[Cite as *State v. Hendrex*, 2010-Ohio-2820.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2009-T-0091**
- vs -	:	
JEREMY T. HENDREX,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 07 CR 750.

Judgment: Affirmed.

Dennis Watkins, Trumbull County Prosecutor, and *LuWayne Annos*, Assistant Prosecutor, Administration Building, Fourth Floor, 160 High Street, N.W., Warren, OH 44481-1092 (For Plaintiff-Appellee).

Brett Mancino, 1000 IMG Center, 1360 East Ninth Street, Cleveland, OH 44114 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, Jeremy T. Hendrex, appeals his conviction, following a jury trial, by the Trumbull County Court of Common Pleas of child endangering and felonious assault committed against his two-month old daughter. Appellant's commission of these crimes resulted in multiple skull fractures, severe brain injury, and permanent blindness. Appellant challenges the sufficiency and weight of the evidence and raises certain procedural objections. For the reasons that follow, we affirm.

{¶2} Appellant was indicted for child endangering resulting in serious physical harm, a felony of the second degree, in violation of R.C. 2919.22(B)(1) and (E)(1)(2)(d), and felonious assault, a felony of the second degree, in violation of R.C. 2903.11(A)(1) and (D)(1). Appellant pled not guilty and the case was tried to a jury between July 6, 2009 and July 13, 2009.

{¶3} Shari Jarome testified she met appellant during the summer of 2002, when they were both working at Cedar Point. They started dating at that time and, shortly thereafter, moved in together in Sandusky. In 2004, they left their employment with Cedar Point, and moved to the Youngstown area where Shari's family resides. Shari and appellant lived together in Youngstown and then in Girard. In the summer of 2006, they started living in a trailer in Weathersfield Township.

{¶4} After living with appellant for four years, in November 2006, Shari became pregnant. In April 2007, Shari began working as a van driver for Niles Trumbull Transit. Appellant was unemployed and his sole source of income was selling cookbooks on eBay that he had purchased at flea markets and auctions. Appellant sold these items from the couple's trailer.

{¶5} Shari continued working until the day before she gave birth to the couple's child Alyssa Jarome on July 12, 2007. Shari returned to work with Niles Trumbull Transit three weeks after Alyssa was born. Her job was part-time with no benefits so she applied for and obtained public assistance with the Trumbull County Department of Job and Family Services. Soon after Alyssa was born, Job and Family Services notified appellant of a hearing to determine his child support obligation as Alyssa's father.

Appellant told Shari he did not want to pay child support and to tell Job and Family Services she did not want any support from him.

{¶6} While Shari was pregnant, appellant told her he was going to a "family reunion" in Kansas where his family lives. Shari was not invited. He left for that alleged reunion on Wednesday, September 5, 2007, driving Shari's truck, and said he would be back in one week. Shari later learned that appellant had been living a double life. There was no family reunion. In fact, appellant was planning to return to Sandusky to marry Dawn Marie, a woman he had been dating for 11 years and to whom he had been engaged for the past two years, and then to go on a honeymoon with her in Georgia.

{¶7} On the day after appellant left town, Thursday, September 6, 2007, Shari took Alyssa to her pediatrician because Alyssa was spitting up. The doctor told Shari to give Alyssa pedialyte for one day and thereafter to dilute her formula with one-half bottle of water. By the end of the week, Alyssa was fine. On the following Friday, September 14, 2007, Shari took Alyssa for a well care visit and the doctor found Alyssa was doing fine.

{¶8} After being gone for two weeks, appellant returned from his "family reunion" on Tuesday, September 18, 2007. He never told Shari about the real purpose of his trip, and simply resumed his routine of selling items on eBay and watching Alyssa during the day while Shari was at work

{¶9} Shari was not working on Friday, September 21, 2007, and on that morning, she, appellant, and Alyssa went out to breakfast. While at the restaurant, Alyssa threw up and Shari gave her pedialyte. By the time Alyssa went to sleep that

night, she was better. Alyssa slept through the night in the living room in her playchair and Shari slept on the couch next to her. Appellant and Shari were alone with Alyssa that entire day and night. On the following morning, Saturday, September 22, 2007, Shari woke up at about 5:30 a.m. because she heard Alyssa playing and giggling. She gave Alyssa a bottle of diluted formula, which she drank without incident, and then Alyssa fell asleep in her playchair. Shari put Alyssa's chair in the bedroom with appellant, who was sleeping on the couple's bed, and left for work.

{¶10} Appellant was alone with Alyssa during the entire day. Shari returned home from work at about 5:00 p.m. At that time Alyssa was sleeping. Shari picked up the family's laundry and washed clothes at the laundromat. She returned home at about 7:30 p.m. Appellant was at the computer and Alyssa was sleeping on the couch. Alyssa planned to meet her three sisters for a drink that evening at a nearby bar. While waiting for one of her sisters to pick her up, Shari gave Alyssa a bottle of diluted formula and she drank one-half of it. Shari held Alyssa and, while holding her, Alyssa's arms shaked for a few seconds and then she appeared to be fine.

{¶11} Shari's sister picked her up at about 9:00 p.m. They went to the bar and Shari's sister took her home at about 11:30 p.m. Shari gave Alyssa a bottle of diluted formula, but she threw it up. While Shari was changing Alyssa's clothes, she started shaking again. This was different, however, from the earlier incident because, this time, both Alyssa's arms and legs were shaking. As a result, Shari took Alyssa to St. Joseph's Hospital Emergency Room. Appellant did not go with them because, as he told Shari, "[h]e's never liked going to hospitals."

{¶12} Upon arrival at the hospital, Alyssa started shaking and a doctor there told Shari Alyssa was having a seizure. Hospital staff was unable to get Alyssa's seizures under control so at about 4:30 a.m., on Sunday, September 23, 2007, Shari and Alyssa were life-flighted to the Cleveland Clinic. Upon arrival, Shari called appellant and told him about Alyssa's condition, but he did not come to the Clinic until the following evening. After taking a CAT scan, doctors told Shari that Alyssa had bleeding in her brain, which was caused by severe trauma.

{¶13} Alyssa was in the neonatal intensive care unit for two and one-half weeks and then for one week in the pediatric intensive care unit. She then went to the rehabilitation center at the Cleveland Clinic, where she stayed until October 31, 2007. After her release from the Cleveland Clinic, Alyssa stayed with Shari's sister until September 2008. Thereafter, she was returned to Shari, with whom she currently resides.

{¶14} Shari stayed at the Cleveland Clinic with Alyssa until October 16, 2007. At first appellant did not stay there with them. Later, after he talked to police, appellant started to stay with Shari and Alyssa because, appellant said, the police told him they would be watching him.

{¶15} Shari testified that at the time of trial, Alyssa was almost two years old. As a result of her injuries, she is completely blind. She is responsive to verbal commands, but can only speak about ten words.

{¶16} Diane Harris, caseworker with Trumbull County Children Services, testified that Alyssa's case was referred to her in September 2007. She and Mark Massucci, investigator with Children Services, interviewed appellant twice at the

Weathersfield Township Police Department. Prior to each interview, he was Mirandized by Weathersfield Police Captain Naples, but Ms. Harris and Mr. Massucci conducted the interviews. On September 26, 2007, when asked how Alyssa could have sustained such severe injuries while he was alone with her, appellant told them there were only two times he was with Alyssa when she might have been injured. The first incident occurred when he took Alyssa out of the bathtub and she hit her head on the spigot. The second occurred when he was holding Alyssa on his lap and she slipped through his legs and he caught her, but she hit her head and was crying. He said that both incidents occurred sometime before Alyssa was taken to the hospital, and that there were no other incidents in which Alyssa could have sustained these injuries.

{¶17} Thereafter, on October 5, 2007, appellant was again interviewed by Ms. Harris and Mr. Massucci. He admitted he was alone with Alyssa the entire day prior to Shari taking her to the hospital. When asked how Alyssa could have sustained her injuries, appellant repeated the bathtub and slipping-from-the lap incidents. However, this time, he added a third incident. He said that during the afternoon prior to Shari taking Alyssa to the emergency room, he was going to put her down on the couch. He boxed her in with pillows so she would not fall, but she slipped and landed on the back side of the cushions, but he did not know if Alyssa hit her head on the couch. He said this was all that happened. When Ms. Harris asked appellant if he had ever thrown Alyssa, as one of the doctors had suggested, he said he never had.

{¶18} Ms. Harris again interviewed appellant on October 13, 2007, and on that occasion, for the first time, he told her about a fourth incident in which he was involved, which, he said, might have caused Alyssa's injuries. He said that on the day Alyssa

went to the hospital, he was carrying her in the living room when he tripped on an electrical cord and Alyssa fell and hit her head on the back of the couch, which has a wooden frame.

{¶19} Shari testified that after Alyssa had been at the hospital for three weeks, on October 16, 2007, appellant came to the Cleveland Clinic and for the first time, told her that he had been involved in a series of incidents with Alyssa in which she may have sustained her injuries. Shortly thereafter, appellant was arrested by Weathersfield Township Police. He called Shari from the jail several times, telling her he wanted her to post bond for him, but she refused.

{¶20} Dr. Gary Hsich, a pediatric neurologist with the Cleveland Clinic, testified that upon arrival at the hospital, Alyssa's seizures were so severe that she had to be on three different types of medications to control them. She also had significant brain injury, which required her to be on life support. CAT scans revealed that Alyssa had sustained two separate skull fractures. One was at the back of her skull in the occipital bone. Dr. Hsich testified that this is a relatively strong bone, which is difficult to fracture. He said that a significant traumatic injury would have been required to cause this fracture. There was also a second skull fracture near the top of her head on the right side in the parietal bone. Alyssa also had an injury and bleeding in her head and brain, severe swelling inside the brain near the parietal fracture, and multiple retinal hemorrhages. The back of Alyssa's skull expanded due to the severe brain swelling, and when the swelling eventually went down, this section of her skull retracted more than other areas of the skull so there is now a permanent deformity because that section of the skull has a deep depression. Dr. Hsich also testified that the trauma that

injured parts of Alyssa's brain caused those brain cells to die and they will never regenerate. He testified that, despite Alyssa's severe internal injuries, he did not see any external bruising, which sometimes occurs in such cases.

{¶21} Dr. Hsich testified that, due to the Alyssa's significant brain injuries, she will have permanent developmental problems, learning disabilities, and difficulty walking and talking. Also, she will always be at risk for seizures.

{¶22} He also testified that Alyssa's injuries were acute, i.e., they were inflicted within the past few hours or at most within the past 24 hours. This determination was made in part due to the presence of fresh or acute blood in Alyssa's brain. He said this trauma triggered all these injuries, including the subdural bleeding, severe seizures, and retinal hemorrhages. He said that victims who sustain such severe injuries would experience a progression of symptoms. At first, they would be sleepy and groggy, difficult to arouse, and experience vomiting. Then, as the swelling gets worse and there is more bleeding, they would develop seizures and be less responsive.

{¶23} In describing Alyssa's course of treatment, Dr. Hsich testified that doctors in the intensive care unit stabilized her breathing, blood pressure and seizures. The neurosurgeons removed fluid and blood that was putting pressure on her brain. This required drilling holes on each side of Alyssa's head and removing fluid to reduce the swelling and pressure in her brain.

{¶24} Dr. Hsich testified that, due to Alyssa's two separate skull fractures, the bleeding in her brain, her severe seizures, and retinal hemorrhages, it was his opinion, to a reasonable degree of medical certainty, that traumatic injury in the form of child abuse caused Alyssa's injuries and that her injuries were not accidental. Moreover, this

was not a case of just "shaken baby syndrome" because Alyssa sustained traumatic injury as evidenced from her two skull fractures. He opined that she sustained a recent impact injury, which means that her head was struck by some hard object. Dr. Hsich said, "[b]ased on the severity of [A]lyssa's injuries, the multiple skull fractures and the retinal hemorrhages, *** whatever this impact was, had to be quite significant."

{¶25} Dr. Hsich testified that nothing in Alyssa's pediatric records, which he had reviewed, explained her injuries. Alyssa had seen her pediatrician twice within two weeks prior to her admission to Cleveland Clinic. There were no serious problems and Alyssa's development was good

{¶26} Dr. Jonathon Sears, ophthalmologist and retina specialist with the Cleveland Clinic, examined Alyssa in September 2007. He said she had hemorrhages in every quadrant of the retina in both eyes. He said that because both eyes had a similar finding, that means that some external trauma caused these injuries. Dr. Sears testified that Alyssa also had a retinal detachment in one eye, and Alyssa will never again have vision in that eye. He said the finding of retinal detachment also indicated a traumatic origin to the injury in Alyssa's eye that was consistent with a direct blow to the eye. He said the type of retinal hemorrhages Alyssa sustained in all four quadrants of both eyes and the hemorrhages that surrounded the optic nerve indicate a degree of severity almost always associated with shaken baby syndrome.

{¶27} Dawn Marie Hendrex testified for the defense. She said she had dated appellant for eleven years when they were married in Sandusky on September 8, 2007. She found out about Shari because on a prior occasion, she went to appellant's house in Sandusky and found that Shari was living there with him. Dawn Marie testified she

and appellant were engaged for two years before they were married and she did not know appellant was still with Shari. She said appellant led her to believe he had broken up with Shari three years earlier. When appellant left Sandusky after their honeymoon, Dawn Marie understood he was going back to work because appellant told her he had a job that required him to travel. She did not know that, in fact, he was unemployed. A few weeks later, after Shari refused to post appellant's bond, appellant's sister called Dawn Marie and told her appellant was in jail in Warren and needed bail. Dawn Marie then called a bondsman and came up with $2,000 to get appellant out of jail. When she learned about the charges, she had no idea appellant had a baby or that he was still seeing Shari. Dawn Marie then e-mailed Shari and told her she and appellant were married. Despite this history of lies and deceit, Dawn Marie decided to "stand by" her man because she "had this feeling from above" that she was meant to stay with him.

{¶28} Appellant testified, offering for the first time at trial new details concerning his throwing Alyssa on the couch. He said that at about noon of the day Alyssa went to the hospital, as he walked from the kitchen to the living room holding her, he tripped on a rug that had "bunched up" because there was an electrical cord underneath it. He said Alyssa flew out of his arms. He did not want to fall on her so he threw her to the couch. She flew three feet, hit the couch, and her head bounced back and hit the wood frame of the couch. He said the frame was exposed because he had previously taken the back pillows off the couch so they would not flip over on Alyssa and suffocate her. He said Alyssa landed on her back, and when she hit the couch he heard a "thump." Alyssa was crying, but he did not think any medical attention was necessary because he thought she had just bumped her head. Appellant said that when Shari took Alyssa

to the hospital that night, he did not go because he thought it was just a routine check-up. Appellant said he did not tell the Children Services investigators about throwing Alyssa to the couch during either the first or second interview because he was "scared." However, he did not explain why he did not disclose this to Shari for three weeks after she took Alyssa to the hospital or to the doctors at St. Joseph's Hospital and the Cleveland Clinic, who were desperately trying to safe Alyssa's life.

{¶29} The jury returned its verdict finding appellant guilty of both counts as charged in the indictment. The trial court sentenced appellant to eight years in prison on each count. The state moved to merge the two counts as allied offenses and the court granted the motion.

{¶30} Appellant appeals his conviction, asserting four assignments of error. Because the first two are interrelated, we shall consider them together. They allege:

{¶31} "[1.] The defendant appellant was denied his right to due process of law when he was convicted for felonious assault and child endangering based upon insufficient evidence and it was plain error for trial counsel not to have renewed a motion for judgment of acquittal at the close of the evidence.

{¶32} "[2.] The defendant appellant was denied due process of law when he was convicted of felonious assault and child endangering against the manifest weight of the evidence."

{¶33} An appellate court reviewing the sufficiency of the evidence examines the evidence admitted at trial and determines whether, after viewing the evidence most favorably to the state, the jury could have found the essential elements of the crime proven beyond a reasonable doubt. *State v. Jenks* (1991), 61 Ohio St.3d 259, 273.

"On review for sufficiency, courts are to assess not whether the state's evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction." *State v. Thompkins*, 78 Ohio St.3d 380, 390, 1997-Ohio-52 (Cook, J., concurring).

{¶34} "'[S]ufficiency' is a term of art meaning that legal standard which is applied to determine whether the case may go to the jury or whether the evidence is legally sufficient to support the jury verdict as a matter of law." *Thompkins*, supra, at 386, citing Black's Law Dictionary (6 Ed.1990) 1433. See, also, Crim.R. 29(A) (motion for judgment of acquittal can be granted by the trial court if the evidence is insufficient to sustain a conviction). "In essence, sufficiency is a test of adequacy. Whether the evidence is legally sufficient to sustain a verdict is a question of law." *Thompkins*, supra. See, also, *State v. Robinson* (1955), 162 Ohio St. 486.

{¶35} The Supreme Court of Ohio in *Jenks*, supra, held:

{¶36} "Circumstantial evidence and direct evidence inherently possess the same probative value. In some instances certain facts can only be established by circumstantial evidence. Hence, we can discern no reason to continue the requirement that circumstantial evidence must be irreconcilable with any reasonable theory of an accused's innocence in order to support a finding of guilt. *** Since circumstantial evidence and direct evidence are indistinguishable so far as the jury's fact-finding function is concerned, all that is required of the jury is that it weigh all of the evidence, direct and circumstantial, against the standard of proof beyond a reasonable doubt. Nothing more should be required of a factfinder." (Citations omitted.) *Jenks*, supra, at 272.

{¶37} There is a fundamental distinction between a challenge to the sufficiency of the evidence and a challenge to the weight of the evidence. The legal concepts of sufficiency of the evidence and weight of the evidence are quantitatively and qualitatively different from each other. *Thompkins*, supra, at 386.

{¶38} A court reviewing the manifest weight observes the entire record, 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. *State v. Schlee* (Dec. 23, 1994), 11th Dist. No. 93-L-082, 1994 Ohio App. LEXIS 5862, *14-*15. "The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." *State v. Martin* (1983), 20 Ohio App.3d 172, 175. An appellate court must defer to the factual findings of the jury regarding the weight to be given the evidence and credibility of the witnesses. *State v. DeHass* (1967), 10 Ohio St.2d 230, at paragraph one of the syllabus. When examining witness credibility, "[t]he choice between credible witnesses and their conflicting testimony rests solely with the finder of fact and an appellate court may not substitute its own judgment for that of the finder of fact." *State v. Awan* (1986), 22 Ohio St.3d 120, 123. The factfinder is free to believe all, part, or none of the testimony of each witness appearing before it. *State v. Brown*, 11th Dist. No. 2002-T-0077, 2003-Ohio-7183, at ¶53. Moreover, if the evidence admits to more than one interpretation, a reviewing court must interpret it in a manner consistent with the verdict. Id.

{¶39} Before addressing appellant's sufficiency argument, we note he failed to renew his motion for directed verdict after presenting his case. We also note that in his first assignment of error, appellant alleges that, in failing to renew his motion after he presented his defense, his attorney committed plain error. For there to be plain error, there must first be an error, i.e., a deviation from a legal rule. *State v. Payne*, 114 Ohio St.3d 502, 505, 2007-Ohio-4642. The error to which appellant refers was not renewing his motion for acquittal at the end of his case. He therefore concedes he waived the argument on appeal. Further, we note that "[t]he burden of demonstrating plain error is on the party asserting it." *State v. Porter*, 178 Ohio App. 3d 304, 317, 2008-Ohio-4627, citing *State v. Jester* (1987), 32 Ohio St.3d 147, 150; *State v. Hill*, 92 Ohio St.3d 191, 203, 2001-Ohio-141. In his argument in support of his first assigned error, appellant failed to demonstrate or even argue plain error. In the circumstances of this case, with appellant contending on appeal that his trial counsel erred in this regard, we hold appellant waived his Crim.R. 29 motion by not renewing it at the close of the evidence. However, even if appellant had not waived the argument, it would not be well-taken.

{¶40} In order to convict appellant of endangering children, the state was required to prove that he recklessly abused a child and that the child abuse resulted in serious physical harm. In order to convict appellant of felonious assault, the state was required to prove appellant knowingly caused serious physical harm to Alyssa. Appellant does not dispute that Alyssa sustained serious physical harm. Instead, he argues the evidence was insufficient to prove that he inflicted the baby's injuries. Specifically, he argues that no direct testimony was presented that appellant knowingly

or recklessly injured Alyssa. However, as the Eighth Appellate District held in *State v. Woodson*, 8th Dist. No. 85727, 2005-Ohio-5691:

{¶41} "'*** [I]t is not unusual that evidence of shaken baby syndrome may be primarily circumstantial, especially where a child is in the sole custody of one adult at the time the injuries are sustained. See [*State v.*] *Gulertekin*, [(Dec. 3, 1998), 10th Dist. No. 97APA12-1607, 1998 Ohio App. LEXIS 5641] (sufficient circumstantial evidence to support conviction of child endangering where an infant suffered injuries consistent with shaken baby syndrome while entrusted to the defendant's care); *State v. Williams*, (1992) Ohio App. LEXIS 1010 (Mar. 5, 1992), Franklin App. No. 91AP-653, unreported (sufficient circumstantial evidence to support conviction of child endangering where there was medical expert testimony that an infant was injured as the result of abuse and where the defendant was the primary caretaker of the infant immediately [preceding] the manifestation of the infant's injuries) ***.'" *Woodson*, supra, at ¶53, quoting *State v. Brooks*, 10th Dist. No. 00AP-1440, 2001 Ohio App. LEXIS 4310,*18-*19.

{¶42} Appellant argues the instant case is virtually indistinguishable from *State v. Miley* (1996), 114 Ohio App.3d 738, and that, like the Fourth District in that case, we should reverse appellant's conviction. However, except for the injuries sustained by the child in *Miley*, the circumstances in that case are distinguishable from the facts in the instant case. First, while the doctors in *Miley* were unable to determine when the injuries were inflicted on the child, here, Dr. Hsich testified that Alyssa's injuries were acute and that they were inflicted within the past few hours or at most within the past 24 hours. Next, while there was no evidence in *Miley* that the defendant was with the child 24 hours a day and would have seen the abuse, here, appellant admitted that during the

relevant time, i.e., within the past 24 hours, he was Alyssa's sole caregiver except for the brief periods outlined above at which time only appellant and Shari were with the baby. There is no evidence or even argument that Shari harmed the baby during the relevant time or at any other time.

{¶43} Further, unlike in *Miley*, appellant was under the pressure of leading a double life with two different women, neither of whom was aware of his involvement and life with the other. This pressure led him to constantly lie to each partner about his life away from her. Dawn Marie testified appellant misled her concerning his alleged job and the alleged break-up of his relationship with Shari three years earlier. She testified appellant concealed from her his ongoing relationship with Shari and even the existence of the couple's two-month old baby. Likewise, Shari testified appellant lied to her about the reason for his long absence in September 2007 and concealed his marriage to Dawn Marie, which took place when Alyssa was less than two months old. Appellant was also facing increased financial stress because he had no job and did not want to pay child support. While appellant was able to maintain this double life for the last three years, his recent marriage to Dawn Marie would soon force him to choose between his life with Dawn Marie and his life with Shari and Alyssa.

{¶44} Further, unlike in *Miley*, appellant provided four different versions of how Alyssa sustained her injuries. Significantly, appellant concealed the fourth and most incriminating version of events for three weeks from authorities and the hospital doctors, who were then attempting to safe the baby's life. In appellant's fourth version, he admitted he intentionally threw Alyssa a distance of three feet to the couch; that her head bounced back and hit the wood frame of the couch; that when her head hit the

wood, he heard a thump; and that at the time Alyssa was crying and appellant did nothing to help her. It is well-settled that evidence of an accused's concealment of incriminating facts is admissible to show his consciousness of guilt. *State v. Williams*, 79 Ohio St.3d 1, 11, 1997-Ohio-407. Appellant's concealment of this information is strong circumstantial evidence of guilt.

{¶45} We note that the Fourth District distinguished its holding in *Miley* in a later child abuse case, *State v. Meadows*, 4th Dist. No. 99CA2651, 2001 Ohio App. LEXIS 3120, 2001-Ohio-2510, as follows:

{¶46} "We find that the case sub judice is distinguishable from *Miley*. In *Miley*, the state was unable to establish a specific period of time during which the abuse occurred. Here, Dr. Buerger testified that [the abused child] Natasha sustained her injuries no more than twenty-four hours before she died. On the day before her death, there is no indication that anything was wrong with Natasha before Tabitha went to the pawnshop. When Tabitha returned from the pawnshop, however, Natasha was complaining of stomach pain. While Tabitha was away, the evidence indicates that appellant was the only one who was alone with Natasha." *Meadows*, supra, at *33.

{¶47} In summary, the state offered the testimony of two Cleveland Clinic physicians, each of whom testified that Alyssa's injuries were the result of an inflicted head injury or shaken baby syndrome and not an accident. Further, the jury was entitled to infer that appellant, as the sole caregiver at the time Alyssa became symptomatic, was the person responsible for inflicting the injuries to her head. Finally, the state presented sufficient evidence to establish that appellant acted knowingly and recklessly when he injured his daughter. Appellant admitted that he intentionally, i.e.,

purposely, threw Alyssa three feet toward a couch that, according to his admission, he knew had its wood frame exposed and thus would have been dangerous to the baby. When recklessness or knowledge suffice to establish an element of an offense, then purpose is also sufficient culpability for such element. R.C. 2901.22(E).

{¶48} Accordingly, in construing the evidence in a light most favorable to the prosecution, we hold that sufficient evidence was presented for the jury to conclude beyond a reasonable doubt that appellant was guilty of child endangering and felonious assault.

{¶49} In support of his manifest-weight challenge, appellant argues that his private expert Dr. Joseph Scheller testified there was no evidence that Alyssa had been traumatized, either accidentally or intentionally, because, he claims, Alyssa did not have any broken limbs, there were no neck injuries, and there was no injury to the brain. However, appellant ignores Dr. Hsich's testimony that this was not merely a case involving shaken baby syndrome because the perpetrator of this unspeakable horror also, by the means of a hard object, fractured Alyssa's skull in two separate places. Appellant also ignores Dr. Hsich's testimony that it was his opinion, to a reasonable degree of medical certainty, that, due to Alyssa's two separate skull fractures, the bleeding inside her head, her severe seizures, her brain injury, and her retinal hemorrhages, it was traumatic injury in the form of child abuse that caused Alyssa's devastating injuries.

{¶50} Appellant also argues that the jury should have accepted his expert's opinion that Alyssa suffered from hydrocephalus, which is excess spinal fluid around the brain, rather than child abuse. However, Dr. Hsich's testimony directly contradicted

appellant's expert. Dr. Hsich testified that Alyssa did not suffer from hydrocephalus because such children do not present with seizures, and they do not have skull fractures or retinal hemorrhages. Dr. Hsich also testified that, while the size of Alyssa's head was in the upper percentile, many children change percentiles in the first few months after their birth. We note that Dr. Scheller's opinion that Alyssa sustained no trauma contradicts appellant's explanation of the cause of Alyssa's injuries. Appellant admitted at trial that he threw Alyssa toward a couch that he knew had its wood frame exposed; that Alyssa hit the couch and her head bounced back and hit the wood frame of the couch; that Alyssa landed on her back and when she hit the couch, he heard a thump and she was crying.

{¶51} We observe that appellant's expert never examined Alyssa, while Alyssa is a patient of both Dr. Hsich and Dr. Sears. Moreover, Dr. Scheller's expert services have been confined to providing testimony solely on behalf of the defense. Further, while Dr. Scheller conceded that four physicians noted Alyssa's skull fractures on the CAT scan, Dr. Scheller testified that, in his opinion, Alyssa's skull was not fractured. Dr. Scheller's testimony stood in stark contrast to the testimony of two independent experts from the Cleveland Clinic, who were at least equally, if not more, qualified than Dr. Scheller. The jury as the trier of fact was entitled to believe the state's experts and to reject the opinion of appellant's privately-retained expert, as it obviously did.

{¶52} Based upon our thorough and complete review of the record, we cannot say that, in resolving the conflicts in the testimony in favor of the state, the jury clearly lost its way and created such a manifest miscarriage of justice that appellant was entitled to have his conviction reversed

{¶53} Appellant's first and second assignments of error are overruled.

{¶54} For his third assigned error, appellant claims:

{¶55} "The defendant appellant was denied due process of law and prejudiced when the trial court failed to provide a written copy of the jury instructions a violation [sic] of Ohio Rule of Criminal Procedure 30."

{¶56} Appellant does not argue that any of the trial court's instructions were erroneous or that the court failed to instruct the jury on all relevant issues. Further, appellant concedes that the trial court reduced its instructions to writing and that they are in the record. Instead, appellant argues the trial court failed to provide the jury with a written copy of its instructions, as required by Crim.R. 30.

{¶57} However, we note from our review of the record that appellant never objected to this alleged failure and he does not allege plain error. The argument is therefore waived on appeal. *Awan*, supra, at 122. The general rule is that "'an appellate court will not consider any error which counsel for a party complaining of the trial court's judgment could have called but did not call to the trial court's attention at a time when such error could have been avoided or corrected by the trial court.'" Id., citing *State v. Childs* (1968), 14 Ohio St.2d 56, at paragraph three of the syllabus.

{¶58} Further, even if appellant had not waived his right to assert this assigned error, he failed to cite the record in support of this argument, in violation of App.R. 16(A)(7). For this additional reason, his argument lacks merit. We also note that, based on our review of the record, there is no evidence to support appellant's argument that the trial court failed to give a copy of the charge to the jury. In fact, the court made a comment to the jury during the charge to the jury, which strongly suggests the court

did give a copy of the charge to them. During the jury instructions, the court told the jury: "You will have in the jury room two verdict forms, one factual question. I will now read the forms to you. By the way, you're also going to have the instructions." An appellate court, in determining the existence of error, is limited to a review of the record. *State v. Sheldon* (Dec. 31, 1986), 11th Dist. No. 3695, 1986 Ohio App. LEXIS 9608, *2; *Schick v. Cincinnati* (1927), 116 Ohio St. 16, at paragraph three of the syllabus. Without any evidence in support of appellant's assignment of error, there is nothing for us to consider. On appeal it is the appellant's responsibility to support his argument by evidence in the record that supports his or her assigned errors. *City of Columbus v. Hodge* (1987), 37 Ohio App.3d 68. Without evidence in support of an assigned error, we are bound to presume the regularity of the proceedings. *State v. Yankora* (Mar. 16, 2001), 11th Dist. No. 2000-A-0033, 2001 Ohio App. LEXIS 1230, *6. Because the record in the case sub judice does not evidence that the trial court failed to give a copy of the charge to the jury, we must presume the regularity of the proceedings below and that the court gave a written copy of the charge to the jury.

{¶59} Appellant's third assignment of error is overruled.

{¶60} Appellant contends for his fourth assignment of error:

{¶61} "The trial court erred to the prejudice of the defendant/appellant and denied the defendant/appellant his right to present a defense when it excluded defense exhibits B, C, and D."

{¶62} Appellant argues the trial court erred in excluding three of his trial exhibits. This court has held that an appellate court reviews the trial court's admission or exclusion of evidence for an abuse of discretion. *State v. McArthur*, 11th Dist. No.

2006-L-260, 2007-Ohio-7133, at ¶43, citing *State v. Ahmed*, 103 Ohio St.3d 27, 40, 2004-Ohio-4190. "The term 'abuse of discretion' connotes more than an error of law or of judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *State v. Adams* (1980), 62 Ohio St.2d 151, 157.

{¶63} First, appellant argues that Exhibit B, which he states is Dr. Scheller's report, should have been admitted in evidence. However, Exhibit B is not Dr. Scheller's report. It is the doctor's curriculum vitae. Dr. Scheller's report was admitted in evidence as Exhibit A. This argument is therefore moot and lacks merit. We also note that Dr. Scheller testified at length regarding his credentials. As a result, even if appellant meant his argument to refer to his expert's curriculum vitae, which was not admitted in evidence, any error resulting from the trial court's exclusion of this exhibit from the evidence would have been harmless beyond a reasonable doubt.

{¶64} Next, appellant argues that Exhibit C was appellant's drawing depicting how he threw Alyssa to the couch, and should have been admitted to illustrate his testimony. However, appellant did not make this drawing; his trial counsel did. We also note that counsel's drawing was demonstrative in nature, like a witness' drawing of an accident scene on a chalk board, and was not intended to be an accurate or scale drawing of the living room. As a result, the trial court did not abuse its discretion in excluding this exhibit. In any event, appellant testified regarding this event and his counsel's drawing and, moreover, numerous photographs were admitted in evidence depicting the couch and the general area where appellant allegedly tripped and threw Alyssa to the couch. Thus, even if the court abused its discretion in not admitting this exhibit, any error would have been harmless.

{¶65} Finally, appellant argues that a timeline he created showing his activities between July 24, 2007 and September 18, 2007, when he was absent from Trumbull County and not with Alyssa, should have been admitted in evidence. However, it was undisputed below that any trauma resulting in Alyssa's injuries occurred within 24 hours of her arrival at St. Joseph's Hospital. As a result, evidence of appellant's activities prior to midnight on September 22, 2007 was irrelevant. The timeline was therefore inadmissible. Further, appellant's trial counsel suggested to the court that the purpose of the timeline was merely to assist appellant in remembering the dates on which he was absent from his trailer. Writings used to refresh a witness' memory pursuant to Evid.R. 612 are not admissible in evidence. See 1 Giannelli & Snyder, Evidence (1996) 477-478, 574-575; *Dayton v. Combs* (1993), 94 Ohio App.3d 291, 298; *State v. Ballew* (1996), 76 Ohio St.3d 244, 254. The timeline was therefore inadmissible for this additional reason. In any event, the trial court permitted appellant to use the timeline to assist him in remembering the events listed thereon. As a result, even if appellant was entitled to have his timeline admitted in evidence, any error resulting from its exclusion would have been harmless.

{¶66} Appellant's fourth assignment of error is overruled.

{¶67} For the reasons stated in the Opinion of this court, appellant's assignments of error are without merit. It is the judgment and opinion of this court that the judgment of the Trumbull County Court of Common Pleas is affirmed.

DIANE V. GRENDELL, J.,

TIMOTHY P. CANNON, J.,

concur.