[Cite as *State v. Johnson*, 2009-Ohio-2568.]

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO,	:	APPEAL NOS. C-080156 C-080158
Plaintiff-Appellee,	:	TRIAL NOS. B-0607511 B-0406121
vs.	:	
FRED JOHNSON,	:	*O P I N I O N.*
Defendant-Appellant.		

Criminal Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed in Part, Sentences Vacated in Part, and Cause Remanded in C-080156; Appeal Dismissed in C-080158

Date of Judgment Entry on Appeal: June 5, 2009

Joseph T. Deters, Hamilton County Prosecuting Attorney, and *Philip R. Cummings*, Assistant Prosecuting Attorney, for Plaintiff-Appellee,

Michaela Stagnaro, for Defendant-Appellant.

J. HOWARD SUNDERMANN, Judge.

{¶1} In the case numbered B-0607511, defendant-appellant Fred Johnson was indicted for seven offenses in connection with the beating death of his live-in girlfriend's seven-year-old son, Milton. Count one charged Johnson with aggravated murder in violation of 2903.01(C), with a death-penalty specification. Count two charged him with felonious assault in violation of R.C. 2903.11(A)(1). Counts three and four charged him with felony murder with the predicate offenses of child endangering in violation of R.C. 2903.02 and felonious assault in violation of R.C. 2903.02. Counts five through seven charged Johnson with child endangering in violation of R.C. 2929.22(A), 2919.22(B)(1), and 2919.22(B)(3).

I. The State's Evidence Against Johnson

{¶2} At trial, the state presented evidence that Milton's mother, Latina Stallworth, and his younger sister, Toryonna, had moved from Sandusky, Ohio, to Cincinnati in March 2003 to escape an abusive relationship with Toryonna's father, Taron Banks. While staying at a local shelter, Stallworth met Johnson. She and Toryonna moved into an apartment with Johnson around May 2003. In February 2004, Stallworth obtained custody of Milton from his paternal grandparents, and Milton came to live with her, Toryonna, and Johnson.

A Johnson's Abuse of Stallworth and Milton

{¶3} Stallworth testified that Johnson would periodically abuse her and Milton. In June 2004, Stallworth, who was pregnant with Johnson's child, left with Milton and Toryonna for a YMCA shelter after she had a physical altercation with Johnson. On the intake sheet for the shelter, Stallworth wrote that her abuser was Taron Banks. She admitted during the trial that she had lied about who was abusing her. She testified that Johnson had choked her to the floor. When Milton intervened to

help her, Johnson had slapped Milton to the floor. She stayed at the shelter for a week. She and the children missed Johnson, so she took the children and went back to their apartment. That fall, she enrolled Milton in kindergarten. She and Johnson fought periodically during this time. She testified that Johnson had hit her and given her a black eye. Shortly thereafter, she gave birth to a daughter.

{¶4} In September 2005, she and Johnson were having financial difficulties. Johnson blamed her and the children for the situation. They had just moved to an apartment on Freeman Avenue when they had a heated argument. She left with the children and went to a shelter on September 7, 2005. She admitted that she again lied on the intake form about the identity of her abuser. She listed her abuser as Taron Johnson, instead of Johnson, because she loved Johnson and did not want to get him in trouble. She testified that Johnson had choked, punched, kicked, and pushed her. She testified that she and the children went back to living with Johnson on September 20, 2005, because they missed him.

{¶5} Stallworth testified that, after returning from the shelter, she was constantly fighting with Johnson. One of the arguments was caused by Johnson whipping Milton. On November 7, 2005, she called Women Helping Women for advice on the situation. Linda Iverson, a former manager of 241 Kids, testified that her agency had received a referral from Women Helping Women on November 7, 2005, alleging that one Milton Baker was being abused by "Fred Johnson."

{¶6} On November 31, 2005, Stallworth left Johnson again for a shelter in Northern Kentucky. She took all three children with her. She testified that she and Johnson had been arguing and fighting. Johnson had pulled her hair and pushed her to the ground. While staying at the shelter, she decided to homeschool Milton instead of enrolling him in public school in Kentucky. She filled out the necessary paperwork for Milton. Toward the end of December, Johnson starting visiting them on the weekends

and apologized for everything, so she and children left the shelter and returned home to Johnson.

{¶7} Teresa Singleton, the YWCA's Abuse Protection Director, testified that the YWCA provided services to Stallworth three times from 2003 to 2005. Stallworth twice identified her abuser as "Taron Banks" and once as "Taron Johnson" on the intake forms. Singleton testified that it was not uncommon for battered women to give information about their abuser that was not completely truthful or to leave the shelter and return to their abuser.

{¶8} Stallworth testified that, after returning from the shelter in late December, she became pregnant with Johnson's son. She had a difficult pregnancy and was placed on partial bed rest. As a result, Johnson, who was working part-time in pest control, took care of the three children and homeschooled Milton. She and Johnson would argue frequently about Milton's school work. Johnson told her that she was babying Milton too much and that Milton would not listen to him because she was always intervening and telling Johnson to leave Milton alone.

{¶9} In June 2006, Stallworth noticed that Milton had belt marks and welts on his body and legs, but Milton would not tell her how he had gotten them. She would then confront Johnson, they would argue, and she would tell him to keep his hands off Milton. She saw marks on Milton three more times after that. When she would question Johnson about the marks, he would call her names and never tell her what had happened to Milton. She thought Johnson was hitting Milton too hard with a belt.

{¶10} She testified that in late July Milton's wrist was swollen. Milton would not tell her what had happened. When she questioned Johnson, he said that they would put some ice on it and that it would be alright. She did not seek medical treatment for Milton's wrist, but treated it herself with ice as Johnson suggested. She testified that she kept asking Milton about his wrist. He finally told her that Johnson had twisted his arm behind his back.

B. A Reading Lesson Gone Horribly Wrong

{¶11} Stallworth testified that on August 10, 2006, Johnson was alone with Milton in the master bedroom at their home. Milton was reading a book. The rest of the family was eating and watching a movie in another room. At some point, Stallworth heard a loud boom and stomping. She turned the volume on the television down and went to the bedroom where Milton was reading to Johnson. Johnson was yelling at Milton for mispronouncing the word "family." Johnson said that Milton was acting like "a little bitch" again and pushed him to the floor. Stallworth argued with Johnson over Milton finishing the book. She told Milton that he could come with her, but Milton insisted that he finish reading. So Stallworth left the room and went back to watching the movie.

{¶12} A few minutes later, Stallworth heard Johnson yelling. She turned down the television and heard another boom and thump or stomp. When she returned to the room, Milton was shaking on the floor.

{¶13} Instead of calling for emergency assistance, Johnson told Stallworth that Milton was having a seizure. He carried Milton to the bathtub and turned on the shower. He then got into the shower with Milton and started rubbing his head. Milton started choking, so he turned him on his side and performed the Heimlich maneuver.

C. The Trip to the Emergency Room

{¶14} Later, at Stallworth's urging, Johnson drove Stallworth, Milton, and the two girls 16 miles from their home to St. Luke Hospital in Florence, Kentucky. When they arrived at the hospital in the early morning hours of August 11, Milton was in cardiac arrest. Dr. James Lucas Evans, the emergency-room physician, and his staff were able to resuscitate Milton. When Dr. Evans spoke to Stallworth, she told him that Milton had a seizure in the bathtub and fell. After examining Milton, Dr. Evans told

Stallworth that Milton had been severely beaten. Stallworth became very upset, yelling that she had not abused her son.

{¶15} Dr. Evans testified that Milton had numerous bruises and scars on his body, an unhealed wrist fracture, contusions on both sides of his head, and hemorrhages in both retinas. Dr. Evans testified that retinal hemorrhages were a "tell tale sign of severe head injury in children that goes along with non accidental trauma." As a result, he ordered a CAT scan of Milton's head. The scan showed that Milton had a subdural hematoma and swelling of his brain tissue.

D. Milton's Treatment at Children's Hospital

{¶16} Milton was transferred to the intensive care unit (ICU) at Children's Hospital in Cincinnati. Once there, Dr. Kathi Makaroff, a pediatric physician specializing in child abuse, examined Milton at the request of the physicians in the ICU. Milton was unconscious and attached to a respirator. He had swelling over his skull, bruising above his ears and around his eyes, retinal hemorrhages in both his eyes, and multiple bruises on his body. Milton also had numerous linear and curved marks on his arms, trunk, and legs. His right wrist was also swollen and deformed. The CAT scan that had been done at St. Luke Hospital showed that Milton had bleeding between his scalp and his brain. Dr. Makaroff testified that Milton's brain was very swollen and that part of it had started to herniate into the hole leading to his spinal cord, compressing the areas responsible for his respiration and heartbeat.

{¶17} Milton's severe head injuries, the deformity in his wrist, and the multiple skin markings and bruises caused Dr. Markoff to order additional tests. A skeletal survey of Milton's bones and a CAT scan of his chest, abdomen, and pelvis confirmed that Milton had two fractures in his right wrist, at least 20 rib fractures, and fractures to both his pelvic bones. These fractures, which were in various healing stages, were

between ten days and two months old. Milton's eyes were also examined by an ophthalmologist who determined that Milton had retinal hemorrhages in both his eyes.

{¶18} The ICU also ordered two sets of exams to measure Milton's brain activity. Both sets of exams, which were performed six to eight hours apart, showed no brain activity. Milton was taken off life support and died on the evening of August 12, 2006.

{¶19} Dr. Makaroff testified that Stallworth had reported that Milton had a history of seizures and that Milton had suffered a seizure at home on the night he came to the hospital. She also said that Milton had played football. Dr. Makaroff testified, however, that Milton's injuries were not caused by a seizure, by falling in the bathtub, by playing football without proper padding, or by play boxing or roughhousing with a same-aged or slightly older peer.

{¶20} Dr. Makaroff testified that it would have taken considerable force to fracture Milton's ribs and his pelvic bones. She testified that slamming a child, punching a child, or throwing a child could have caused these injuries. She further testified that the large number of patterned marks on Milton's body were not normal childhood scrapes or scars, but were consistent with Milton being disciplined with an implement such as a belt, a switch, or a rod.

{¶21} Dr. Makaroff further explained that retinal hemorrhaging occurred when children were violently shaken, thrown down, or thrown against an object. Dr. Makaroff testified that Milton's head injuries were so severe that they would have immediately incapacitated him. In Dr. Makaroff's opinion, Milton was a victim of on-going child abuse.

E. Stallworth's Statements to Police

{¶22} In the meantime, Stallworth was being interviewed by the police. In an initial interview, Stallworth told police that Milton had been diagnosed with epilepsy when he was two years old and that he frequently suffered from seizures. She said that

Milton had had a seizure causing him to fall in the bathtub and hit his head. She also said Milton had experienced a seizure three days earlier and fell off a barstool. When questioned about his other injuries, she attributed them to playing football. She told police that her fiancé, Chris Parshall, had driven her, Milton, and her two daughters to the hospital in a red Ford Focus. She told police that she did not live with Parshall, that he had left the hospital with her two other children, and that she did not know where he was because he would not return her phone calls.

{¶23} In a second interview with police, Stallworth was shown photographs of Chris Parshall and Fred Johnson. She identified Parshall, but denied knowing Johnson. The police, who had independently confirmed that Parshall and Johnson were the same person, knew Stallworth was lying. Stallworth told police that she had left Milton and the girls with Parshall most of the day. When she came back around 8:45 p.m., Parshall and the children were eating ravioli and watching a movie. Milton seemed fine. Around 10:45 p.m. she left for a Rally's restaurant. When she came back to the apartment, Milton was in the shower. Parshall was playing video games and the two girls were watching a movie. When she went to check on Milton, he was shaking in the bathtub.

{¶24} The officers told Stallworth that Milton's injuries were not consistent with her story, and that they did not believe she was telling the entire truth. Stallworth was told that she would be in trouble if she continued lying. Stallworth then told police that she was afraid of Parshall because he had hit her in the past. She said that she had never seen Parshall hit Milton, but that he must have hit Milton while she had been away to pick up food that night because he was the only other adult with Milton at that time. She told the officers that she had not caused Milton's injuries. She said that Parshall would often get upset with Milton when he was reading and could not pronounce words correctly. Stallworth, however, continued to insist that she did not know the whereabouts of Parshall or her daughters.

{¶25} After Johnson had been arrested, Stallworth gave a third statement to police. She told them that she wanted to tell them what had really happened because she owed it to Milton, who was dying, to be truthful. Stallworth was also concerned that she would go to jail if she were untruthful. In the interview, Stallworth admitted that Johnson and Chris Parshall were the same person. She told police that Johnson had been mentally and physically abusive to her and that she had taken Milton and his sisters on a number of occasions to live in shelters.

{¶26} She also said that Johnson had hit Milton with a belt for not doing his schoolwork properly, and that the abuse had gotten worse during the past two months. She had seen Johnson punch Milton in the arm or the chest several times for mispronouncing words while reading. She had noticed bruises on Milton's back and bottom from belt whips. She said that Milton would not cry, but that he would just "suck it up like it was nothing."

{¶27} She told police that, around 8:45 p.m. on August 10, she was watching television and coloring on the floor with the girls, when Johnson had asked Milton to come into the master bedroom and finish reading his book. She had just returned from a fast-food restaurant with some food. She heard Johnson yelling. She asked Johnson to let Milton eat his food. She and Johnson then argued over Milton finishing his reading. Milton told her that he would finish reading the book before eating. She went back to eating with her daughters. Then she heard a "boom, boom, boom." She went back to the room and told Johnson to leave Milton alone. Milton was getting up from the floor. Milton looked fine, so she left the room again.

{¶28} Shortly thereafter, she heard another "boom, boom, boom." When she ran back to the room, Milton was on the floor, holding his arm. He was looking at her to help him. She and Johnson then started arguing. She picked up her two daughters, who had followed her, and put them in another room. She turned on a movie for them to watch, locked the door, and told them not to come out. When she came back into the

room, Milton was lying on the floor. She started screaming at Johnson. He told her that Milton had had a seizure and that he would be alright. He picked up Milton, turned on the shower, and got in the shower with him. She was yelling for Johnson to get Milton out of the shower, but Johnson kept telling her that Milton was going to be alright.

{¶29} After a few minutes, Johnson got out of the shower with Milton. Stallworth ran into the bedroom. Johnson brought Milton in and gave him the Heimlich maneuver. Milton started vomiting. She cleaned up Milton and put his clothes on, so they could take him to the hospital. Johnson carried Milton to the car. She got the girls, who had been sleeping, and they drove to the hospital. Johnson carried Milton into St. Luke Hospital and stayed in the waiting room with the girls. Johnson followed the ambulance to Children's Hospital, but he left once he saw her with police officers outside the hospital. She had been unable to get in touch with him since that time.

F. Johnson's Apprehension and Interrogation

{¶30} During this same time, Johnson had returned home from St. Luke Hospital and had barricaded himself inside with the two little girls. A SWAT team had to be called before Johnson was arrested. After his arrest, the police searched the home and found numerous belts in the residence, including in the room where Milton had been reading to Johnson.

{¶31} Johnson was interviewed by the police later that day. During the interview, Johnson claimed that he had known Stallworth for three or four years, and that they had a child together, but he insisted that they were not living together. He denied hitting Milton with his hands or with a belt. He said that Milton was a good child who suffered from frequent seizures. He told police that Milton had fallen down steps during a seizure and had hurt his wrist.

{¶32} Johnson attributed the numerous marks and bruises on Milton's body to playing football without a shirt, play boxing with friends in the neighborhood, and being

"jumped" by some bigger boys in the neighborhood for a personal game system. Johnson told police that he "had no idea" that Milton's ribs and pelvic bones were broken.

{¶33} Johnson claimed that he had been watching a movie with Stallworth, Milton, and the two girls on August 10. Around 11 p.m., Milton went into the bathroom to take a shower. Stallworth noticed that Milton was taking a long time, so she went to check on him. She found Milton half in and half out of the shower. Johnson got in the shower with Milton and started rubbing his head and face "to bring him out of it." When he touched Milton's head, it did not feel right. He thought Milton had hit his head on the bathtub.

{¶34} He heard funny sounds in Milton's chest that he had not heard before. He thought that Milton could have been choking on his tongue, so he put a spoon in Milton's mouth to hold his tongue. He then put Milton on the bed and performed the Heimlich maneuver, which caused Milton to vomit. He turned Milton on his side and used a bulb syringe to suction out Milton's mouth.

{¶35} Johnson denied driving Milton to the hospital. Instead, he told police that he had stayed home while his friend Chris drove Stallworth and Milton to the hospital. When the police asked Johnson for Chris's last name and phone number, Johnson changed his story and told police that Chris had just happened to stop by to see him and ended up driving Stallworth and Milton to the hospital. In a second tape-recorded statement, however, Johnson told police that he had gone with Stallworth and Milton to the hospital, but that Chris had taken him and the girls back home.

{¶36} When the police informed Johnson that they had towed his car, Johnson denied ownership of the vehicle. Johnson also denied using the name Chris Parshall, even though the police had found a binder of paperwork in the car, some of which had the name Chris Parshall on it and some of which had the name Fred Johnson. The police also found a belt buckle in the shape of an "F" in the glove box of the car.

{¶37} When asked specifically if Stallworth had ever beaten Milton with a belt or if she had ever caused any of Milton's injuries, Johnson told police that she had never hit Milton. Johnson also told police that he had not heard from Stallworth after Milton had been taken to the hospital.

G. Statements from Johnson's Neighbors

{¶38} During their investigation, the police spoke with Johnson's next-door neighbors, Pamela and Venita Collis. The two women testified that they were standing outside on the evening of August 10, 2006, when they heard someone crying. When they walked in the backyard, the crying got louder. They heard Johnson yelling at Milton and Milton crying.

{¶39} Pamela testified that she heard Johnson "whooping" Milton and yelling, "Do you want pain? You want pain? I'll give you pain." Milton was crying and saying, "No, sir. I don't want no pain." Venita testified that she heard Fred beating Milton. Milton was crying and pleading with Johnson, "Okay. Okay. Okay. Okay. I won't do it no more. I won't do it no more. I won't do it no more." Johnson then yelled, "Do you want pain?" When Milton replied, "No," Johnson yelled, "Well, I'll give you pain."

{¶40} Both women testified that the crying lasted five to fifteen minutes. Later that night, Pamela saw Johnson put Milton in the car. The next day, Venita saw the police towing Johnson's vehicle. When Venita told Johnson about his car, he peeked around the corner, went back in the house, and locked the door. Later that day, they learned from the police that Milton had died.

H. Coroner's Testimony

{¶41} Hamilton County Deputy Coroner Obinna R. Ugwu performed the autopsy on Milton. His external examination showed that Milton had injuries extending from his head to his toes. Milton had multiple patterned and nonpatterned injuries on his arms, trunk, and legs, some of which were between 48 hours and two weeks old.

Ugwu testified that Milton had semicircular and linear marks that had been caused by an implement such as a belt or a belt buckle. Milton also had a number of recent contusions on his body, including contusions on his head, his right clavicle, his front left thigh, and the back of his left foot.

{¶42} Milton also had an older through-and-through laceration to his tongue that Ugwu surmised had been caused by Milton's teeth lacerating his tongue after significant trauma to his head. Milton also had a number of fractured bones. He had fractures in two bones in his right foream, fractures to both his pelvic bones, fractures to all twelve ribs on the left side of his body, and fractures to five of his ribs on the right side of his body. Some of these fractures were a week old, some were a month old, and some had occurred within 24 to 48 hours of death. Dr. Ugwu testified that the rib and pelvic fractures would have been very painful, making it difficult for Milton to breathe and walk. In Dr. Ugwu's opinion, these fractures indicated that there had been repeated blunt-force trauma to Milton's body consistent with child abuse.

{¶43} When Dr. Ugwu examined Milton's head, he noted that Milton's eyes were surrounded by a dusky gray discoloration that was consistent with a blunt impact to that area. Milton had a large contusion behind his left ear that had occurred within 48 hours of the autopsy. Milton also had an almost identical contusion behind his right ear. Milton also had a large contusion on the back of his head. Tests performed on the large contusion on the back of Milton's head revealed that there were two injuries: a newer injury that was superimposed on an older injury. Milton also had a partially healed abrasion on the right side of the back of his head.

{¶44} Dr. Ugwu testified that when he resected Milton's scalp during the autopsy, there was extensive bleeding under the areas where there had been exterior bruising and in other areas where there had been no indication of exterior injuries to his scalp. He opined that Milton had sustained at least four recent blows to his head. He

testified that the injuries to the back of Milton's head were caused by a hard flat object, such as a wall, a floor, or a flat piece of wood.

{¶45} His internal examination revealed that blood had collected between the dura, a tough covering over the brain, and the arachnoid membrane, which is underneath the dura and wraps directly around brain. Milton also had extensive bleeding between the arachnoid membrane and the brain itself, including bleeding on the left, right, and frontal surfaces of his brain. Milton also had bleeding in his retinal nerves.

{¶46} Dr. Ugwu concluded that Milton had died by homicide and noted that the cause of death was severe brain injuries due to extreme blunt-impact trauma to the head. Dr. Ugwu testified that the extensive injuries to Milton's brain were consistent with a child falling from a two- or three-story building, but were not consistent with a child having a seizure and striking his head on a bathtub. Dr. Ugwu stated that the contusions located behind Milton's ears were not accidental injuries, but were consistent with blunt-force trauma caused by a fist or an implement. Dr. Ugwu testified that, given the various injuries detailed in the autopsy, both recent and old, he believed that Milton had been subjected to multiple episodes of blunt, violent force and was a victim of child abuse.

II. Jury Verdict and Sentence

{¶47} After hearing all the evidence, the jury acquitted Johnson of aggravated murder, but found him guilty of the remaining counts. The trial court sentenced Johnson to an aggregate term of 23 years to life in prison. The trial court merged count two, the felonious assault, with count 4, the felony murder predicated upon felonious assault. The trial court sentenced Johnson to fifteen years to life in prison on counts three and four, the two felony-murder charges, and it ordered those terms to be served concurrently. With respect to the child-endangering counts, the trial court sentenced

Johnson concurrently to five years in prison for count five, to eight years in prison for count six, and to eight years in prison for count seven. The trial court otherwise made all the child-endangering terms consecutive to the terms for the remaining offenses.

{¶48} When Johnson had committed the murder, he had been on community control in the case numbered B-0406121 for two counts of nonsupport of dependents. Following the murder trial, Johnson pleaded no contest to violating his community control. The trial court found Johnson guilty, terminated his community control, and sentenced him to concurrent nine-month prison terms that were made consecutive to his sentence in the murder case.

III. Dismissal of Appeal Numbered C-080158

{¶49} Johnson has filed appeal number C-080158 in the case numbered B-0406121, but his assignments of error challenge only those proceedings relating to his convictions for murder, felonious assault, and child endangering in the case numbered B-0607511. We, therefore, conclude that Johnson has abandoned appeal number C-080158.[1] As a result, we dismiss this appeal.[2]

IV. Appeal Numbered C-080156

{¶50} In the appeal numbered C-080156, Johnson raises five assignments of error for our review. He challenges the trial court's admission of other-acts and hearsay evidence against him, the effectiveness of his trial counsel, the weight and sufficiency of the evidence supporting his convictions, and his sentence. We vacate the sentences imposed for the counts of felony murder and remand this case to the trial court for the imposition of only one sentence for those two counts. The trial court's judgment is otherwise affirmed.

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[1] *State v. Benson*, 152 Ohio App.3d 495, 2003-Ohio-1944, 788 N.E.2d 693, at ¶8.
[2] *State v. Perez*, 1st Dist. Nos. C-040363, C-040364, and C-040365, 2005-Ohio-1326, at ¶24.

A. Admission of Alleged Other-Acts Evidence

{¶51} In his first assignment of error, Johnson argues the trial court erred as a matter of law by allowing the state to introduce other-acts evidence against him in violation of Evid.R. 404(B).

{¶52} Evid.R. 404(B) provides that "evidence of other crimes, wrongs, or acts is not admissible to prove the character of person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

{¶53} Johnson argues that testimony from Stallworth, Teresa Singleton, the Abuse Protection Director of the YWCA, and Linda Iverson, the one-time manager of 241 KIDS, was improper because it was elicited merely for the purpose of proving that he had previously abused Stallworth and Milton and, therefore, must have abused Milton on the night that Milton was fatally injured.

{¶54} The record reveals, however, that prior to Singleton's testimony, counsel for the state and the defense met with the court in chambers. Their discussions in chambers were not transcribed. Immediately after Singleton's testimony, counsel met with the trial court again in chambers. The trial court referred to the prior discussion in chambers and asked defense counsel if she would like the court to give a limiting instruction to the jury with regard to Johnson's character. Defense counsel told the trial court that such an instruction would be more appropriate during Stallworth's testimony. The trial court then replied that it would provide the limiting instruction during Stallworth's testimony. The discussion in chambers then ended.

{¶55} Iverson testified without objection. Stallworth testified next. During Stallworth's testimony, the trial court sua sponte gave two limiting instructions. In both instructions, the trial court told the jury that "any testimony of acts said to have been done by the defendant before August 10, 2006, is not admitted in any way to prove the

character of the defendant, to show that he acted consistently with any particular character in any matters alleged in this case. Such testimony is admitted at this point for purposes of consideration as to what effect it may have, if any, with regard to a motive or intent or absence of mistake or ac[cident], or to help with evaluating this witness's testimony with regard to any motivations, she may or may not have had in regard to speaking or acting or not speaking or acting in any particular way."

{¶56} Later, during a break in Stallworth's testimony, the trial court met with counsel for the state and the defense to inform them that one of the jurors had asked the court's bailiff if the court could clarify its instruction about Stallworth's testimony. The trial court told counsel that it intended to restate the limiting instruction unless counsel had a problem with doing so. Counsel for both the state and the defense agreed that the trial court should restate the limiting instruction. When the trial resumed, the trial court gave the jury the same limiting instruction and stated that the instruction was to remain in effect during the remainder of Stallworth's testimony. Johnson did not object to the court's instruction or otherwise draw the court's attention to any inadequacy in the instruction.

{¶57} The record reveals that the court and counsel engaged in an extensive discussion regarding Singleton, Iverson, and Stallworth's testimony. Defense counsel did not object to Singleton's or Iverson's testimony or request the trial court to give a limiting instruction for their testimony. Rather, defense counsel only sought a limiting instruction for Stallworth's testimony. The trial court gave a limiting instruction that adequately informed the jury that it could not use Stallworth's testimony as "other acts" evidence prohibited by Evid.R. 404(B). Defense counsel, moreover, agreed that this instruction was a correct statement of law. Johnson cannot now argue that the trial court erred in admitting this testimony, when he requested a limiting instruction, the

trial court gave the requested instruction, and Johnson did not object to the instruction or move for a mistrial.[3] As a result, we overrule the first assignment of error.

B. Admission of Alleged Hearsay Statements

{¶58} In his second assignment of error, Johnson argues that the trial court's admission of several hearsay statements from Pamela and Venita Collis and from Stallworth prejudiced his right to a fair trial.

{¶59} Johnson's failure to object to the admission of any of these statements at trial has waived all but plain error. For there to be plain error, there must be a plain or obvious error that "affect[s] 'substantial rights,' which has been interpreted to mean 'but for the error, the outcome of the trial clearly would have been otherwise.' "[4]

{¶60} Johnson first contends that the trial court erred by permitting Pamela and Venita Collis to testify that they had heard Johnson yelling at and beating Milton, and Milton crying on the day that he died. The Collis sisters' testimony that they had heard Johnson beating Milton and Milton crying on the night of the murder was not hearsay. It was based on their firsthand knowledge and was, therefore, admissible under Evid.R. 602. Their testimony about Johnson's statements, although offered for the truth of the matter, was also not hearsay because Johnson's statements were admissible under Evid.R.801(D)(2) as statements against interest. But the Collis sisters' testimony about Milton's statements that he "did not want any pain" and that he would not "do it no more" was clearly hearsay and was not admissible under any of the recognized exceptions to the hearsay rule. But in light of the admissibility of the Collis sisters' other testimony that Johnson was yelling and Milton was crying, we cannot say that the improper admission was plain error that affected the outcome of the trial.

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[3] See *State v. Austin* (Dec. 17, 1986), 1st Dist. No. C-860148; *State v. Wharton*, 9th Dist. No. C.A. 23300, 2007-Ohio-1817, at ¶44; *Bowden v. Annenberg*, 1st Dist. No. C-040469, 2005-Ohio-6515, at ¶19; *Urutia v. Jewell* (2002), 257 Ga.App. 869, 873, 572 S.E.2d 405.

[4] *State v. Litreal*, 170 Ohio App.3d 670, 2006-Ohio-4516, 868 N.E.2d 1018 at ¶11, quoting *State v. Barnes*, 94 Ohio St.3d 21, 27, 2002-Ohio-68, 759 N.E.2d 1240.

{¶61} Johnson also contends that Stallworth should have been prohibited from testifying that Milton had told her that Johnson had injured his wrist. While we agree that Stallworth's testimony was hearsay, her single statement can hardly be considered as plain error in the context of all the state's evidence against Johnson. We, therefore, overrule Johnson's second assignment of error.

C. Ineffective Assistance of Counsel

{¶62} In his third assignment of error, Johnson claims he was denied the effective assistance of counsel. Johnson claims that his counsel was ineffective for failing to object to the prejudicial other-acts evidence and hearsay evidence discussed in the first and second assignments of error.

{¶63} To prevail on his argument, Johnson "must show that [his] counsel's representation fell below an objective standard of reasonableness"[5] and that he was prejudiced by counsel's deficient performance.[6] Prejudice is demonstrated by showing "that there is a reasonable probability that, but for * * *[the] errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."[7] Both prongs must be met to demonstrate ineffective assistance of counsel. Johnson, furthermore, must overcome the presumption that defense counsel's performance constituted sound trial strategy.[8]

{¶64} Based upon our holdings in the first and second assignments of error, Johnson's claims of ineffectiveness are without merit. As stated in our response to the first assignment of error, defense counsel was not deficient for requesting and receiving a limiting instruction from the trial court that adequately informed the jury that it could not use Stallworth's testimony as "other acts" evidence prohibited by Evid.R. 404(B). While defense counsel was arguably deficient for failing to request a limiting instruction

[5] See *Strickland v. Washington* (1984), 466 U.S. 668, 688, 104 S.Ct. 2052.
[6] See id. at 687.
[7] See id. at 694.
[8] *State v. Bond* (Oct. 29, 1999), 1st Dist. No. C-990195.

during Singleton and Iverson's testimony, we cannot say that Johnson was prejudiced by their testimony in light of the broad limiting instruction that was requested by defense counsel and given by the trial court three times during Stallworth's testimony.

{¶65} While defense counsel should have objected on hearsay grounds to the testimony from the Collis sisters and Stallworth regarding Milton's statements, we cannot conclude based upon our holding in the second assignment of error that counsel's failure to object prejudiced Johnson.[9] Because we have also concluded that the remainder of the Collis sisters' testimony was not hearsay, any hearsay objection to that testimony would have been futile. Thus, counsel cannot be said to have been ineffective on that basis either. As a result, we overrule the third assignment of error.

D. Sufficiency and Weight of the Evidence

{¶66} In his fourth assignment of error, Johnson argues that the felony murder, felonious-assault, and child-endangering convictions were not supported by sufficient evidence and were against the manifest weight of the evidence.

{¶67} When a defendant claims that his conviction is supported by insufficient evidence, this court must review the evidence in the light most favorable to the prosecution and determine whether any rational trier of fact could have found all the elements of the crime proved beyond a reasonable doubt.[10] When addressing a manifest-weight claim, this court must review the record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, and determine whether, in resolving conflicts, the trier of fact clearly lost its way and created a manifest miscarriage of justice.[11]

{¶68} During the trial, Stallworth testified that Milton was born on December 21, 1998, and was seven years of age when Johnson had taken him into a bedroom to

[9] *State v. Davis*, 6th Dist. No. WD-07-031, 2008-Ohio-3574, at ¶21-29.
[10] *State v. Eley* (1978), 56 Ohio St.2d 169, 383 N.E.2d 132.
[11] *Tibbs v. Florida* (1982), 457 U.S. 31, 102 S.Ct. 2211.

finish reading a book. Soon thereafter, she heard Johnson yelling and then a thump or a stomp or boom. When she went back to the room, Johnson was yelling at Milton for mispronouncing a word. Johnson called Milton "a little bitch" and pushed him to the floor. After exchanging words with Johnson and Milton, she left the room.

{¶69} Shortly thereafter, she heard another boom. When she returned, Johnson was standing over Milton, who was shaking on the floor. When Stallworth asked what had happened, Johnson told her that Milton had suffered a seizure. Instead of seeking the emergency medical treatment that Milton needed, Johnson attempted to revive Milton by putting him in the shower. When Stallworth finally convinced Johnson to take Milton to a hospital, he drove 16 miles away from their home to a hospital in northern Kentucky, when a number of other hospitals were located within several miles of their home.

{¶70} Dr. Evans, the emergency-room physician at St. Luke Hospital, and Dr. Makaroff, a pediatric physician specializing in child abuse at Children's Hospital, both testified that Milton's head injuries were not consistent with accidental trauma. Dr. Makaroff testified that Milton's head injuries had been caused by a great force, as if he had been thrown down violently or thrown against a hard object. The deputy coroner, Dr. Ugwu, testified that Milton had sustained at least four recent severe blows to his head, causing extreme trauma and ultimately his death. Dr. Ugwu testified that the blows to the back of Milton's head had been caused by a hard flat object, such as a wall, a floor, or a flat piece of wood, while the blows to the side of his head were consistent with a belt or a fist striking him. Dr. Ugwu testified that the extensive injuries to Milton's brain were consistent with a child falling from a two- or three-story building. This evidence was sufficient to convict Johnson of the three counts of child endangering, felonious assault, and the two counts of felony murder.

{¶71} Johnson argues, nonetheless, that the jury lost its way in believing Stallworth's testimony. But the weight to be given the evidence and the credibility to be

afforded her testimony were issues for the jury to determine.[12] The jury was able to observe Stallworth's demeanor, gestures and voice inflections, and to use those observations to weigh her credibility.[13] The jury, as the trier of fact, was free to believe all, part, or none of her testimony.[14]

{¶72} During the trial, Johnson maintained that Stallworth had abused Milton and that she had caused his death. As a result, defense counsel repeatedly attacked Stallworth's credibility. Defense counsel cross-examined Stallworth extensively about the inconsistencies in her prior statements to police and medical personnel. Defense counsel then highlighted those inconsistencies in closing argument to the jury. Defense counsel also pointed out that Stallworth had only been charged with child endangering in connection with Milton's death, when she could have been charged with involuntary manslaughter, and that she had a motive to testify against Johnson. The jury, however, found Stallworth's testimony that Johnson had fatally beaten her son more credible than the defense's theory that Stallworth had committed the crimes.

{¶73} Moreover, as the state points out, Stallworth's testimony was supported by other evidence at trial. Neighbors Pamela and Venita Collis testified that they had overheard Johnson yelling at and beating Milton while Milton cried. Police investigators also recovered a number of Johnson's belts from the residence, some of them from the very room that Johnson and Milton had been in prior to his death. Johnson himself told police that he had never seen Stallworth beat Milton.

{¶74} Johnson's own behavior was also indicative of his guilt. Johnson barricaded himself at his home until a SWAT team had to be called. And when he was finally questioned by investigators, Johnson lied about using the name Chris Parshall

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[12] See *State v. Dye*, 82 Ohio St.3d 323, 329, 1998-Ohio-234, 695 N.E.2d 763; *State v. Frazier*, 73 Ohio St.3d 323, 339, 1995-Ohio-235, 652 N.E.2d 1000.
[13] See *Myers v. Garson*, 66 Ohio St.3d 610, 615, 1993-Ohio-9, 614 N.E.2d 742; *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 80, 461 N.E.2d 1273.
[14] See *State v. Long* (1998), 127 Ohio App.3d 328, 335, 713 N.E.2d 1; *State v. Nichols* (1993), 85 Ohio App.3d 65, 76, 619 N.E.2d 80.

and about his ownership of the red Ford. He also said that Milton had experienced a seizure and had fallen in the bathtub on the night in question. But testimony from Dr. Evans, Dr. Makaroff, and Dr. Ugwu firmly refuted any claim that Milton's injuries had been caused by a seizure or a fall in a bathtub.

{¶75} These doctors concluded, based upon the multiple injuries that had been inflicted upon Milton over at least a two-month period—the fractured wrist, fractured ribs, and fractured pelvic bones, the numerous cutaneous markings and bruises to his body, and the significant head trauma—that Milton had been severely beaten and that he was a victim of child abuse. Dr. Ugwu testified that Milton had suffered at least four recent blows to his head, and that these blows had caused his death. In view of this evidence, no reasonable person could claim that the jury lost its way and created a manifest miscarriage of justice in concluding that Johnson had inflicted the injuries upon Milton, rather than Milton's own mother. We, therefore, overrule his fourth assignment of error.

E. Sentencing Issues

{¶76} In his fifth assignment of error, Johnson argues that the trial court erred in sentencing him for two felony murders and three counts of child endangering because they are allied offenses of similar import under R.C. 2941.25. He maintains that there was one act with one victim, and that all his offenses should have merged into one offense of felony murder with a sentence of 15 years to life.

{¶77} R.C. 2941.25 provides the following:

{¶78} "(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.

{¶79} "(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."

{¶80} In *State v. Rance*, the Ohio Supreme Court held that when considering whether two or more offenses constitute allied offenses of similar import under R.C. 2941.25(A), courts must employ a two-step test.[15] In the first step, the statutorily defined elements of the offenses are compared in the abstract.[16] If the elements of the offenses correspond to such a degree that the commission of one crime results in the commission of the other, then the offenses are allied, and the court must undertake the second step in the analysis.[17] If, however, the elements of the offenses do not correspond, then the crimes are of dissimilar import, and the court's inquiry ends.[18] In the second step, the defendant's conduct is reviewed to determine whether the defendant can be convicted of two offenses of similar import.[19] If the court finds either that the offenses were committed separately or that there was a separate animus for each crime, the defendant may be convicted of both offenses.[20]

{¶81} In *State v. Cabrales*, the Ohio Supreme Court clarified that *Rance* does not require an exact alignment of the elements of the offenses.[21] "Instead, if in comparing the elements of the offenses in the abstract, the court determines that the offenses are so similar that the commission of one offense will *necessarily* result in the commission of the other, then the offenses are allied offenses of similar import [emphasis added]."[22]

{¶82} Subsequently, "[i]n *State v. Brown*,[23] the supreme court developed a preemptive exception holding that resort to the two-tiered test developed in *Rance* and

[15] 85 Ohio St.3d 632, 1999-Ohio-291, 710 N.E.2d 699.
[16] Id. at 638.
[17] Id.
[18] Id.
[19] Id.
[20] Id. at 638-639.
[21] 118 Ohio St.3d 54, 2008-Ohio-1625, 886 N.E.2d 181, paragraph one of the syllabus.
[22] Id.
[23] 119 Ohio St.3d 447, 2008-Ohio-4569, 895 N.E.2d 149, at ¶37.

other opinions is unnecessary 'when the legislature's intent is clear from the language of the statute.' "[24] In *Brown*, the court held "that separate convictions for aggravated assault under two different subdivisions of the same statute violated R.C. 2941.25 even though each form of the offense could be committed without necessarily committing the other form, because the General Assembly did not intend for the convictions to be separately punishable. The subdivisions addressed 'two different forms of the same offense, in each of which the legislature manifested its intent to serve the same [societal] interest–preventing physical harm to persons.' "[25]

1. Felony-Murder Counts

{¶83} Johnson first argues that the two felony-murder counts should have merged at sentencing. The record reveals that the state indicted Johnson on two counts that specified alternate means of committing the alleged act of felony murder. Count three charged Johnson with causing the death of Milton as a proximate result of committing the offense of endangering children. Count four charged Johnson with causing the death of Milton as a proximate result of committing the offense of felonious assault.

{¶84} At the sentencing hearing, the trial court stated that Johnson had committed only one murder, yet it imposed a concurrent sentence of fifteen years to life for each count of felony murder. Because both counts involved alternate theories for the single offense of felony murder, the trial court should have merged the two counts into a single conviction and sentence.[26] Consequently, we find Johnson's first argument well taken.

[24] *State v. Winn*, 2009-Ohio-1059, at ¶39, (Moyer, C.J., dissenting).
[25] Id.
[26] See *State v. Huertas* (1990), 51 Ohio St.3d 22, 28, 553 N.E.2d 1058 (holding that when a defendant who kills only one victim is found guilty of two aggravated-murder counts, the trial court may sentence on only one count).

2. Three Counts of Child Endangering

{¶85} Johnson next contends that all three counts of child endangering involved allied offenses that should have merged for sentencing. The state, however, relying on *State v. Cooper*, argues that because Johnson's child-endangering convictions stemmed from separate conduct, we need not engage in an allied-offense analysis.[27] We agree with the state.

{¶86} In *Cooper*, the Ohio Supreme Court held that because the state had not relied upon the "same conduct" of the defendant to support the offense of involuntary manslaughter predicated upon child endangering and a separate offense of child endangering under R.C. 2919.22, R.C. 2941.25(A) was not even implicated.[28] In reaching this conclusion, the court focused upon the fact that the state had presented evidence of two separate acts of child endangering: one act of endangering children involved the defendant slamming an infant's head against an object, which served as the predicate offense for involuntary manslaughter, while the other act involved shaking the infant.[29]

{¶87} Similarly, in this case, the state did not rely upon the same conduct to support the three charges of child endangering against Johnson. The state argued that Milton was in a room reading a book with Johnson when Milton had difficulty pronouncing a word. To "punish" Milton, Johnson struck Milton on the head or body and pushed him to the floor. At trial, Milton's mother testified that she was watching a movie when she heard a boom and stomping. When she ran into the room, Johnson was yelling at Milton for mispronouncing the word "family." Johnson said, "He [Milton] is acting like a little bitch again," and pushed Milton to the ground. This conduct corresponded to count seven, which charged that Johnson had violated R.C. 2919.22(B)(3) by administering corporal punishment or other physical discipline to

[27] 104 Ohio St.3d 293, 2004-Ohio-6553, 819 N.E.2d 657, at ¶17-30.
[28] Id.
[29] Id.

Milton that was excessive under the circumstances and that created a substantial risk of serious physical harm to Milton.

{¶88} After this initial blow to "punish" Milton for mispronouncing a word in his book, Milton's mother testified, she left the room and went back to watching her movie. A few minutes later, she heard another boom and stomping. When she came into the room, Milton was lying unresponsive on the floor. The Collis sisters both testified that they heard Johnson beating Milton and Milton pleading for him to stop. Moreover, the coroner testified that Milton had died from blunt-force trauma to his head caused by at least four blows, that he also had sustained multiple blows to his body causing broken ribs and contusions, and that these injuries were the result of a massive force, such as a belt or a fist, hitting Milton's body. The state argued that this conduct corresponded to count six of the indictment, which charged that Johnson had violated R.C. 2919.22(B)(1) by abusing Milton and causing him serious physical harm.

{¶89} Finally, the state presented evidence that, after beating Milton, Johnson had failed to call for emergency assistance, had attempted to treat Milton at home, and had delayed treatment and hospital care for Milton by driving needlessly to a distant hospital instead of one closer to their home. The state argued that this conduct corresponded to count five of the indictment, which charged that Johnson, while acting in loco parentis, had violated R.C. 2919.22(A) by creating a substantial risk of harm to Milton's health or safety by violating a duty of care, protection, or support, and that the violation had resulted in serious physical harm to Milton.

{¶90} Because the record demonstrates that the state did not rely on the same conduct by Johnson to prove the three child-endangering offenses, Johnson was properly convicted and sentenced for each of these offenses.

3. Felony-Murder and Child-Endangering Counts

{¶91} Finally, Johnson argues that the trial court erred in failing to merge his felony-murder conviction under R.C. 2903.02(B) with his child-endangering convictions under R.C. 2919.22(B)(1), 2919.22(B)(3), and 2919.22(A).

{¶92} We begin our analysis by noting that the state did not use the same conduct to prove child endangering under R.C. 2919.22(B)(3) and 2919.22(A) as it used to prove felony murder. Johnson, therefore, cannot benefit from the protection of R.C. 2941.25(A) in this respect. As a result, he was properly convicted and sentenced for each of these crimes.[30]

{¶93} The state did, however, rely upon the same conduct to support Johnson's convictions for child endangering under R.C. 2919.22(B)(1) and felony murder. We, therefore, must determine if they are allied offenses of similar import.

{¶94} As we have mentioned earlier, in *Brown*, the Ohio Supreme Court developed a preemptive exception to the two-tiered test in *Rance*.[31] The court held that resort to the two-tiered test is "not necessary when the legislature's intent is clear from the language of the statute."[32] In determining legislative intent, the court compared the societal interests protected by the two statutes.[33] It held that if the societal interests are similar, then the crimes are allied offenses of similar import.[34] If, however, the societal interests are different, then the crimes are not offenses of similar import, and the court's analysis ends.[35]

{¶95} In *State v. Morin*, the Fifth Appellate District utilized the Ohio Supreme Court's analysis in *Brown* to conclude that the offenses of felonious assault and child

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[30] *Cooper*, supra, at ¶2 (holding that offenders may not benefit from the protection provided by R.C. 2941.25(A) unless they show that the prosecution has relied upon the same conduct to support both offenses charged).
[31] *Brown*, supra.
[32] Id. at ¶37.
[33] Id. at ¶38.
[34] Id. at ¶35-40.
[35] Id.; see, also, *State v. Mosley*, 178 Ohio App.3d 631, 2008-Ohio-5483, 899 N.E.2d 1021, at ¶37.

endangering are offenses of dissimilar import because they protect different societal interests.[36] Central to its analysis was the recognition that the legislature intended to "bestow special protection upon children" when "crafting" the offense of child endangering.[37]

{¶96} In comparing the unique societal interest protected by the child-endangering statute to the societal interest protected by the felony-murder statute, which is to protect all human life, we likewise conclude that the General Assembly intended to distinguish these offenses and to permit separate punishments for the commission of these two crimes. As a result, we hold that the offense of felony murder and the offense of endangering children are not allied offenses of similar import.

{¶97} We recognize that our decision directly conflicts with the Fifth Appellate District's decision in *State v. Mills*.[38] In that case, the court held that "the elements of child endangering [as set forth in R.C. 2919.22(B)(1)] [we]re sufficiently similar to the elements of felony murder with child endangering as the predicate offense that the commission of the murder logically and necessarily also result[ed] in the commission of child endangering."[39] In reaching this conclusion, the court stated that it "fail[ed] to see how a person could cause the death of a child without at the same time abusing the child in such a manner that the abuse resulted in serious physical harm."[40]

{¶98} The Fifth Appellate District's analysis in *Mills*, however, was flawed because it did not consider the separate societal interests protected by the felony-murder and child-endangering statutes. Its analysis in *Mills* also directly conflicted with its decision in *Morin*. Because we find *Morin* to be the better reasoned decision, we decline to follow *Mills*.

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[36] 5th Dist. No. 2008-CA-10, 2008-Ohio-6707, at ¶43-58.
[37] Id. at ¶57, quoting *State v. Anderson*, (1984), 16 Ohio App.3d 251, 254, 475 N.E.2d 492, overruled on other grounds in *State v. Campbell* (1991), 74 Ohio App.3d 352, 598 N.E.2d 1244.
[38] 5th Dist. No. 2007 AP07 0039, 2009-Ohio-1849, at ¶229.
[39] Id.
[40] Id.

{¶99} In sum, we hold that only Johnson's two convictions for felony murder should have merged into one conviction with one sentence. Accordingly, we sustain that part of Johnson's fifth assignment of error challenging the multiple sentences for the felony-murder offenses. We, therefore, vacate the sentences for the two counts of felony murder and remand this cause for the imposition of a single sentence for those two offenses. We affirm the trial court's judgment and sentences in all other respects.

Judgment accordingly.

DINKELACKER, J., concurs.
PAINTER, P.J., dissents in part.

PAINTER, P.J., dissenting in part

{¶100} I concur in all but one respect: I would follow *State v. Mills* and hold that felony murder based on child endangering and child endangering based on the same conduct are necessarily allied offenses.

Please Note:

The court has recorded its own entry on the date of the release of this decision.