[Cite as *State v. Henry*, 2005-Ohio-3931.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee (Cross-Appellant),	:	No. 04AP-1061
	:	(C.P.C. No. 02CR02-1032)
v.	:	(REGULAR CALENDAR)
Elwood D. Henry, Jr.,	:	
Defendant-Appellant (Cross-Appellee).	:	

O P I N I O N

Rendered on August 2, 2005

Ron O'Brien, Prosecuting Attorney, and *Seth L. Gilbert*, for plaintiff-appellee.

Andrew P. Avellano, for defendant-appellant.

APPEAL from the Franklin County Court of Common Pleas.

FRENCH, J.

{¶1} Defendant-appellant, Elwood D. Henry, Jr. ("appellant"), appeals from the judgment of the Franklin County Court of Common Pleas finding him guilty of one count of child endangering, one count of felonious assault, and one count of felony murder.

Plaintiff-appellee, the State of Ohio ("appellee"), appeals the trial court's decision to merge the felonious assault conviction into the felony murder conviction.

{¶2} The Franklin County Grand Jury indicted appellant on: (1) child endangering, Count 1, in violation of R.C. 2919.22(B)(1); (2) felonious assault, Count 2, in violation of R.C. 2903.11(A)(1); and (3) felony murder, Count 3, in violation of R.C. 2903.02(B). The charges stem from the death of appellant's four-month-old son, Jaheiem D. Henry. The felony murder count alleged that appellant "did purposely cause the death of another, to wit: Jaheiem D. Henry, as a proximate result of [appellant] committing or attempting to commit an offense of violence that is a felony of the first or second degree, to wit: Endangering Children and/or Felonious Assault[.]" Appellant pled not guilty.

{¶3} Prior to trial, appellee amended the indictment to strike the word "purposely" from the felony murder charge in Count 3. Thus, the amended felony murder charge alleged that appellant "did cause the death of another" while "attempting to commit an offense of violence that is a felony of the first or second degree[.]"

{¶4} Next, appellant waived a jury trial, and the case proceeded to a bench trial. The trial transcript reflects considerable confusion and/or misstatements about the dates upon which certain related events occurred. However, taken together, the exhibits and direct testimony clarify that the most significant events occurred between Friday, February 8, 2002, and Wednesday, February 13, 2002.

{¶5} Jaheiem's mother, April Williams ("April"), testified as follows on direct examination. In February 2002, she, appellant, and Jaheiem lived together in an apartment. No one else lived in the apartment. On Friday, February 8, 2002, April left

Jaheiem with appellant while she went away for the weekend. Jaheiem was "perfect" and in good health. (Vol. II Tr. at 84.) April left Jaheiem with appellant despite having previously "gotten in trouble for leaving Jaheiem with [appellant] * * * [f]rom [her] family members[.]" (Vol. II Tr. at 83.)

{¶6} On Monday, February 11, 2002, appellant called April while she was at her cousin's house. Appellant told April: "You have to come home; * * * [d]on't bring no family." (Vol. II Tr. at 85.) April asked about Jaheiem, and appellant stated that he had just given Jaheiem a bottle and put him to sleep. April thought that appellant was acting "weird, like something was going on, but he wouldn't tell me." (Vol. II Tr. at 85.)

{¶7} April's cousin, Meeko Williams ("Meeko"), gave her a ride to her apartment, and April's cousin, Zachary Williams ("Zachary"), accompanied them. When April arrived at the apartment, Meeko stayed in the car, and she and Zachary went into the apartment.

{¶8} When April went in the apartment, she noticed that the apartment was in disarray and that the legs to Jaheiem's basinet had broken. Appellant was in the same room as the basinet. There was a green towel draped over the basinet. April asked about Jaheiem, and appellant started to grab her. Appellant would not say if something was wrong with Jaheiem, but would only say that Jaheiem was in the basinet. Zachary left to get Meeko, and appellant kept grabbing April and getting more aggressive after Zachary left. April did not look in the basinet.

{¶9} Ultimately, April was able to break free from appellant. At that time, Meeko came running upstairs toward the apartment. Appellant slammed the apartment door (locking himself inside), and Meeko started kicking the door. April left the building

to call the police. April indicated that she eventually found out what happened to Jaheiem, and appellant and appellee proceeded to stipulate to Jaheiem being dead at the scene.

{¶10} On cross-examination, April verified that the prosecution charged her with child endangering and involuntary manslaughter as a result of Jaheiem's death. April further confirmed that she agreed to testify against appellant in exchange for her pleading guilty to child endangering and the prosecution dismissing the involuntary manslaughter charge.

{¶11} In addition, April testified on cross-examination that she told appellant she wanted to leave him for another man and that she was going to take Jaheiem with her. April also testified that she told appellant she was pregnant with that man's child and that appellant may not be Jaheiem's father. Lastly, April confirmed that she left on the weekend of February 8, 2002, to be with the other man.

{¶12} Zachary also testified at trial. Zachary testified that he accompanied Meeko and April to April's apartment. Zachary also confirmed that, while April was at the apartment, appellant kept grabbing her and tried to prevent her from leaving. According to Zachary, both appellant and April fell to the floor at one point during the struggle. Zachary also testified that he ultimately heard April say that Jaheiem was dead, and Zachary went to get Meeko.

{¶13} Meeko testified that he drove Zachary and April to April's apartment. According to Meeko, he waited in the car while April and Zachary went into the apartment. Meeko noted that Zachary came back to the car to tell him that April and appellant were wrestling. Meeko stated that he then saw through a window that

appellant was pulling April, and April was screaming and trying to break free; subsequently, Meeko indicated that he ran to April and appellant's apartment. According to Meeko, the apartment door was closed and Meeko kicked the door until the police arrived.

{¶14} Columbus Police Officers Michael Kyde and William Joseph Kiser investigated the incident on February 11, 2002, at about 9:00 p.m. They testified that they knocked on April and appellant's apartment door, but no one answered. Thus, according to the officers, they forced entry into the apartment. The officers stated that no one was in the apartment and that a window was open. Kiser noted that the window had no screen. Both officers testified that they found Jaheiem in a basinet. Kiser described Jaheiem's skin as gray, and both officers verified that Jaheiem had bruising on his face, as well as other injuries. Kyde testified that he checked Jaheiem for a pulse, but found none.

{¶15} Medic Jill Dixon examined Jaheiem at the scene, arriving at 9:12 p.m. Dixon testified that Jaheiem had a rosary around his neck and was holding a Bible on his chest. Dixon also testified that Jaheiem's skin was cold, his nail beds were purple, and there were large, dark marks on the left side of his face and crusted marks around his mouth and nose. According to Dixon, Jaheiem was not breathing and had no heart rate. Thus, Dixon testified that she declared the baby "[d]ead on arrival" at 9:16 p.m., and she noted that Jaheiem "had been dead for some time[.]" (Vol. II Tr. at 53.)

{¶16} Deputy Sheriff Michael Bostic saw appellant on State Route 23 at approximately 1:20 p.m., on February 13, 2002, and testified as follows. Bostic approached appellant, who "seemed a little nervous." (Vol. II Tr. at 154.) Appellant told

Bostic that he lived "around the corner[,]" pointing north on Route 23, and that he was going to a BP gas station. (Vol. II Tr. at 154.) Appellant's statements puzzled Bostic, given that the BP was not the closest gas station to where appellant said that he lived.

{¶17} In the course of the conversation, appellant also told Bostic that he was going to the racetrack. Bostic told appellant that the racetrack was closed and asked for identification. Appellant stated that he had no identification, but told Bostic that his name was "Jaheiem Henry[,]" that he was 18 years old, and that he lived off Refugee Road. (Vol. II Tr. at 156.) Bostic then noticed appellant's wallet inside his coat pocket. At Bostic's request, appellant opened the wallet and showed Bostic his identification. The name on the identification was "Elwood Henry." (Vol. II Tr. at 157.) Bostic asked appellant why he lied, and appellant responded: "Please, just take me to jail." (Vol. II Tr. at 158.) In the course of his conversation with Bostic, appellant also made a statement to the effect that he just wanted to get out of town.

{¶18} Bostic realized that appellant might be the man that Columbus police were searching for in connection with the death of the suspect's son. After conferring with the Columbus Police Department, Bostic discovered that appellant had an arrest warrant for murder, and he arrested appellant. While searching appellant incident to the arrest, Bostic found in appellant's coat pocket a February 13, 2002 newspaper article with the headline: "Police search for father charged in baby's death." (State's Exh. 49.) The trial court admitted the newspaper article into evidence "for the limited purpose of showing that [appellant] had an article about the incident on his person[.]" (Vol. II Tr. at 163.)

{¶19} Dr. Keith Norton performed the autopsy on Jaheiem and testified about the autopsy and as an expert in forensic pathology. Norton testified that Jaheiem had external bruises on his chest, buttocks, upper leg, and both sides of his face. Norton also indicated that Jaheiem had scrapes throughout his body.

{¶20} Norton further testified that Jaheiem had internal bruising in the back of his neck and at the base of his skull. Norton noted that he found blood around the outside of Jaheiem's spinal cord and more bruising under Jaheiem's scalp and behind his left ear. Norton also testified that Jaheiem had six fractured ribs and a swollen brain with a collection of blood outside the brain. Norton stated that Jaheiem's optic nerve experienced hemorrhaging.

{¶21} According to Norton, Jaheiem died from "an acceleration injury of the head and neck that caused the injuries to the brain and the spinal cord." (Vol. II Tr. at 133.) Norton explained that "[t]he acceleration would have caused the brain to shake; and when the brain is shaking in the skull," the victim experiences bleeding outside the brain in the skull. (Vol. II Tr. at 133-134.) Norton also explained that the acceleration further caused the bleeding around Jaheiem's spinal cord. Norton concluded that these injuries disrupted Jaheiem's ability to breathe.

{¶22} Next, Norton testified that Jaheiem was the victim of a homicide, given that he was too young to cause the injuries himself and that there was no evidence that Jaheiem was involved in an event like an accident that could have caused such a massive acceleration. Norton specified that Jaheiem was the victim of "shaken infant syndrome," given the bleeding inside the head and optic nerves. (Vol. II Tr. at 135.) Norton also stated that Jaheiem was the victim of "shaken impact syndrome," given his

other injuries, especially the bruising to his scalp. (Vol. II Tr. at 136.) Lastly, Norton testified that Jaheiem's injuries would have been "immediately debilitating," would have "happened at one time[,]" and could have been three to four days old. (Vol. II Tr. at 136-137, 140.)

{¶23} Appellant moved for an acquittal, pursuant to Crim.R. 29, at the close of appellee's case and again after he decided not to present any testimony or evidence. The trial court denied both motions.

{¶24} Subsequently, the trial court found appellant guilty as charged. The trial court merged Count 2, felonious assault, into Count 3, felony murder. In merging the offenses, the trial court noted that, "since the murder conviction had to do with conviction, you know, they had to be convicted of a felony of the second degree in order to get to the murder[.]" (Vol. III Tr. at 196.) The trial court sentenced appellant to seven years imprisonment on Count 1, child endangering. The trial court sentenced appellant to the mandatory 15 years to life on Count 3, felony murder, pursuant to R.C. 2929.02(B). The trial court ordered appellant to serve the prison terms concurrently. In discussing the felony murder sentence, the trial court stated: "[W]henever you talk about Count Three being 15 to life, that it would be purposeful, or, in accordance with the guidelines." (Vol. III Tr. at 197.)

{¶25} Appellant appeals, raising two assignments of error:

> ASSIGNMENT OF ERROR 1
>
> Appellant's convictions were not supported by sufficient evidence and were against the manifest weight of the evidence, thereby violating Appellant's due process rights, under Section 10, Article I of the Ohio Constitution and the

> Fifth and Fourteenth Amendments to the United States Constitution.
>
> ASSIGNMENT OF ERROR II
>
> The trial court committed reversible error when it failed to sustain Appellant's Criminal Rule 29 motions.

{¶26} Appellee cross-appeals, raising one assignment of error:

> The trial court erred in merging the counts of felony murder and felonious assault for purposes of sentencing.

{¶27} We begin with appellant's appeal and will address together appellant's two assignments of error because they concern his convictions. In his assignments of error, appellant first contends that his convictions are based on insufficient evidence and that the trial court erred in denying his Crim.R. 29 motions for acquittal. We disagree.

{¶28} A trial court grants a Crim.R. 29 motion for acquittal if the evidence is insufficient to sustain a conviction. *State v. Woodward*, Franklin App. No. 03AP-398, 2004-Ohio-4418, at ¶11. A trial court shall not grant a Crim.R. 29 motion if reasonable minds can reach different conclusions as to whether the prosecution has proved each material element beyond a reasonable doubt. Id.

{¶29} Similarly, an appeal challenging the sufficiency of the evidence tests whether the evidence introduced at trial is legally sufficient to support a verdict. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386. We examine the evidence to conclude whether any rational trier of fact could have found that the state proved beyond a reasonable doubt the essential elements of the crime. *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus, following *Jackson v. Virginia* (1979), 443 U.S. 307; *State v. Yarbrough,* 95 Ohio St.3d 227, 2002-Ohio-2126*,* at ¶78. We will not

disturb the verdict unless we determine that reasonable minds could not arrive at the conclusion reached by the trier of fact. *Jenks* at 273. In determining whether a conviction is based on sufficient evidence, we do not assess whether the evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction. See *Jenks* at paragraph two of the syllabus; *Yarbrough* at ¶79 (noting that courts do not evaluate witness credibility when reviewing a sufficiency of the evidence claim); *State v. Lockhart* (Aug. 7, 2001), Franklin App. No. 00AP-1138. In addition, we review the evidence in the light most favorable to the state. *Jenks* at paragraph two of the syllabus.

{¶30} Our standard for reviewing the sufficiency of the evidence is virtually identical to the review of a trial court's decision to deny a Crim.R. 29 motion for acquittal. *Woodward* at ¶10. Thus, we review together appellant's claims that his convictions are based on insufficient evidence and that the trial court erred by denying his Crim.R. 29 motions.

{¶31} The trial court convicted appellant of child endangering, in violation of R.C. 2919.22(B)(1), which, in pertinent part, prohibits an individual from recklessly abusing someone under 18 years old. The conviction constitutes a second-degree felony under R.C. 2919.22(E)(1)(d) on the basis that Jaheiem sustained serious physical harm. The trial court also convicted appellant of felonious assault as a second-degree felony, in violation of R.C. 2903.11(A)(1), which prohibits an individual from knowingly causing physical harm to another. Lastly, the trial court convicted appellant of felony murder, in violation of R.C. 2903.02(B), which prohibits an individual from causing the death of another while committing or attempting to commit a first or second-degree felony

offense of violence other than voluntary or involuntary manslaughter. Here, pursuant to the indictment, the child endangering and felonious assault charges form the basis of the felony murder conviction.

{¶32} In challenging his convictions, appellant does not dispute that Jaheiem died from injuries caused by a sudden acceleration of his head and neck. Likewise, appellant does not dispute that the injuries were consistent with "shaken infant syndrome" and "shaken impact syndrome[.]" (Vol. II Tr. at 135-136.) Rather, appellant claims that insufficient evidence establishes that appellant was the one who injured Jaheiem.

{¶33} Both parties recognize that appellee based its case on circumstantial evidence. Circumstantial evidence is the "proof of facts by direct evidence from which the trier of fact may infer or derive by reasoning other facts in accordance with the common experience of mankind." *State v. Bentz* (1981), 2 Ohio App.3d 352, 355, fn. 6, citing 1 Ohio Jury Instructions (1968), Section 5.10(d). Circumstantial evidence has probative value equal to that of direct evidence. *State v. Nicely* (1988), 39 Ohio St.3d 147, 151. Similarly, "individual pieces of evidence, insufficient in themselves to prove a point, may in cumulation prove it. The sum of an evidentiary presentation may well be greater than its constituent parts." *Bourjaily v. United States* (1987), 483 U.S. 171, 179-180. Here, we conclude that sufficient evidence supports appellant's convictions when considering the "cumulation" of the "individual pieces of evidence," pursuant to *Bourjaily*, and viewing the evidence in the light most favorable to appellee, pursuant to *Jenks*.

{¶34} On February 8, 2002, April left Jaheiem in appellant's sole custody at their apartment. At that time, Jaheiem was "perfect" and in good health. (Vol. II Tr. at 84.) On February 11, 2002, April returned to find that appellant and Jaheiem were still the only people in the apartment, and Jaheiem was dead.

{¶35} In *State v. Butts*, Franklin App. No. 03AP-495, 2004-Ohio-1136, at ¶29, this court upheld a defendant's convictions for murder, involuntary manslaughter, felonious assault, and two counts of child endangering based on shaken infant syndrome, noting, in part, that the infant suffered injuries while entrusted to the defendant's care. We acknowledge that *Butts* differs from appellant's case to the extent that the evidence in *Butts* pinpointed the time that the victim sustained the injuries, and here, the evidence generally demonstrates that the victim sustained fatal injuries at some point during the four-day period that appellant had custody. Nonetheless, in line with *Butts*, appellant's custody of Jaheiem constitutes one of the "individual pieces of evidence" that supports appellant's convictions in "cumulation" of all the evidence. See *Bourjaily* at 179-180.

{¶36} In this regard, appellant erroneously relies on *State v. Woods* (1988), 48 Ohio App.3d 1, and *Fuller v. Anderson* (C.A.6, 1981), 662 F.2d 420. Both *Woods* and *Fuller* held that a defendant's mere presence during the commission of a crime, without more, is insufficient to support a defendant's culpability under complicity principles. See *Woods* at 6-7; *Fuller* at 424. Here, appellant's case involves neither his complicity to fatally injure Jaheiem, nor appellant's mere presence at the home where Jaheiem died. Rather, the case centers around appellant himself injuring Jaheiem, and appellant's

custody of Jaheiem is one of several pieces of evidence that, taken together, support his convictions. See *Butts* at ¶29. Thus, *Woods* and *Fuller* are inapplicable.

{¶37} Likewise, appellant's reliance on *McKenzie v. Smith* (C.A.6, 2003), 326 F.3d 721, is misplaced. In *McKenzie*, a jury convicted the defendant of attempted murder of his girlfriend's 3-year-old daughter. Like here, the victim's mother in *McKenzie* left the child with the defendant at their home. However, the United States Court of Appeals for the Sixth Circuit held that the defendant's conviction was based on insufficient evidence, noting that the police found the child injured and unconscious in a vacant building, and that the defendant had no idea of the child's whereabouts or that the child was injured. Such circumstances differ from here, where police found fatally-injured Jaheiem in an apartment that appellant had just occupied. Moreover, in *McKenzie*, family members testified that they had never seen the defendant harm the victim and did not think that he would. Conversely, here, April indicated that she had previously "gotten in trouble" with her family members "for leaving Jaheiem with [appellant.]" (Vol. II Tr. at 83.) Thus, contrary to appellant's assertions, *McKenzie* does not establish that his convictions are based on insufficient evidence.

{¶38} We further conclude, contrary to appellant's assertions, that appellant's post-crime behavior suggests his guilt for the convicted crimes. A person's post-crime behavior "is considered relevant to the question of guilt" because "the commission of a crime can be expected to leave some mental traces on the criminal." *Thomas v. State* (Md.2002), 812 A.2d 1050, 1056, citing 1 Wigmore, Evidence (3rd Ed.1940), 632, Section 173.

{¶39} The trial court had no admitted testimony or evidence concerning appellant's whereabouts from the time April left the apartment (with appellant locked inside) and when Bostic made contact with appellant. However, the evidence suggests that appellant fled the apartment before police arrived, given that he was no longer in the apartment and considering that police found the window open in the empty apartment. Likewise, the evidence establishes that the Columbus police were searching for him and that appellant appeared to be leaving town on February 13. Thus, we conclude that appellant's flight from the scene and apparent attempt to flee from Columbus constitute additional "pieces of evidence" that support appellant's convictions in "cumulation" of all the evidence. See *Bourjaily* at 179-180. Flight is akin to "an admission by conduct which expresses consciousness of guilt." *United States v. Martinez* (C.A.10, 1982), 681 F.2d 1248, 1256, citing McCormick, Evidence (2nd Ed.1972) 655, Section 271. Thus, " ' "[i]t is today universally conceded that the fact of an accused's flight * * * [is] admissible as evidence of consciousness of guilt, and thus of guilt itself." ' " *State v. Williams* (1997), 79 Ohio St.3d 1, 11, quoting *State v. Eaton* (1969), 19 Ohio St.2d 145, 160, vacated on other grounds (1972), 408 U.S. 935.

{¶40} We also recognize that appellant did not want anyone but April to know about Jaheiem's death. Appellant asked April to come back to the apartment, but not to bring family. Likewise, when appellant called April to tell her to come home, he did not tell her that Jaheiem had died, as evinced by the medic's conclusion that the baby "had been dead for some time[.]" (Vol. II Tr. at 53.) Rather, in an attempt not to alarm April while she was outside his control, appellant told April on the phone that he had just given Jaheiem a bottle and put him to sleep. When April returned to the apartment and

surmised that something had happened to her child, appellant tried to restrain April to prevent her from leaving. By attempting to conceal Jaheiem's death in this manner, appellant revealed additional "consciousness of guilt[.]" See *Williams* at 11.

{¶41} Appellant continued to demonstrate a consciousness of guilt to Bostic by providing a false name and age to the law enforcement officer. Id. (holding that an individual's " ' "assumption of a false name * * * [is] admissible as evidence of consciousness of guilt, and thus of guilt itself" ' "). In addition, we find germane to appellant's guilt his post-crime conduct of: (1) failing to call medical authorities or otherwise taking action to address Jaheiem's injuries; (2) leaving Jaheiem posed with a rosary and a Bible; (3) providing inconsistent statements to Bostic concerning where he was going on February 13, 2002; and (4) asking Bostic to take him to jail. See *Thomas* at 1056. In accordance with *Thomas*, such behavior reveals "mental traces" of appellant's guilt from committing the fatal crimes against Jaheiem. Id.

{¶42} Likewise, we note appellant's motive. "[T]he question of motive is generally relevant in all criminal trials, even though the prosecution need not prove motive in order to secure a conviction." *State v. Curry* (1975), 43 Ohio St.2d 66, 70-71, citing *Fabian v. State* (1918), 97 Ohio St. 184. Here, April testified that she recently told appellant she wanted to leave him for another man and that she was going to take Jaheiem with her. April also told appellant that she was pregnant with another man's child and that appellant may not be Jaheiem's father. In addition, when April left Jaheiem in appellant's custody on February 8, 2002, April was going to spend the weekend with the other man.

{¶43} Accordingly, considering the "cumulation" of appellee's "individual pieces of evidence," pursuant to *Bourjaily*, and, as noted above, viewing the evidence in the light most favorable to appellee, pursuant to *Jenks*, we conclude that sufficient evidence establishes that appellant caused Jaheiem's fatal injuries. In addition, although appellant does not argue as such in his brief, we note that the evidence supports the requisite mental states for felonious assault and child endangering, which, in turn, form the underlying offenses for felony murder pursuant to the indictment. Specifically, evidence of Jaheiem suffering "shaken infant syndrome" and "shaken impact syndrome" demonstrates that appellant caused the fatal injuries knowingly, an element of felonious assault. See *State v. Garcia*, Franklin App. No. 03AP-384, 2004-Ohio-1409, at ¶26. Evidence sufficient to prove that appellant acted knowingly is, by definition, also sufficient to prove that appellant acted recklessly, an element of child endangering. R.C. 2901.22(E); *Garcia* at ¶28.

{¶44} As such, we conclude that sufficient evidence supports appellant's convictions for child endangering, felonious assault, and felony murder. Thus, we further conclude that the trial court properly denied appellant's Crim.R. 29 motions for acquittal.

{¶45} Next, appellant argues that his convictions are against the manifest weight of the evidence. Again, we disagree.

{¶46} In determining whether a verdict is against the manifest weight of the evidence, we sit as a "thirteenth juror." *Thompkins* at 387. Thus, we review the entire record, weigh the evidence and all reasonable inferences, and consider the credibility of witnesses. Id. Additionally, we determine " 'whether in resolving conflicts in the

evidence, the [trier of fact] clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.' " Id., quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175; see, also, *Columbus v. Henry* (1995), 105 Ohio App.3d 545, 547-548. We reverse a conviction on manifest weight grounds for only the most " 'exceptional case in which the evidence weighs heavily against the conviction.' " *Thompkins* at 387, quoting *Martin* at 175. Moreover, " 'it is inappropriate for a reviewing court to interfere with factual findings of the trier of fact * * * unless the reviewing court finds that a reasonable juror could not find the testimony of the witness to be credible.' " *State v. Brown*, Franklin App. No. 02AP-11, 2002-Ohio-5345, at ¶10, quoting *State v. Long* (Feb. 6, 1997), Franklin App. No. 96APA04-511.

{¶47} In claiming that his convictions are against the manifest weight of the evidence, appellant first asserts that his flight did not stem from a "consciousness of guilt." Rather, appellant explains his flight by indicating that Meeko was furiously trying to confront him and that "[f]light is also something that can be reasonably expected, especially from someone of [a]ppellant's cultural background[.]" However, appellant's flight is consistent with the other multiple and separate acts evincing his consciousness of guilt, and the flight occurred just after he tried to conceal Jaheiem's death to all but April. Therefore, the trial court could properly conclude that appellant's flight also revealed appellant's consciousness of guilt.

{¶48} Appellant also claims that the trial court could not implicate appellant with his request that Bostic take him to jail. Appellant explains that such a statement could be expected from a father whose child was killed and who was emotionally exhausted. However, appellant's actions refute this assertion. Appellant did not make the

statement in an attempt to surrender immediately upon meeting Bostic. Rather, the statement followed Bostic realizing that appellant had just provided false information about his identity, and that appellant had provided nonsensical information about where he was going. Such conduct conforms with appellant's other acts revealing his "consciousness of guilt," like his flight and his attempt to conceal Jaheiem's death to all but April. See *Thomas* at 1056; *Williams* at 11.

{¶49} Lastly, appellant generally claims that the trial court lost its way in convicting appellant. However, under our above analysis of the evidence, we conclude that the trial court properly decided from the circumstantial evidence that appellant caused Jaheiem's fatal injuries.

{¶50} Accordingly, the trial court did not lose its way or create a manifest miscarriage of justice in finding appellant guilty of child endangering, felonious assault, and felony murder. As such, appellant's convictions are not against the manifest weight of the evidence.

{¶51} Again, we conclude that appellant's convictions are not based on insufficient evidence, are not against the manifest weight of the evidence, and that the trial court did not err by denying appellant's Crim.R. 29 motions for acquittal. Therefore, we overrule appellant's first and second assignments of error.

{¶52} Next, we address appellee's cross-appeal. In its cross-appeal, appellee contends that the trial court erred by merging the felonious assault conviction in Count 2 into the felony murder conviction in Count 3. We agree.

{¶53} At the outset, we recognize that appellant argues the trial court merged the felonious assault into murder, not felony murder. Appellant reasons that murder, set

forth in R.C. 2903.02(A), contains a "purposely" mental element, and Count 3 in the indictment alleged that appellant "did purposely cause the death of another[.]" Appellant also notes that the trial court discussed the merger issue and stated: "I will run the sentences – Count One and Three concurrent, * * * that whenever you talk about Count Three being 15 to life, that it would be purposeful, or, in accordance with the guidelines." (Vol. III Tr. at 197.)

{¶54} However, before trial, appellee amended the felony murder count by striking the word "purposely," which resulted in the count alleging that appellant "did cause the death of another" while "attempting to commit an offense of violence that is a felony of the first or second degree[.]" Such language tracks the felony murder statute in R.C. 2903.02(B). Likewise, despite the trial court's use of the word "purposeful" when discussing the merger issue, the trial court made clear that it sentenced appellant for felony murder in R.C. 2903.02(B) when it referenced language in the felony murder statute:

> * * * [S]ince the murder conviction had to do with conviction, you know, they had to be convicted of a felony of the second degree in order to get to the murder * * *.

(Vol. III Tr. at 196.) Thus, contrary to appellant's assertions, the trial court merged the felonious assault conviction into the felony murder conviction.

{¶55} R.C. 2941.25 governs a trial court's authority to merge offenses and states:

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

> (B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them.

{¶56} According to the Ohio Supreme Court:

> * * * Ohio's multiple-count statute "is a clear indication of the General Assembly's intent to permit cumulative sentencing for the commission of certain offenses." * * *
>
> With its multiple-count statute Ohio intends to permit a defendant to be punished for multiple offenses of *dissimilar import.* * * * If, however, a defendant's actions "can be construed to constitute two or more allied offenses of *similar import,*" the defendant may be convicted (*i.e.,* found guilty and punished) of only one. * * * But if a defendant commits offenses of similar import separately or with a separate animus, he may be punished for both * * *.

(Emphasis sic.) *State v. Rance* (1999), 85 Ohio St.3d 632, 635-636.

{¶57} If the elements of the crimes " ' "correspond to such a degree that the commission of one crime will result in the commission of the other, the crimes are allied offenses of similar import." ' " Id. at 636, quoting *State v. Jones* (1997), 78 Ohio St.3d 12, 13. "If the elements do not so correspond, the offenses are of dissimilar import and the court's inquiry ends--the multiple convictions are permitted." *Rance* at 636, citing R.C. 2941.25(B).

{¶58} "[T]he statutorily defined elements of offenses that are claimed to be of similar import are compared *in the abstract*." (Emphasis sic.) *Rance* at 638. "[I]f the elements do so correspond, the defendant may not be convicted of both unless the court finds that the defendant committed the crimes separately or with separate animus." Id. at 638-639, citing R.C. 2941.25(B) and *Jones* at 14.

{¶59} Appellant contends that felonious assault must merge with felony murder because felonious assault is a predicate offense to felony murder. However, the Twelfth District Court of Appeals rejected such an argument in *State v. Gomez-Silva* (Dec. 3, 2001), Butler App. No. CA2000-11-230. The appellate court in *Gomez-Silva* recognized that R.C. 2941.25 and *Rance* dictate whether the defendant may be convicted and sentenced on separate counts of felonious assault and felony murder even though the felonious assault is the underlying offense for felony murder. Thus, the court noted that the proper analysis is whether the offenses are allied offenses of similar import under R.C. 2941.25. As such, the court examined the elements of both offenses in the abstract, pursuant to *Rance*, and concluded, "[f]elony murder requires causing death while committing a first or second-degree felony of violence, whereas felonious assault requires knowingly causing serious physical harm to another. The commission of one crime does not result in the commission of the other." Therefore, the appellate court in *Gomez-Silva* held that felony murder and felonious assault are not allied offenses of similar import.

{¶60} Because felonious assault and felony murder are not allied offenses of similar import, our merger inquiry ends. *Rance* at 636. Therefore, under R.C. 2941.25 and pursuant to *Rance*, felonious assault and felony murder do not merge, and appellee may obtain separate convictions for felonious assault and felony murder. As such, the trial court erred by merging appellant's felonious assault conviction into the felony murder conviction. Accordingly, we sustain appellee's single cross-assignment of error.

{¶61} In summary, we overrule appellant's first and second assignments of error and sustain appellee's single cross-assignment of error. As such, we affirm in part and

reverse in part the judgment of the Franklin County Court of Common Pleas, and we remand this cause to the trial court for further proceedings consistent with this opinion.

Judgment affirmed in part,
reversed in part, and cause remanded.

BROWN, P.J., and BRYANT, J., concur.

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