[Cite as *State v. Pendland*, 2021-Ohio-1313.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

ERIC PENDLAND,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 19 MA 0088

Criminal Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case No. 17 CR 903

BEFORE:
Cheryl L. Waite, Carol Ann Robb, Judges and Judge Stephen W. Powell, Judge of the Twelfth District Court of Appeals, Sitting by Assignment.

JUDGMENT:
Affirmed.

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

Atty. Brian A. Smith, Brian A. Smith Law Firm, LLC, 755 White Pond Drive, Suite 403, Akron, Ohio 44320, for Defendant-Appellant.

Dated: January 28, 2021

WAITE, J.

{¶1} Appellant Eric Pendland appeals from a judgment of the Mahoning County Court of Common Pleas sentencing him to prison after a jury convicted him on two counts of child endangering. For the following reasons, the judgment of the trial court is affirmed.

Factual and Procedural History

{¶2} On March 1, 2017, Appellant was at his residence on Midlothian Boulevard in Youngstown, Ohio with his three-month old son. The child's mother was at work and Appellant was the sole caretaker for the entire day until mother returned home from work at approximately 4:00 p.m. When she got home that evening, mother, Appellant, and mother's friend Lillian Schulte ("Schulte") traveled to several stores, including the Eastwood Mall. Schulte sat in the back seat next to the child who was in a car seat. She thought the child seem unresponsive, because he never opened his eyes and made occasional moans. (6/10/19 Tr., p. 330.) Mother noticed this, and mother and Schulte became worried about the child's condition. They wanted to seek help for the child, but Appellant insisted the child was fine and was simply sleeping. (6/10/19 Tr., p. 332.) After shopping, they dropped Schulte off at home and proceeded to go to dinner. (6/10/19 Tr., p. 356.) When they returned home mother attempted to give the child a bath and found him completely unresponsive. (6/10/19 Tr., p. 356.) They then took the child to Akron Children's Hospital emergency room in Boardman, Ohio. (6/10/19 Tr., p. 356.)

{¶3} At approximately 10:00 p.m. the child was evaluated by Dr. James M. Lee ("Dr. Lee"), the attending emergency room physician. The child was immediately taken to a resuscitation room, as it was determined the child's status was critical. (6/10/19 Tr., p. 262.) The child was very difficult to arouse and was not responding to any stimulation. (6/10/19 Tr., p. 263.) Dr. Lee did not observe any signs of external trauma or bruises. (6/10/19 Tr., p. 265.) Appellant told Dr. Lee that he had been home alone with the child all day and the child's behavior was normal, but that the child seemed tired. (6/10/19 Tr., p. 266.) Appellant did not report that the child had fallen, suffered a seizure, or that any accidents had occurred that day. (6/10/19 Tr., pp. 266-267.) A CAT scan revealed the child suffered from subdural hemorrhaging, causing the brain to swell which could lead to death. (6/10/19 Tr., pp. 268-269.) When Dr. Lee informed the parents of his findings, mother seemed extremely distraught while Appellant appeared reserved and matter-of-fact. Dr. Lee had concerns that injury or non-accidental trauma had been inflicted on the child. (6/10/19 Tr., p. 275.) As the child needed to be examined immediately by a trauma surgeon, the child was taken to the hospital's Akron campus.

{¶4} A pediatric social worker, Ashley Mariano ("Mariano") was assigned to the case and interviewed the parents. Appellant told her that everything had been fine and the child had just been tired. (6/10/19 Tr., p. 294.) He said the child had a 14 month-old sister who sometimes was rough with the child and may have hit him in the head. (6/10/19 Tr., p. 295.) After the child was taken to Akron, Mariano contacted the Akron social worker assigned to the case, Shannon Smith ("Smith"), and shared her report.

{¶5} The following day, Officer James Rowley ("Officer Rowley") from the Youngstown Police Department was assigned to investigate the matter. Officer Rowley

and Lieutenant Michael Cox drove to Akron to interview Appellant and mother. Mother was very upset and crying during the interview. (6/10/19 Tr., p. 353.) Appellant appeared nonchalant and told the officers that on the day the symptoms first appeared, he spent a normal day at home and was alone with the child for approximately eight hours. (6/10/19 Tr., p. 356.) Appellant denied that he or anyone else harmed the child.

{¶6} Dr. Tsulee Chen ("Dr. Chen"), a pediatric neurosurgeon at the Akron campus, performed surgery on the child on March 2, 2017 to relieve the pressure on his brain, which included removing half of the child's skull. (6/10/19 Tr., p. 512.) Dr. Chen attributed the blood clotting and swelling to a "shearing" caused by back and forth or rotational force. (6/10/19 Tr., pp. 513-514.) After surgery, MRIs were obtained on March 10th and March 19th, both indicating that fluid continued to collect in the child's brain and that the brain injury was not healing. (6/10/19 Tr., p. 531.) Dr. Chen concluded that the child's injuries were not as a result of a single seizure and were not caused by birth trauma. (6/10/19 Tr., pp. 533, 539-540.)

{¶7} Dr. Paul McPherson ("Dr. McPherson"), the Medical Director of the Children at Risk Evaluation Center ("CARE") in Akron, became involved in the case due to concern that the child had been abused. Dr. McPherson examined the child on March 2, 2017 while he was in the pediatric intensive care unit and determined that, based on his injuries, the child may not survive. Appellant told Dr. McPherson that on the day in question he was home alone all day with the child and the child seemed to be acting normally throughout the day. Appellant said the child just seemed tired until he began breathing in an unusual way around 9:30 p.m., when he and mother took the child to the hospital. Appellant said the child had fallen a few weeks prior, but had returned to his normal

behavior. Appellant did not disclose any other injuries or illnesses. Dr. McPherson concluded that the child's injuries could not have been sustained at birth because the subdural bleeding was fresh. (6/10/19 Tr., p. 434.) He concluded that the child had likely been shaken, but he also could not rule out some type of impact to the child's head. (6/10/19 Tr., pp. 439-441.) The doctor stated that the injuries could not be sustained from a typical fall from a bed or a couch. (6/10/19 Tr., p. 442.) Dr. McPherson opined that, "a reasonable person would know they could harm the baby if they shook the baby that hard." (6/10/19 Tr., p. 454.) The child was unlikely to recover from his injuries and would have neurological problems for the rest of his life. Dr. McPherson concluded that the injuries were consistent with nonaccidental trauma and that the child was a victim of child abuse. (6/10/19 Tr., p. 461.) He also determined that it was possible the child's prognosis would have been better had he received medical care immediately after the event. (6/10/19 Tr., p. 462.)

{¶8} Officer Rowley requested another interview with mother and Appellant on March 17, 2017 as part of the ongoing investigation. Mother appeared at the interview. Appellant did not attend.

{¶9} The child was hospitalized from March 2, 2017 through March 22, 2017, and was diagnosed with shaken baby syndrome. Nicki Hinchcliffe ("Hinchcliffe"), a caseworker for Mahoning County Children Services ("CSB") then became involved in the matter in February of 2018, as the child continued to have substantial medical problems and was placed in foster care in a therapeutic foster home. CSB sought temporary custody on April 13, 2017. Mother refused to participate in the case plan and agreed to terminate her parental rights to the child. In the process, Hinchcliffe made 31 attempts to

obtain a home visitation with mother and Appellant but was unsuccessful. (6/10/19 Tr., p. 385.)

{¶10} On August 17, 2017, Appellant was indicted on one count of endangering children in violation of R.C. 2919.22(B)(1)(E)(2)(d), a felony of the second degree; and one count of endangering children in violation of R.C. 2919.22(A)(E)(1)(2)(c), a felony of the third degree. The child endangering counts alleged that serious physical harm was caused, elevating the offenses to second and third degree felonies.

{¶11} The matter proceeded to a jury trial. The state presented multiple witnesses including Dr. Lee, Dr. Chen and Dr. McPherson, who testified regarding the child's treatments, procedures, prognoses and diagnoses. Dr. Jessica Tattershall, who had evaluated the child at birth, also testified. She stated that she noticed no abnormalities on examination except for a small sacral dimple. She affirmed that the child was healthy at birth. (6/10/19 Tr. p. 312.) Mother's friend, Ms. Schulte, testified regarding her car trip with the child and his parents. Officer Rowley testified regarding the child abuse investigation. The pediatric social worker provided testimony as to her interaction with the parents at hospital intake. Also, the CSB caseworker, Ms. Hinchcliffe, testified as to the child's medical condition at the time of trial, stating:

> He is nonverbal. He can't hear you, they don't believe that he can see. So when you observe him, he's just laying there. That's basically all he can do. He's fed through a GI tube.

(6/10/19 Tr. p. 378.)

{¶12} The defense presented a single witness, Dr. Joseph Scheller ("Scheller"), a pediatric neurologist. He testified he had been a defense witness in at least 150 cases in his career. He stated he did not "think the evidence points to child abuse." (6/10/19 Tr. p. 575.) Dr. Scheller concluded that the child's lack of blood flow may be due to seizures, stating, "[t]he only condition that I can imagine that causes blood flow to decrease that much is that he was having seizures." (6/10/19 Tr. p. 602.) He testified on cross-examination that he had not actually physically examined the child and was not a child abuse specialist. (6/10/19 Tr. p. 625.) Dr. Scheller also conceded on cross-examination that the injuries sustained by the child could be the result of a shaken baby incident. (6/10/19 Tr. p. 639.)

{¶13} Dr. Shankar Ganapathy ("Ganapathy"), a pediatric radiologist at Akron Children's Hospital, testified for the state on rebuttal. Dr. Ganapathy was a specialist in neuroradiology, including CT scans and MRIs of the brain. Dr. Ganapathy read the child's CT scan on the night he was brought to the emergency room. He opined the extensive blood and swelling were not the result of seizures or a chronic condition stating, "I can say with a reasonable degree of medical certainty that this is due to abusive head trauma." (6/10/19 Tr. p. 697.)

{¶14} Dr. McPherson testified again for the state on rebuttal. He confirmed Dr. Chen's findings of subdural bleeding, and stated that such bleeding would not have occurred at birth. (6/10/19 Tr. p. 702.) He testified that if this bleeding had occurred at birth, "by six weeks of age, the body is [sic] has reabsorbed it and the babies have no outward manifestations that it's there." (6/10/19 Tr. p. 702.) Dr. McPherson disagreed with Dr. Scheller's conclusions, testifying that he had not changed his original assessment

that the child was a victim of child abuse in the form of abusive head trauma. (6/10/19 Tr. p. 712.)

{¶15} The jury found Appellant guilty on both counts of endangering a child. Appellant was sentenced to eight years of imprisonment on count one and three years on count two, to be served consecutively, for a total stated prison term of 11 years.

{¶16} Appellant filed this timely appeal.

ASSIGNMENT OF ERROR NO. 1

Appellant's convictions were against the manifest weight of the evidence.

{¶17} Weight of the evidence focuses on "the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other." (Emphasis deleted.) *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997). A review of the manifest weight of the evidence focuses on the state's burden of persuasion and the believability of the evidence presented. *State v. Merritt*, 7th Dist. Jefferson No. 09 JE 26, 2011-Ohio-1468, ¶ 34. A reviewing court ' "weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.' " *Thompkins* at 387, quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 484 N.E.2d 717 (1st Dist.1983).

{¶18} A reversal following a manifest weight review in a criminal matter should be granted only "in the exceptional case in which the evidence weighs heavily against the conviction." *State v. Andric*, 7th Dist. Columbiana No. 06 CO 28, 2007-Ohio-6701, ¶ 19,

citing *Martin* at 175. Determinations regarding witness credibility, conflicting testimony, and evidence weight "are primarily for the trier of the facts." *State v. Hunter*, 131 Ohio St.3d 67, 2011-Ohio-6524, 960 N.E.2d 995, ¶ 118, quoting *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraph one of the syllabus. The trier of fact is in the best position to weigh all evidence and judge the witnesses' credibility by observing their gestures, voice inflections, and demeanor. *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984). When presented with two fairly reasonable perspectives regarding the evidence or with two conflicting versions of events, neither of which can be ruled out as unbelievable, this Court will not choose which one is more credible. *State v. Gore*, 131 Ohio App.3d 197, 201, 722 N.E.2d 125 (7th Dist.1999).

{¶19} Appellant was convicted of two counts of endangering children pursuant to R.C. 2919.22(A)(E)(1)(2)(c) and R.C. 2912.22(B)(1)(E)(2)(d). R.C. 2912.22(A) provides that, "[n]o person, who is the parent * * * of a child under eighteen 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." When a violation of R.C. 2919.22(A) results in serious physical harm to the child, it is a felony of the third degree. R.C. 2919.22(A)(E)(1)(2)(c). "It is not necessary to show an actual instance or pattern of physical abuse on the part of the accused in order to justify a conviction under R.C. 2919.22(A)." *State v. Kamel,* 12 Ohio St.3d 306, 308, 466 N.E.2d 860 (1984). "[A]n inexcusable failure to act in discharge of one's duty to protect a child where such failure to act results in a substantial risk to the child's health or safety is an offense under R.C. 2919.22(A)." *Id.* at 309.

{¶20} R.C. 2919.22(B)(1) provides: "No person shall do any of the following to a child under eighteen years of age * * *: (1) Abuse the child." When a violation of R.C.

2919.22(B)(1) results in serious physical harm to the child, it is felony of the second degree. R.C. 2919.22(B)(1)(E)(2)(d). Both counts of child endangering require the state to prove that Appellant acted recklessly. *State v. McGee,* 79 Ohio St.3d 193, 680 N.E.2d 975 (1997):

> A person acts recklessly when, with heedless indifference to the consequences, the person disregards a substantial and unjustifiable risk that the person's conduct is likely to cause a certain result or is likely to be of a certain nature. A person is reckless with respect to circumstances when, with heedless indifference to the consequences, the person disregards a substantial and unjustifiable risk that such circumstances are likely to exist.

{¶21} The question before us is whether the jury's verdict that Appellant: (1) recklessly abused the child which resulted in serious physical harm, and; (2) recklessly created a substantial risk to the health and safety of the child by violating a duty of care, protection and support which resulted in serious physical harm to the child, were unsupported by the manifest weight of the evidence.

{¶22} Appellant raises several challenges to the evidence. First, he contends Dr. Scheller's testimony provided an explanation to the jury as to the timing and cause of the child's injuries. Dr. Scheller posited that the injury could have been caused at birth. Dr. Scheller also concluded that the subdural hematomas were not serious enough to squeeze the child's brain and cause him to nearly die. Appellant incorrectly asserts that Dr. Scheller testified the child had been having seizures before arriving at the hospital. In

reality, he testified, "[t]he only condition that I can imagine that causes blood flow to decrease that much is that he was having seizures." (6/10/19 Tr. p. 602.) Thus, Dr. Scheller merely presumed the child must have been having seizures, and did not testify it was his opinion the child had actually had a seizure. Appellant asserts that none of the doctors who testified for the state could rule out Dr. Scheller's conclusion that the child suffered from seizures, but again, that was not Dr. Scheller's actual conclusion. Regardless, Appellant contends that an alternative cause for the child's injuries was proven and that it was undisputed by the state's evidence. Appellant refers to this as a "critical weakness" in the state's case.

{¶23} Dr. Scheller was Appellant's sole witness. As earlier discussed, this witness posited that the child's injuries may have resulted from a seizure disorder or from birth trauma. (6/10/19 Tr. pp. 602, 613.) However, Dr. Scheller also testified on cross-examination that he could not rule out that the child's injuries could have resulted from being shaken. (6/10/19 Tr. pp. 639.) And while Dr. Scheller mentioned birth trauma as a possible cause on direct testimony, he testified on cross-examination that he never mentioned birth trauma as a possible cause in his report submitted prior to trial. (6/10/19 Tr. p. 627.) The state presented testimony from Dr. Tattershall who had examined the child shortly after birth. She testified that at birth, the child was completely healthy and that there was no evidence of trauma. (6/10/19 Tr. p. 312.) The state also had Dr. McPherson and Dr. Ganapathy testify on rebuttal. Their testimony called into question Dr. Scheller's conclusions and corroborated the testimony of other state's medical experts, all of whom had examined the child. Dr. McPherson testified that the subdural bleeding shown on the child's CT scans was not consistent with birth trauma, as it would

have healed by the time the child was three months of age. He reiterated that the child's injuries were consistent with child abuse from being shaken rapidly. (6/10/19 Tr. pp. 702, 712.) Dr. Ganapathy testified that the child's brain bleeding and swelling were not the result of a chronic seizure disorder but were due to abusive head trauma. (6/10/19 Tr. p. 697.) Testimony from the investigators and social workers all revealed that neither parent reported that the child was having any kind of seizures prior to his hospitalization.

{¶24} Appellant also claims that the state was unable to discredit Dr. Scheller's credentials on cross-examination, and that this somehow casts doubt on the jury's verdicts. We note that Dr. Scheller had never examined the child and on cross-examination Dr. Scheller testified that he had not discussed the case with any of the treating physicians. (6/10/19 Tr. p. 626.) Dr. Scheller testified that he had not read any of the statements the parents provided to police regarding what had occurred on the day in question, (6/10/19 Tr. pp. 627-628) and he conceded that he had previously testified in another case that the type of subdural bleeding seen in the instant matter was consistent with child abuse. (6/10/19 Tr. p. 645.)

{¶25} Appellant also asserts that the state's medical experts had career backgrounds related to treatment of suspected child abuse, which caused them to be predisposed to finding abuse where none existed. Appellant contends, "[Dr.] McPherson was employed as the director of a clinic specifically focused on child abuse, with the implication being that the clinic would not exist without diagnosed child abuse cases[.]" (Appellant's Brf., p. 9.) Appellant cites to Dr. McPherson's testimony on cross-examination that he could have written "99 percent" of his report in this case without having seen the child's MRI. (6/10/19 Tr. p. 476.) However, the doctor testified that his

report was written only after he personally examined the child and reviewed all of the available records, including the CT scan. No MRI had been performed because the child was not yet physically stable to undergo this test. (6/10/19 Tr. pp. 473-475.) Dr. McPherson testified that he completed his report only after the MRI was obtained. (6/10/19 Tr. p. 479.) Therefore, Appellant's assertion that the physicians were predisposed to finding child abuse because they pursued careers in pediatric medicine where they have encountered abuse cases, and that Dr. Scheller's testimony was more believable, is not supported in this record.

{¶26} This matter ultimately was decided on testimony from multiple medical experts, most of whom testified for the state and corroborated each other's conclusions that the child's serious physical harm resulted from abuse. Appellant's expert posited the theory that the child's injuries were the result of birth trauma or perhaps a seizure disorder, and that the child had not been abused. While both may be plausible theories as to causation, it was up to the jury to determine which medical experts and evidence were more believable. Again, it is axiomatic that the jury is in the best position to assess the credibility of the witnesses and to determine the weight given to the evidence presented. *DeHass,* paragraph one of the syllabus. The jury clearly chose the evidence presented by the state in this matter as more credible. That evidence included multiple medical experts, most of whom directly treated the child. There was a great deal of evidence in this record that, if believed, supports conviction. There is no indication that the jury clearly lost its way or created such a manifest miscarriage of justice that Appellant's convictions should be reversed or a new trial ordered.

{¶27} Appellant also urges that the state failed to present eyewitness testimony that Appellant shook the child, and instead relied on circumstantial evidence from social workers and medical doctors. This assertion by Appellant challenges the sufficiency of the evidence, and not its weight. Sufficiency of the evidence is a question of law relating to the legal adequacy of the evidence. *Thompkins,* at 386. This standard is used to determine whether the case may go to the jury or whether this evidence is adequate, as a matter of law, to support the jury verdict. *State v. Smith,* 80 Ohio St.3d 89, 113, 684 N.E.2d 668 (1997). In determining whether a judgment is supported by sufficient evidence, we must inquire whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *State v. Treesh,* 90 Ohio St.4d 460, 484, 739 N.E.2d 749 (2001).

{¶28} Appellant contends the state did not present evidence on an essential element of these crimes: identity. Even if the child had been abused, there was no proof it was Appellant who was the perpetrator. While medical testing revealed the nature of the child's injuries, and testimony of the physicians the state presented as witnesses all reach the conclusion that the injuries were caused by abuse, Appellant argues that no evidence exists on which to base a conclusion that he abused the child. On review of this record, while no witness testified they actually saw Appellant commit the abuse, there is a great deal of circumstantial evidence to support Appellant's convictions. Importantly, we are first presented with Appellant's own admissions to multiple witnesses, including the social worker, Officer Rowley, and Dr. Lee, that he was home alone with the child all day on the day in question. Appellant has never disputed that fact. Circumstantial

evidence demonstrating that a person caused serious brain injuries to a child exists where the child is alone with the accused during the timeframe in which the injury was likely sustained. *State v. Lee,* 7th Dist. Mahoning No. 14 MA 120, 2016-Ohio-649, ¶ 50; *State v. Dawson,* 7th Dist. Mahoning No. 15 MA 0118, 2017-Ohio-2957, 91 N.E.3d 140, ¶ 51. Even absent eyewitness testimony regarding the specific incident of abuse that caused the child's injuries, the overwhelming medical testimony presented by the state regarding the cause of these injuries, coupled with the fact that Appellant admittedly was the only one with the child for the entire day of the incident, provides sufficient evidence on which to convict. Therefore, Appellant's challenge to the sufficiency of the identity evidence lacks merit.

ASSIGNMENT OF ERROR NO. 2

> Appellant's sentence was contrary to law due to Counts One and Two of the Indictment being allied offenses of similar import, but not being merged for purposes of sentencing, in violation of the Double Jeopardy Clauses of the United States Constitution and the Ohio Constitution.

{¶29} Whether two offenses are allied presents a question of law, and an appellate court must conduct a *de novo* review. *State v. Burns,* 7th Dist. Mahoning No. 09 MA 193, 2012-Ohio-2698, ¶ 60. In *State v. Ruff,* 143 Ohio St.3d 114, 2015-Ohio-995, 34 N.E.3d 892, the Ohio Supreme Court created a three-part, fact-specific analysis that looks at the defendant's conduct, the animus, and the import. *Id.* at ¶ 26. Specifically, a court must consider: (1) whether the offenses are dissimilar in import or significance, meaning whether each offense caused a separate and identifiable harm; (2) whether the

offenses were separately committed, and (3) whether the offenses had separate animus or motivation. *Id.* If the answer to any of these questions is "yes," then the offenses do not merge. The fact-specific nature of the analysis requires a case-by-case consideration rather than application of a bright-line rule. *Id.*

{¶30} The jury found Appellant guilty of both second-degree and third-degree felony child-endangering. Second-degree felony child-endangering prohibits the following:

> (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:
>
> (1) Abuse the child;
>
> * * *
>
> (E)(1) Whoever violates this section is guilty of endangering children.
>
> (2) If the offender violates division (A) or (B)(1) of this section, endangering children is one of the following, and, in the circumstances described in division (E)(2)(e) of this section, that division applies:
>
> * * *
>
> (d) If the violation is a violation of division (B)(1) of this section and results in serious physical harm to the child involved, a felony of the second degree.

R.C. 2919.22(B)(1)(E)(1)(2)(d).

{¶31} Appellant was found to have caused serious physical harm to his child under this statute.

{¶32} Appellant was also found guilty of third-degree felony child-endangering:

> (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. It is not a violation of a duty of care, protection, or support under this division when the parent, guardian, custodian, or person having custody or control of a child treats the physical or mental illness or defect of the child by spiritual means through prayer alone, in accordance with the tenets of a recognized religious body.
>
> * * *
>
> (E)(1) Whoever violates this section is guilty of endangering children.
>
> (2) If the offender violates division (A) or (B)(1) of this section, endangering children is one of the following, and, in the circumstances described in division (E)(2)(e) of this section, that division applies:
>
> * * *

> (c) If the violation is a violation of division (A) of this section and results in serious physical harm to the child involved, a felony of the third degree[.]

R.C. 2919.22(A)(E)(1)(2)(c).

{¶33} Both child endangering crimes share a common element: the perpetrator caused serious physical harm. The definition of "serious physical harm to persons," is found in R.C. 2901.01(A)(5)(a)-(e) and provides:

> (5) "Serious physical harm to persons" means any of the following:
>
> (a) Any mental illness or condition of such gravity as would normally require hospitalization or prolonged psychiatric treatment;
>
> (b) Any physical harm that carries a substantial risk of death;
>
> (c) Any physical harm that involves some permanent incapacity, whether partial or total, or that involves some temporary, substantial incapacity;
>
> (d) Any physical harm that involves some permanent disfigurement or that involves some temporary, serious disfigurement;
>
> (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.

{¶34} The second-degree felony child endangering conviction pursuant to R.C. 2919.22(B)(1)(E)(2)(d) in this matter also requires the jury to find the element that the

accused committed abuse of a child. The third-degree felony child endangerment contains the element of violating a duty of care, protection or support. The accused need not be the perpetrator of abuse. Thus, while both crimes involve serious physical harm to the child, a violation of R.C. 2919.22(A), involving the violation of a duty of care, protection or support does not automatically result in a violation of R.C. 2919.22(B), involving the commission of child abuse.

{¶35} Appellant was convicted of not only abusing his child, but of failing to timely seek medical care for the child. On appeal, he challenges all three prongs of the *Ruff* test. He argues there was no separate and identifiable harm for the two offenses under the first prong and that none of the experts distinguished between the harm the child actually suffered compared with the harm he may have suffered had medical assistance been sought earlier. Further, Appellant contends the offenses were not committed separately and the state failed to demonstrate that Appellant's alleged abuse was a separate act from failing to seek prompt medical attention for the child. Instead, he argues that this record reflects only one crime. *State v. Logan*, 60 Ohio St.2d 126, 131, 397 N.E.2d 1245 (1979). Lastly, Appellant argues there was no separate animus or motivation for the two charges, because Appellant's state of mind was the same for both alleged offenses. Appellant contends he believed that the child was not seriously hurt and no medical attention was necessary. Appellant relies on our holding in *State v. Henderson*, 7th Dist. Mahoning No. 15 MA 0137, 2018-Ohio-2816, ¶ 8, as precedent that his two offenses are allied for sentencing purposes. In *Henderson*, the parties had agreed at sentencing the offenses were allied and merged for sentencing. *Id*. Similarly, Appellant cites *State v. Lindsey*, 2nd Dist. Montgomery No. 28025, 2019-Ohio-1550 and *State v.*

Dayton, 3d Dist. Union No. 14-17-03, 2018-Ohio-3003, in support of his argument. In both *Lindsey* and *Dayton*, the issue of allied offenses was not addressed by the appellate court. In both, the trial courts had merged the offenses for sentencing purposes.

{¶36} The state responds that the evidence presented at trial established that (1) Appellant physically abused the child and (2) subsequent to the abuse failed to seek the necessary medical care for the child, and that each offense involved separate and distinct animus.

{¶37} The evidence in this record leads to the conclusion that Appellant had two different states of mind in the commission of these crimes. His animus when perpetrating the abuse of this child was different from his animus in failing to seek medical help, which was caused by a desire to avoid detection of the abuse. Although both second and third degree child endangering offenses required the state to establish "serious physical harm," there is a distinction between the two offenses. Second-degree endangering required the state to offer evidence that Appellant directly abused the child. Third-degree endangering required that the state establish Appellant violated his duty of care by not seeking treatment for his child after the abuse. The medical and circumstantial evidence presented at trial established that Appellant committed child abuse. He violently shook the child causing serious physical harm in the form of abusive head trauma. Moreover, the testimony of Ms. Schulte established that he did not seek timely care. She testified that she and mother were concerned about the unresponsiveness of the child while the group was running errands, but that Appellant refused to seek medical care, insisting the child was just sleeping. Dr. McPherson testified that Appellant certainly knew the harm he had inflicted, as "a reasonable person would know they could harm the baby if they

shook the baby that hard." (6/10/19 Tr. p. 454.) Concerning the initial refusal to seek care and the timing of the decision to finally seek treatment, Dr. McPherson testified that the child would have experienced symptoms of the injury caused by Appellant's abuse by exhibiting problems breathing or losing consciousness "within minutes" of the abuse occurring. (6/10/19 Tr. p. 426.) Had Appellant sought medical care immediately, Dr. McPherson opined the child's prognosis would have been better had he received medical attention immediately after the injuries were inflicted. (6/10/19 Tr. p. 462.) This evidence demonstrates separate animus: the rage or frustration which led to the child abuse by shaking, followed by the violation of a duty of care, protection and support in failing to immediately seek medical attention for the child, instead waiting several hours to avoid detection of Appellant's abuse. This record reveals a separate animus or motivation existed for each of the two offenses. The state presented evidence that Appellant abused the child, causing serious physical harm. The state also presented evidence that Appellant failed to seek treatment for the child immediately after the abuse which created a substantial risk of serious physical harm due to the amount of time that elapsed before medical care was finally sought. Because the offenses had separate, distinct animus and there was a break between the abuse and the failure to seek care of several hours, the offenses cannot be merged for sentencing purposes.

{¶38} Appellant's second assignment of error is without merit and is overruled.

ASSIGNMENT OF ERROR NO. 3

The trial court's sentence of Appellant was contrary to law, due to the trial court's failure to state on the record, at Appellant's sentencing hearing, the

required findings to impose consecutive sentences under R.C. 2929.14(C)(4).

{¶39} Pursuant to the Ohio Supreme Court's holding in *State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231, ¶ 1, "an appellate court may vacate or modify a felony sentence on appeal only if it determines by clear and convincing evidence that the record does not support the trial court's findings under relevant statutes or that the sentence is otherwise contrary to law."

{¶40} Thus, under *Marcum,* we apply the clear and convincing standard to a review of the findings required under particular statutory provisions, including consecutive sentencing, as well as to the trial court's consideration of the sentencing factors set forth in R.C. 2929.11 and R.C. 2929.12. Clear and convincing evidence "is that measure or degree of proof which is more than a mere 'preponderance of the evidence,' but not to the extent of such certainty as is required 'beyond a reasonable doubt' in criminal cases, and which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established." *Id* at ¶ 22, quoting *Cross v. Ledford*, 161 Ohio St. 469, 120 N.E.2d 118 (1954), paragraph one of the syllabus.

{¶41} A sentence is considered to be clearly and convincingly contrary to law if it falls outside of the statutory range for the particular degree of offense; if the trial court failed to properly consider the purposes and principles of felony sentencing as enumerated in R.C. 2929.11 and the seriousness and recidivism factors set forth in R.C. 2929.12; or if the trial court orders consecutive sentences and does not make the necessary consecutive sentence findings. See *State v. Collins,* 7th Dist. Noble No. 15

NO 0429, 2017-Ohio-1264, ¶ 9; *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, ¶ 30.

{¶42} Pursuant to R.C. 2929.11, in sentencing a felony defendant a court must be guided by the overriding sentencing purposes and principles of: (1) protecting the public from future crime by the offender and others; and (2) punishing the offender using the minimum sanctions the court determines will accomplish those purposes without imposing unnecessary burden on state or local government resources. R.C. 2929.11(A). To achieve these purposes the trial court is to consider the need for incapacitating the offender; the need to deter the offender and others from future crime; rehabilitation of the offender; and making restitution to the victim, the public, or both. *Id.* R.C. 2929.11(B) provides:

> (B) A sentence imposed for a felony shall be reasonably calculated to achieve the three overriding purposes of felony sentencing set forth in division (A) of this section, commensurate with and not demeaning to the seriousness of the offender's conduct and its impact upon the victim, and consistent with sentences imposed for similar crimes committed by similar offenders.

{¶43} Finally, a sentencing court has the discretion to determine the most effective way to comply with the principles and purposes of sentencing and, in so doing, shall consider the statutory seriousness and recidivism factors set forth in R.C. 2929.12(B), (C), (D) and (E) as well as any other relevant factors. The trial court is not required to set forth its findings regarding principles and purposes of sentencing in R.C. 2929.11 or the

seriousness or recidivism factors of R.C. 2929.12, nor is it required to state these findings on the record. *State v. Henry,* 7th Dist. Belmont No. 14 BE 40, 2015-Ohio-4145, ¶ 22-24.

{¶44} If the trial court decides to order consecutive sentences, the court must make the statutory findings pursuant to R.C. 2929.14(C)(4), which reads:

> If multiple prison terms are imposed on an offender for convictions of multiple offenses, the court may require the offender to serve the prison terms consecutively if the court finds that the consecutive service is necessary to protect the public from future crime or to punish the offender and that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and if the court also finds any of the following:
>
> (a) The offender committed one or more of the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, or was under post-release control for a prior offense.
>
> (b) At least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender's conduct.

> (c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

{¶45} The trial court need not provide reasons in support of its consecutive sentencing findings and need not quote the statute verbatim. *Bonnell*, *supra*, at ¶ 27, 29. The court must find consecutive sentences are necessary to protect the public from future crime or to punish the offender; consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and must make one of the three alternative findings in subdivisions (a), (b) or (c). R.C. 2929.14(C)(4).

{¶46} In the instant matter, the trial court made the requisite findings under R.C. 2929.14(C)(4):

> And the court finds that a non-prison sanction would demean the seriousness factors contained in Section 2929 of the Revised Code and that a non-prison sanction would not adequately protect the public or punish you. Based on your criminal history, the court believes that you do pose the greatest likelihood of committing future crimes.
>
> * * *
>
> These sentences shall run consecutively because the court finds that the public -- that consecutive sentences are necessary to punish this defendant and protect the public from future crime based on information contained in

> this presentence investigation and that's not disproportionate to the seriousness of the defendant's conduct and the danger that he poses to the public.
>
> Defendant is no stranger to prison in that he served prison on past charges of aggravated robbery and theft of firearms from a firearms licensee, federal firearms licensee. And he was sentenced on an answer to many other offenses, including aggravated trespass, disorderly conduct, possession of drugs and theft, and many, many offenses as a juvenile, some very serious. Despite this, defendant continues to commit serious crimes and shows no remorse for his actions, including the instant offense.

(7/30/19 Sentencing Tr., pp. 29-31.)

{¶47} Appellant concedes that the trial court also made findings in the sentencing entry, restating other findings and concluding: "In addition, the Court further finds that pursuant to O.R.C. 2929.14(C)(4)(b) the offenses were committed during a course of conduct and the harm was so great/unusual that a single term does not reflect the seriousness of the Defendant's conduct." (7/31/19 J.E., p. 2.)

{¶48} Based on the foregoing, the trial court made the findings required under R.C. 2929.14(C)(4)(b) and (c) for imposing consecutive sentences. Appellant's third assignment of error is without merit and is overruled.

ASSIGNMENT OF ERROR NO. 4

> The trial court's imposition of consecutive sentences on Appellant was not supported by the record.

{¶49} Appellant argues that the trial court relied on his history of criminal conduct in making its findings under R.C. 2929.14(C)(4)(c), but that those convictions were not similar to these child endangering convictions and, so, were unrelated to his potential to commit similar offenses in the future. Appellant concedes his prior criminal record was accurately discussed by the trial court.

{¶50} In imposing consecutive sentences, the trial court need not provide reasons in support of its consecutive sentence findings and need not quote the statute verbatim in making these findings. *Bonnell*, *supra*, at ¶ 27, 29. However, the court must determine that consecutive sentences are necessary to protect the public from future crime or to punish the offender; are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and must make one of the three alternative findings in subdivisions (a), (b) or (c). R.C. 2929.14(C)(4). As earlier discussed, in sentencing Appellant the trial court imposed consecutive sentences based on R.C. 2929.14(C)(4)(b) and (c). At the sentencing hearing the court stated that it was relying on the history of criminal convictions contained in the presentence investigation report. This report is not part of the record before us, but his criminal history is not disputed by Appellant. He argues only that his prior offenses were not related to his interaction with children. Pursuant to R.C. 2929.14(C)(4)(c), the trial court may rely upon an offender's history of criminal conduct in order to impose consecutive sentences. It does not require that the offender's criminal conduct be related to or be the same type of offense as the offenses for which the offender is being sentenced.

{¶51} In addition, the trial court also concluded that the offenses in this case were committed during a course of conduct and the harm caused by Appellant is so great that

consecutive sentences were required to reflect the seriousness of Appellant's conduct. The record before us demonstrates that multiple physicians concluded with reasonable medical certainty that Appellant abused his child. Further, the evidence reveals the resulting harm to the child was extensive. Dr. McPherson testified:

> He was gravely ill. He had undergone neurosurgery. Because the swelling of his brain was so severe, they had to remove the left side of his skull. Because he was having problems from that brain swelling, he needed help breathing, so he had a tube down his throat. * * * And he was not interacting, looking around like you would expect a three-month old, he was just laying there in the bed, the left side of his skull removed, a breathing tube down his throat and lines everywhere on his body.

(6/10/19 Tr. pp. 410-411.)

{¶52} Ms. Hinchcliffe, the caseworker from CSB testified that at the time of trial the child was nonverbal, "[h]e can't hear you, they don't believe that he can see. So when you observe him, he's just laying there." (6/10/19 Tr. p. 378.) She also testified that he cries "three to four hours at a time when he's in pain." (6/10/19 Tr. p. 379.)

{¶53} At sentencing, the trial court stated:

> And finally, because of the egregious nature of this offense, or these offenses, the fact of the matter is, Mr. Pendland, the jury found you guilty on these charges. And what they found was that you blinded and rendered your own son deaf. You took away his life, essentially. That child is so severely brain damaged that there's no chance for ever experiencing a

> normal childhood. Child can't eat on its own and he'll never walk. And the evidence showed that this was no accident or medical condition. You did this.

(7/30/19 Tr., p. 32.)

{¶54} Based on the record in this matter, the trial court properly sentenced Appellant to consecutive terms pursuant to R.C. 2929.14(C). Therefore, Appellant's fourth assignment of error is without merit and is overruled.

{¶55} Based on the foregoing, there is no error in Appellant's convictions or in the sentences he received. All of Appellant's assignments of error are without merit and the judgment of the trial court is affirmed.

Robb, J., concurs.

Powell, 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.