[Cite as *State v. Journey*, 2010-Ohio-2555.]

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

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	Case No. 09CA3270
vs.	:	
CLORISSA JOURNEY,	:	DECISION AND JUDGMENT ENTRY
Defendant-Appellant.	:	

APPEARANCES:

COUNSEL FOR APPELLANT: Marc E. May, 602 Chillicothe Street, Suite 237, Portsmouth, Ohio 45662

COUNSEL FOR APPELLEE: Mark E. Kuhn, Scioto County Prosecuting Attorney, and Pat Apel, Scioto County Assistant Prosecuting Attorney, 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 Clorissa Journey, defendant below and appellant herein, guilty of: (1) six counts of complicity to felonious assault; (2) eight counts of child endangering; (3) nine counts of complicity to child endangering; (4) one count of complicity to assault; and (5) one count of obstructing justice.

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

FIRST ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED WHEN IT CONVICTED AND SENTENCED APPELLANT SEPARATELY FOR ALLIED OFFENSES OF SIMILAR IMPORT UNDER OHIO REVISED CODE 2941.25."

SECOND ASSIGNMENT OF ERROR:

"THERE WAS INSUFFICIENT EVIDENCE TO CONVICT APPELLANT OF FELONIOUS ASSAULT UNDER OHIO REVISED CODE 2903.11(A)(1) AND ENDANGERING CHILDREN UNDER OHIO REVISED CODE 2919.22(A) AND (E)(2)(c) AND 2919.22(B)(2) AND (E)(3) WITH REGARD TO AUSTIN'S EAR INJURY BECAUSE IT DID NOT CONSTITUTE 'SERIOUS PHYSICAL HARM.'"

THIRD ASSIGNMENT OF ERROR:

"THERE WAS INSUFFICIENT EVIDENCE TO CONVICT APPELLANT OF OBSTRUCTING JUSTICE, A THIRD DEGREE FELONY, UNDER OHIO REVISED CODE 2921.32(A)(5) AND (C)(4)."

{¶ 3} On September 5, 2008, appellant and her live-in boyfriend, Aaron Evans, took appellant's eleven-month old baby to Evans' mother's (Susan Vernier) house. 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 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-five count indictment 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 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; (4) three counts of second-degree felony child endangering; and (5) one count of obstructing justice. Appellee later amended the indictment to

change five of the R.C. 2919.22(B)(1) child endangering offenses to charge a violation of R.C. 2919.22(B)(2).

{¶ 6} On November 17, 18, 19, and 25, 2008, the trial court held a bench trial. At trial, appellant's almost-nine-year old daughter testified that she saw Evans 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 Evans tripped appellant when appellant had the baby in her arms. She stated that she told appellant that Evans was hurting the baby.

{¶ 7} 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. Scribano interviewed appellant over the telephone. Appellant advised 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." Appellant 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, appellant noticed that the baby had a swollen leg. She took the baby to SOMC where x-rays revealed fractures. Appellant told 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."

{¶ 8} 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 he appeared exhausted and pale. These findings led Leder to believe that the child had suffered nutritional neglect. She also observed the baby's swollen upper lip and blood encrusted 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**,** 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, 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)."

{¶ 9} Appellee also presented several video and audio taped interviews of appellant and one of Evans. 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.

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

1. Lower Extremities Fractures: (a) second-degree complicity to felonious assault, in violation of R.C. 2903.11(A)(1), five years; (b) third-degree felony child endangering, in violation of R.C. 2919.22(A), five years; and (c) second-degree felony complicity to child endangering, in violation of R.C. 2919.22(B)(1), five years.
2. Rib Fractures: (a) second-degree felony complicity to 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 complicity to child

endangering, in violation of R.C. 2919.22(B)(1), four years.

3. Malnutrition: (a) first-degree misdemeanor complicity to 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 complicity to child endangering, in violation of R.C. 2919.22(B)(1), six months in county jail.

4. Eye Injury: (a) second-degree felony complicity to 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 complicity to child endangering, in violation of R.C. 2919.22(B)(2), two years.

5. Ear Injury: (a) second-degree felony complicity to 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 complicity to child endangering, in violation of R.C. 2919.22(B)(2), two years.

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

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

8. Broken Arm: (a) second-degree felony complicity to felonious assault, in violation of

R.C. 2903.11(A)(1), five years; (b) third-degree felony child endangering, in violation of R.C. 2919.22(A), five years; and (c) second-degree felony complicity to child endangering, in violation of R.C. 2919.22(B)(2), five years.

9. Obstructing justice, in violation of R.C. 2921.32(A)(5), three 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 twenty-seven years imprisonment. This appeal followed.

I

{¶ 11} In her first assignment of error, appellant asserts that the trial court erred by sentencing her for allied offenses of similar import. Specifically, she contends in a multi-part argument that the felonious assault offenses and the various child endangering offenses constitute allied offenses of similar import.

A

STANDARD FOR DETERMINING WHETHER OFFENSES CONSTITUTE ALLIED OFFENSES OF SIMILAR IMPORT

{¶ 12} R.C. 2941.25 sets forth the statutory analysis for determining whether offenses constitute allied offenses of similar import and provides:

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

defendant may be convicted of all of them.

The Ohio Supreme Court has interpreted R.C. 2941.25 to involve a two-step analysis:

> "'In the first step, the elements of the two crimes are compared. If the elements of the offenses correspond to such a degree that the commission of one crime will result in the commission of the other, the crimes are allied offenses of similar import and the court must then proceed to the second step. In the second step, the defendant's conduct is reviewed to determine whether the defendant can be convicted of both offenses. If the court finds either that the crimes were committed separately or that there was a separate animus for each crime, the defendant may be convicted of both offenses.'"

State v. Harris, 122 Ohio St.3d 373, 2009-Ohio-3323, 911 N.E.2d 882, at ¶10, quoting State v. Blankenship, 38 Ohio St.3d 116, 117, 526 N.E.2d 816; see, also, State v. Winn, 121 Ohio St.3d 413, 2009-Ohio-1059, 905 N.E.2d 154; State v. Cabrales, 118 Ohio St.3d 54, 2008-Ohio-1625, 886 N.E.2d 181, at ¶14.

{¶ 13} In determining whether offenses constitute allied offenses of similar import under R.C. 2941.25(A), courts must "compare the elements of offenses in the abstract, i.e., without considering the evidence in the case * * *." Cabrales at ¶27; see, also, Harris, at ¶12. The elements need not, however, be identical for the offenses to constitute allied offenses of similar import. Winn, at ¶12. The key word is "similar," not "identical." Winn at ¶12; see, also, Harris, at ¶16 (stating that the offenses need not exactly align to constitute allied offenses). Offenses constitute allied offenses of similar import if "'in comparing the elements of the offenses in the abstract, the offenses are so similar that the commission of one offense will necessarily result in commission of the other * * *.'" Winn at ¶12, quoting Cabrales at ¶26.

{¶ 14} The Ohio Supreme Court rendered its most recent allied-offense-of-similar-import decision in Harris. The Harris court held that robbery and aggravated robbery are allied offenses of similar import and that R.C. 2903.11(A)(1) felonious assault and R.C. 2903.11(A)(2) felonious assault are allied offenses of similar import. In determining that robbery and aggravated robbery are allied offenses of similar import, the Harris court explained:

> "Each count of robbery herein was charged under R.C. 2911.02(A)(2), which provides that no person, in attempting to commit or committing a theft offense, or fleeing immediately thereafter, shall '[i]nflict, attempt to inflict, or threaten to inflict physical harm on another.' Each count of aggravated robbery was charged under R.C. 2911.01(A)(1), which provides that no person, in attempting to commit or committing a theft offense, or in fleeing immediately thereafter, shall '[h]ave a deadly weapon on or about the offender's person or under the offender's control and either display the weapon, brandish it, indicate that the offender possesses it, or use it.'
>
> * * * *
>
> * * * * The possession of a deadly weapon, used, shown, brandished, or made known to the victim during a theft or flight from a theft also constitutes a threat to inflict physical harm on that victim. Thus, robbery defined in R.C. 2911.02(A)(2) and aggravated robbery defined in R.C. 2911.01(A)(1) are so similar that the commission of one offense will result in commission of the other."

Id. at ¶¶15 and 17.

{¶ 15} In State v. Winn, 121 Ohio St.3d 413, 2009-Ohio-1059, 905 N.E.2d 154, the court held that kidnapping and aggravated robbery are allied offenses of similar import. The court first examined the elements of the offenses in the abstract and then concluded that the commission of one necessarily results in commission of the other. The court explained:

> "In essence, the elements to be compared in the abstract are the restraint, by force, threat, or deception, of the liberty of another to 'facilitate the commission of any felony' (kidnapping, R.C. 2905.01(A)(2))

> and having 'a deadly weapon on or about the offender's person or under the offender's control and either display[ing] the weapon, brandish[ing] it, indicat[ing] that the offender possesses it, or us[ing] it' in attempting to commit or committing a theft offense (aggravated robbery, R.C. 2911.01(A)(1)). It is difficult to see how the presence of a weapon that has been shown or used, or whose possession has been made known to the victim during the commission of a theft offense, does not also forcibly restrain the liberty of another. These two offenses are 'so similar that the commission of one offense will necessarily result in commission of the other.' Cabrales, 118 Ohio St.3d 54, 2008-Ohio-1625, 886 N.E.2d 181, paragraph one of the syllabus."

Id. at ¶21.

{¶ 16} In State v. Brown, 119 Ohio St.3d 447, 2008-Ohio-4569, 895 N.E.2d 149, the court held that aggravated assault under R.C. 2903.12(A)(1) and (A)(2) are allied offenses of similar import, even though commission of one offense does not necessarily result in the commission of the other. The court determined that because R.C. 2903.12(A)(1) aggravated assault required proof of serious physical harm and R.C. 2903.12(A)(2) did not, then the commission of R.C. 2903.12(A)(2) would not necessarily result in the commission of R.C. 2903.12(A)(1). Instead of ending its analysis there, however, the Brown court further examined the legislative intent to determine whether the two offenses constituted allied offenses of similar import. The Brown court stated that in determining whether the legislature intended to permit multiple punishment, a court may look to the societal interests protected under the statutes at issue. The Brown court referred to Justice Rehnquist's dissenting opinion in Whalen v. United States (1980), 445 U.S. 684, 709-711, 100 S.Ct. 1432, 63 L.Ed.2d 715, in which he wrote: "'[B]y asking whether two separate statutes each include an element the other does not, a court is really asking whether the legislature manifested an intention to serve two different interests in enacting the two statutes.'" Brown, at ¶35, quoting

Whalen, 445 U.S. at 714 (Rehnquist, J., dissenting). The Brown court then stated that it has "previously considered the societal interests protected by the relevant statutes" when determining whether two offenses constitute allied offenses of similar import. Id. at ¶36. Brown noted its previous holding in State v. Mitchell (1983), 6 Ohio St.3d 416, 453 N.E.2d 593, in which the court held that aggravated burglary and theft protected different societal interests. The court explained that in Mitchell, it "acknowledged that the theft statute seeks to prohibit the nonconsensual taking of property by any means, while the focus of the aggravated-burglary statutes seeks to minimize the risk of harm to persons." Id. at ¶36. Thus, Mitchell held that because the statutes protect different societal interests, "the General Assembly intended to distinguish the offenses of aggravated burglary and theft and permit separate punishments for their commission." Brown at ¶36. Brown ultimately concluded that R.C. 2903.12(A)(1) aggravated assault and R.C. 2903.12(A)(2) aggravated assault are allied offenses of similar import and noted that the "subdivisions set forth two different forms of the same offense, in each of which the legislature manifested its intent to serve the same interest–preventing physical harm to persons." Brown at ¶39.

{¶ 17} In Cabrales, the court compared the elements of possession of drugs and trafficking in drugs and held that they are allied offenses of similar import. Cabrales at ¶30. The court explained:

> "To be guilty of possession under R.C. 2925.11(A), the offender must 'knowingly obtain, possess, or use a controlled substance.' To be guilty of trafficking under R.C. 2925.03(A)(2), the offender must knowingly prepare for shipment, ship, transport, deliver, prepare for distribution, or distribute a controlled substance, knowing, or having reason to know, that the substance is intended for sale. In order to ship a controlled substance, deliver it, distribute it, or prepare it for shipping, etc., the

> offender must 'hav[e] control over' it. R.C. 2925.01(K) (defining 'possession'). Thus, trafficking in a controlled substance under R.C. 2925.03(A)(2) and possession of that same controlled substance under R.C. 2925.11(A) are allied offenses of similar import because commission of the first offense necessarily results in commission of the second."

Cabrales at ¶30.

{¶ 18} In State v. Minifee, Cuyahoga App. No. 91017, 2009-Ohio-3089, at ¶¶88-89, the court summarized the current state of the law regarding allied offenses of similar import as follows:

> "In sum, after reviewing the whirlwind of Cabrales, Brown, and Winn, we find that under the first step, courts must still 'compare the elements in the abstract,' but that the elements do not have to 'exactly align' (as courts had previously interpreted Rance to mean). If when comparing the elements, 'the offenses are so similar that the commission of one will necessarily result in the commission of the other [but not both, meaning the opposite does not have to be true], then the offenses are allied offenses of similar import.' That means that if either crime 'is wholly subsumed within the other,' then the offenses are of similar import. Cabrales, at ¶39 (Fain, J., concurring).
>
> It may be helpful to state the test another way. When comparing the offenses, if either offense could not be committed without also committing the other * * * then the offenses are allied. But if both offenses require 'proof of an element that the other does not,' meaning both offenses can be committed without committing the other * * * then the offenses are not allied."

{¶ 19} With the foregoing principles in mind, we turn to appellant's argument that several of the offenses of which the trial court convicted her constitute allied offenses of similar import.

B

R.C. 2903.11(A)(1) FELONIOUS ASSAULT AND R.C. 2919.22(B) CHILD ENDANGERING

{¶ 20} Appellant first argues that R.C. 2903.11(A)(1) felonious assault and R.C. 2919.22(B)(1) and (2) second-degree felony child endangering constitute allied

offenses of similar import. Appellant contends that the offense of felonious assault necessarily results in the commission of the offense of child endangering under R.C. 2919.22(B). She states: "[I]f an offender knowingly causes serious physical harm to a child, the offender necessarily recklessly abuses, tortures, or cruelly abuses that same child which results in serious physical harm because each involves the same victim, knowledge is sufficient to satisfy recklessness, and abuse, torture and cruelly abuse are just other ways of saying 'causes.'" We begin our analysis by comparing the elements of the offenses in the abstract.

{¶ 21} R.C. 2903.11(A)(1) provides: "(A) No person shall knowingly * * * (1) Cause serious physical harm to another or to another's unborn * * * ."

{¶ 22} R.C. 2919.22(B) provides:

> (B) No person shall do any of the following to a child under eighteen years of age or a mentally or physically handicapped child under twenty-one years of age:
> (1) Abuse the child;
> (2) Torture or cruelly abuse the child * * *.

{¶ 23} The penalty provisions in R.C. 2919.22(E)(2)(d) and (E)(3) state that a violation of R.C. 2919.22(B)(1) or R.C. 2919.22(B)(2) that results in "serious physical harm" to the child involved constitutes a second-degree felony.[1]

{¶ 24} The elements to be compared in the abstract are: (1) "knowingly," "cause," "serious physical harm," "to another," (felonious assault); (2) "recklessly,"[2] "child under

[1] Neither party has raised any argument regarding whether penalty provisions constitute "elements of the offense" that courts must compare when determining whether offenses are allied offenses of similar import. We therefore do not address this issue but assume, for the sake of argument, that they do.

[2] In State v. Adams (1980), 62 Ohio St.3d 151, 153, 404 N.E.2d 144, the court

eighteen," "abuse," and "serious physical harm," (R.C. 2919.22(B)(1) second-degree felony child endangering); and (3) "recklessly," "child under eighteen," "torture or cruelly abuse," and "serious physical harm" (R.C. 2919.22(B)(2) second-degree felony child endangering).

{¶ 25} Felonious assault and child endangering have different culpable mental states. Felonious assault requires knowing behavior, while child endangering requires reckless action. For this reason, courts have consistently found that the offenses of felonious assault under R.C. 2903.11(A)(1), and child endangering under R.C. 2919.22(B) are not allied offenses of similar import. See State v. Robinson, Logan App. No. 8-08-05, 2008-Ohio-4956, at ¶22; State v. Garcia, Franklin App. No. 03AP-384, at ¶41; State v. Potter, Cuyahoga App. No. 81037, 2003-Ohio-1338; State v. Ross (1999), 135 Ohio App.3d 262, 733 N.E.2d 659; State v. Anderson (1984), 16 Ohio App.3d 251, 475 N.E.2d 492, overruled on other grounds by State v. Campbell (1991), 74 Ohio App.3d 352, 598 N.E.2d 1244. In Garcia, the court explained:

> "'Although proof of knowledge may suffice to prove recklessness, proof of recklessness is not sufficient to prove knowledge.' [State v.] Cudgel [(Mar. 9, 2000), Franklin App. No. 99AP-532]. Given these different culpable mental states, it cannot be said that an act of child endangering in violation of R.C. 2919.22(B)(1) results in the commission of a felonious assault. In addition, one can commit an act of felonious assault on someone over the age of 18 and not be guilty of child endangering. State v. Anderson (1984), 16 Ohio App.3d 251, 254, 475 N.E.2d 492; State v. Potter, Cuyahoga App. No. 81037, 2003-Ohio-1338, fn. 4, overruled on other grounds, State v. Campbell (1991), 74 Ohio App.3d 352, 598 N.E.2d 1244."

Id. at ¶41. We note that all of these cases relied upon pre-Cabrales allied offense law

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held that recklessness is the culpable mental state for endangering children.

in reaching the conclusion that felonious assault and child endangering are allied offenses of similar import. We nonetheless conclude that under a post-Cabrales analysis, the two offenses are not allied.

{¶ 26} Upon comparing the elements of the offenses in the abstract without requiring an exact alignment, a defendant who abuses, tortures, or cruelly abuses a child so as to cause the child serious physical harm also necessarily causes serious physical harm to another (i.e., a child under the age of eighteen). The only difference is the requisite mental state. A defendant who recklessly abuses, tortures, or cruelly abuses a child so as to cause the child serious physical harm does not necessarily also knowingly cause serious physical harm to another. A defendant can act recklessly so as to abuse, torture, or cruelly abuse a child so as to cause the child serious physical harm without also acting knowingly so as to cause serious physical harm to another.

{¶ 27} Furthermore, the felonious assault statute protects a broader class of persons from serious physical harm. Thus, the statutes protect different societal interests and to this extent, the Ohio Supreme Court's decision in Brown states that when the statutes protect different societal interests, then the offenses are not allied offenses of similar import. Both the felonious assault and R.C. 2919.22(B) second-degree felony child endangering statutes contain the element of "serious physical harm" and, thus, generally protect the societal interest of preventing serious physical harm. The felonious assault statute, however, seeks to protect the public in general from conduct that results in serious physical harm to another. In contrast, the child endangering statute provides protection from serious physical harm to a

specifically limited class of people–children under the age of eighteen. Thus, while both statutes protect the societal interest in preventing serious physical harm, only the child endangering statute serves the societal interest of providing a special protection to children under eighteen years of age. We therefore believe that the General Assembly intended to protect two separate societal interests in enacting the felonious assault and R.C. 2919.22(B)(2) child endangering statutes.[3] Consequently, we believe that the Ohio General Assembly intended to permit multiple punishment for violating these statutory provisions. See State v. Klein, Hamilton App. No. C-080470, 2009-Ohio-2886, at ¶33 (holding that the felonious assault and child endangering statutes protect different societal interests).

{¶ 28} We therefore disagree with appellant that the trial court should have merged her felonious assault and second-degree felony R.C. 2919.22(B) convictions.

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[3] We welcome further review of this issue from the Ohio Supreme Court. One court noted, "'one would be hard-pressed to find an area of Ohio law that is more confused than [the law regarding allied offenses of similar import].'" State v. Minifee, Cuyahoga App. No. 91017, 2009-Ohio-3089, at ¶71, quoting Russ Bensing, The Briefcase, Commentary and Analysis of Ohio Law (Oct. 9, 2008), "Another go-around on Rance,' at http://briefcase8.com/2008/10/09/anothergo-around-on-rance. We agree.

Moreover, we are cognizant of the Ohio Supreme Court's holding in State v. Cooper, 104 Ohio St.3d 293, 2004-Ohio-6553, 819 N.E.2d 657, at ¶30, that: "Where the state has not relied upon the same conduct of the defendant to support a conviction for the offense of involuntary manslaughter involving child endangering and a separate conviction for child endangering, the defendant may be convicted of both crimes and sentenced on each." The converse of this statement arguably could be true. We further observe, however, that in Cooper the court never reached the issue of whether the two offenses constitute allied offenses of similar import if the State relies upon the same conduct. Rather, because it was clear that the State relied upon separate conduct, the court never engaged in an analysis of the elements of the statutes to determine whether they constitute allied offenses of similar import. Accordingly, we do not find Cooper dispositive of the issues raised in appellant's first assignment of error.

C

R.C. 2903.13(A) ASSAULT AND R.C. 2919.22(B)(1) FIRST-DEGREE MISDEMEANOR CHILD ENDANGERING

{¶ 29} Appellant asserts that the trial court should have merged her R.C. 2903.13(A) assault conviction with the first-degree misdemeanor child endangering conviction. She contends: "[I]f an offender knowingly causes physical harm to a child, the offender necessarily recklessly abuses that same child which results in physical harm because each involves the same victim, knowledge is sufficient to satisfy recklessness, and abuse is just another way of saying 'causes.'"

{¶ 30} We begin by comparing the elements of the offenses in the abstract. R.C. 2903.13(A) provides: "No person shall knowingly cause or attempt to cause physical harm to another or to another's unborn." R.C. 2919.22(B)(1) states: "No person shall do any of the following to a child under eighteen years of age or a mentally or physically handicapped child under twenty-one years of age: (1) Abuse the child * * *."

{¶ 31} The elements we must compare are: (1) "knowingly," "cause or attempt to cause," "physical harm," "to another" (assault); and (2) recklessly, "abuse," a "child" (R.C. 2919.22(B)(1) first-degree misdemeanor child endangering). Noticeably absent from R.C. 2919.22(B)(1) is a requirement that the offender cause the victim "physical harm." Theoretically, one could "abuse" a child without physically harming the child. Nothing in the criminal code requires the "abuse" within the meaning of this section to be physical. The abuse may be emotional or psychological. Therefore, we do not find that a comparison of the elements of these two offenses demonstrates that the

commission of one necessarily results in the commission of the other. See State v. Wickard, Hancock App. No. 5-05-30, 2006-Ohio-6088, at ¶17. Even if they do, however, based upon our analysis set forth supra, we conclude that the statutes protect different societal interest, and thus, multiple punishment is permitted. See Klein, supra; Brown, supra.

{¶ 32} Consequently, the trial court did not err by failing to merge appellant's R.C. 2903.13 (A)(1) assault and R.C. 2919.22(B)(1) first-degree misdemeanor convictions.

D

R.C. 2919.22(A) CHILD ENDANGERING AND R.C. 2919.22(B) CHILD ENDANGERING

{¶ 33} Appellant also argues that R.C. 2919.22(A) child endangering and complicity to R.C. 2919.22(B) child endangering are allied offenses of similar import. She argues that both offenses involve the violation of a legal duty that results in a child's harm.

{¶ 34} R.C. 2919.22(A) states:

> (A) No person, who is the parent, guardian, custodian, person having custody or control, or person in loco parentis of a child under eighteen years of age or a mentally or physically handicapped child under twenty-one years of age, shall create a substantial risk to the health or safety of the child, by violating a duty of care, protection, or support. * * *

{¶ 35} R.C. 2919.22(B) states:

> No person shall do any of the following to a child under eighteen years of age or a mentally or physically handicapped child under

twenty-one years of age:
(1) Abuse the child;
(2) Torture or cruelly abuse the child * * *.

{¶ 36} The elements we must compare are: (1) parent, guardian, custodian, person having custody of control, or person in loco parentis of a child under eighteen, "create a substantial risk," "to the health or safety of the child," "by violating a duty of care, protection, or support" (R.C. 2919.22(A)); (2) recklessly, abuse, a child (R.C. 2919.22(B)(1)); and (3) recklessly, torture or cruelly abuse, a child.

{¶ 37} R.C. 2919.22(A) applies to a defined class of people, whereas the R.C. 2919.22(B) offenses do not. Moreover, an offender could violate a duty of care, protection, or support without also abusing, torturing, or cruelly abusing a child. Thus, we do not believe that R.C. 2919.22(A) and the R.C. 2919.22(B) offenses constitute allied offenses of similar import. See State v. Carroll, Clermont App. Nos. CA2007-02-030 and CA2007-03-041; 2007-Ohio-7075; Garcia, supra.

{¶ 38} Appellant nevertheless asserts that her complicity convictions under R.C. 2919.22(B) should merge with the R.C. 2919.22(A) convictions. She contends that her complicity convictions involved violating a legal duty, which is encompassed under the R.C. 2919.22(A) offense. She argues: "[T]o be complicit in committing section (B)(1) of endangering children an offender must recklessly violate a legal duty that results in another abusing a child which results in physical harm or serious physical harm; and to be complicit in committing section (B)(2) of endangering children an offender must recklessly violate a legal duty that results in another torturing or cruelly abusing a child which results in physical harm or serious physical harm."

{¶ 39} R.C. 2923.03 defines complicity as follows:

> (A) No person, acting with the kind of culpability required for the commission of an offense, shall do any of the following:
> (1) Solicit or procure another to commit the offense;
> (2) Aid or abet another in committing the offense;
> (3) Conspire with another to commit the offense in violation of section 2923.01 of the Revised Code;
> (4) Cause an innocent or irresponsible person to commit the offense.

{¶ 40} Appellant asserts that "aid or abet" is synonymous with violating a legal duty when one exists. "To 'aid' is to assist and to 'abet' is to incite or encourage. Mere approval or acquiescence, without expressed concurrence or the doing of something to contribute to an unlawful act, is not an aiding or abetting of the act. * * * [I]n order to aid or abet, whether by words, acts, encouragement, support or presence, there must be something more than a failure to object unless one is under a legal duty to object." State v. Stepp (1997), 117 Ohio App.3d 561, 568-569, 690 N.E.2d 1342 (internal citations omitted). An aider or abettor need not necessarily violate a legal duty in order to be found guilty of offense by complicity. Aiding and abetting may be shown in multiple ways. Thus, R.C. 2919.22(B)(2) complicity to child endangering is not necessarily synonymous with violating a legal duty under R.C. 2919.22(A).

{¶ 41} Consequently, the trial court did not err by failing to merge the R.C. 2919.22(A) and R.C. 2919.22(B) convictions.

E

MALNOURISHMENT AND MOUTH INJURY OFFENSES

{¶ 42} Appellant next argues that the trial court should have merged: (1) her assault and R.C. 2919.22(A) and (B)(1) endangering children convictions relating to the

child's malnourishment; and (2) her felonious assault and R.C. 2919.22(A) and (B)(2) endangering children convictions relating to the child's mouth injury. She essentially repeats her prior arguments that the offenses are allied offenses of similar import. We reject this argument for the reasons we outlined above. Furthermore, we observe that the malnourishment and mouth injuries involved two distinct injuries. Thus, this is not a situation in which the State sought to convict appellant of two separate crimes for the same conduct.

{¶ 43} Consequently, the trial court did not err by failing to merge the malnourishment convictions with the mouth injury convictions.

F

ANIMUS

{¶ 44} Appellant next contends that she committed the offenses with the same animus and that the injuries arose simultaneously. Our disposition of the foregoing arguments renders moot the remainder of appellant's first assignment of error asserting that she committed the alleged allied offenses of similar import with the same animus. We therefore decline to address the remaining arguments. See App.R. 12(A)(1)(c).

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

II

{¶ 46} Appellant's second and third assignments of error challenge the sufficiency of the evidence. Because the same standard of review governs our

disposition of both assigned errors, we consider them together.

A

SUFFICIENCY OF EVIDENCE

{¶ 47} When reviewing the sufficiency of the evidence, our inquiry focuses primarily upon the adequacy of the evidence; that is, whether the evidence, if believed, reasonably could support a finding of guilt beyond a reasonable doubt. See State v. Thompkins (1997), 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (stating that "sufficiency is the test of adequacy"); State v. Jenks (1991), 61 Ohio St.3d 259, 273, 574 N.E.2d 492. The standard of review is whether, after viewing the probative evidence and inferences reasonably drawn therefrom in the light most favorable to the prosecution, any rational trier of fact could have found all the essential elements of the offense beyond a reasonable doubt. Jackson v. Virginia (1979), 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560; Jenks, 61 Ohio St.3d at 273. Furthermore, a reviewing court is not to assess "whether the state's evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction." Thompkins, 78 Ohio St.3d at 390 (Cook, J., concurring).

{¶ 48} When reviewing sufficiency-of-evidence claims, appellate courts must construe the evidence in a light most favorable to the prosecution. See State v. Hill (1996), 75 Ohio St.3d 195, 205, 661 N.E.2d 1068; State v. Grant (1993), 67 Ohio St.3d 465, 477, 620 N.E.2d 50. Reviewing courts will not overturn convictions on sufficiency-of-evidence claims unless reasonable minds could not reach the conclusion that the trier of fact did. See State v. Tibbetts (2001), 92 Ohio St.3d 146, 749 N.E.2d 226; State v. Treesh (2001), 90 Ohio St.3d 460, 739 N.E.2d 749.

B

SERIOUS PHYSICAL HARM

{¶ 49} In her second assignment of error, appellant argues that the record does not contain sufficient evidence to support her R.C. 2903.11(A)(1) felonious assault conviction or her endangering children convictions under R.C. 2919.22(A) and (B)(2) with respect to the child's ear injury because the injury did not constitute "serious physical harm."

{¶ 50} R.C. 2901.01(A)(5) defines "serious physical harm" as "any of the following":

> (a) Any mental illness or condition of such gravity as would normally require hospitalization or prolonged psychiatric treatment;
> (b) Any physical harm that carries a substantial risk of death;
> (c) Any physical harm that involves some permanent incapacity, whether partial or total, or that involves some temporary, substantial incapacity;
> (d) Any physical harm that involves some permanent disfigurement or that involves some temporary, serious disfigurement;
> (e) Any physical harm that involves acute pain of such duration as to result in substantial suffering or that involves any degree of prolonged or intractable pain.

{¶ 51} In the case at bar, the question is whether the baby's laceration to his ear falls within the definition of serious physical harm set forth in R.C. 2901.05(A)(5)(e). Because the baby obviously could not express the level or duration of the pain, the fact finder was left to rely upon circumstantial evidence to determine whether the injury caused the baby serious physical harm. We note that circumstantial evidence possesses the same evidentiary value as direct evidence. See Jenks, 61 Ohio St.3d at 272 ("Circumstantial evidence and direct evidence inherently possess the same

probative value [and] in some instances certain facts can only be established by circumstantial evidence."). When reviewing the value of circumstantial evidence, we note that "the weight accorded an inference is fact-dependent and can be disregarded as speculative only if reasonable minds can come to the conclusion that the inference is not supported by the evidence." Wesley v. The McAlpin Co. (May 25, 1994) Hamilton App. No. C-930286, unreported (citing Donaldson v. Northern Trading Co. (1992), 82 Ohio App.3d 476, 483, 612 N.E.2d 754).

{¶ 52} "The degree of harm that rises to level of 'serious' physical harm is not an exact science, particularly when the definition includes such terms as 'substantial,' 'temporary,' 'acute,' and 'prolonged.'" State v. Irwin, Mahoning App. No. 06MA20, 2007-Ohio-4996, at ¶37. Courts have held that when a victim's injuries "'are serious enough to cause him or her to seek medical treatment, the finder of fact may reasonably infer that the force exerted on the victim caused serious physical harm as defined by R.C. 2901.01(A)(5).'" State v. Smith, Cuyahoga App. No. 90476, 2008-Ohio-5985, at ¶25, quoting State v. Lee, Cuyahoga App. No. 82326, 2003-Ohio-5640, ¶24, citing State v. Wilson (Sept. 21, 2000), Cuyahoga App. No. 77115. For instance, a one centimeter cut above the right eyebrow constitutes serious physical harm. See State v. Edward (1992), 83 Ohio App.3d 357, 614 N.E.2d 1123; see, also, State v. Henricks, Wood App. No. WD-05-051, 2006-Ohio-6181 (concluding that sufficient evidence existed to prove the element of serious physical harm when the victim suffered a small laceration to the back of her head when her husband struck her in the head with a skillet, and she suffered severe headaches and disorientation after the injury); State v. Powell, Lake App. No. 2007-L-187, 2009-Ohio-2822 (finding

sufficient evidence of serious physical harm when defendant hit victim with a beer glass that caused a gash at the back of the victim's head that required eight stitches). Another court held that serious physical harm is established, when "there were bruises around a child's buttocks and back, described as moderate, purple and red in color, and somewhat raised and swollen * * *." State v. Krull, 154 Ohio App.3d 219, 2003-Ohio-4611, 796 N.E.2d 979, ¶22, citing State v. Burdine-Justice (1998), 125 Ohio App.3d 707, 709 N.E.2d 551. We further recognize, however, "that the appearance of a bruise or a temporary or slight injury generally does not constitute serious physical harm." State v. Daugherty, Ross App. No. 00CA2572, 2001-Ohio-2670, citing State v. Ivey (1994), 98 Ohio App.3d 249, 648 N.E.2d 519; State v. Massey (1998), 120 Ohio App.3d 438, 715 N.E.2d 235; In re Schuerman (1991), 74 Ohio App.3d 528, 599 N.E.2d 728.

{¶ 53} In the case at bar, we believe that the prosecution presented sufficient evidence to support the trial court's finding of "serious physical harm." The evidence demonstrates that the baby suffered a laceration to his ear and that the baby subsequently received medical attention. The examining doctors suspected that someone had either bitten the baby's ear or that someone's fingernails cut the baby. Appellant's daughter stated that Evans bit the baby's ear. The photographs of the baby's ear show blood around the upper ear lobe and a cut to the back of the ear. Dr. Cheatham testified that a "marked amount of force" had to have been used to cause the injury and that it is difficult to "tear" flesh. It is difficult to imagine that an eleven-month old baby would not experience "acute pain of such duration as to result in substantial suffering or that involves any degree of prolonged or intractable pain" upon

being bitten or scratched so as to cause a visible laceration. Thus, we believe that the state presented sufficient circumstantial evidence that the baby's ear injury constituted "serious physical harm."

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

{¶ 55} C

OBSTRUCTING JUSTICE

{¶ 56} In her third assignment of error, appellant argues that the record does not contain sufficient evidence to support her obstructing justice conviction. She contends that she did not have a purpose to hinder the investigation but, rather, to protect herself and her family. She further asserts that the prosecution did not present any evidence that she knew or had reason to believe she was aiding Evans in committing a second degree felony.

{¶ 57} R.C. 2921.32 sets forth the offense of obstructing justice and states:

> (A) No person, with purpose to hinder the discovery, apprehension, prosecution, conviction, or punishment of another for crime or to assist another to benefit from the commission of a crime * * * shall do any of the following:
>
> * * * *
>
> (5) Communicate false information to any person.

"[T]he making of an unsworn false oral statement to a law enforcement officer with the purpose to hinder the officer's investigation of a crime is punishable conduct within the meaning of R.C. 2921.32(A)(5)." State v. Bailey, 71 Ohio St.3d 443, 448, 644 N.E.2d 314 (1994). R.C. 2921.32(A)(5) simply requires that the false statement be made with the intent to hamper the investigation of the authorities, and not that it result in an actual

delay. See State v. Puterbaugh (2001), 142 Ohio App.3d 185, 191, 755 N.E.2d 359.

{¶ 58} Purposely is defined in Revised Code Section 2901.22(A):

> A person acts purposely when it is his specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is his specific intention to engage in conduct of that nature.

R.C. 2921.32(C)(4) states that obstructing justice is a third-degree felony "[i]f the crime committed by the person aided is * * * a felony of the * * * second degree * * * if the offender knows or has reason to believe that the crime committed by the person aided is one of those offenses * * *."

{¶ 59} In the case at bar, we believe that the prosecution presented sufficient circumstantial evidence to allow the trier of fact to conclude that appellant made an unsworn false oral statement to a law enforcement officer with the purpose to hinder the officer's investigation of a crime. Appellant admittedly was not truthful with law enforcement officials when she first spoke with them and she was not truthful out of fear for her and her children's safety. Other evidence, however, casts doubt on appellant's veracity. For instance, appellant claimed that Evans essentially held her prisoner during the time that he lived with her, yet other evidence contradicts her story. Moreover, appellant had several opportunities when Evans was not present to report the baby's injuries to friends or to family members. Perhaps most telling was the occurrence in June 2008 when appellant expressed her disbelief with the doctors' report that the baby had suffered any fractures in his lower extremities. A mother who is trying to protect her child would not disagree with such a report. Rather, her actions

demonstrate the actions of a mother who elevated the interests of her live-in boyfriend, or even her own interests, over her child's interest.

{¶ 60} We also conclude that the prosecution presented sufficient evidence to show that appellant knew, or had reason to believe, that at least some of the crimes Evans committed are second-degree felonies. Appellant should have known**,** or had reason to believe**,** that a severe penalty would be imposed upon Evans for breaking the bones of an eleven-month old baby and for causing some or all of the other extensive injuries. Even if she did not have precise knowledge that some of the offenses are labeled as second-degree felonies, in view of the severe nature of the injuries it is reasonable to conclude that she had reason to believe that Evans committed at least one second-degree felony.

{¶ 61} Accordingly, based upon the foregoing reasons, we overrule appellant's third assignment of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

Harsha, J., concurring in part and dissenting in part:

I concur in judgment and opinion except for that part of the decision affirming the imposition of a third degree felony penalty for obstructing justice. The penalty section of the statute is poorly drafted. In order to reach the conclusion that Journey "knows or has reason to believe that the crime committed by the person aided" is a second degree felony, we have to construe that statute broadly in favor of the State. Although I agree with the majority that Journey clearly knew or should have known that Evans had inflicted terrible injuries on the child and that he would suffer severe a penalty if caught, that is not the standard that the statute imposes. Moreover, the statute seems to require a lay person to have some technical knowledge of the penalty provisions of the Ohio Revised Code. I believe the current version is unworkable and should be revisited. Thus, I dissent in part.

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.

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

Concurs in Part & Dissents in Part with 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.