[Cite as *State v. Evans*, 2010-Ohio-2554.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
SCIOTO COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	Case No. 08CA3268
vs.	:	
AARON EVANS,	:	DECISION AND JUDGMENT ENTRY
Defendant-Appellant.	:	

APPEARANCES:

COUNSEL FOR APPELLANT: Robert A. Cassity, 612 Sixth Street, Courthouse Annex, Suite A, Portsmouth, Ohio 45662

COUNSEL FOR APPELLEE: Mark E. Kuhn, Scioto County Prosecuting Attorney, and Pat Apel and Julie Hutchinson, Scioto County Assistant Prosecuting Attorneys, 602 7th Street, Room 310, Portsmouth, Ohio 45662

CRIMINAL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED: 6-1-10

ABELE, J.

{¶ 1} This is an appeal from a Scioto County Common Pleas Court judgment of conviction and sentence. The trial court found Aaron Evans, defendant below and appellant herein, guilty of: (1) seven counts of felonious assault in violation of R.C. 2903.11(A)(1); (2) eight counts of child endangering in violation of R.C. 2919.22(A); (3) three counts of child endangering in violation of R.C. 2919.22(B)(1); (4) five counts of child endangering in violation of R.C. 2919.22(B)(2); and (5) one count of assault in violation of R.C. 2903.13.

{¶ 2} Appellant raises the following assignments of error for review:

FIRST ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED IN OVERRULING DEFENDANT'S MOTION TO DISMISS SPECIFIC COUNTS OF THE INDICTMENT WHEN THE STATE FAILED TO PROVIDE FACTS TO ALLEGE IN LOCO PARENTIS."

SECOND ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED WHEN IT ALLOWED THE STATE TO AMEND THE INDICTMENT ON THE DAY OF TRIAL."

THIRD ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED WHEN IT DENIED THE DEFENDANT'S MOTION FOR SEPARATE TRIALS."

FOURTH ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED WHEN IT CONVICTED APPELLANT OF BOTH FELONIOUS ASSAULT AND CHILD ENDANGERING."

{¶ 3} On September 5, 2008, Clorissa Journey and appellant, her live-in boyfriend, took Journey's eleven-month old baby to appellant's mother's (Susan Vernier) house.[1] Vernier noticed that the child had obvious, multiple injuries and called the emergency squad. The emergency squad reported the baby's injuries as: (1) a swollen right arm that was double the size of the left arm; (2) bruises to the right temple; (3) bruises to the occipital region; (4) bruises below the right eye; (5) bruises below the neck; (6) "popknots" on right and left sides of the head; (7) abrasions around the mouth; (8) sunken eyes; (9) periorbital blood in the right eye; and (10) pale, dry skin. The

[1]The recitation of facts depicted in this case are, in essence, nearly identical to

emergency medical technician stated in the report that the baby appeared "very listless."

{¶ 4} The emergency squad transported the baby to the Southern Ohio Medical Center (SOMC). Dr. Jason Cheatham diagnosed the baby with: (1) child abuse; (2) a healing left posterior rib fracture; (3) a "probable acute upon chronic right humerus fracture"; (4) a probable dislocation fracture of the right elbow; and (5) "[v]arious and sundry bruising of different stages to the child's body." SOMC transferred the baby to Nationwide Children's Hospital for further evaluation. Medical professionals subsequently discovered that the baby had suffered multiple injuries and they then photographed those injuries. The photographs, which were admitted into evidence at trial, depict multiple, obvious injuries of which anyone would be hard-pressed to deny their existence. The photographs depict a baby in obvious pain with horrible injuries around the mouth. The mouth is red and encrusted with blood. Another photograph depicts a large bruise to the scalp. Yet another shows what appear to be cigarette burns to the feet. The photograph of the broken arm shows obvious swelling. Any person with even a modicum of common sense who observed this child on September 5, 2008 should have recognized that the baby needed medical attention.

{¶ 5} On September 29, 2008, the Scioto County Grand Jury returned a twenty-four count indictment against appellant that charged three separate offenses for each of the baby's eight distinct injuries. For example, regarding the fractures to the baby's lower extremities, the indictment charged felonious assault, child endangering

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the facts set forth in the companion case State v. Journey, Scioto App. No. 09CA3270.

under R.C. 2919.22(A), and child endangering under R.C. 2919.22(B). In total, the indictment charged appellant with: (1) eight counts of second-degree felony felonious assault; (2) eight counts of third-degree felony child endangering; (3) five counts of second-degree felony child endangering); and (4) three counts of second-degree felony child endangering. Appellee later amended the indictment to change five of the R.C. 2919.22(B)(1) child endangering offenses to violations of R.C. 2919.22(B)(2).

{¶ 6} On the day of trial, appellant filed a motion to dismiss the counts of the indictment based upon the appellee's theory that he violated R.C. 2919.22(A) as a person in loco parentis to the child. Appellee (1) objected to the timeliness of appellant's motion and, (2) filed a motion to amend the indictment to allege that appellant lived in the residence, as Journey's boyfriend, and that he exercised discipline and control over the child. The trial court orally denied appellant's motion to dismiss, found that it was not timely and that the cases appellant cited are distinguishable. The court subsequently allowed the appellee's amendment to the bill of particulars.

{¶ 7} Appellee also filed a motion to amend the counts that related to the rib fractures to include the time period beginning May 1, 2008. The trial court eventually granted this motion. See Tr. at 518. Appellant did not request a continuance.

{¶ 8} On November 17, 18, 19, and 25, 2008, the trial court held a bench trial. At trial, Journey's almost-nine-year old daughter testified that she saw appellant poke the baby in the eye, burn his feet with cigarettes, bite his ear, twist the baby's arm, squeeze the baby, throw the baby, and place part of the couch on the baby's foot. She also testified that appellant tripped Journey when Journey had the baby in her arms. She stated that she told Journey that appellant was hurting the baby.

{¶ 9} Dr. Philip Scribano testified that on June 2, 2008, he evaluated the baby at Nationwide Children's Hospital due to a referral of multiple fractures and concern of abuse. Dr. Scribano interviewed Journey over the telephone. Journey advised Dr. Scribano that on June 1, 2008 she tripped over a toy while carrying the baby and fell on top of the child. She stated that the baby did not cry, but let out a "slight whimper." Journey stated that she saw the baby smile shortly after the fall, so she had no concern that he had been injured. She reported that she and the baby then slept for several hours and that when they awoke, Journey noticed that the baby had a swollen leg. She took the baby to SOMC where x-rays revealed fractures. Journey told Dr. Scribano that she did not believe the medical reports that found that the baby had suffered fractures. However, Scribano's report lists the following fractures: (1) left first metatarsal fracture, proximal (buckle)–acute; (2) right ulna midshaft greenstick fracture–acute; (3) left distal tibia (corner metaphyseal fracture–acute; (4) left distal fibula (torus) fracture–acute; (5) left tibia spiral fracture with evidence of periosteal reaction of the proximal portion of the left fibula (sub-acute); and (6) right distal tibia (corner metaphyseal fracture)–acute with a triangular fragment noted. Scribano concluded that "[s]everal of these fractures are not consistent with the history provided. As such the injuries are highly suspicious for physical abuse. * * * Some of the injuries have evidence of healing with a timeframe of at least 7-10 days old. In addition, mother reports the infant appearing fine following the fall, without evidence of trauma but with swelling that followed. While swelling may be delayed after a traumatic event, it would be unlikely that this infant would appear 'fine' immediately following the incident. In addition, the type of fractures noted * * * have a different mechanism than

what is reported. As such, these injuries remain suspicious for non-accidental trauma."

{¶ 10} Dr. Mary Leder, Nationwide Children's Hospital attending physician and associate professor of clinical pediatrics, testified that she evaluated the baby on September 6, 2008. The child looked thin and pale and upon weighing the baby, she discovered that he was in the third percentile for his age group and that he had lost approximately 3 kilograms (approximately 6.6 pounds) since his June 2008 examination. Testing also revealed that the baby was anemic and appeared exhausted and pale. These findings led Leder to believe that the child had suffered nutritional neglect. She also observed that the baby had a swollen upper lip and that blood encrusted his lower lip. Leder stated that her examination revealed that the baby had a torn sublingual frenulum (the piece of tissue that "anchors the tongue to the floor of the mouth"), that the roof of his mouth had been scraped, and that he had a cut in his mouth where the base of the tongue meets the back of the throat. She testified that the mouth injuries likely resulted from forcefully jamming an object into the baby's mouth. Leder also observed that the baby's right eye had a violet or purple discoloration and was swollen shut. The eye lashes were matted with a yellow discharge, and the white of the eye was extremely red. Further examination revealed that the baby's eye had been lacerated. She further noticed red marks around the baby's neck, a laceration to his right ear, scratches on his scalp, a bruise to his forehead, and blisters on his feet, and a bruise on his cheek and bruises about his upper chest. Leder discovered that the baby had "old and new fractures including those of the rib (mechanism is forceful squeezing), femur (twisting mechanism), ulna (blunt impact), and humerus (blunt impact and/or twisting)."

{¶ 11} Appellee also presented several video and audio taped interviews of Journey and one of appellant. At trial, it appears that the appellee did not play the entire taped interviews and the recordings were not transcribed into the record. Thus, we have no accurate method to determine the portions of the taped interviews that were admitted into evidence.

{¶ 12} On November 25, 2008, the trial court found appellant guilty of the following offenses and imposed the following sentences:

1. Lower Extremities Fractures: (a) felonious assault, in violation of R.C. 2903.11(A)(1), seven years; (b) third-degree felony child endangering, in violation of R.C. 2919.22(A), four years; and (c) second-degree felony child endangering, in violation of R.C. 2919.22(B)(1), seven years.
2. Rib Fractures: (a) felonious assault, in violation of R.C. 2903.11(A)(1), four years; (b) third-degree felony child endangering, in violation of R.C. 2919.22(A), four years; and (c) second-degree felony child endangering, in violation of R.C. 2919.22(B)(1), four years.
3. Malnutrition: (a) first-degree misdemeanor assault, six months in county jail; (b) first-degree misdemeanor child endangering, in violation of R.C. 2919.22(A), six months in county jail; and (c) first-degree misdemeanor child endangering, in violation of R.C. 2919.22(B)(1), six months in county jail.
4. Eye Injury: (a) felonious assault, in violation of R.C. 2903.11(A)(1), two years; (b) third-degree felony child endangering, in violation of R.C. 2919.22(A), two years; and (c) second-degree felony child endangering, in violation of R.C. 2919.22(B)(2), two years.
5. Ear Injury: (a) felonious assault, in violation of R.C. 2903.11(A)(1), two years; (b)

third-degree felony child endangering, in violation of R.C. 2919.22(A), two years; and (c) second-degree felony child endangering, in violation of R.C. 2919.22(B)(2), two years.

6. Burns to Feet: (a) felonious assault, in violation of R.C. 2903.11(A)(1), eight years; (b) third-degree felony child endangering, in violation of R.C. 2919.22(A), four years; and (c) second-degree felony child endangering, in violation of R.C. 2919.22(B)(2), eight years.

7. Mouth Injury: (a) felonious assault, in violation of R.C. 2903.11(A)(1), four years; (b) third-degree felony child endangering, in violation of R.C. 2919.22(A), four years; and (c) second-degree felony child endangering, in violation of R.C. 2919.22(B)(2), four years.

8. Broken Arm: (a) felonious assault, in violation of R.C. 2903.11(A)(1), seven years; (b) third-degree felony child endangering, in violation of R.C. 2919.22(A), four years; and (c) second-degree felony child endangering, in violation of R.C. 2919.22(B)(2), seven years.

The trial court ordered that the sentences for the counts that involved the same injury be served concurrently. The court then ordered appellant to serve the concurrent prison terms consecutively to one another for a total of thirty-two years imprisonment. This appeal followed.

I

{¶ 13} In his first assignment of error, appellant asserts that the trial court erred by overruling his motion to dismiss the counts of the indictment that relied upon a theory of "in locos parentis." He asserts that because both the indictment and the bill of particulars failed to allege sufficient facts to support a finding of "in locos parentis," the indictment was invalid.

{¶ 14} Appellee responds that appellant, by waiting until the day of trial to move

to dismiss the counts of the indictment based upon an "in locos parentis" theory, failed to timely raise the issue and, thus, the trial court was well-within its discretion to deny appellant's motion on this basis alone. Appellee further argues that the indictment, the bill of particulars, and the amended bill of particulars alleged sufficient facts to support the in locos parentis theory.

A

TIMELINESS

{¶ 15} Initially, we agree with the appellee that appellant did not timely move to dismiss the in loco parentis counts of the indictment. Crim.R. 12(D) requires a defendant to file a motion based upon defects in the indictment "within thirty-five days after arraignment or seven days before trial, whichever is earlier." The trial court may, however, in the interest of justice, extend the time for making pretrial motions. Id. When a defendant fails to timely file a motion based upon defects in the indictment, that failure constitutes a waiver, unless the trial court, for good cause shown, grants relief from the waiver. See Crim.R. 12(H).

{¶ 16} Generally, appellate courts review trial court decisions to extend the time for filing a pretrial motions under the abuse of discretion standard. State v. Robson, 165 Ohio App.3d 621, 2006-Ohio-628, 847 N.E.2d 1233, at ¶9, citing State v. Rush (July 22, 2003), Delaware App. No. 03CAC01002. An abuse of discretion involves more than an error of judgment; rather, it connotes an attitude on the part of the court that is unreasonable, unconscionable, or arbitrary. See, e.g., Blakemore v. Blakemore (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140. When applying the abuse of discretion standard, a reviewing court is not free to merely substitute its judgment for

that of the trial court. See, e.g., Berk v. Matthews (1990) 53 Ohio St.3d 161, 169, 559 N.E.2d 1301. This court has previously held that a trial court does not abuse its discretion by failing to consider a pretrial motion filed on the day of trial. See Robson at ¶15; also, see, generally, State v. Lloyd, Gallia App. No. 03CA20, 2004-Ohio-4729.

{¶ 17} In the case at bar, appellant did not file his motion to dismiss the in locos parentis counts of the indictment until the day of trial. Thus, appellant did not file his motion in accordance with Crim.R. 12(D). The trial court, therefore, could have denied his motion on this basis alone.

{¶ 18} B

MERITS OF MOTION TO DISMISS IN LOCO PARENTIS COUNTS

{¶ 19} Assuming, arguendo, that appellant had timely filed his motion, the trial court appropriately determined that it lacked merit. "'[A] motion to dismiss charges in an indictment tests the [legal] sufficiency of the indictment, without regard to the quantity or quality of evidence that may be produced by either the state or the defendant.'" State v. Barcus (1999), 133 Ohio App.3d 409, 414, 728 N.E.2d 420, quoting State v. Patterson (1989), 63 Ohio App.3d 91, 95, 577 N.E.2d 1165; see, also, State v. Certain, 180 Ohio App.3d 457, 2009-Ohio-148, 905 N.E.2d 1259. Thus, "when a defendant moves to dismiss, the proper determination is whether the allegations contained in the indictment constitute offenses under Ohio criminal law." Id. The sufficiency of an indictment is a question of law that we review de novo. See State v. Smith, Pickaway App. No. 06CA7, 2007-Ohio-502, at ¶26.

{¶ 20} The primary purpose of an indictment is to inform a defendant of the

offense with which he is charged to enable his preparation for trial. Id. at ¶23, citing State v. Lindway (1936), 131 Ohio St. 166, 182, 2 N.E.2d 490 (citation omitted). An indictment must contain a statement that the defendant has committed a public offense that is specified in the indictment. Crim.R. 7(B). The Rule further provides: "The statement may be made in ordinary and concise language without technical averments or allegations not essential to be proved. The statement may be in the words of the applicable section of the statute, provided the words of that statute charge an offense, or in words sufficient to give the defendant notice of all the elements of the offense with which the defendant is charged." Crim.R. 7(B).

{¶ 21} "While the rule permits an indictment to be in the words of the statute, the Ohio Supreme Court has recognized that 'the courts might still require more to put the defendant on notice of the offense charged.'" Smith at ¶24, quoting State v. Ross (1967), 12 Ohio St.2d 37, 39, 231 N.E.2d 299. "'The general rule that an indictment or information for a statutory offense is sufficient if the offense is charged in the words of the statute, either literally or substantially, or in equivalent words, does not apply when the statutory words do not in themselves fully, directly, and expressly, without uncertainty or ambiguity, set forth all the elements and ingredients necessary to constitute the offense intended to be punished.'" Id. at 39-40, quoting 4 Wharton's Criminal Law and Procedure 626; see, also, Smith at ¶24.

{¶ 22} In the case at bar, appellant asserts that the indictment fails to comply with the special in loco parentis pleading requirements that the Ohio Supreme Court set forth in State v. Noggle (1993), 67 Ohio St.3d 31, 615 N.E.2d 1040. In Noggle, the court held: "Indictments based upon an alleged offender's status as a person in loco

parentis should at least state the very basic facts upon which that alleged status is based." Id. at paragraph two of the syllabus. In that case, the State charged the defendant, a high school teacher and coach, with R.C. 2907.03(A)(5)[2] sexual battery based upon alleged sexual conduct with a student.

{¶ 23} The indictment returned against Noggle alleged that an in loco parentis relationship existed between Noggle and the student, but did not specify the nature or underlying basis of that relationship. An amended bill of particulars specified in pertinent part as follows: " * * * the said Dale G. Noggle being a person in loco parentis of said * * *, and the said Dale G. Noggle being such a person in loco parentis by virtue of his position as a teacher and school coach * * *."

{¶ 24} The trial court granted Noggle's motion to dismiss the indictment, holding that a teacher and coach is not, as a matter of law, a person in loco parentis for purposes of the sexual battery statute. Both the appellate court and the Ohio Supreme Court affirmed the dismissal. In affirming the dismissal, the Noggle court stated:

> "The phrase 'person in loco parentis' in R.C. 2907.03(A)(5) applies to a person who has assumed the dominant parental role and is relied upon by the child for support. This statutory provision was not designed for teachers, coaches, scout leaders, or any other persons who might temporarily have some disciplinary control over a child. Simply put, the statute applies to the people the child goes home to."

{¶ 25} Although the court determined that the indictment was insufficient as a matter of law based upon the defendant's status as teacher and coach, the court

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[2] R.C. 2907.03(A)(5) provides: "No person shall engage in sexual conduct with another, not the spouse of the offender, when any of the following apply: * * * (5) The offender is the other person's natural or adoptive parent, or a stepparent, or guardian, custodian or person in loco parentis."

nonetheless determined that the bill of particulars set forth the basic facts upon which the in loco parentis theory rested. The court explained:

> "Finally, ordinarily, an indictment against a defendant is sufficient if it states the charge against the defendant in the words of the statute. Crim.R. 7(B). However, in regard to this particular statute, the words used are not sufficient. The phrase 'person in loco parentis' is a general phrase demanding specificity. Indictments based upon the alleged offender's status as a person in loco parentis should at least state the very basic facts upon which that status is based.
>
> In this case the amended bill of particulars served the purpose of stating the basic facts supporting the allegation that Noggle was a person in loco parentis. The fact that Noggle was a teacher and coach was insufficient to support an indictment based upon R.C. 2907.03(A)(5)."

Id. at 34.

{¶ 26} We believe that the case at bar is vastly different from Noggle. In the case at bar, appellant lived with the child. In Noggle, the defendant was not a person with custody of the child. Here, the bill of particulars stated that appellant was a parent and/or person having custody of the child. Furthermore, the trial court permitted the appellee to amend the bill of particulars to allege that appellant lived with the child and that he exercised discipline and control over the child. While these facts may not first appear to be overly specific, they fulfill the Noggle requirement to set forth the "very basic facts" upon which the State's in loco parentis theory rested. Furthermore, Noggle does not require, as appellant suggests, that the indictment or bill of particulars explicitly allege that the defendant assumed a dominant role over the child or that the child relied upon the defendant for support. Instead, these issues are relevant to determining whether the basic facts alleged are legally sufficient, as a matter of law, to support an in loco parentis theory. In the case at bar, the basic facts that support the appellee's in loco parentis theory are that appellant was a parent and/or person with

custody of the child, that he lived with the child, and that he exercised discipline and control over the child. These basic facts support an inference that appellant assumed a dominant role over the child and that the child relied upon the defendant for support, sufficient to overcome a motion to dismiss the in loco parentis counts of the indictment. Thus, we believe that the trial court correctly denied appellant's motion to dismiss the in loco parentis counts of the indictment.

{¶ 27} We do not find appellant's reliance upon State v. Reinhardt, Franklin App. No. 04AP-116, 2004-Ohio-6443, or State v. Funk, Franklin App. No. 05AP-230, 2006-Ohio-2068, persuasive. In those cases, the courts considered whether the evidence presented at trial was sufficient to establish an in loco parentis relationship, not whether the indictment sufficiently alleged the very basic facts upon which the relationship existed.[3] The sufficiency of an indictment and the sufficiency of evidence presented at trial to sustain an in loco parentis conviction are two different questions and must be evaluated under two different legal standards.

{¶ 28} To the extent that State v. Stout, Logan App. No. 8-07-12, 2008-Ohio-161, which appellant also cites, requires an indictment alleging an in loco parentis theory to allege facts showing that the defendant assumed a dominant parental role and that he was relied upon by the child for support, we do not read Noggle as demanding this exact specificity in the indictment. In fact, Noggle held that the indictment in that case

[3] Technically, Funk considered the sufficiency of the indictment, but did not engage in a lengthy analysis of the issue because the defendant waived all but plain error with respect to this issue. The language appellant cites to support his argument is taken from the Funk court's discussion of the sufficiency of the evidence to support the in loco parentis allegation.

alleged the very basic facts supporting the in loco parentis theory (teacher and coach), even though those facts did not also allege that the defendant assumed a dominant parental role and that he was relied upon by the child for support. Noggle, instead, held that as a matter of law, a teacher and coach did not meet the definition of a person in loco parentis. In essence, Noggle sets forth a definition of in loco parentis as one who assumes a dominant parental role and upon whom the child relies for support. (i.e., "the people the child goes home to.") Noggle then examined the alleged facts to see whether they would meet this definition. Noggle did not, however, require the definitional terms to be alleged in the indictment. Thus, we disagree with appellant's assertion that the indictment in the case at bar was defective for failing to allege that he assumed a dominant parental role and that the child relied upon him for support.

{¶ 29} Furthermore, we find Stout distinguishable for the same reasons that we find Noggle distinguishable. In Stout, there was no allegation that the defendant had a parental or custodial relationship with the child. Instead, the indictment and bill of particulars alleged:

> "The Defendant was acting in loco parentis in an ongoing relationship with S.M. as she confided to him about her problems and family issues. He was entrusted by the parents of S.M. with her care and protection as he was listed on the High School emergency contact list, above other family members, as a person who could travel to her school to sign her out. By virtue of this emergency contact form, S.M. was permitted by her parents and the school to go home with the Defendant. While S.M. was in the Defendant's company he was routinely entrusted with her care and protection, given her significant medical issues. The parents of S.M. on a regular basis relied upon the Defendant to help with S.M.'s emotional, psychological, and physical healing process."

The Stout court held that as a matter of law, these facts did not support an in loco parentis theory.

{¶ 30} In the case at bar, by contrast, if the appellee's allegations in the bill of particulars and the amended bill of particulars are true, then those facts are sufficient to support the indictment's allegation of an in loco parentis theory. Thus, unlike Stout, the allegations are legally sufficient to allege an in loco parentis theory.

{¶ 31} Accordingly, based upon the foregoing reasons, we overrule appellant's first assignment of error.

II

{¶ 32} In his second assignment of error, appellant argues that the trial court erred by permitting the appellee, on the day of trial, to amend the indictment to include an additional time period within which the alleged criminal acts that related to the rib fractures occurred.

{¶ 33} Section 10, Article I of the Ohio Constitution states: "[N]o person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a grand jury." This constitutional provision "guarantees the accused that the essential facts constituting the offense for which he is tried will be found in the indictment of the grand jury. Where one of the vital elements identifying the crime is omitted from the indictment, it is defective and cannot be cured by the court as such a procedure would permit the court to convict the accused on a charge essentially different from that found by the grand jury." State v. Headley (1983), 6 Ohio St.3d 475, 478-79, 453 N.E.2d 716. This rule ensures that a criminal defendant will not be "surprised" by a charge. See In re Reed, 147 Ohio App.3d 182, 2002-Ohio-43, 769 N.E.2d 412, at ¶33.

{¶ 34} By specifying when a court may permit an amendment to an indictment, Crim.R. 7(D) supplements the constitutional right to presentment and indictment by a grand jury. See id; State v. Strozier (Oct. 5, 1994), Montgomery App. No. 14021. The rule states:

> The court may at any time before, during, or after a trial amend the indictment, information, complaint, or bill of particulars, in respect to any defect, imperfection, or omission in form or substance, or of any variance with the evidence, provided no change is made in the name or identity of the crime charged. If any amendment is made to the substance of the indictment, information, or complaint, or to cure a variance between the indictment, information, or complaint and the proof, the defendant is entitled to a discharge of the jury on the defendant's motion, if a jury has been impanelled, and to a reasonable continuance, unless it clearly appears from the whole proceedings that the defendant has not been misled or prejudiced by the defect or variance in respect to which the amendment is made, or that the defendant's rights will be fully protected by proceeding with the trial, or by a postponement thereof to a later day with the same or another jury. Where a jury is discharged under this division, jeopardy shall not attach to the offense charged in the amended indictment, information, or complaint. No action of the court in refusing a continuance or postponement under this division is reviewable except after motion to grant a new trial therefore is refused by the trial court, and no appeal based upon such action of the court shall be sustained nor

> reversal had unless, from consideration of the whole proceedings, the reviewing court finds that a failure of justice resulted.

Thus, the rule permits most amendments, but flatly prohibits amendments that change the name or identity of the crime charged. See State v. Kittle, Athens App. No. 04CA41, at ¶12, 2005-Ohio-3198. Crim.R. 7(D) permits a trial court, before, during or after a trial, to allow the State to amend an indictment, provided no change is made in the name or identity of the crime charged. Crim.R. 7(D). A trial court's decision to allow an amendment that changes the name or identity of the offense charged constitutes reversible error regardless of whether the accused can demonstrate prejudice. Kittle at ¶12. Whether an amendment changes the name or identity of the crime charged is a question of law. Id.

{¶ 35} If an amendment does not change the name or identity of the crime charged, we review the trial court's decision under an abuse of discretion standard. Id. at ¶13; State v. Beach, 148 Ohio App.3d 181, 772 N.E.2d 677, 2002-Ohio-2759, at ¶23. Once again, the term abuse of discretion connotes more than an error of law or judgment; rather, it implies that the court's attitude is unreasonable, arbitrary, or unconscionable. See, e.g., State v. Adams (1980), 62 Ohio St.2d 151, 157, 404 N.E.2d 144. When the court permits an amendment that does not change the name or identity of the offense charged, the accused is entitled, upon motion, to a discharge of the jury or to a continuance, "unless it clearly appears from the whole proceedings that the defendant has not been misled or prejudiced by the defect or variance in respect to which the amendment is made." Crim.R. 7(D). When a trial court refuses to continue or postpone the matter, the appellate court may not reverse the trial court's action

unless "a failure of justice resulted."

{¶ 36} In the case sub judice, the amendment to the indictment that added an additional time period did not change the name or identity of the offense. This court has previously held that amendments that change "only the date on which the offense occurred * * * [do] not charge a new or different offense, nor * * * change the substance of the offense." State v. Quivey, Meigs App. No. 04CA8, 2005-Ohio-5540, at ¶28. We therefore review the trial court's decision in the case sub judice to allow the amendment under the an abuse of discretion standard.

{¶ 37} In the case at bar, we do not believe that the trial court abused its discretion by allowing the appellee to amend the dates alleged in the indictment. Here, the amendment did not alter any of the essential elements of the crimes, and did not add any additional criminal acts. At all times appellant stood charged with the same crimes that resulted from the baby's rib fractures. The amendment simply added an additional time-frame within which those injuries may have occurred. Thus, appellant has not demonstrated that he suffered any specific prejudice as a result of the amendment.

{¶ 38} We find appellant's reliance upon State v. Vitale (1994), 96 Ohio App.3d 695, 645 N.E.2d 1277, misplaced. In that case, the indictment originally alleged that the defendant committed a theft offense on or about June 14, 1991. The trial court permitted the State to amend the indictment to charge that the theft offense occurred between June 14, 1991 and June 21, 1991. The trial court subsequently acquitted the defendant of any theft offense that occurred on June 14, 1991, but convicted him of a June 21, 1991 theft offense. Apparently, the conviction was based upon a different set

of facts than those alleged to have occurred on June 14, 1991. See State v. Smith (Aug. 21, 1997), Cuyahoga App. No. 70855 (distinguishing Vitale). Thus, that amendment essentially added an additional crime. On appeal, the court determined that the trial court abused its discretion by permitting the amendment "because the different events, time, and place of the June 21 offense from the June 14 theft changed the identity of the crime charged in the indictment." Id. In contrast, in the case at bar the appellee consistently relied upon the same set of facts as constituting the crime charged. Both the original indictment and the amended indictment alleged that appellant caused the baby's injuries. The amended indictment did not change the nature or identity of the crime charged by changing the dates within which the alleged crime occurred. Thus, we do not find Vitale applicable.

{¶ 39} Moreover, appellant did not request a continuance either when the appellee requested to amend the indictment or when the court granted the appellee's request to allow the amendment. Appellant, therefore, failed to request an available remedy when a court permits an amendment that does not change the name and identity of the crime charged. See Crim.R. 7(D); Columbus v. Bishop, Franklin App. No. 08AP-300, 2008-Ohio-6964.

{¶ 40} Accordingly, based upon the foregoing reasons, we hereby overrule appellant's second assignment of error.

III

{¶ 41} In his third assignment of error, appellant contends that the trial court abused its discretion by denying his motion for a separate trial.

{¶ 42} Crim.R. 8(B) permits the joinder of defendants' cases when they are "alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses, or in the same course of criminal conduct." As a general rule, the law favors joinder of defendants and the avoidance of multiple trials because it "'conserves judicial and prosecutorial time, lessens the not inconsiderable expenses of multiple trials, diminishes inconvenience to witnesses, and minimizes the possibility of incongruous results in successive trials before different juries.'" State v. Daniels (1993), 92 Ohio App.3d 473, 484, 636 N.E.2d 336, quoting State v. Thomas (1980), 61 Ohio St.2d 223, 225, 400 N.E.2d 401. If, however, joinder prejudices a defendant, Crim.R. 14 permits a trial court to sever the trials. Crim.R. 14 states: "If it appears that a defendant * * * is prejudiced by a joinder of * * * defendants * * * for trial together * * *, the court shall * * * grant a severance of defendants, or provide such other relief as justice requires."

{¶ 43} To establish that a trial court erred by refusing to sever a trial, a defendant must establish: "(1) that his rights were prejudiced, (2) that at the time of the motion to sever, he provided the trial court with sufficient information so that it could weigh the considerations favoring joinder against the defendant's right to a fair trial, and (3) that given the information provided to the court, it abused its discretion in refusing to separate the charges for trial." State v. Schaim (1992), 65 Ohio St.3d 51, 59, 600 N.E.2d 661, citing State v. Torres (1981), 66 Ohio St.2d 340, 421 N.E.2d 1288, syllabus. A trial court abuses its discretion when it acts unreasonably, arbitrarily, or unconscionably. See, e.g., Adams, supra. "[A] trial court does not abuse its discretion in refusing to grant severance where the prejudicial aspects of joinder are too general

and speculative." State v. Payne, Franklin App. No. 02AP-723, 2003-Ohio-4891.

{¶ 44} In the case sub judice, appellant asserts that he demonstrated that prejudice resulted from the joint trial because he and Journey presented mutually antagonistic defenses, i.e., each accused the other of causing the baby's injuries. Generally, defenses are mutually antagonistic when each defendant attempts to exculpate himself and inculpate his co-defendant. Daniels, 92 Ohio App.3d at 486. Mutually antagonistic defenses are not, however, prejudicial per se. See Zafiro v. U.S. (1993), 506 U.S. 534, 538, 113 S.Ct. 933, 122 L.Ed.2d 317. Instead, to demonstrate prejudice resulting from mutually antagonistic defenses, "the defenses must be antagonistic to the point of being irreconcilable and mutually exclusive." State v. Walters, Franklin App. No. 06AP-693, 2007-Ohio-5554, at ¶23, citing United States v. Berkowitz (C.A.5, 1981), 662 F.2d 1127, 1133. As the Walters court explained:

> "The essence or core of the defenses must be in conflict, such that the jury, in order to believe the core of one defense, must necessarily disbelieve the core of the other. [Berkowitz, 662 F.2d] at 1134. 'In such a situation, the co-defendants do indeed become the government's best witnesses against each other. Where two defendants present defenses that are antagonistic at their core, a substantial possibility exists "'that the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty.'"' Id., quoting United States v. Eastwood (C.A.5, 1973), 489 F.2d 818, 822, n.5, quoting United States v. Robinson (D.C.Cir.1970), 432 F.2d 1348, 1351."

Walters at ¶23. Thus, a defendant is not entitled to severance based upon mutually antagonistic defenses unless "there is a serious risk that a joint trial could compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." Zafiro, 506 U.S. at 539.

{¶ 45} The Zafiro court described the type of prejudice that might warrant

severance, stating, "[s]uch a risk might occur when evidence that the jury should not consider against a defendant and that would not be admissible if a defendant were tried alone is admitted against a codefendant. For example, evidence of a codefendant's wrongdoing in some circumstances erroneously could lead a jury to conclude that a defendant was guilty." Id. The court further noted "[e]vidence that is probative of a defendant's guilt but technically admissible only against a codefendant also might present a risk of prejudice. Conversely, a defendant might suffer prejudice if essential exculpatory evidence that would be available to a defendant tried alone were unavailable in a joint trial." Id.

{¶ 46} In the case at bar, we do not believe that appellant established that the trial court's failure to sever the trial constituted an abuse of discretion. In particular, appellant failed to affirmatively demonstrate that his and Journey's alleged mutually antagonistic defenses compromised one of his specific trial rights, or prevented the trial court from making a reliable judgment about his guilt or innocence. See Zafiro. We further observe that because this matter was a trial to the court, there is no danger that a jury considered evidence that would have been inadmissible if appellant had been tried alone. Rather, the trial court was aptly suited to listening to the evidence and weeding out what could have been inadmissible evidence. A trial court is presumed to follow the law and to consider only admissible evidence. Furthermore, appellant has not pointed to any evidence that the trial court improperly considered as a result of the joint trial. Thus, after our thorough review of the transcript, we are unable to conclude that the trial court's refusal to sever the trial resulted in prejudice to appellant.

{¶ 47} Accordingly, based upon the foregoing reasons, we hereby overrule

appellant's third assignment of error.

IV

{¶ 48} In his fourth assignment of error, appellant argues that the trial court erred by convicting him of felonious assault and child endangering. He contends that felonious assault and child endangering constitute allied offenses of similar import.

{¶ 49} We engaged in a lengthy analysis of this exact issue in appellant's co-defendant's case. See State v. Journey, Scioto App. No. 09CA3270, 2010-Ohio- . We ultimately concluded that the various child endangering offenses and the felonious assault offenses do not constitute allied offenses of similar import and adopt and incorporate that reasoning here. For those same reasons, we reject appellant's fourth assignment of error. Accordingly, based upon the foregoing reasons, we hereby overrule appellant's fourth assignment of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and that appellee recover of appellant the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Scioto County Common Pleas Court to carry this judgment into execution.

If a stay of execution of sentence and release upon bail has been previously granted, it is continued for a period of sixty days upon the bail previously posted. The purpose of said stay is to allow appellant to file with the Ohio Supreme Court an application for a stay during the pendency of the proceedings in that court. The stay as herein continued will terminate at the expiration of the sixty day period.

The stay will also terminate if appellant fails to file a notice of appeal with the Ohio Supreme Court in the forty-five day period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Ohio Supreme Court. Additionally, if the Ohio Supreme Court dismisses the appeal prior to the expiration of said sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute that mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Harsha, J. & Kline, J.: Concur in Judgment & Opinion

For the Court

BY: _____
Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.