided by CSEA. The next day, CSEA provided the CSB caseworker with a more recent address which turned out to be the address of the child's maternal grandmother. (Tr. 108). The mother was no longer staying there or at an aunt's house where she sometimes stayed. (Tr. 109).

{¶5} The caseworker returned to Appellant's residence. Appellant insisted his son was fine and had no injuries on him. (Tr. 110). As to visitation, he reported the mother would drop the child off for a few days at a time and then randomly return to retrieve the child. (Tr. 111). The weekend passed with no contact from the mother. The caseworker received a concerning phone call from the child's uncle. The caseworker then asked the prosecutor and law enforcement for help finding the mother's place of employment. (Tr. 112). A phone number was procured for the mother who returned the caseworker's call and transported the child to the agency on April 5, 2017, more than a week after the initial report was received. (Tr. 113-114).

{¶6} The caseworker testified the four-year-old child was covered in marks evidencing injuries. A large burn covered (and extended beyond) the child's left elbow area. The child was African-American, and this burned area with defined borders was scarred pink as it had lost pigmentation. (Tr. 116). In addition, the child held his right arm protectively against his body and could not straighten it; the child's left bicep appeared significantly smaller than the muscle of the other arm. (Tr. 115-116). The caseworker noticed faded marks on the child's arms, hands, and face (some extending into the hairline). (Tr. 117). She then observed fresher "lashes all across his back, crisscross, gaps where his skin was broken." (Tr. 116). The child's buttocks and both legs showed the same "cord like slash marks." (Tr. 117).

{¶7} The caseworker via a deputy sheriff took emergency custody of the child and brought the child to the emergency room at the local campus of Akron Children's Hospital. From x-rays, it was discovered that the child suffered two broken bones in the elbow area, at the end of the upper arm bone and at the end of one of the bones of the forearm (ulna). Further, the child suffered three fractured ribs. (Tr. 120, 210). An emergency room physician testified to discovering the bone injuries, along with the burn

and scars on his back; his report containing the child's medical chart and photographs taken in the emergency room were admitted into evidence. (Tr. 136-142). The photographs showed multiple whip scars across the back of the child's body; there were clear imprints of loops showing a cord-like object was doubled-up during the lashing. The physician concluded to a reasonable degree of medical certainty that the child's injuries were the result of non-accidental trauma due to physical abuse. (Tr. 141). The child was referred to a pediatric orthopedist and a burn specialist at the main campus of Akron Children's Hospital in Akron. (Tr. 122).

{¶8} The child's mother testified she became friends with Appellant after meeting him in 2011 and they had a brief sexual relationship from which she became pregnant. She advised Appellant of her pregnancy and moved away from the area. She returned to the area in 2016. In December 2016, Appellant contacted her about visiting with his child; she went to his residence in Youngstown with the child at first and soon permitted the child to stay overnight. (Tr. 149-150, 166). She said Appellant had the child with him every day in January. (Tr. 163).

{¶9} The mother testified she first noticed injuries in February 2017, as the child was exiting the shower while she was at Appellant's house to retrieve the child. (Tr. 152). She saw whip lashes on his back, which she described as healing and not fresh. (Tr. 152, 154). When she questioned Appellant, he admitted he "whooped" the child. (Tr. 153). She told Appellant he could not put his hands on the child and should use time-out as punishment. (Tr. 153).

{¶10} On another occasion, Appellant told the mother over the phone that the child had a sprained arm. (Tr. 154). When she asked him to take the child for medical treatment, Appellant refused and said he could take care of a sprained arm. (Tr. 155). At the beginning of March, she arrived to pick up the child from Appellant's house. When Appellant unwrapped the child's injured arm, the mother saw the arm was now burned. She testified Appellant said he burned the child in the shower (by putting him in the water without testing it). (Tr. 156). She explained her reason for deciding not to take the child for medical treatment: "I was scared. I didn't want them to – you know, on top of it, it was old. It was already pink. The skin was peeled back. I didn't want

them looking at me like I was the reason for it due to the fact that it was old, so." (Tr. 157).

{¶11} The mother said she was upset and started going with her son to Appellant's house. (Tr. 156, 165, 167). She described the child as well-behaved and said she never had to spank him. She attested that she did not cause the burn, whip marks, broken ribs, or broken elbow and the child was never injured until Appellant entered his life. (Tr. 159-160). The caseworker pointed out there were no marks on the mother's two-year-old daughter (who had a different father), while the subject child was covered in evidence of injuries. (Tr. 115).

{¶12} A police officer testified he got a search warrant for Appellant's residence to look for items fitting the child's statement that a cord was used to make the whip marks on his body. (Tr. 177). The officer seized three black cords and a jump rope from Appellant's residence. (Tr. 180). The items and photographs of the items in situ were admitted as evidence. When the officer presented numbered photographs of the cords to the child, the child identified a photograph of a particular black cord. The officer then presented the cords to the child, and the child identified the same black cord. (Tr. 184-185). Relevant to the specification for the domestic violence charge, evidence of Appellant's two prior domestic violence convictions was presented. (Tr. 186-188).

{¶13} On April 18, 2017, the child was examined by a nurse practitioner at Akron Children's Hospital, Child Advocacy Center, after his medical records were reviewed. In preparing to examine the child, the nurse practitioner listened as the four-year-old child disclosed physical abuse by his father. The child said his father would strike his unclothed back with a cord as a form of discipline which caused pain; he also said his arm was burned when his father turned the water on while he was in the bathtub. (Tr. 203-204). The nurse practitioner outlined the child's injuries: broken bones (two fractured arm bones at the elbow and three fractured ribs); a burned elbow; and whip scars on the back, legs, buttocks, and arm. (Tr. 200-201).

{¶14} Photographs were introduced showing the appearance of the child's injuries two weeks after the emergency room visit. The nurse practitioner opined these were permanent scars. (Tr. 211). She confirmed the looped scars on the back of the

child's body were consistent with being beaten with a cord. (Tr. 208-209). She also observed a scar near the child's mouth. (Tr. 206). She noted the burn scar around the elbow area had fairly smooth edges with no splash or flow marks as typically occurs when a child accidentally burns himself by spilling hot liquid. (Tr. 207). The child's broken bones were healing at the time of her examination, but there was some concern with a reduced range of motion in the elbow. (Tr. 215).

{¶15} The jury returned verdicts finding Appellant guilty as charged. The court sentenced Appellant to thirty-six months for domestic violence and eight years for each child endangering count to run consecutively. Appellant filed a timely notice of appeal from the August 30, 2017 sentencing entry.

ASSIGNMENT OF ERROR ONE: PARENTAL DISCIPLINE

{¶16} Appellant sets forth eight assignments of error, the first of which provides:

"Appellant was denied due process of law and a fair trial, as guaranteed under both the Ohio and United States Constitutions, and the convictions as to all counts were based on insufficient evidence, when the trial court failed to include an instruction that the jury must find that all of the complained of conduct fell outside the realm of reasonable parental discipline."

{¶17} Appellant contends the state had the burden to prove the child's injuries were outside the realm of reasonable parental discipline and the court was required to instruct the jury accordingly. Within this assignment of error, Appellant's sufficiency of the evidence argument is blended with a jury instruction argument. Nevertheless, sufficiency is a different question than the question of whether a more specific jury instruction on the injury should have been provided. As Appellant points out, where there is insufficient evidence to support a conviction, a retrial is barred as jeopardy attached. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997), citing *Tibbs v. Florida*, 457 U.S. 31, 41, 47, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982). However, the remedy for a lacking jury instruction would be to remand for a new trial. *State v. Williford*, 49 Ohio St.3d 247, 253, 551 N.E.2d 1279 (1990); *State v. Duncan*, 154 Ohio App.3d 254, 2003-Ohio-4695, 796 N.E.2d 1006, ¶ 38-42 (1st Dist.). Thus, we address the issue as to whether a jury instruction was mandated after we address the issue of whether there was sufficient evidence.

{¶18} Whether the evidence is legally sufficient to sustain a conviction is a question of law dealing with adequacy. *Thompkins*, 78 Ohio St.3d at 386. An evaluation of witness credibility is not involved in a sufficiency review as the question is whether the evidence is sufficient if believed. *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, 767 N.E.2d 216, ¶ 79, 82; *State v. Murphy*, 91 Ohio St.3d 516, 543, 747 N.E.2d 765 (2001). *See also Thompkins*, 78 Ohio St.3d at 390 (Cook, J., concurring) (sufficiency involves the state's burden of production rather than its burden of persuasion). A conviction cannot be reversed on grounds of sufficiency unless the reviewing court determines, after viewing the evidence in favor of the prosecution, that no rational juror could have found the elements of the offense proven beyond a reasonable doubt. *State v. Goff*, 82 Ohio St.3d 123, 138, 694 N.E.2d 916 (1998). The evidence and all rational inferences are evaluated in the light most favorable to the state. *See, e.g., State v. Filiaggi*, 86 Ohio St.3d 230, 247, 714 N.E.2d 867 (1999).

{¶19} The elements of domestic violence relevant to this case are: knowingly cause or attempt to cause physical harm to a family or household member. R.C. 2919.25(A). *Compare* R.C. 2919.25(B) (recklessly cause serious physical harm to a family or household member). The elements of child endangering pertinent here are: recklessly abuse a child resulting in serious physical harm. R.C. 2919.22(B)(1),(E)(2)(d). *See State v. McGee*, 79 Ohio St.3d 193, 195, 680 N.E.2d 975 (1997).

{¶20} Appellant asserts the state had the burden to prove the lack of reasonable parental disciple. He characterizes unreasonable parental discipline as an additional element of domestic violence when the defendant is a parent, citing to a parent's right to discipline his or her child and to the Supreme Court's *Suchomski* case.

{¶21} In *Suchomski*, the Court compared the domestic violence offense in R.C. 2919.25(A) (knowingly causing or attempting to cause physical harm to a family or household member) with R.C. 2919.22(B)(3) (defining a type of child endangering where corporal punishment was excessive under the circumstances and created a substantial risk of serious physical harm to the child). The Court was asked to determine if the statutes conflicted with each other and with the parent's right to reasonably discipline his child because R.C. 2919.25(A) does not require *serious*

physical harm or *specifically* allow for reasonable parental discipline. *State v. Suchomski*, 58 Ohio St.3d 74, 75, 567 N.E.2d 1304 (1991). The case was a state's appeal after an indictment was dismissed due to the claimed invalidity of the elements in division (A) of the domestic violence statute when applied to a parent. In reversing the dismissal of the indictment, the Supreme Court explained:

> "Nothing in R.C. 2919.25(A) prevents a parent from properly disciplining his or her child." The only prohibition is that a parent may not cause "physical harm" as that term is defined in R.C. 2901.01(C). "Physical harm" is defined as "any injury[.]" "Injury" is defined in Black's Law Dictionary (6 Ed.1990) 785, as "* * * [t]he invasion of any *legally protected interest* of another." (Emphasis added.) A child does not have any legally protected interest which is invaded by proper and reasonable parental discipline.

Id. Contrary to Appellant's contention, the Supreme Court did not expressly add an element to the statute. Rather, the Court provided a definition of an element.

{¶22} While applying *Suchomski*, this district pointed out that after providing the definition of injury, the Supreme Court reviewed the defendant's alleged conduct against the definition and concluded the alleged conduct was sufficient to meet the elements of a domestic violence charge under R.C. 2919.25(A). *State v. Rosa*, 7th Dist. No. 12 MA 60, 2013-Ohio-5867, 6 N.E.3d 57, ¶ 25. This court concluded that unreasonable parental discipline is a component of the physical harm element of a domestic violence charge pursuant to R.C. 2919.25(A) and thus the state had the burden to provide sufficient evidence of unreasonable parental discipline. *Id.* at ¶ 20, 35 (reversing on sufficiency grounds).

{¶23} Initially, we must point out that *Suchomski* and *Rosa* only purported to apply when a parent is alleged to have caused "physical harm" to his or her child, such as in division (A) of the domestic violence statute. Contrary to Appellant's suggestion, the same concerns are not involved in a charge of child endangering through "abuse" of a child. The element of abuse is not a part of the domestic violence statute. Abuse is defined differently than the element of causing a physical injury (for domestic violence); abuse is more than an injury. For instance, the trial court instructed the jury that any

physical or mental injury considered under the abuse element must harm or threaten to harm the child's health or welfare. (Tr. 284). *Compare* R.C. 2901.01(A)(3) (physical harm means any injury, illness, or other physiological impairment, regardless of its gravity or duration).

{¶24} We also note Appellant was convicted of the additional element existing where the abuse caused *serious* physical harm. *See* R.C. 2919.22(B)(1),(E)(2)(d). *See also* R.C 2919.25(A) *compared with* (B) (domestic violence offense involving causing or attempting to cause serious physical harm). In *Suchomski*, the defense seemingly admitted the law will not categorize parental discipline as reasonable where it results in *serious* physical harm to the child. *See Suchomski*, 58 Ohio St.3d at 75.

{¶25} Serious physical harm includes: any mental illness or condition of such gravity as would normally require hospitalization or prolonged psychiatric treatment; any physical harm that carries a substantial risk of death; any physical harm that involves some permanent disfigurement; any physical harm that involves some temporary, serious disfigurement; any physical harm that involves some permanent incapacity, whether partial or total; any physical harm that involves some temporary, substantial incapacity; any physical harm that involves acute pain of such duration as to result in substantial suffering; and any physical harm that involves any degree of prolonged or intractable pain. R.C. 2901.01(A)(5)(a)-(e). The jury was instructed accordingly.

{¶26} The state presented a plethora of evidence showing the four-year-old child suffered serious physical harm as manifested in permanent scars across the back of the body from being whipped, a burn which caused a large scar on the arm, and the existence of broken arm bones and ribs. A reasonable person could easily conclude the child experienced "acute pain" of such duration as to result in "substantial suffering" and/or the harm involved a "degree of prolonged or intractable pain" from the injuries involved. The child suffered "temporary, serious disfigurement" and also "some permanent disfigurement." Moreover, a rational juror could find the child suffered a "temporary, substantial incapacity."

{¶27} We conclude the cases of *Suchomski* and *Rosa* are not directly pertinent to the child endangering convictions. Even if *Rosa* extends to the child endangering offense's elements of abuse causing serious physical harm, there was clearly sufficient

evidence presented that the abuse causing the serious physical harm suffered by the child was not the result of reasonable parental discipline, as further reviewed infra.

{¶28} As to Appellant's use of this court's *Rosa* precedent to challenge his domestic violence conviction, the state cites cases from other districts holding reasonable parental discipline is an affirmative defense that was not raised in this case below. In *Rosa*, this court recognized the split in appellate districts, recited the districts on each side of the issue, and rejected the cases holding reasonable parental discipline was an affirmative defense that the defendant must prove. *Rosa*, 7th Dist. No. 12 MA 60 at ¶ 26-27, fn. 1-2, citing, *e.g., Brooklyn v. Perna*, 8th Dist. No. 96647, 2012-Ohio-265, ¶ 15-17 (applying *Suchomski* to find insufficient evidence to support a parent's conviction for domestic violence as the state did not show the conduct was not reasonable parental discipline).

{¶29} Even assuming it would be advisable to overturn our *Rosa* holding (as implicitly suggested by the state) and thereby label reasonable parental discipline as an affirmative defense, there is no need to do so at this time in this particular case as the record contains sufficient evidence of unreasonable parental discipline. In evaluating the reasonableness of parental discipline, the totality of the circumstances are to be considered, including factors such as: the age of the child; the child's behavior leading up to the discipline; the child's response to prior non-corporal punishment; the location of the injury; the severity of the punishment; and the parent's state of mind while administering the punishment. *Rosa*, 7th Dist. No. 12 MA 60 at ¶ 35, 41. Circumstantial evidence inherently possesses the same probative value as direct evidence. *State v. Treesh*, 90 Ohio St.3d 460, 485, 739 N.E.2d 749 (2001).

{¶30} The child was merely four years old. He was considered a well-behaved child. His mother did not spank him, and he suffered no injuries in life until meeting his father. The child's injuries were in varied locations and were not fleeting or superficial. Marks remained all over the child weeks after Appellant was informed by CSB of the allegations. It is not reasonable to make lasting marks on a child. Considering the enduring evidence of wounds and the medical testimony, the "punishment" was severe. Taking into account the injuries and the child's age, the perpetrator's state of mind can be considered unreasonable.

{¶31} As aforementioned in discussing the serious nature of the physical harm, it was not reasonable to whip one's four-year-old unclothed child with a doubled-up cord so hard that lash marks caused scarring in multiple lines across the child's body. The same can be said of an act that caused three rib fractures on opposite sides of the body and a broken arm at the elbow (with fractures to both the end of the bone of the upper arm and the end of a bone in the lower arm). Obviously, putting a child in scalding hot water cannot be viewed as reasonable parental discipline.

{¶32} Viewing the evidence and the available rational inferences in the light most favorable to the prosecution as is required in a sufficiency review, a rational juror could conclude the conduct at issue was not within the realm of reasonable parental discipline. *See Goff*, 82 Ohio St.3d at 138; *Filiaggi*, 86 Ohio St.3d at 247. In sum, there was sufficient evidence of child abuse resulting in serious physical harm and sufficient evidence of domestic violence even when placing the burden on the state to show any parental discipline was unreasonable.

{¶33} On the issue of jury instructions, Appellant argues the trial court should have instructed the jury that the definition of physical harm does not include an injury caused by conduct qualifying as reasonable parental discipline. However, *the defense did not ask for a jury instruction on this topic*. The trial court noted on the record that the defense did not object to the court's jury instructions. (Tr. 298).

{¶34} "On appeal, a party may not assign as error the giving or the failure to give any instructions unless the party objects before the jury retires to consider its verdict, stating specifically the matter objected to and the grounds of the objection." Crim.R. 30(A). "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Crim.R. 52(B). "Absent plain error, the failure to object to improprieties in jury instructions, as required by Crim.R. 30, is a waiver of the issue on appeal." *State v. Underwood*, 3 Ohio St.3d 12, 13, 444 N.E.2d 1332 (1983).

{¶35} "Notice of plain error under Crim.R. 52(B) is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *State v. Landrum*, 53 Ohio St.3d 107, 111, 559 N.E.2d 710 (1990), quoting *State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804 (1978), paragraph three of the

syllabus. To recognize plain error, the appellate court must find an obvious error which prejudiced the appellant by affecting his substantial rights; this involves a required finding that there is a "reasonable probability that the error resulted in prejudice." *State v. Rogers*, 143 Ohio St.3d 385, 2015-Ohio-2459, 38 N.E.3d 860, ¶ 22. Nevertheless, an appellate court's invocation of plain error is discretionary. *Rogers*, 143 Ohio St.3d 385 at ¶ 23; Crim.R. 52(B).

{¶36} Notably, the opening statement for the defense admitted the child's injuries, noted the jury would hear disturbing information that would tug at their hearts, asked them to judge the mother's credibility when she placed the blame on Appellant, and anticipated the evidence would not show Appellant was the person who hurt the child. (Tr. 96-97). In closing, defense counsel declared: "I'm not here to minimize his injuries because [he's] gone through horrible injuries, but Wesley Triplett is not the perpetrator of those injuries, and the state's not proven that." (Tr. 260). He went on to review the mother's actions and inactions regarding the child, and the state's failure to suspect anyone but Appellant. (Tr. 262-263, 265). Counsel recognized the impact of the photographs and acknowledged the child "has got some horrible injuries and he endured some horrible things, but the state's not proven anything against Mr. Triplett." (Tr. 263-264). Besides refraining from seeking a jury instruction on reasonable parental discipline, defense counsel was essentially conceding any discipline which caused the injuries described was not reasonable.

{¶37} We hereby conclude the alleged jury instruction issue in this case does not present extraordinary circumstances and there is no indication of a manifest miscarriage of justice. As set forth above, there was adequate evidence demonstrating the child's injuries were not the result of reasonable parental discipline. Considering all of the evidence and the arguments made by the defense, there was no prejudice from the lack of an instruction defining physical harm as excluding reasonable parental discipline. As there was no prejudice, there was neither plain error nor ineffective assistance of counsel. *See State v. Montgomery*, 148 Ohio St.3d 347, 2016-Ohio-5487, 71 N.E.3d 180, ¶ 82, citing *Strickland v. Washington*, 466 U.S. 668, 688, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (ineffective assistance involves deficient performance and

prejudice); *Rogers*, 143 Ohio St.3d 385 at ¶ 22 (equating the prejudice analysis for plain error to the prejudice prong for an ineffective assistance of counsel analysis).

{¶38} In addition to a lack of prejudice under the circumstances of this case, the failure to request a jury instruction can be considered reasonable trial strategy. Here, counsel even expressly disclosed the defense strategy of not contesting the severity of the child's injuries. There is a strong presumption counsel strategy fell within the wide range of reasonable professional assistance, and we generally refrain from second-guessing these types of strategic decisions. *See State v. Bradley*, 42 Ohio St.3d at 142-143, 538 N.E.2d 373 (1989) (there are "countless ways to provide effective assistance in any given case"), citing *Strickland*, 466 U.S. at 689; *State v. Carter*, 72 Ohio St.3d 545, 558, 651 N.E.2d 965 (1995).

{¶39} The trial tactic was to refrain from downplaying the injuries or the conduct that caused those injuries and to direct the blame to the child's mother or someone other than Appellant. Strategically, counsel hoped to avoid inflaming emotions by arguing the conduct which caused the injuries was reasonably undertaken by a parent who was disciplining a four-year-old. Counsel's strategy was not unreasonable, especially considering the mother's admitted lack of concern regarding abuse even after seeing the horrific whip marks and her subsequent failure to seek medical attention for the child's large burn or multiple broken bones.

{¶40} "When the decision not to request a particular jury instruction may be deemed to be part of a reasonable trial strategy, we will not find plain error." *State v. Mohamed*, 151 Ohio St.3d 320, 2017-Ohio-7468, 88 N.E.3d 935, ¶ 27. As the state presented sufficient evidence and the trial court did not commit plain error by failing to provide a jury instruction on reasonable parental discipline, Appellant's first assignment of error is overruled.

ASSIGNMENT OF ERROR TWO: FAMILY OR HOUSEHOLD MEMBER

{¶41} Appellant's second assignment of error contends:

"The conviction for Domestic Violence as contained in Count 1 of the indictment was based on insufficient evidence as the State failed to prove that Appellant was a family or household member relative to the alleged victim."

{¶42} The domestic violence statute states: "No person shall knowingly cause or attempt to cause physical harm to a family or household member." R.C. 2919.25(A). The domestic violence statute defines a family or household member as:

> (a) *Any of the following who is residing or has resided with the offender*:
> (i) A spouse, a person living as a spouse, or a former spouse of the offender;
> (ii) A parent, a foster parent, *or a child of the offender*, or another person related by consanguinity or affinity to the offender;
> (iii) A parent or a child of a spouse, person living as a spouse, or former spouse of the offender, or another person related by consanguinity or affinity to a spouse, person living as a spouse, or former spouse of the offender.
> (b) The natural parent of any child of whom the offender is the other natural parent or is the putative other natural parent.

(Emphasis added.) R.C. 2919.25(F)(1).

{¶43} As the other definitions were not pertinent to the facts in this case, the trial court only instructed the jury, under R.C 2919.25(F)(1)(a)(ii), that a family or household member means "a person who is residing or has at some time resided with the defendant and who is a child of the defendant." (Tr. 280). (For instance, there was no evidence Appellant was ever married to the child's mother or lived with her as a spouse.)

{¶44} Appellant contests the sufficiency of the evidence to show the child was his family member or household member, claiming there was insufficient evidence of paternity. He cites a portion of the mother's testimony where she states that upon discussing his paternity of her child when she was pregnant, Appellant "claimed he didn't know." (Tr. 149). He states there was no evidence of: an acknowledgement of paternity, his name on the birth certificate, a child support obligation, or a DNA test. He cites the Sixth District's *Crawford* case where a woman had a child while married, her husband's name was on the child's birth certificate, and another man was charged with domestic violence for acts against the mother. In *Crawford*, the trial court granted the

defendant's motion in limine to prevent the state from presenting testimony from the mother that she believed he was the child's father in order to show the mother qualified as the defendant's family or household member via R.C. 2919.25(F)(1)(b), i.e., she was the natural parent of a child of whom the defendant was the other natural parent "or the putative other natural parent."

{¶45} The Sixth District affirmed, relying on a statutory presumption of paternity for children born during marriage. *State v. Crawford*, 6th Dist. No. F-06-017, 2007-Ohio-2254, ¶ 8, citing R.C. 3111.03(B) ("A presumption that arises under this section can only be rebutted by clear and convincing evidence that includes the results of genetic testing."). The court ruled: "Without DNA testing, the state cannot overcome the presumption created by R.C. 3111.03 and appellee's status as a "family member" could not be proven beyond a reasonable doubt." *Crawford*, 6th Dist. No. F-06-017 at ¶ 10. It was concluded: "since [the mother's] husband is the undisputed natural father, [the defendant] cannot be a 'putative' natural father." *Id.* at ¶ 12. The court opined: "With the certainty and accuracy that DNA testing provides, mere testimony by the mother that appellee could be the father is simply inadmissible in this case." *Id.* at ¶ 13.

{¶46} Contrary to Appellant's contention, the Sixth District's *Crawford* case is not similar to his case as: the statutory meaning of "putative other parent" is not at issue; there is no indication the mother was married to another person when the subject child was born; and there is thus no need to resort to language about DNA in a separate statute which provides a presumption of paternity during marriage. Also, as discussed further infra, Appellant made verbal acknowledgments of his parental status at the time of the investigation.

{¶47} The Fifth District considered the sufficiency of the evidence on the alleged father-son relationship between a victim and an offender. On this element, the victim of domestic violence testified the defendant was his son. The court stated: "we are unpersuaded that the State must produce formal documentation of civil paternity establishment in order to meet the 'family member' element in father/child criminal domestic violence prosecutions. Instead, the State can utilize testimonial evidence going to the issue of paternity, subject to a credibility determination by the jurors or the finder of fact." *State v. Davis*, 5th Dist. No. 13 CA 55, 2014-Ohio-1197, ¶ 36.

{¶48} Here, the mother testified she and Appellant were friends who had a brief sexual relationship that resulted in her pregnancy and the subject child's birth. (Tr. 148-149). She indicated Appellant contacted her in December 2016 in order to establish a relationship with his son. (Tr. 150-151). When asked about the continued visitation after she saw the child's injuries such as the whip marks, she responded she did not see a problem "when he first did it, no 'cause it still didn't trigger to me, okay, this man is – his own dad is abusing him." (Tr. 163).

{¶49} Furthermore, the caseworker explained she went to Appellant's residence to discuss a report of abuse against the subject child, noting she complied with her duty to disclose to Appellant the content of the allegations in the referral. (Tr. 104-105). She testified Appellant replied "by stating that he did not harm his child, that his child had no injuries to him, that his child had no bruises." (Tr. 104). He also told the caseworker his son was not present at the time and provided the mother's first name. (Tr. 105-106).

{¶50} The caseworker also testified to contacting the Child Support Enforcement Agency to see if paternity had been established and learned Appellant was listed as the child's father. (Tr. 106-107). Related to the topic of child support, we note the mother testified that Appellant wondered if (or doubted that) he had medical coverage for the child. (Tr. 155). The four-year-old child believed Appellant was his father as he explained his injuries by stating his father struck his back with a cord and burned him (and Appellant admitted to the mother that he caused the marks on the child's back when he "whooped" him and caused the child's burn). (Tr. 153, 156, 204).

{¶51} Finally, the second time the caseworker went to Appellant's residence to speak about the subject child, Appellant again denied "his son" was injured. Specifically, she quoted Appellant as declaring: "I promise you, Miss Patty, my son is fine. There's no injuries on him." (Tr. 110).

{¶52} Considering all of the evidence in the light most favorable to the prosecution, a rational juror could conclude Appellant was the child's father. Most importantly, the mother indicated her pregnancy with the subject child was the result of her sexual relationship with Appellant, and Appellant held himself out (around the time of the abuse) as the child's father to the child and to others (including to the caseworker

to whom Appellant essentially admitted he was the child's father). There was sufficient evidence that the victim was Appellant's child. This assignment of error is overruled.

ASSIGNMENT OF ERROR THREE & FOUR: MEDICAL STANDARD

{¶53} Appellant's third and fourth assignments of error allege:

"Appellant was denied due process of law and a fair trial as guaranteed under both the Ohio and United States Constitutions, when the trial court allowed, and the State argued for a definition of reasonable parental discipline that was based on medical standards that are in conflict with the legal standards of this State."

"Trial counsel was ineffective for failing to object to trial testimony and State's argument as to reasonable parental discipline when such argument was violative of Ohio legal standards, and rather based on a medical standard."

{¶54} The nurse practitioner testified to a reasonable degree of medical certainty that the injuries suffered by the child represent physical abuse. (Tr. 211). She answered in the affirmative when asked whether it was her opinion that the injuries exceeded the bounds of appropriate physical parental discipline. (Tr. 212). This was after the state asked about standards set forth by the American Academy of Pediatrics, to which she answered:

> So according to the American Academy of Pediatrics, appropriate physical discipline might include striking a child with the hand on the clothed buttocks, but it should not leave a mark longer than a few moments. So if a child was physically disciplined and they have marks that are persistent more than a few moments, then that child is physically abused.

(Tr. 211). In closing, the state described the child's injuries as "beyond the tolerated standards for corporal punishment" and referred to the nurse practitioner's testimony "about what the American Pediatric Society has recommended, that it should be a spanking, bare hand against clothed skin." (Tr. 254).

{¶55} Appellant protests the nurse's quoted testimony and the state's recap of that testimony as manifesting the adoption of a more stringent standard than the law in this state. He cites to the reasonable parental discipline standard in the aforementioned *Rosa* case.

{¶56} However, no objection was lodged to the nurse's testimony that this standard set forth by the American Academy of Pediatrics was the source of her medical opinion or to the state's closing argument. Consequently, Appellant raises plain error and contends it was ineffective assistance of counsel to refrain from objecting to the nurse's testimony and the state's closing argument.

{¶57} Initially, we note the nurse practitioner said a bare hand on a clothed child was an example of appropriate parental discipline; she did not state it was the only appropriate physical discipline. In a recent case, we found no plain error where a physician testified that a child's injury was the result of unreasonable physical discipline and explained the American Academy of Pediatrics states physical discipline should be hand-to-buttocks contact that does not leave marks persisting for more than 5 to 10 minutes. *State v. Henderson*, 7th Dist. No. 15 MA 0137, 2018-Ohio-2816, ¶ 75-84.

{¶58} As set forth supra, the defense strategy was to avoid minimizing the child's injuries or the actions of the person who caused the injuries. The defense wished to deflect the blame to the mother (or someone she was protecting). Agreeing that the conduct which caused the injuries would not fall under the realm of reasonable parental discipline falls into this strategy, as would refraining from contesting testimony about what the American Academy of Pediatrics recommends. We shall not second-guess this tactical decision. *See Bradley*, 42 Ohio St.3d at 142-143, citing *Strickland*, 466 U.S. at 689; *Carter*, 72 Ohio St.3d at 558.

{¶59} Where there is no deficiency, prejudice need not be considered on an ineffective assistance of counsel claim. *State v. Madrigal*, 87 Ohio St.3d 378, 389, 721 N.E.2d 52 (2000) (both prongs must be established; if the performance was not deficient, then there is no need to review for prejudice, and vice versa). *See also Bradley*, 42 Ohio St.3d at 141-143, citing *Strickland*, 466 U.S. 668 (the defendant must demonstrate both deficient performance and prejudice). Furthermore, where a failure to object can be considered tactical, a reviewing court need not find plain error. *See Mohamed*, 151 Ohio St.3d 320 at ¶ 27 ("When the decision not to request a particular jury instruction may be deemed to be part of a reasonable trial strategy, we will not find plain error.").

{¶60} In addition, plain error is a discretionary doctrine under Crim.R. 52(B), and this matter does not result in an extraordinary situation involving manifest miscarriage of justice. *Rogers*, 143 Ohio St.3d 385 at ¶ 23 (an appellate court's invocation of plain error is discretionary); *Landrum*, 53 Ohio St.3d at 111 ("Notice of plain error under Crim.R. 52(B) is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice."). Finally, prejudice has not been demonstrated in any event, as the injuries at issue were established by overwhelming evidence to lie outside the bounds of reasonable parental discipline. These assignments of error are overruled.

ASSIGNMENT OF ERROR FIVE: UNANIMITY

{¶61} Appellant's fifth assignment of error contends:

"Appellant was denied due process of law pursuant to both the United States Constitution and Ohio Constitution as there is no way to know that the jurors who convicted him reached a unanimous verdict as to each and every act because the acts in this case, relative to child endangering were not delineated."

{¶62} As Appellant points out, the prosecution must prove the elements of the offense beyond a reasonable doubt. *Sullivan v. Louisiana*, 508 U.S. 275, 277-78, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993). "[T]he Fifth Amendment requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement of a jury verdict are interrelated. * * * In other words, the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt." *Id*. at 278.

{¶63} Appellant cites *Winship* where the United States Supreme Court held the Fourteenth Amendment's due process clause protects a defendant in a criminal case against conviction "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Even if juror unanimity is not a constitutional right applicable to noncapital state trials, Crim.R. 31(A) directs that the verdict shall be unanimous. *See State v. Gardner*, 118 Ohio St.3d 420, 2008-Ohio-2787, 889 N.E.2d 995, ¶ 35.

{¶64} Appellant states this assignment of error applies to the child endangering verdicts. As to the three "carbon copy" child endangering counts, Appellant concludes

"there is no way to know, based on the trial testimony and jury instructions, that each juror considered specific testimony as to a specific charge." He states he was denied due process because "it is impossible to know what count(s) the jury convicted on as to what conduct." The state responds that the jury need not unanimously agree on the underlying type of conduct constituting each count, citing the Ohio Supreme Court's *Gardner* and *Thompson* cases and the United States Supreme Court's *Schad* and *Richardson* cases.

{¶65} In *Thompson*, the defendant argued: the jury should have been instructed to make a specific finding as to whether he committed vaginal rape, anal rape, or both; some jurors may have found him guilty of one type and others may have found him guilty of another type of sexual conduct; and it was not possible to ascertain whether there was a non-unanimous finding as to the type of sexual conduct. *State v. Thompson*, 33 Ohio St.3d 1, 11, 514 N.E.2d 407 (1987). The Supreme Court found these arguments lacked merit and concluded there was no requirement for the reviewing court to have knowledge of the type of sexual conduct found by each juror. *Id.* "The fact that some jurors might have found that appellant committed one, but not the other, type of rape in no way reduces the reliability of appellant's conviction, because a finding of either type of conduct is sufficient to establish the fact of rape in Ohio." *Id.*

{¶66} In the plurality decision of *Gardner*, the Supreme Court explained "the law on juror unanimity distinguishes between the elements of a crime and the means by which a defendant commits an element." *Gardner*, 118 Ohio St.3d 420 at ¶ 37. "Although Crim.R. 31(A) requires juror unanimity on each element of the crime, jurors need not agree to a single way by which an element is satisfied." *Id.* at ¶ 38, citing *Richardson v. United States*, 526 U.S. 813, 817, 119 S.Ct. 1707, 143 L.Ed.2d 985 (1999) ("jury need not always decide unanimously which of several possible sets of underlying brute facts make up a particular element, say, which of several possible means the defendant used to commit an element of the crime"). "[D]ifferent jurors may be persuaded by different pieces of evidence, even when they agree upon the bottom line. Plainly there is no general requirement that the jury reach agreement on the preliminary factual issues which underlie the verdict." *Gardner*, 118 Ohio St.3d 420 at ¶

39, quoting *Schad v. Arizona*, 501 U.S. 624, 631-632, 111 S.Ct. 2491, 115 L.Ed.2d 555 (1991) (jurors need not agree on mental state for murder where statute lists two different ways to satisfy the means rea element).

{¶67} The *Gardner* Court distinguished an "alternative means case" (citing *Thompson* as an example) from a "multiple acts case" (where "several acts are alleged and any one of them could constitute the crime charged"). *Id.* at ¶ 48-51. The plurality cited a case holding "the jury must be unanimous as to which act or incident constitutes the crime" in a multiple acts case, and in order "[t]o ensure jury unanimity in multiple acts cases, we require that either the State elect the particular criminal act upon which it will rely for conviction, or that the trial court instruct the jury that all of them must agree that the same underlying criminal act has been proved beyond a reasonable doubt." *Id.*

{¶68} In discussing the burglary element of intent to commit a criminal offense, the Court found the phrase "any criminal offense" may in some cases result in a "patchwork" verdict based on "conceptually distinct groupings of crimes" or on multiple acts. "[I]n such cases, due process requires that the jurors must be instructed as to the specific criminal act(s) that the defendant intended to commit inside the premises." *Id.* at ¶ 72. "Nevertheless, we do not require this instruction in every case. Prudence may strongly suggest such a precaution, but we are not persuaded that it is appropriate in all circumstances. Trial judges are in the best position to determine the content of the instructions based on the evidence at trial and on whether the case presents an alternative-means or multiple-acts scenario." *Id.* at ¶ 74. The *Gardner* Court found no plain error in the trial court's failure to instruct the jury it must be unanimous on the type of criminal offense underlying the burglary. *Id.* at ¶ 77.

{¶69} Multiple acts cases can exist where there are distinct conceptual groupings *within a statute* and alleged in a single count in an indictment. *See id.* at ¶ 51-52; *State v. Johnson*, 46 Ohio St.3d 96, 104-105, 545 N.E.2d 636 (1989) (distinguishing this from a "single conceptual grouping of related facts"). Here, there were not conceptual groupings in the statute defining the pertinent offense of child endangering. The elements of the charged offense are: the abuse of a child that results in serious physical harm. *See* R.C. 2919.22(B)(1),(E)(2)(d). Due to "carbon copy" counts of child endangering sharing the same date range, Appellant believes jury

unanimity was in question as it is unknown which child endangering count corresponds to which injury/incident.

{¶70} The state presented evidence of incidents corresponding to the three child endangering charges. The mother testified to three occasions where she learned of injuries from Appellant. In closing, the state outlined the injuries it was relying on for the three child endangering convictions: "the whip marks, the burn, and the broken bones." (Tr. 252). The court instructed the jury:

> Although the charges in Counts Two, Three, and Four appear to be identical, the state alleges that they occurred separately and caused different injuries to the victim on different occasions within that four or four-and-a-half month time period.
>
> So if you find beyond a reasonable doubt all the essential elements of any one or more of the offenses charged in separate counts in the indictment, your verdict must be guilty of that offense or offenses.
>
> If you find that the state failed to prove beyond a reasonable doubt any one of the essential elements of any one or more of the offenses charged in separate counts in the indictment, your verdict must be not guilty.
>
> The charges set forth in each count in the indictment constitute separate and distinct matters. You must consider each count and the evidence applicable to each count separately, and you must state your finding as to each count uninfluenced by your verdict as to any other count. The defendant may be found guilty or not guilty of any one or more of the offenses charged.

(Tr. 288-289). In thereafter reviewing the verdict forms for child endangering, the court explained: "The next three verdict forms are virtually identical as I indicated but they do -- the three counts allege separate injuries, three separate injuries, that may or may not have occurred on different occasions but for which they allege the defendant is accountable * * *." (Tr. 292).

{¶71} One could reasonably conclude the instruction was sufficiently clear to prompt the juror to deliberate each of the child endangering counts separately. Alternatively, there was no objection to the jury instructions under Civ.R. 30(A), which provides: "On appeal, a party may not assign as error the giving or the failure to give any instructions unless the party objects before the jury retires to consider its verdict, stating specifically the matter objected to and the grounds of the objection." Additionally, the prosecutor's closing argument set forth the state's election and delineated three groups of injuries corresponding to the three counts of child endangering. The state thus elected the incidents on which it was proceeding for the child endangering counts, which was an alternative to a jury instruction on specific unanimity as to the act constituting each offense. *See Gardner*, 118 Ohio St.3d 420 at ¶ 50.

{¶72} The jurors unanimously agreed that all the elements of child endangering were satisfied and that this reckless abuse of a child causing serious physical harm occurred three separate times. Neither prejudice nor a manifest injustice is apparent, and this is not an extraordinary case on the topic of juror unanimity. In accordance, this assignment of error is overruled. (The effect of any lack of specificity between the child endangering counts is further discussed in the next assignment of error.)

ASSIGNMENT OF ERROR SIX: UNDELINATED COUNTS

{¶73} Appellant's sixth assignment of error argues:

"Appellant was denied due process of law pursuant to both the United States and Ohio Constitutions, had his right to protection against double jeopardy violated and was further deprived his right pursuant to Article I, Section 10 of the Ohio Constitution as the State failed to distinguish the alleged crimes through indictment, and/or the bill of particulars."

{¶74} Appellant quotes the Sixth Amendment to the United States Constitution as follows: "In all criminal prosecutions, the accused shall enjoy the right * * * to be informed of the nature and cause of the accusation." He also quotes the following from Article I, Section 10 of the Ohio Constitution: "no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury." This guarantees the essential facts constituting the offense to be tried will be

found in the indictment issued by the grand jury. *State v. Pepka*, 125 Ohio St.3d 124, 2010-Ohio-1045, 926 N.E.2d 611, ¶ 14.

{¶75} In discussing due process, Appellant raises the related concept of double jeopardy, stating the notice of the charge assists a defendant in avoiding future double jeopardy issues. Article I, Section 10 of the Ohio Constitution states: "No person shall be twice put in jeopardy for the same offense." *See also* Fifth Amendment to the U.S. Const. (no person shall "be subject for the same offence to be twice put in jeopardy of life or limb"). The double jeopardy clause prohibits re-prosecution for the same offense after a conviction (or an acquittal) and prohibits multiple punishments for the same offense. *State v. Ruff*, 143 Ohio St. 3d 114, 2015-Ohio-995, 34 N.E.3d 892, ¶ 10. Appellant points out a constitutionally-valid indictment must contain the elements of the offense charged, fairly inform him of the charge against which he must defend, and enable him to plead an acquittal or conviction to bar any future prosecution for the same offense. *State v. Childs*, 88 Ohio St.3d 558, 564-565, 728 N.E.2d 379 (2000), quoting *Hamling v. United States*, 418 U.S. 87, 117-118, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974).

{¶76} An indictment is sufficient if it "contains a statement that the defendant has committed a public offense" which may be "in ordinary and concise language" and in the words of the applicable section of the statute, "provided the words of that statute charge an offense, or in words sufficient to give the defendant notice of all the elements of the offense with which the defendant is charged." Crim.R. 7(B). An indictment can be amended "at any time" by the court if it does not alter the name or identity of the offense. *Pepka*, 125 Ohio St.3d 124 at ¶ 15.

{¶77} An indictment is not made invalid for stating the time imperfectly, and a date is not required to be changed unless it is an element. *State v. Sellards*, 17 Ohio St.3d 169, 171, 478 N.E.2d 781 (1985) (where date is not an element "it shall be sufficient if it can be understood that the offense was committed at some time prior to the time of the filing of the indictment"). There is no issue with the provision of a date range, especially when the victim is a young child abused by a parent. S*tate v. Parker*, 7th Dist. No. 13 MA 161, 2015-Ohio-4101, ¶ 15-25 (each offense need not be differentiated by date).

{¶78} Appellant asserts that of the three child endangering counts, only a single verdict of child endangering can stand, claiming the offenses are not distinguished in the indictment *or* the bill of particulars. In contending "carbon copy" charging of multiple child endangering allegations violated his rights to due process or double jeopardy, Appellant relies on the Sixth Circuit's *Valentine* case.

{¶79} In *Valentine*, the defendant was convicted in Ohio of 20 counts of child rape and 20 counts of felonious sexual penetration of a minor for abusing his eight-year-old step-daughter. The victim testified Valentine forced her to perform fellatio in the living room on "about twenty" occasions, digitally penetrated her vagina in the living room on "about fifteen" occasions, engaged in similar incidents in three different bedrooms, and anally penetrated her with his penis on "about ten" occasions. She apparently altered her numbers on cross-examination. The Eighth District found insufficient evidence for five of the felonious sexual penetration counts.

{¶80} The defendant then filed a federal petition for a writ of habeas corpus arguing his due process rights were violated when he was convicted on an indictment which did not specify a date or distinguish the counts by conduct, and the trial court for the Northern District of Ohio granted the writ of habeas corpus as to all charges. In the state's appeal, the Sixth Circuit allowed two convictions to stand, one in each category. Although the appellate court found no issue with the lack of specificity on dates and the use of a date range in the case involving a child victim of sexual abuse, the court found a problem with the lack of factual distinctions within each set of 20 counts. *Valentine v. Konteh*, 395 F.3d 626, 632 (6th Cir.2005).

{¶81} The *Valentine* court essentially held the prosecution was required to specifically lay out a separate factual basis for each count and could not rely on the victim outlining the "typical" molestation she suffered or her estimate on the number of incidents. *Id.* at 632-633. The court opined: "Given the way Valentine was indicted and tried, it would have been incredibly difficult for the jury to consider each count on its own." *Id.* at 633. The court said the jury could have found him guilty of some counts within the block but not others, but the court then admitted the jury could have acquitted him of some of the counts if they believed the child overestimated the number of incidents. *Id.* at 633-634 ("due to the failure to differentiate, Valentine could only

successfully defend against some of the charges by effectively defending against all of the charges"). The court surmised the defendant had little ability to defend himself because each count was not "anchored" to a "distinguishable" offense. *Id.* at 633. "The indictment, the bill of particulars, and even the evidence at trial failed to apprise the defendant of what occurrences formed the bases of the criminal charges he faced." *Id.* at 634. Yet the court also said *the state could have cured* any due process problems by delineating the factual basis for each count at trial. *Id.*

{¶82} The *Valentine* court also found double jeopardy problems. For instance, the court concluded the lack of specificity in the indictment or in the trial record precluded Valentine from pleading his convictions as a bar to future prosecutions; the court also entertained the possibility he was subject to double jeopardy in his initial trial by being punished multiple times for the same offense. *Id.* at 634-635. The court believed: "As the charges were not linked to differentiated incidents, there is resulting uncertainty as to what the trial jury actually found. * * * When prosecutors opt to use such carbon-copy indictments, the defendant has neither adequate notice to defend himself, nor sufficient protection from double jeopardy." *Id.* at 636. The court also expressed concern as to jury unanimity as to the underlying factual basis for each offense, but still upheld one conviction from each block of counts.

{¶83} As we recently stated in *Miller*, this court does not follow *Valentine*. *State v. Miller*, 7th Dist. No. 17 MA 120, 2018-Ohio-3430, ¶ 30, citing, *e.g.*, *State v. Adams*, 7th Dist. No. 13 MA 130, 2014-Ohio-5854, 26 N.E.3d 1283, ¶ 36; *Billman*, 7th Dist. Nos. 12 MO 3, 12 MO 5 at ¶ 34-36; *State v. Clemons*, 7th Dist. No. 10 BE 7, 2011-Ohio-1177 (finding no due process violations and opining potential double jeopardy concerns can be cured if they arise in the future). This type of argument would improperly protect a defendant who committed multiple instances of the same offense against a child in his care. *Miller*, 7th Dist. No. 17 MA 120 at ¶ 31, citing *Billman*, 7th Dist. Nos. 12 MO 3, 12 MO 5 at ¶ 36. Contrary to the *Valentine* majority's claim, there is no indication the jury would believe its finding of guilt on one count of child endangering would require a conviction on another count of child endangering merely because it contained the same elements and the same date range. Furthermore, the Sixth Circuit does not rely on *Valentine* as precedent. *Miller*, 7th Dist. No. 17 MA 120 at ¶ 22, citing *Coles v. Smith*,

577 Fed.Appx. 502, 507-508 (6th Cir. 2014) (rejecting this argument by a defendant in a case of 43 undifferentiated counts of rape regarding his step-daughter as *Valentine* used an incorrect standard for habeas).

{¶84} The case at bar is also distinguishable from *Valentine* as it does not involve an estimated total and the trial record contains physical evidence of distinct injuries supporting each of the three child endangering counts. The trial testimony of the mother reviews how she learned of three different incidents from the father on three different occasions while the child was staying at the father's residence. The physical evidence confirmed this. As such, *trial testimony and evidence* delineated distinct, separate occurrences coinciding with separate counts of child endangering. And, the bill of particulars alleged different incidents of child abuse.

{¶85} "There is no inherent defect in an indictment that charges a defendant with repetition of the same crime over a defined period of time." *State v. Billman*, 7th Dist. Nos. 12 MO 3, 12 MO 5, 2013-Ohio-5774, ¶ 33. The indictment need not demonstrate the underlying facts that are not elements as this is the function of the bill of particulars. *Pepka*, 125 Ohio St.3d 124 at ¶ 23. The state provided a bill of particulars here disclosing the allegations that Appellant: struck the child with a cord-like object causing injuries and scarring to the back and buttocks; burned the child's arm with water in the bathtub; and caused fractures to the child's ribs and arm. The bill of particulars noted Appellant did not seek medical attention for any of the child's injuries, claimed the injuries were in various stages of healing, and said this indicated Appellant injured the child on multiple occasions while he was staying at Appellant's residence.

{¶86} Finally, as quoted under the prior assignment of error, the trial court instructed the jury that each count of child endangering was a separate matter even though the language charging each count was identical. *See Miller*, 7th Dist. No. 17 MA 0120 at ¶ 31, citing *State v. Shafer*, 8th Dist. No. 79758, 2002-Ohio-6632, ¶ 24. For all of the foregoing reasons, we overrule Appellant's argument that his due process and double jeopardy rights were violated where the indictment did not specifically delineate the conduct relevant to each of the three child endangering counts. This assignment of error is overruled.

ASSIGNMENT OF ERROR SEVEN: MEDICAL HEARSAY OF CHILD

{¶87} Appellant's seventh assignment of error alleges:

"The trial court allowed, over trial counsel's objection, the inadmissible hearsay testimony of [the child] prejudicing Appellant and denying him a fair trial."

{¶88} There is a hearsay exception for "Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment." Evid.R. 803(4). Utilizing this rule, the state filed a motion in limine seeking a pretrial ruling on the admissibility of the child's statements while being treated at the hospital, including the examination and treatment by the Child Advocacy Center of the Akron Children's Hospital.

{¶89} At a hearing on the motion in limine, it was noted that law enforcement had not spoken to the child prior to this visit. (Mot.Tr. 13). It was explained that the nurse practitioner listened while a hospital social worker interviewed the child so the nurse practitioner could be prepared to perform the medical examination of the child; this technique was standard hospital protocol used to put the child at ease in order to gather information for the medical evaluation, diagnosis, and treatment. (Mot.Tr. 11-13, 15, 20). It was considered unlikely the four-year-old child was speaking with intent to provide information for a future prosecution. (Mot.Tr. 14, 16, 19-20). The court granted the state's motion in limine to allow the nurse practitioner to testify to the child's statements which were provided for medical diagnosis and treatment.

{¶90} At trial, the nurse practitioner explained how a patient's statement as to how the injuries were sustained was an important part of the medical history which she relied upon for a diagnosis and treatment. (Tr. 202-203). She spoke of non-leading interview techniques used by hospital social workers when speaking to child-victims. (Tr. 202). She explained that she observed the interview in real-time through a one-way mirror. (Tr. 203-204). She then testified to the child's disclosure that his father burned his arm with water in the bathtub and would strike him with a cord on his unclothed back. Defense counsel's objection to this testimony was overruled. (Tr. 204).

{¶91} If a hearsay statement being considered for admission is testimonial, then it is subject to the confrontation clause. *Crawford v. Washington*, 541 U.S. 36, 61-62, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). If hearsay is non-testimonial, its admissibility is left to the Rules of Evidence, and it is not subject to the confrontation clause. *Ohio v. Clark*, __ U.S. __, 135 S.Ct. 2173, 2180, 192 L.Ed.2d 306 (2015). The same test applies to evaluate statements regardless of the status of the recipient of the statement as a law enforcement agent or a person other than law enforcement; although, the statements to non-law enforcement agents are much less likely to be considered testimonial. *Id.* at 2181 (finding a child's statements to her preschool teacher "clearly were not made with the primary purpose of creating evidence for [the defendant's] prosecution"). Specifically, *a statement cannot fall within the confrontation clause unless its primary purpose was testimonial*. *Id.* at 2180.[1]

{¶92} Appellant contends the child's statements to the nurse practitioner were testimonial and therefore inadmissible under the Confrontation Clause. He claims the child's statements, which the nurse practitioner relayed at trial, were testimonial because the primary purpose of the interview was a forensic investigation and there was no immediate medical emergency. He relies on the Ohio Supreme Court's *Arnold* case, which he believes is a case on point. The state points out the *Arnold* case made two holdings due to the different categories of statements in that case, and the second holding supports the state's response to this assignment of error.

{¶93} In *Arnold*, the Ohio Supreme Court concluded that the statements of a child during an interview at a child advocacy center had dual characteristics: the interview by the hospital's social worker while the nurse practitioner watched was both a forensic investigation with a purpose of collecting evidence for the police for future prosecution and an intake interview with a purpose of eliciting a medical history necessary for the medical examination, diagnosis, or treatment. *State v. Arnold*, 126 Ohio St.3d 290, 2010-Ohio-2742, 933 N.E.2d 775, ¶ 33. The Court found some of the

[1] The Court added to the holding by observing this "does not mean that the Confrontation Clause bars every statement that satisfies the 'primary purpose' test * * * [which] is a necessary, but not always sufficient, condition for the exclusion of out-of-court statements under the Confrontation Clause." *Clark*, 135 S.Ct. at 2180-2181.

child's statements were testimonial and inadmissible; for certain statements the social worker was acting akin to an agent of the police with a primary purpose of eliciting certain statements in order to investigate for future prosecution (and not to meet an ongoing emergency as the child had already been released from the hospital). *Id.* at ¶ 34-35. The Court thus excluded certain statements of the child, such as that the defendant locked the bedroom door before raping her, the location of her mother at the time, and what the defendant's penis looked like. *Id.* at ¶ 34.

{¶94} However, the Supreme Court ruled that other statements made during the same interview were not testimonial as they transmitted information necessary to diagnose and medically treat the child. Id. at ¶ 35. The Court concluded:

> [The child's] statements that described the acts that Arnold performed, including that Arnold touched her "pee-pee," that Arnold's "pee-pee" went inside her "pee-pee," that Arnold's "pee-pee" touched her "butt," that Arnold's hand touched her "pee-pee," and that Arnold's mouth touched her "pee-pee," were thus necessary for the proper medical diagnosis and treatment of [the child].

Id. at ¶ 36. The Court found a follow-up examination still involves medical diagnosis and treatment and observed how the nurse practitioner relies on the information she hears during the interview by the social worker to perform her medical duties and will not necessarily ask the child questions concerning medical history during the examination. *Id.* at ¶ 39 (a function of the child advocacy center is to decrease stress on a child from continual and repeated questioning).

{¶95} In allowing the nurse practitioner to testify to the child's statements about the actionable conduct perpetrated upon the child's body by the defendant, the Court *characterized the social worker as an agent of the nurse practitioner when asking certain questions for the purpose of medical diagnosis and treatment*. *Id.* at ¶ 40-41. The "dual capacity" role of a hospital social worker does not destroy the status of the statements elicited for the purpose of medical diagnosis and treatment, and "the same interview or interrogation might produce both testimonial and nontestimonial statements." *Id.* at ¶ 41, citing *Davis v. Washington*, 547 U.S. 813, 828-829, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006). Consequently, "[s]tatements made to interviewers at

child-advocacy centers that are made for medical diagnosis and treatment are nontestimonial and are admissible without offending the Confrontation Clause." *Arnold*, 126 Ohio St.3d 290 at paragraph two of syllabus.

{¶96} We accordingly conclude the objected-to testimony of the nurse practitioner was not testimonial. Her testimony that the child disclosed his father would strike him with a cord on his unclothed back causing pain, and his father burned his arm with water in the bathtub concerned statements of the child made for the purpose of medical diagnosis and treatment. The nurse practitioner was preparing to examine the child's lash-marked body, burnt elbow, and broken bones as a part of the child's follow-up and treatment. Pursuant to the Supreme Court's *Arnold* case, the fact that the hospital visit was a follow-up or that the interviewer could be seen as having a dual capacity does not detract from the primary purpose of eliciting this particular information: to gather a medical history, including the cause of the injuries being evaluated, for diagnosis and/or treatment.

{¶97} In other words, the mere fact that the child was previously examined in an emergency room does not mean subsequent medical examinations of a child are not conducted for the purpose of medical diagnosis or treatment. A prior diagnosis by an emergency room physician does not necessarily mean every possible medical diagnosis corresponding to the child's condition was discovered. In fact, psychological injuries are frequently addressed later. As for treatment, it is common knowledge that emergency room physicians advise patients to follow-up with a general physician (and sometimes also with specialists). In addition, the ultimate issuance of a prescribed treatment regime is not the test. The monitoring of healing progress and the determination of whether further treatment is warranted cannot be made without the medical examination. Statements made for the purpose of medical diagnosis or treatment do not lose their status as such if the practitioner does not testify to prescribing a regime of new or further treatment. In accordance, this argument is overruled.

{¶98} Appellant also suggests the nurse practitioner infringed on the jury's fact-finding function, pointing out a witness cannot give an opinion on the veracity of a child and base a medical diagnosis solely on the child's narrative, citing *State v. Schewirey*,

7th Dist. No. 05 MA 155, 2006-Ohio-7054, citing *State v. Boston*, 46 Ohio St.3d 108, 545 N.E.2d 1220 (1989). On this topic, a medical expert can conclude a particular child is the victim of abuse under Evid.R. 702. *Boston*, 46 Ohio St.3d at 126 (a sexual abuse case). However, the admission of an expert opinion on the veracity of a child is improper. *Id.* at 128.

{¶99} In *Schewirey*, this court found a physician should not have been permitted to testify to his opinion that the child was a victim of sexual abuse where his opinion was based solely on the child's narrative as this was essentially an opinion on the child's credibility. *Schewirey*, 7th Dist. No. 05 MA 155 at ¶ 50-51 ("When an expert bases their diagnosis on nothing more than what the child tells them, then their "diagnosis" is nothing more than an opinion on the child's veracity."). This court recognized: "However, an expert does not need physical findings to reach a diagnosis. If the expert relies on other facts in addition to the child's statements, then the expert's opinion will not be an improper statement on the child's veracity." *Id.* at ¶ 50 (such as where the child acts in a certain manner).

{¶100} Here, the nurse practitioner testified as to her diagnosis that the child's injuries represented child physical abuse and held this opinion to a reasonable degree of medical certainty. (Tr. 211). No objection was entered to this testimony. This testimony was relevant under Evid.R. 402 and had a probative value which was not substantially outweighed by any considerations in Evid.R. 403 (such as unfair prejudice, confusion, or the issues of misleading of the jury). Moreover, the nurse practitioner did not rely on merely the child's statement that his father would strike him with a cord as discipline or that his father burned him in the bathtub.

{¶101} She inspected the telling marks across this four-year-old child's body and the burn on his arm. Multiple looped whip marks were still clearly visible across the child's back, legs, and elsewhere and were believed to have resulted in permanent scarring. The burned elbow was prominent and permanent (and evinced no splash marks). The jury was presented with photographs of the scarring. The child also had multiple broken bones, including fractured arm bones and ribs on both sides of his body. The nurse practitioner was permitted to consider the medical reports on these conditions. This is not akin to a case where the diagnosis is essentially a mere opinion

that a child is credible. Accordingly, this argument is without merit, and this assignment of error is overruled.

ASSIGNMENT OF ERROR EIGHT: OFFICER RECITING CHILD'S HEARSAY

{¶102} Appellant's eighth and final assignment of error claims:

"Appellant was denied his right to effective representation as guaranteed by both the Ohio and United States constitutions as a result of trial court's failure to object to inadmissible hearsay from Sergeant Smith."

{¶103} Appellant argues his trial attorney rendered ineffective assistance of counsel when he failed to object when the police officer testified about hearsay statements made by the child. Appellant asserts the statements do not qualify for a hearsay exception. The state responds by claiming the police officer did not testify as to a statement by the child but merely testified about what item the child identified.

{¶104} Although unaddressed by either side, we note the officer did testify that the warrant allowed him to search for a black cord because the investigation resulted in the child stating "he got hit with a black cord." (Tr. 177). Nevertheless, this statement was cumulative with no reasonable probability of affecting the outcome as the nurse practitioner was properly permitted to testify that the child said his father struck him with a cord and the mother testified Appellant admitted the marks were caused when he "whooped" the child. (Tr. 153, 204).

{¶105} In any event, Appellant's brief focuses on the following testimony by the officer: (1) when he presented the child with three photographs of three black cords seized from Appellant's residence and asked him to select the photo of the cord used, the child picked photograph number three; and (2) when he thereafter laid the seized cords on the floor and asked him to select the one used, the child "[i]nstantly went right to the cord that was identified in photo number 3." (Tr. 184-185). *See* Apt.Br at 3, 15-16.

{¶106} Citing no law on the topic, the state suggests this is not hearsay, equating the situation to an officer testifying about the identification of a suspect during a line-up. However, testimony on the identification of a person during a line-up has its own rule. *See* Evid.R. 801(D)(1)(c) (a prior statement by a witness is not hearsay if the statement is one of *identification of a person* soon after perceiving the person where the

circumstances demonstrate the reliability of the prior identification *and if the declarant testifies* at trial or hearing and is subject to cross-examination concerning the statement).

{¶107} Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Evid.R. 801(C). A "statement" is defined as "(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion." Evid.R 801(A). The act of identifying the cord that was previously used as a weapon from an array of three cords upon being asked to do so by a police officer is nonverbal conduct intended as an assertion.

{¶108} However, counsel did not object to the officer's testimony. On cross-examination, counsel elicited that the officer did not have the cords tested for DNA or even for blood. (Tr. 191). Counsel's closing argument opined the failure to test for forensic evidence was part of the general failure to investigate any suspect other than Appellant. (Tr. 265). This could be seen as a tactical decision to allow evidence which could be used to show a lack of investigation in a case where the defense strategy was to blame the mother (or someone she was protecting) for the child's injuries and to further criticize the investigators for failing to suspect anyone but Appellant, even though his accuser was the mother who failed to bring the child for medical treatment upon seeing multiple injuries at various times (and who may have coached the child). Our scrutiny of this performance by counsel is highly deferential, and we conclude Appellant has not overcome the strong presumption the challenged action might be considered sound trial strategy. *See Carter*, 72 Ohio St.3d at 558, citing *Strickland*, 466 U.S. at 689,

{¶109} Moreover, the testimony on the child's identification of one of the three cords seized from Appellant's residence would not result in reversible prejudice where: there was testimony that Appellant admitted he "whooped" the child upon the mother's viewing of the child's wounds in Appellant's presence; there was testimony the child disclosed during a medical evaluation that his father would strike him with a cord; the nurse practitioner saw physical evidence the child was struck by a flexible cord-like object; the jury saw photographs showing the looped scars across the child's body

which demonstrate that a cord-like object was repeatedly used to whip the child; and Appellant told the caseworker the child had no injuries on his body. This and other evidence established beyond a reasonable doubt that Appellant used a cord to injure the child. It cannot be said Appellant would not have been convicted but for the testimony challenged here. This assignment of error is overruled.

{¶110} For the foregoing reasons, the trial court's judgment is affirmed.

Donofrio, J., concurs.

Bartlett, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignments of error are overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Mahoning County, Ohio, is affirmed. Costs waived.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.