[Cite as *State v. Cunningham*, 2021-Ohio-416.]

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

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	Case No. 19CA3698
vs.	:	
JUSTIN CUNNINGHAM,	:	DECISION AND JUDGMENT ENTRY
Defendant-Appellant.	:	

APPEARANCES:

Max Hersch, Columbus, Ohio, for appellant.

Jeffrey C. Marks, Ross County Prosecuting Attorney, and Pamela C. Wells, Assistant Ross County Prosecuting Attorney, Chillicothe, Ohio, for appellee.

CRIMINAL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED: 1/20/21
ABELE, J.

{¶ 1} This is an appeal from a Ross County Common Pleas Court judgment of conviction and sentence. Justin Cunningham, defendant below and appellant herein, assigns the following errors for review:

> FIRST ASSIGNMENT OF ERROR:
>
> "THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY NOT ISSUING CURATIVE INSTRUCTIONS AFTER INADMISSIBLE TEXT MESSAGES WERE READ INTO EVIDENCE."
>
> SECOND ASSIGNMENT OF ERROR:
>
> "THE TRIAL COURT ERRED BY NOT MERGING MR. CUNNINGHAM'S CONVICTIONS."
>
> THIRD ASSIGNMENT OF ERROR:

> "IF MR. CUNNINGHAM'S CHILD-ENDANGERING CONVICTION WAS BASED ON HIS FAILURE TO ACT, THEN THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THAT CONVICTION UNDER R.C. 2919.22(B)(2)."

{¶ 2} In October 2018, appellant's fifteen-year-old daughter, K.C., reported that in July 2018, appellant "tried to break her mouth" and "punch[ed] her in the chest."

{¶ 3} A Ross County grand jury subsequently returned an indictment that charged appellant with attempted felonious assault, in violation of R.C. 2923.02, and endangering children, in violation of R.C. 2919.22. Appellant entered not guilty pleas.

{¶ 4} At the September 17, 2019 jury trial, Nicole Brown, appellant's live-in girlfriend at the time of the incident, testified that in July 2018, appellant became angry with K.C. and "was threatening her." Appellant threatened to lock K.C. in her room for thirty days. Brown later heard K.C. screaming and visited K.C.'s bedroom to check on her. When Brown entered K.C.'s room, Brown saw appellant "sitting on top of [K.C.] punching her in the chest, pulling her mouth open from her jaw, and sitting there threatening to rip her tongue out that she was to never speak again." Brown stated that she ran toward K.C. and pushed appellant off of her.

{¶ 5} Brown testified that after the incident, she noted that K.C. was bleeding in her mouth and had scratches and a bruise on her chest. Brown stated that in the days and weeks after the incident, she noticed that K.C. seemed to have difficulty eating.

{¶ 6} Brown also explained that she and appellant exchanged text messages after the incident. The prosecutor gave Brown two exhibits to review that contained screen shots of the text messages. Appellant's counsel objected and a bench conference ensued. Appellant's

counsel objected on the basis of Evid.R. 106. The court overruled appellant's objection, but noted that it could revisit the issue if needed.

{¶ 7} The prosecutor resumed questioning and asked Brown what appellant's text message stated about the incident. Brown responded that appellant wrote "that [K.C.] was lucky that she can walk." Appellant again objected, and the court sustained the objection.

{¶ 8} The prosecutor also asked Brown whether she and appellant continued to exchange text messages, and Brown stated that they did. Brown testified that she responded to appellant's message and wrote, "really that's your daughter, you're talking about your, saying she–you're lucky she's can walk [sic]." Appellant's counsel again objected, and another bench conference ensued. The trial court indicated that the prosecutor needed to show "why [the text messages] might be admissible which is going to be how they came into existence and how they came into the detective's hands."

{¶ 9} After the bench conference, the prosecutor asked Brown if she recalled when the text message conversations occurred, and Brown stated that she did not recall.

{¶ 10} K.C. testified that in July 2018, appellant became angry after he learned that she purchased a cell phone. K.C. stated that appellant "told [K.C.] to go to [her] room" and made her "stay there." K.C. explained that appellant made her stay in her room for a month and that during this time, she mostly slept and "hung out" in her room.

{¶ 11} K.C. indicated that one day, appellant entered her room and "put his hands in [K.C.'s] mouth and hurt [her] jaw really bad," and also struck her in her chest. K.C. related that after the incident, she had blood on her mouth and all over her hands.

{¶ 12} K.C. additionally testified that her mouth was sore for about two weeks, and she could not "really eat" and could only "to take like a bite or two" of her breakfast. K.C. explained that she "mostly" gave her dinner to her siblings because she could not eat it. She could, however, eat soft foods like mashed potatoes.

{¶ 13} Appellant testified in his defense and denied K.C.'s claim that he injured her mouth or punched her in the chest.

{¶ 14} During deliberations, the jury asked to see the text-message evidence. The trial court met with counsel and advised counsel that the court would instruct the jury that it had "received all of the evidence you're gonna [sic] receive in this case [and] you may not consider those items that that [sic] were not admitted into evidence." Appellant's counsel did not object or raise any concern with the court's proposed response.

{¶ 15} When the jury returned, the trial court instructed the jury that it had "received all of the evidence that you're going to receive in this case. There will be no additional evidence for you to consider. You'll have to decide this case with the evidence that you have." Appellant's counsel again did not object to the court's instruction.

{¶ 16} Subsequently, the jury found appellant guilty of attempted felonious assault and endangering children. At the sentencing hearing, the state asserted that the offenses do not merge because the offenses resulted in two separate and identifiable harms: "count one, attempt[ed] felonious assault being the action with the jaw and count two endangering children for not getting medical attention after the incident uh, occurred." Appellant did not agree with the state's position and contended that the record fails to show that he committed two separate and identifiable offenses.

{¶ 17} The trial court determined that the offenses do not merge and concluded that appellant's conduct caused separate harms: "the harm he caused and then [the child's] inability to get medical treatment and his inability to take the child for medical treatment." The trial court sentenced appellant to serve thirty-six months for the attempted felonious assault charge and twelve months for the endangering children charge, with the sentences to be served consecutively to one another. This appeal followed.

I

{¶ 18} For ease of discussion, we first address appellant's second assignment of error. In his second assignment of error, appellant asserts that the trial court erred by failing to merge his felonious assault and endangering children convictions. Appellant argues that the evidence fails to show that he committed two separate and distinct offenses because the same conduct that formed the basis of his attempted felonious assault conviction also formed the basis for his endangering children conviction. Appellant further claims that the child did not suffer separate and identifiable harms, but instead, suffered only one harm.

{¶ 19} The state, however, contends that the attempted felonious assault and the endangering children offenses constitute separate and distinct offenses that do not merge. The state argues that the attempted felonious assault offense occurred when appellant injured the child's jaw and punched her in the chest, and the child endangering offense was an ongoing offense during which appellant confined the child to her room for thirty days and allowed her to suffer with the injuries that he had caused. The state argues that appellant's conduct, in confining the child to her room except to eat and to use the bathroom and in failing to facilitate appropriate care for her injuries, caused a harm distinct from punching the child in the chest and injuring her mouth.

{¶ 20} "R.C. 2941.25 codifies the protections of the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution, which prohibits multiple punishments for the same offense." *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923, ¶ 23; *accord State v. Miranda*, 138 Ohio St.3d 184, 2014-Ohio-451, 5 N.E.3d 603; *State v. Washington*, 137 Ohio St.3d 427, 2013-Ohio-4982, 999 N.E.2d 661, ¶ 11. The statute provides:

> (A) Where the same conduct by [a] 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.

{¶ 21} R.C. 2941.25(A) thus allows only a single conviction when the same conduct constitutes "allied offenses of similar import." R.C. 2941.25(B), however, permits multiple convictions when any of the following circumstances apply: (1) the defendant's conduct constitutes offenses of dissimilar import; (2) the defendant's conduct shows that the defendant committed the offenses separately; or (3) the defendant's conduct shows that the defendant committed the offenses with separate animus. *State v. Ruff*, 143 Ohio St.3d 114, 2015-Ohio-995, 34 N.E.3d 892, ¶ 13, citing *State v. Moss*, 69 Ohio St.2d 515, 519, 433 N.E.2d 181 (1982).

{¶ 22} Offenses are of dissimilar import "if they are not alike in their significance and their resulting harm." *Ruff* at ¶ 21. Additionally, "a defendant's conduct that constitutes two or more

offenses against a single victim can support multiple convictions if the harm that results from each offense is separate and identifiable from the harm of the other offense." *Id.* at ¶ 26. Thus, "two or more offenses of dissimilar import exist within the meaning of R.C. 2941.25(B) when the defendant's conduct constitutes offenses involving separate victims or if the harm that results from each offense is separate and identifiable." *Id.* at ¶ 23.

{¶ 23} When determining whether offenses are allied offenses of similar import within the meaning of R.C. 2941.25, courts must answer three essential questions: "(1) Were the offenses dissimilar in import or significance? (2) Were they committed separately? and (3) Were they committed with separate animus or motivation? An affirmative answer to any of the above will permit separate convictions." *State v. Earley*, 145 Ohio St.3d 281, 2015-Ohio-4615, 49 N.E.3d 266, ¶ 12, citing State v. Ruff, 143 Ohio St.3d 114, 2015-Ohio-995, 34 N.E.3d 892, ¶ 31 and paragraphs one, two, and three of the syllabus. Accordingly, courts must consider "[t]he conduct, the animus, and the import." *Id.*

{¶ 24} We further note that a defendant bears the burden to establish that R.C. 2941.25 prohibits multiple punishments. *State v. Washington*, 137 Ohio St.3d 427, 2013-Ohio-4982, 999 N.E.2d 661, ¶ 18, citing *State v. Mughni*, 33 Ohio St.3d 65, 67, 514 N.E.2d 870 (1987). Additionally, appellate courts review a trial court's R.C. 2941.25 merger decision independently and without deference to the trial court. *State v. Williams*, 134 Ohio St.3d 482, 2012–Ohio–5699, 983 N.E.2d 1245, ¶ 28.

{¶ 25} In the case sub judice, appellant asserts that attempted felonious assault and endangering children under R.C. 2919.22(B)(2) are allied offenses of similar import. Appellant argues that his conduct did not result in two separate and identifiable harms to the child, but

instead, the state relied upon the same conduct and the same harm to support the attempted felonious assault and endangering children convictions.

{¶ 26} Appellant also observes that at sentencing, the state asserted that the two offenses do not merge based upon the theory that appellant's failure to obtain medical treatment for the child's injuries constituted endangering children. Appellant's counsel countered that the basis for the jury's verdict is unclear and the jury's findings of guilt might have been based upon the same conduct.

{¶ 27} On appeal, appellant contends that the trial court's jury instructions show that the jury could not have found appellant guilty of endangering children due to a failure to seek medical treatment, an act of omission. Appellant argues that the jury, instead, must have found that appellant tortured or cruelly abused the child through an affirmative act. Appellant alleges that the record contains one affirmative act that satisfies the torture-or-cruelly-abuse standard and that this same act, injuring the child's jaw and chest, forms the basis for his attempted felonious assault conviction. Appellant thus claims that the state relied upon the same conduct and the same harm to prove both offenses. Therefore, he asserts that the trial court should have merged the offenses for purposes of sentencing.

{¶ 28} The state argues that appellant committed two separate offenses, each with an identifiable harm. The state contends that appellant committed attempted felonious assault when he injured the child's jaw and punched her in the chest.

{¶ 29} Although the state argued at sentencing that appellant's failure to seek medical attention for the child shows that he committed the offense of endangering children separately from attempted felonious assault, the state presents a new theory on appeal. The state no longer

contends that appellant's failure to seek medical attention for the child shows, on its own, that he separately committed endangering children, but instead contends that appellant committed endangering children through "several acts and omissions." The state asserts:

> First, [appellant] forced open the victim's jaw to an extent where she had serious physical harm. Then, he confined her to [her] room without a television for approximately thirty days. In addition, for at least two weeks of this time frame, he confined her to the room without a cell phone, failing to give her pain medication or allowing her to seek medical treatment which made it difficult for her to eat for two weeks. This act and omission demonstrated "indifference and delight in another's suffering." These acts of omission and commission show a pattern of behavior by Appellant and go beyond the mere act of the attempted felonious assault.

{¶ 30} We begin by considering the elements of the offenses. R.C. 2923.02(A) defines the elements necessary to prove attempt:

> (A) No person, purposely or knowingly, and when purpose or knowledge is sufficient culpability for the commission of an offense, shall engage in conduct that, if successful, would constitute or result in the offense.

{¶ 31} R.C. 2903.11 defines the offense of felonious assault as charged in appellant's indictment:

> (A) No person shall knowingly do either of the following:
> (1) Cause serious physical harm to another or to another's unborn[.]

{¶ 32} R.C. 2919.22(B)(2) contains the essential elements of the endangering children offense as charged in appellant's indictment:

> (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:
> * * * *
> (2) Torture or cruelly abuse the child[.]

{¶ 33} Although the statute does not define "[t]orture or cruelly abuse," we note that endangering children under R.C. 2919.22(B) ordinarily involves "[a]ffirmative acts of torture, abuse, and excessive acts of corporal punishment or disciplinary measures." *State v. Kamel*, 12 Ohio St.3d 306, 308–09, 466 N.E.2d 860 (1984); *accord State v. Adkins*, 4th Dist. No. 14CA3674, 2016-Ohio-7250, 2016 WL 5887354, ¶ 17; *State v. Carse*, 10th Dist. No. 09AP-932, 2010-Ohio-4513, 2010 WL 3722763, ¶ 40; *State v. Burdine–Justice*, 125 Ohio App.3d 707, 713, 709 N.E.2d 551 (12th Dist.1998); *State v. Bogan*, 2d Dist. No. 11920, 1990 WL 80572 (June 14, 1990).

{¶ 34} R.C. 2919.22(A), by contrast, "is concerned with circumstances of neglect."[1] *Kamel*, 12 Ohio St.3d at 309 (footnote omitted). "Manifestly, such neglect is characterized by acts of omission rather than acts of commission." Id. (citation omitted). A defendant's "inexcusable failure to act in discharge of [the] duty to protect a child" violates R.C. 2919.22(A), if the defendant's failure to act creates a substantial risk to the child's health or safety. *Id.*

---

[1] R.C. 2919.22(A) states:

> 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. It is not a violation of a duty of care, protection, or support under this division when the parent, guardian, custodian, or person having custody or control of a child treats the physical or mental illness or defect of the child by spiritual means through prayer alone, in accordance with the tenets of a recognized religious body.

{¶ 35} In view of the *Kamel* court's clear statement that R.C. 2919.22(B)(2) requires an affirmative act of torture, abuse, or excessive acts of corporal punishment or disciplinary measures, we agree with appellant that his failure to seek medical treatment does not constitute a violation of R.C. 2919.22(B)(2). Therefore, we must determine whether the record shows that appellant committed an affirmative act of torture, abuse, or excessive corporal punishment or discipline that is separate and identifiable from the conduct that formed the basis for his attempted felonious assault conviction, i.e., injuring the child's jaw and punching her in the chest.

{¶ 36} We again note that R.C. 2919.22(B)(2) requires proof that the defendant tortured or cruelly abused the child.

> "Torture" is defined as: (1) the infliction of severe pain or suffering (of body or mind); (2) acting upon violently in some way, so as to strain, wrench, distort, twist, pull or knock about. XI Oxford English Dictionary (2 Ed.1933) 169-70. To treat someone "cruelly" is to: (1) demonstrate indifference to or delight in another's suffering; (2) treat severely, rigorously, or sharply. II OED at 1216-17. "Abuse" is defined as: (1) ill-use, maltreat; to injure, wrong or hurt. I OED at 44-5.

State v. Nivert, 9th Dist. Summit No. 16806, 1995 WL 608415 (Oct. 18, 1995), *2; *accord State v. Dayton*, 3rd Dist. Union No. 14-17-03, 2018-Ohio-3003, ¶ 17; *State v. Fields*, 5th Dist. Stark No. 2018 CA 00002, 2018-Ohio-4394, 2018 WL 5617933, ¶ 48; *State v. Wainscott*, 12th Dist. Butler No. CA2015–07–056, 2016–Ohio–1153, ¶ 24; *State v. Brown*, 9th Dist. Summit No. 23737, 2008-Ohio-2956, ¶ 12; *State v. Dillard*, 4th Dist. Pike No. 98 CA 627, 1999 WL 552629, *3.

{¶ 37} "Abuse" also may mean "'cruel or violent treatment of someone; [specifically] physical or mental maltreatment, often resulting in mental, emotional, sexual, or physical injury.'"

In re C.W., 1st Dist. Hamilton No. C-180677, 2019-Ohio-5262, 2019 WL 6977924, ¶ 16, quoting Black's Law Dictionary (11th Ed.2019); *see* Ohio Jury Instruction 519.22(5) (defining abuse as "any act that causes physical or mental injury that harms or threatens to harm the child's health or welfare"); *State v. Ivey*, 98 Ohio App.3d 249, 257, 648 N.E.2d 519 (8th Dist. 1994) (defining "child abuse" as "an act which inflicts serious physical harm or creates a substantial risk of serious harm to the physical health or safety of the child"). R.C. 2919.22(B) thus typically "deals with actual physical abuse of a child, whether through physical cruelty or through improper discipline or restraint." R.C. 2919.22, 1973 Legislative Service Commission Notes.

{¶ 38} Examples of conduct that violates R.C. 2919.22(B) include:

> various actions resulting in the "battered child syndrome;" reducing a child to a state of frightened withdrawal to the point where he may become incapable of normal learning because of repeated punishment inflicted with little or no cause; and chaining a child to his bed or locking him in his room for prolonged periods so as to endanger his sanity or risk his arrested development.

Id.

{¶ 39} Courts thus have readily affirmed endangering children convictions under R.C. 2919.22(B)(2) when excessive physical abuse is involved. For example, forcing a child to stand in a corner for seven to fifteen hours per day and beating the child for disobeying satisfies the torture-or-cruelly-abuse element of an R.C. 2919.22(B)(2) endangering children conviction. *State v. Wainscott*, 12th Dist. Clermont No. CA2015-07-056, 2016-Ohio-1153, 2016 WL 1090789, ¶ 26-30. Additionally, whipping a child with a leather belt with enough force to cause a neighbor to call the police satisfies the torture-or-cruelly-abuse element of an R.C. 2919.22(B)(2)

endangering children conviction. *State v. Rackley*, 9th Dist. No. 13441, 1988 WL 126778 (Nov. 16, 1988); *accord State v. Surles*, 9th Dist. No. 23345, 2007-Ohio-6050 (affirming R.C. 2919.22(B)(2) convictions when defendant struck children with a wet belt between ten and twenty times). Moreover, this court affirmed an R.C. 2919.22(B)(2) conviction when the defendant poured hot wax on a child's genitals. *State v. Dillard*, 4th Dist. Pike No. 98 CA 627, 1999 WL 552629, *3–4.

{¶ 40} At least one court has concluded that "grounding" a child, coupled with sexually suggestive talk, is insufficient to establish the torture-or-cruelly-abuse element under R.C. 2919.22(B)(2). *State v. Brown*, 9th Dist. Lorain No. 18CA011310, 2019-Ohio-2599, 2019 WL 2721335. In *Brown*, the defendant grounded his teenage daughter for spending the night elsewhere without calling home. The defendant allowed his daughter to go to work each day, but informed her that she would remain grounded until she completed the defendant's "sex lessons." *Id.* at ¶ 3. Following his conviction for attempted endangering children, the defendant appealed.

{¶ 41} The Ninth District reversed the defendant's attempted endangering children conviction, and recognized that "torture" includes "the infliction of mental suffering," but stated that "the suffering must be severe in nature." *Id.* at ¶ 20. The court did not believe that the defendant's conduct in grounding his daughter and engaging in sexually explicit conversations with his daughter satisfied the torture-or-cruelly-abuse standard set forth in R.C. 2919.22(B)(2). The court noted that the daughter continued to go to work each day, "kept in contact with her relatives, and went to the police department when she was ready to do so." *Id.* The court further observed that the defendant "did not lock [the child] in her room, take away her cell phone, or make it impossible for her to get help." *Id.* Although the court found the defendant's behavior

"despicable and depraved," it did not believe that his behavior supported an attempted child endangering conviction. *Id.* The court thus reversed the conviction for attempted endangering children.

{¶ 42} In the case at bar, we recognize the record contains evidence that appellant physically injured the child on one occasion in July 2018. The state did not present evidence of any other incidents of physical abuse. The state asserts, however, that appellant's course of conduct during the thirty-day time period, in which appellant required the child to stay in her room, and leave only to eat and use the bathroom satisfies the torture-or-cruelly-abuse standard.

{¶ 43} The state further points out that appellant did not allow the child to have a television or a cell phone while confined to her room, and that appellant allowed the child to needlessly suffer from the injuries to her jaw by failing to give her medicine or to seek medical attention. Thus, the state argues that the foregoing evidence shows that appellant displayed an indifference to the child's suffering and that this indifference sufficiently establishes the cruelly-abuse element of an R.C. 2919.22(B)(2) conviction.

{¶ 44} We, however, do not agree with the state's assertion that appellant's conduct in grounding, or confining, the child to her room for a thirty-day period without a cell phone and while in pain for two weeks establishes that appellant cruelly abused the child. Even if appellant acted indifferently to the child's suffering, the state did not argue that appellant committed an act of physical abuse apart from the one incident when appellant injured the child's mouth and punched her chest. The state did not allege that any other physical abuse occurred or that appellant's conduct constituted cruel mental or emotional abuse or excessive corporal punishment or disciplinary measures.

{¶ 45} Moreover, the evidence does not show that appellant kept the child locked in her room for a prolonged period so as to endanger her sanity or risk her arrested development. *See* R.C. 2919.22, 1973 Legislative Service Commission Notes, supra. We note that the child testified that she could leave her room to eat and to use the bathroom. The child did not indicate that appellant kept her locked in her room all alone for thirty days with no escape. Instead, she stated that she mainly "hung out" and slept. Furthermore, none of the evidence suggests that the child suffered starvation or malnourishment. *See State v. Thompson*, 7th Dist. No. 16 CO 0031, 2017-Ohio-9044, 101 N.E.3d 632, 2017 WL 6402918, ¶ 55 (upholding R.C. 2919.22(B)(1) conviction when evidence showed that defendant deprived children of food and that children showed signs of malnourishment). Even if we believe that appellant acted indifferently or took delight in the child's circumstances, the record does not show that appellant acted indifferently or took delight in causing injury to the child, separate and apart from his conduct in committing attempted felonious assault. The evidence does not, therefore, show that appellant cruelly abused the child separate and apart from attempted felonious assault.

{¶ 46} Consequently, we do not agree with the state that the record contains evidence to show that appellant committed a separate and independent act sufficient to constitute endangering children under R.C. 2919.22(B)(2).

{¶ 47} Accordingly, based upon the foregoing reasons, we sustain appellant's second assignment of error, vacate the sentence that the trial court imposed and remand the matter to the trial court so that the state may choose which offense to pursue at resentencing.

II

{¶ 48} In his first assignment of error, appellant asserts that the trial court plainly erred by failing to give the jury a curative instruction after Brown read the following text messages that appellant and Brown allegedly exchanged: (1) appellant stated that the child "was lucky that she can walk"; and (2) Brown responded, "really that's your daughter, you're talking about your, saying she–you're lucky she[] can walk [sic]." Appellant notes that, although the court sustained his objections to these two statements, trial counsel did not request the court to issue a curative instruction. Appellant nevertheless asserts that the court's failure to give a curative instruction constitutes plain error. Appellant contends that the trial court's failure to give the jury a curative instruction is an obvious error that affected the outcome of the trial. Appellant observes that, during deliberations, the jury asked to see the text-message evidence. Thus, appellant argues, the jury's request to see the text-message evidence shows that the jury gave weight to the evidence while deliberating. Appellant contends that if the trial court had issued a curative instruction, the jury would not have considered the text-message evidence and would not have been persuaded to convict appellant.

{¶ 49} The state responds that any error that occurred did not affect appellant's substantial rights. The state observes that (1) the trial court instructed the jury when to disregard testimony after an objection was sustained, (2) the exhibits were not presented to the jury, and (3) the court informed the jury that the exhibits and evidence that it already had was the only evidence that it could consider during deliberations. The state additionally contends that, even if the court had specifically instructed the jury to disregard Brown's testimony regarding the text messages, the jury still would have nevertheless found appellant guilty. The state thus argues that any error that occurred did not affect the outcome of the trial.

{¶ 50} Initially, we note that the failure to request a curative instruction at trial forfeits all but plain error on appeal. *State v. Ellison*, 4th Dist. No. 16CA16, 2017-Ohio-284, 81 N.E.3d 853, 2017 WL 390211, ¶ 26; *State v. Rafter*, 8th Dist. Cuyahoga No. 106787, 2019-Ohio-529, 2019 WL 645155, ¶ 23 (determining that failure to request curative instruction forfeits right to raise issue on appeal); *State v. Jones*, 7th Dist. No. 06 MA 109, 2008–Ohio–1541, ¶ 65 ("if the defense objects and has its objection sustained but allows the trial to continue without seeking curative instructions for any statements that made it into the record, any error is waived."). It is well-established that appellate courts """will not consider any error which counsel for a party complaining of the trial court's judgment could have called but did not call to the trial court's attention at a time when such error could have been avoided or corrected by the trial court."""" *State v. Quarterman*, 140 Ohio St.3d 464, 2014-Ohio-4034, 19 N.E.3d 900, ¶ 15, quoting *State v. Awan*, 22 Ohio St.3d 120, 122, 489 N.E.2d 277 (1986), quoting *State v. Childs*, 14 Ohio St.2d 56, 236 N.E.2d 545 (1968), paragraph three of the syllabus. Appellate courts nevertheless have discretion to consider forfeited issues using a plain-error analysis. *E.g., Risner v. Ohio Dept. of Natural Resources, Ohio Div. of Wildlife*, 144 Ohio St.3d 278, 2015-Ohio-3731, 42 N.E.3d 718, ¶ 27; *Quarterman* at ¶ 16.

{¶ 51} Crim.R. 52(B) provides appellate courts with discretion to correct "[p]lain errors or defects affecting substantial rights." "To prevail under the plain-error standard, a defendant must show that an error occurred, that it was obvious, and that it affected his substantial rights," i.e., the trial court's error must have affected the outcome of the trial. *State v. Obermiller*, 147 Ohio St.3d 175, 2016-Ohio-1594, 63 N.E.3d 93, ¶ 62, citing *State v. Barnes*, 94 Ohio St.3d 21, 27, 2002-Ohio-68, 759 N.E.2d 1240. "We take '[n]otice of plain error * * * with the utmost caution,

under exceptional circumstances and only to prevent a manifest miscarriage of justice.'" *Obermiller* at ¶ 62, quoting *State v. Long*, 53 Ohio St.2d 91, 97, 372 N.E.2d 804 (1978). "Reversal is warranted only if the outcome of the trial clearly would have been different absent the error." *State v. Hill*, 92 Ohio St.3d 191, 203, 749 N.E.2d 274 (2001).

{¶ 52} In the case sub judice, appellant did not object to the lack of a curative instruction when the trial court sustained his objections to Brown's testimony regarding the text messages. Appellant also did not object when the court gave the jury an instruction in response to the jury's request to see the text-message evidence. Under these circumstances, appellant forfeited all but plain error. Assuming, arguendo, that the trial court obviously erred by failing to instruct the jury to disregard Brown's testimony regarding the text messages, we do not believe that the outcome of the trial clearly would have been different absent the error. Even without Brown's statements regarding the text messages, the evidence shows that appellant (1) punched the child in the chest and (2) used enough force in the child's mouth to cause bleeding, pain, and an inability to eat normally for about two weeks.

{¶ 53} Appellant nevertheless contends that *State v. Henson*, 1st Dist. Hamilton No. C-060320, 2007-Ohio-725, 2007 WL 549750, shows that the jury's request in the case at bar to see the text-message evidence improperly influenced its decision and requires us to reverse his conviction. *Henson*, however, is distinguishable from the case at bar. In *Henson*, the victim testified on cross-examination that she could not remember certain details of the alleged assault. On redirect, the state asked the victim to read aloud a written statement that she had made to the police shortly after the incident had occurred. The victim read the statement, but at times, became too upset to read the statement clearly. The state did not seek to introduce the victim's written

statement into evidence. During deliberations, the jury asked the court to view the victim's written statement and the trial court, sua sponte, marked the written statement as the court's own exhibit and provided it to the jury. None of the parties were present in the courtroom when the court read the jury's question, or when the court gave the statement to the jury. The jury found the defendant guilty.

{¶ 54} The defendant appealed and argued that the trial court erred by sua sponte submitting the witness's written statement to the jury without input from the defense or the prosecutor. The appellate court determined that the trial court erred by giving the jury the witness's written statement. The court noted that "neither [the defendant] nor the prosecution offered the written statement into evidence." *Id.* at ¶ 17. Additionally, the trial court "marked its own exhibit and gave it to the jury with no notice to [the defendant] and therefore no opportunity for him to review the document or to object to its admission." *Id.* at ¶ 18. The court concluded that the trial court's error prejudiced the defendant. The court noted that the jury's question to the court "indicated that [the jury] intended to use the written statement to supplement the portions of [the witness's] testimony that it found to be incomplete or unclear." *Id.* at ¶ 20. The court additionally stated, "And the very fact that the jury requested the written statement demonstrated that the statement carried significant weight in its deliberations." *Id.* at ¶ 21.

{¶ 55} In the case sub judice, the trial court, unlike the trial court in *Henson*, did not sua sponte give the jury a written record of text messages. Instead, when the jury asked to review the text-message evidence, the trial court instructed the jury that the jury had received all of the evidence presented in the case and that no additional evidence would be provided. Thus, unlike

the *Henson* jury that considered the witness's written statement during deliberations, the jury in the case at bar did not consider a written record of the text-message evidence during deliberations.

{¶ 56} We further observe that appellant faults the trial court for failing to instruct the jury, after it asked to see the text-message evidence, that it could not consider the text-message evidence at all. The trial court, however, reviewed the jury's question with the parties and the response that the court intended to provide. Appellant voiced no concerns with the court's proposed response. Appellant could have asked the court to further instruct the jury that it could not consider the text-message evidence at all, but did not.

{¶ 57} Moreover, even if the jury's question to see the text-message evidence indicated that the jury was considering Brown's text-message testimony, we do not believe that the text-message evidence affected the outcome of the trial. Instead, as we indicated above, the evidence otherwise supports appellant's convictions.

{¶ 58} Additionally, we observe that appellant asserts that the trial court apparently sustained his objection based upon Evid.R. 403. We do not believe, however, that we must determine the trial court's reasoning in order to evaluate appellant's first assignment of error. Instead, the question is whether the trial court plainly erred by failing to issue a curative instruction after it sustained appellant's objection, not whether the trial court cited the correct rule in sustaining appellant's objection. We therefore do not find it necessary to address appellant's argument regarding the evidentiary basis for the court's decision to sustain appellant's objections to the text messages.

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

III

{¶ 60} In his third assignment of error, appellant asserts that the record does not contain sufficient evidence to support his endangering children conviction. Appellant argues that his alleged failure to seek medical treatment for the child does not, as a matter of law, amount to endangering children under R.C. 2919.22(B)(2). Appellant further contends that the record fails to contain any evidence that he committed an affirmative act sufficient to satisfy the "torture" or "cruelly abuse" standard contained in R.C. 2919.22(B)(2).

{¶ 61} We believe that our disposition of appellant's second assignment of error disposes of his third assignment of error. We therefore find appellant's third assignment of error moot, and we do not address it. See App.R. 12(A)(1)(c).

{¶ 62} Accordingly, based upon the foregoing reasons, we overrule appellant's third assignment of error, affirm the trial court's judgment in part, vacate the imposed sentence and remand this matter for further proceedings consistent with this opinion.

JUDGMENT AFFIRMED IN PART,
VACATED IN PART, AND REMANDED
FOR FURTHER PROCEEDINGS
CONSISTENT WITH THIS OPINION.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed in part, vacated in part, and remanded for further proceedings consistent with this opinion. Appellant and appellee shall equally share 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 Ross 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.

Smith, P.J. & Hess, 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.