[Cite as *State v. Cook*, 2010-Ohio-6222.]

IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 23721
vs.	:	T.C. CASE NO. 08CR3161
KIMBERLY COOK	:	(Criminal Appeal from Common Pleas Court)
Defendant-Appellant	:	

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O P I N I O N

Rendered on the 17th day of December, 2010.

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GRADY, J.:

{¶ 1} Defendant, Kimberly Cook, appeals from her conviction and sentence for felony murder, endangering children, and felonious assault.

{¶ 2} Five year old Dexter Cook went to live with Defendant, who is his older half-sister, in March 2007. Six months later Hope Cook, Dexter's younger sister, also joined Defendant's household. Dexter Cook was removed from Defendant's home on July 20, 2008, after being battered and abused. Three year old Hope Cook died that day from catastrophic brain injuries caused by repeated impact against a hard, flat surface.

{¶ 3} On July 20, 2008 around 3:00 p.m., Defendant went to the home of her neighbor, Mildred Combs, and asked for help, claiming that Hope Cook was having a seizure. Combs found Hope Cook naked and unconscious on the front room floor. Her hands were clenched, her toes were curled under, her eyes were closed and she was not moving. Combs wanted to immediately call 911 but Defendant refused, electing instead to try to revive Hope Cook by talking to her and rubbing her hands and legs. After five to ten minutes, Defendant agreed to call for help. Combs made that 911 call.

{¶ 4} Paramedic Lisa Johnson found Hope Cook on the floor, motionless and unconscious. Johnson recognized that Hope Cook had sustained an injury to her brain. Johnson also noticed bruises on Hope Cook's left cheek, brow, jaw, and arm. Defendant told Johnson that Hope Cook had fallen in the tub three days earlier.

{¶ 5} Hope Cook was transported to Children's Medical Center.

When she arrived, her brain was swelling and her condition was worsening. A specialized trauma team including a critical care pediatric physician, a surgeon, and a neurosurgeon was mobilized. CAT scans showed multiple, complex skull fractures, bleeding on the brain, swelling of the brain, and pressure inside the skull. The decision was made to operate in an attempt to relieve the pressure caused by the swelling, but the prognosis for Hope Cook was very poor.

{¶ 6} Doctors were unable to save Hope Cook due to the severe swelling in her brain. Dr. Abboud, a critical care pediatric physician, attempted unsuccessfully for ninety minutes to resuscitate Hope Cook. Dr. Abboud pronounced Hope Cook dead at 9:46 p.m., on July 20, 2008.

{¶ 7} Defendant told the doctors at Children's Medical Center that Hope Cook had been fine that day, right up to the point where she threw a tantrum in the bathroom and fell and then went limp. Defendant additionally said Hope Cook had fallen in the shower three days earlier. Defendant's father-in-law claimed Hope Cook had fallen from a merry-go-round and struck her head on concrete just three days before she died.

{¶ 8} Defendant was charged by indictment with five felony offenses.

{¶ 9} Count One charged that Defendant caused the death of

Hope Cook, as a proximate result of committing the offense of endangering children by abuse, R.C. 2919.22(B)(1), in violation of R.C. 2903.02(B).

{¶ 10} Count Two charged that Defendant recklessly abused a child under eighteen years of age, Hope Cook, resulting in serious physical harm to the child in violation of R.C. 2919.22(B)(1).

{¶ 11} Count Three charged that Defendant caused the death of Hope Cook as a proximate result of committing the offense of felonious assault (serious physical harm), R.C. 2903.11(A)(1), in violation of R.C. 2903.02(B).

{¶ 12} Count Four charged that Defendant knowingly caused serious physical harm to Hope Cook, in violation of R.C. 2903.11(A)(1).

{¶ 13} Count Five charged that Defendant did recklessly torture or cruelly abuse a minor child, Dexter Cook, in violation of R.C. 2919.22(B)(2).

{¶ 14} Doctors Abboud and Drazner, who treated Hope Cook at Children's Medical Center, and Dr. Casto, the deputy coroner who performed the autopsy, all testified at Defendant's trial that Hope Cook's catastrophic brain injuries were so severe that they could not have been caused by an accidental fall in the bathtub or on the playground, or even two such falls. The doctors explained that this type of trauma occurs from high velocity injuries such

as a high-speed vehicle collision or a fall from great heights. Hope Cook's injuries did not result from a fall or two, but were caused by inflicted blunt force trauma. Cause of death was blunt force trauma to the head.

{¶ 15} Defendant was found guilty of all five charges in the indictment. The trial court merged the two felony murder offenses arising from the death of Hope Cook, Counts One and Three, and sentenced Defendant to serve a term of fifteen years to life on the merged offenses. The court imposed sentences of eight years to life on Count Two, endangering children through abuse of Hope Cook, and eight years to life as Count Four, felonious assault arising from serious physical harm inflicted on Hope Cook. The court imposed a term of five years on Count Five, involving Dexter Cook. The court ordered all the terms to be served consecutively.

{¶ 16} Defendant appealed to this court from her conviction and sentence. Defendant's assignments of error pertain only to the charges involving Hope Cook.

FIRST ASSIGNMENT OF ERROR

{¶ 17} "THE TRIAL COURT ERRED WHEN IT FOUND DEFENDANT GUILTY OF COUNTS ONE (I) THROUGH (IV) OF THE INDICTMENT, AS SUCH A FINDING IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶ 18} Though Defendant frames her assignment of error as a manifest weight of the evidence claim, the substance of her argument

is that the evidence was insufficient as a matter of law to convict her of the offenses of felony murder, child endangering, and felonious assault arising from the death of Hope Cook, and therefore the trial court erred when it denied Defendant's Crim.R. 29 motion for a judgment of acquittal.

{¶ 19} When considering a Crim.R. 29 motion for acquittal, the trial court must construe the evidence in a light most favorable to the State and determine whether reasonable minds could reach different conclusions on whether the evidence proves each element of the offense charged beyond a reasonable doubt. ***State v. Bridgeman*** **(1978), 55 Ohio St.2d 261. The motion will be granted only when reasonable minds could only conclude that the evidence fails to prove all of the elements of the offense.** ***State v. Miles*** **(1996), 114 Ohio App.3d 738.**

{¶ 20} A Crim.R. 29 motion challenges the legal sufficiency of the evidence. A sufficiency of the evidence argument challenges whether the State has presented adequate evidence on each element of the offense to allow the case to go to the jury or sustain the verdict as a matter of law. ***State v. Thompkins,*** **(1997), 78 Ohio St.3d 380. The proper test to apply to such an inquiry is the one set forth in paragraph two of the syllabus of** ***State v. Jenks*** **(1991), 61 Ohio St.3d 259:**

{¶ 21} "An appellate court's function when reviewing the

sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt."

{¶ 22} Defendant argues that her convictions for felony murder proximately resulting from endangering children (abuse resulting in serious physical harm) and felonious assault (causing serious physical harm) are not supported by legally sufficient evidence because, while the evidence established that Hope Cook suffered head injuries that resulted in her death, the evidence fails to prove that the child's injuries were not the result of accidental falls. We disagree.

{¶ 23} Defendant attempted to show at trial through the testimony of her father-in-law and the cross-examination of the State's witnesses that Hope Cook's head injuries were the result of one or more accidental falls in the tub and/or on the playground. However, every physician who testified rejected the idea that Hope Cook's head injuries were the result of one or even two accidental falls. The direct and circumstantial evidence in this

case demonstrates that Hope Cook's head struck against a hard, flat surface, causing massive brain swelling, and that there is no reasonable possibility that the child's head injuries resulted from an accidental fall, or even two such falls.

{¶ 24} Dr. Drazner testified that Hope Cook had extensive multiple skull fractures, a very large hematoma, and such severe swelling that her brain had shifted past the mid-line. Dr. Drazner testified that such injuries are comparable to those occurring in high velocity car crashes, or falls from great heights, and could not have been caused by accidentally falling to the ground in a tub or shower. Hope Cook's injuries were instead caused by inflicted trauma.

{¶ 25} Dr. Patricia Abboud testified that Hope Cook's injuries, which resulted from inflicted trauma, occurred within several hours before she arrived at Children's Medical Center. Dr. Casto, who performed the autopsy on Hope Cook, observed deep bruises on the top of her spine, the back of her neck, and the back of her head. The child had at least two separate complex skull fractures, from two separate impacts with a broad, flat hard surface. The injuries resulted from inflicted trauma, and could not have been caused by a hard fall to the ground or even two such falls. Cause of death was blunt force head trauma.

{¶ 26} Hope Cook's body contained numerous bruises in different

stages of healing, and Defendant's uncle testified that he saw Defendant hit Hope Cook more than once.

{¶ 27} Viewing the totality of this evidence in a light most favorable to the State, as we must, we conclude that a rational trier of facts could find beyond a reasonable doubt all of the essential elements of the charged offenses, including that Hope Cook's head injuries and resulting death were caused by inflicted blunt force trauma and not accidental falls in the tub and/or on the playground. Defendant's convictions are supported by legally sufficient evidence and the trial court properly overruled her Crim.R. 29 motion for acquittal.

{¶ 28} A weight of the evidence argument challenges the believability of the evidence and asks which of the competing inferences suggested by the evidence is more believable or persuasive. *State v. Hufnagle* (Sept. 6, 1996), Montgomery App. No. 15563. The proper test to apply to that inquiry is the one set forth in *State v. Martin* (1983), 20 Ohio App.3d 172, 175:

{¶ 29} "[t]he court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." Accord: *State v. Thompkins*, *supra*.

{¶ 30} The credibility of the witnesses and the weight to be given to their testimony are matters for the trier of facts to resolve. *State v. DeHass* (1967), 10 Ohio St.2d 230. In *State v. Lawson* (Aug. 22, 1997), Montgomery App.No. 16288, we observed:

{¶ 31} "[b]ecause the factfinder . . . has the opportunity to see and hear the witnesses, the cautious exercise of the discretionary power of a court of appeals to find that a judgment is against the manifest weight of the evidence requires that substantial deference be extended to the factfinder's determinations of credibility. The decision whether, and to what extent, to credit the testimony of particular witnesses is within the peculiar competence of the factfinder, who has seen and heard the witness."

{¶ 32} This court will not substitute its judgment for that of the trier of facts on the issue of witness credibility unless it is patently apparent that the trier of facts lost its way in arriving at its verdict. *State v. Bradley* (Oct. 24, 1997), Champaign App. No. 97-CA-03.

{¶ 33} Defendant argues that in light of the evidence she presented suggesting that Hope Cook's head injuries and resulting death were the result of accidental falls, the jury lost its way and her convictions are against the manifest weight of the evidence. We disagree.

{¶ 34} The evidence presented by the State, if believed, demonstrates that Hope Cook sustained inflicted blunt force trauma to her head while in Defendant's custody and care, which resulted in Hope Cook's death, and that Hope Cook's head injuries could not have been caused by the child accidentally falling to the ground in a tub or on the playground, as Defendant claimed. That is sufficient to support Defendant's convictions. *State v. King*, 179 Ohio App.3d 1, 2008-Ohio-5363.

{¶ 35} The credibility of the witnesses and the weight to be given to their testimony were matters for the trier of facts, the jury, to decide. *DeHass*. Hope Cook's injuries were inconsistent with Defendant's theory that those injuries resulted from the child accidentally falling in the tub and/or on the playground. The jury did not lose its way in this case simply because they chose to believe the State's version of the events, rather than Defendant's, which they had a right to do. *State v. Flugga*, Licking App. No. 2009CA5, 2009-Ohio-5648; *State v. Ligon*, Clermont App. No. CA2009-09-056, 2010-Ohio-2054; *State v. Craycraft*, Clermont App. Nos. CA 2009-02-013 and 014, 2010-Ohio-596.

{¶ 36} Reviewing this record as a whole, we cannot say that the evidence weighs heavily against a conviction, that the trier of facts lost its way in choosing to believe the State's witnesses, or that a manifest miscarriage of justice has occurred.

Defendant's convictions are not against the manifest weight of the evidence.

{¶ 37} Defendant's first assignment of error is overruled.

SECOND ASSIGNMENT OF ERROR

{¶ 38} "THE COURT COMMITTED PLAIN ERROR WHEN IT FAILED TO MERGE COUNTS TWO (II) AND FOUR (IV) INTO COUNT ONE (I) OF THE INDICTMENT WHEREAS BOTH ARE ALLIED OFFENSES OF SIMILAR IMPORT, COMMITTED WITH A SINGLE ANIMUS."

{¶ 39} The court imposed prison sentences of fifteen years to life for each of the two R.C. 2903.02(B) felony murder offenses, Count One and Count Three. The court then merged Counts One and Three. The court imposed sentences of eight years for each of Counts Two (endangering children/abuse/serious physical harm) and Four (felonious assault/serious physical harm), the predicate offenses for the two felony murder offenses. The court ordered that "[a]ll Counts are to be served consecutive to each other." (Dkt. 89).

{¶ 40} Defendant argues that the trial court erred when it did not also merge into the two felony murder offenses the child endangering/abuse/serious physical harm and felonious assault/ serious physical harm offenses that were the predicate offenses for the felony murder offenses. In its most recent iteration on the issue of allied offenses of similar import, the Ohio Supreme

Court wrote:

{¶ 41} "Our analysis of allied offenses originates in the prohibition against cumulative punishments embodied in the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, as applied to the states through the Fourteenth Amendment, and Section 10, Article I of the Ohio Constitution. *United States v. Halper* (1989), 490 U.S. 435, 440, 109 S.Ct. 1892, 104 L.Ed.2d 487, citing *North Carolina v. Pearce* (1969), 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed.2d 656. However, both this court and the Supreme Court of the United States have recognized that the Double Jeopardy Clause does not entirely prevent sentencing courts from imposing multiple punishments for the same offense but rather 'prevent[s] the sentencing court from prescribing greater punishment than the legislature intended.' *State v. Rance* (1999), 85 Ohio St.3d 632, 635, 710 N.E.2d 699, quoting *Missouri v. Hunter* (1983), 459 U.S. 359, 366, 103 S.Ct. 673, 74 L.Ed.2d 535, and citing *State v. Moss* (1982), 69 Ohio St.2d 515, 518, 23 O.O.3d 447, 433 N.E.2d 181. Thus, in determining whether offenses are allied offenses of similar import, a sentencing court determines whether the legislature intended to permit the imposition of multiple punishments for conduct that constitutes multiple criminal offenses." *State v. Williams*, 124 Ohio St.3d 382, 2010-Ohio-147, at ¶12.

{¶ 42} In Ohio, the vehicle for determining application of the Double Jeopardy Clause to the issue of multiple punishments is R.C. 2941.25. That section states:

{¶ 43} "(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.

{¶ 44} "(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."

{¶ 45} "A two-step analysis is required to determine whether two crimes are allied offenses of similar import. E.g. *State v. Blankenship* (1988), 38 Ohio St.3d 116, 117, 526 N.E.2d 816; *Rance,* 85 Ohio St.3d at 636, 710 N.E.2d 699. Recently, in *State v. Cabrales,* 118 Ohio St.3d 54, 2008-Ohio-1625, 886 N.E.2d 181, we stated: 'In determining whether offenses are allied offenses of similar import under R.C. 2941.25(A), courts are required to compare the elements of offenses in the abstract without considering the evidence in the case, but are not required to find an exact alignment of the elements. Instead, 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, then the offenses are allied offenses of similar import.' Id. at paragraph one of the syllabus. If the offenses are allied, the court proceeds to the second step and considers whether the offenses were committed separately or with a separate animus. Id. at ¶ 31." *Williams*, at ¶16.

{¶ 46} R.C. 2903.02(B) sets forth the elements of felony murder:

{¶ 47} "No person shall cause the death of another as a proximate result of the offender's committing or attempting to commit an offense of violence that is a felony of the first or second degree and that is not a violation of section 2903.03 or 2903.04 of the Revised Code."

{¶ 48} "Offense of violence" is defined in R.C. 2901.01(A)(9) and includes both felonious assault in violation of R.C. 2903.11 and endangering children in violation of R.C. 2919.22(B)(1), which are felonies of the first or second degree.

{¶ 49} R.C. 2903.02(B) does not prohibit specific conduct. Instead, that section prohibits the result of causing the death of another as a proximate result of committing an offense of violence that is a first or second degree felony. Thus, commission of another felony offense is a necessary predicate to an R.C. 2903.02(B) offense, and the predicate felony must be a proximate

cause of the death R.C. 2903.02(B) prohibits. *State v. Reid*, Montgomery App. No. 23409, 2010-Ohio-1686. The further issue is whether, when they involve the same conduct, the predicate felony offense is an allied offense of felony murder because commission of one offense necessarily results in commission of the other offense. *Reid; Cabrales*.

{¶ 50} R.C. 2903.11(A)(1) defines felonious assault:

{¶ 51} "No person shall knowingly do either of the following:

{¶ 52} "Cause serious physical harm to another or to another's unborn."

{¶ 53} R.C. 2919.22(B)(1) defines endangering children:

{¶ 54} "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:

{¶ 55} "Abuse the child."

{¶ 56} If the violation of R.C. 2919.22(B)(1) results in serious physical harm to the child, the offense is a felony of the second degree. R.C. 2919.22(E)(1)(d).

{¶ 57} Relying upon *State v. Mills*, Tuscarawas App. No. 2007AP07 0039, 2009-Ohio-1849, Defendant argues that felony murder based upon a predicate offense of felonious assault and the underlying felonious assault offense are allied offenses of similar import that must be merged. Likewise, felony murder based upon a

predicate offense of child endangering/abuse/serious physical harm and the underlying child endangering offense are allied offenses of similar import that must be merged. Simply put, because proof of each felony murder charge necessarily proves the underlying predicate felony offense, the predicate offenses are allied offenses of similar import and each underlying felony must merge with its respective felony murder charge. *Id*. Furthermore, the two felony murder charges must also merge, as the trial court did here, where there is a single incident involving one killing and one victim. *Id*. As a result, with respect to Hope Cook, Defendant claims that she should have been convicted and sentenced on only one offense, felony murder.

{¶ 58} In *State v. Williams*, the Ohio Supreme Court held that attempted felony murder, R.C. 2923.02, 2903.02(B), and felonious assault, causing serious physical harm, R.C. 2903.11(A)(1), are allied offenses of similar import. This court recently held that felony murder based upon felonious assault, causing serious physical harm, R.C. 2903.02(B), and felonious assault, causing serious physical harm, R.C. 2903.11(A)(1), are allied offenses of similar import under the two-tiered test set forth in *State v. Rance*, 85 Ohio St.3d 632, 1999-Ohio-291, and clarified in *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625. Therefore, those offenses must be merged for purposes of conviction and sentence

pursuant to R.C. 2941.25, unless they were committed separately or with a separate animus as to each. *State v. Reid,* ¶39-40; *State v. Scandrick*, Montgomery App. No. 23406, 2010-Ohio-2270, at ¶55.

{¶ 59} We see no reason why a different result should be reached when the predicate felony offense underlying the felony murder charge is endangering children/abuse/serious physical harm in violation of R.C. 2919.22(B)(1) rather than felonious assault/ serious physical harm in violation of R.C. 2903.11(A)(1). It is not possible to cause the death of another as a proximate result of abusing a child in a manner that results in serious physical harm to the child in violation of R.C. 2903.02(B) without also committing child endangerment involving abuse of a child that results in serious physical harm in violation of R.C. 2919.22(B)(1). The death would not have occurred without the child endangerment having been committed, and the child endangerment is itself a cause which in the natural and continuous sequence of events involved resulted in the victim's death. *Reid*. The two offenses involve the same conduct, and commission of the felony murder offense necessarily, and by default, results in commission of the underlying predicate felony offense, child endangerment. Therefore, the two offenses are allied offenses of similar import, *Cabrales*, and because on this record the two offenses involve one incident and the same conduct, and were not committed separately

or with a separate animus as to each, their merger for purposes of R.C. 2941.25 is required.

{¶ 60} In *Mills*, the Fifth Appellate District analyzed a case nearly identical to the one now before us. In that case the defendant was found guilty of felony murder based upon felonious assault, felony murder based upon child endangering, felonious assault, and child endangering. Applying the *Cabrales* analysis, the *Mills* court concluded that each underlying felony offense, felonious assault and child endangering, must merge with its respective felony murder count because, while the elements do not exactly align when viewed in the abstract, the commission of the felony murder necessarily results in commission of the underlying predicate felony offense, and therefore the offenses are allied offenses of similar import. The *Mills* court further concluded there where, as here, there is but one incident leading to the death of one victim, the two felony murder counts must also merge.

{¶ 61} Based upon our recent decisions in *Reid and Scandrick*, and the Fifth Appellate District's decision in *Mills*, we conclude that felony murder based upon felonious assault/causing serious physical harm, in violation of R.C. 2903.02(B), and the predicate offense of felonious assault/causing serious physical harm, in violation of R.C. 2903.11(A)(1), are allied offenses of similar import that must be merged pursuant to R.C. 2941.25. Likewise,

felony murder based upon child endangering involving abuse of child that results in serious physical harm to the child, in violation of R.C. 2903.02(B), and the offense of child endangering involving abuse of a child that results in serious physical harm to the child, in violation of R.C. 2919.22(B)(1), are allied offenses of similar import that must be merged. Because but one death occurred as a result of Defendant's conduct, the two felony murder offenses must also merge.

{¶ 62} Defendant's second assignment of error is sustained. We will reverse and vacate Defendant's sentences for felony murder, R.C. 2903.02(B), felonious assault, causing serious physical harm, R.C. 2903.11(A)(1), and child endangering, R.C. 2919.22(B)(1). The case will be remanded to the trial court to merge the felonious assault offense with its respective felony murder charge, merge the child endangering offense with its respective felony murder charge, and then merge the two felony murder charges, and resentence Defendant accordingly.

BROGAN, J., And MCFARLAND, J., concur.

(Hon. Matthew W. McFarland, Fourth District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.)

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