[Cite as *State v. Overton*, 2010-Ohio-5256.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 09AP-858 (C.P.C. No. 07CR-06-4577)
Robert R. Overton,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on October 28, 2010

Ron O'Brien, Prosecuting Attorney, and *Seth L. Gilbert*, for appellee.

Yeura R. Venters, Public Defender, and *Allen V. Adair*, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

McGRATH, J.

{¶1} Defendant-appellant, Robert R. Overton ("appellant"), appeals from the judgment of the Franklin County Court of Common Pleas convicting him of felonious assault, in violation of R.C. 2903.11, and endangering children, in violation of R.C. 2919.22, both felonies of the second degree, entered upon a jury's verdict of guilty of the same.

{¶2} This matter arises out of the March 8, 2007 death of four-year-old Antwan Bowman. On this date, medics were dispatched at approximately 10:01 a.m. to 1603

Briarwood Avenue on a report of a "non-breather." When they arrived, the medics were directed to a bedroom in the rear of the house where they found Antwan on the floor showing no pulse and slowing respirations. Revival efforts were unsuccessful, and Antwan was transported to Children's Hospital where he was pronounced dead at 11:23 a.m. The cause of death was determined to be heart arrhythmia induced by trauma to the chest.

{¶3} At the home that morning, medics had noticed bruising on Antwan's chest that to them indicated a possible abuse situation. Antwan's mother, Monica Dumas ("Dumas"), was present at the home and told medics she had just gotten Antwan out of the shower and that he had starting vomiting the day prior. At the hospital, Dumas indicated that after she got Antwan out of the shower, he vomited and then collapsed. Dumas was investigated by Columbus Police homicide detectives on three occasions where her account of events remained the same as it had been relayed to medical personnel and medics the morning of Antwan's death. At no time during these interviews did Dumas implicate appellant. On May 7, 2007, however, Dumas was interviewed again, and this time accused appellant of harming Antwan.

{¶4} On June 28, 2007, a Franklin County Grand Jury indicted appellant on one count of murder, in violation of R.C. 2903.02, one count of felonious assault, in violation of R.C. 2903.11, and one count of endangering children, in violation of R.C. 2919.22. A jury trial commenced on June 1, 2009, and on June 11, 2009, the jury found appellant guilty of the felonious assault and child endangering charges but was unable to reach a verdict on the murder charge. A pre-sentence investigation ("PSI") was ordered, and on August 12, 2009, a sentencing hearing was held. The trial court sentenced appellant to a six-year

term of incarceration on each count to be served consecutively. On August 31, 2009, a nolle prosequi was entered as to the murder count.

{¶5} This appeal followed, and appellant brings the following eight assignments of error for our review:

> First Assignment of Error: The trial court erroneously refused to give a supplemental instruction to the effect that mere presence at the time of criminal activity is not enough for conviction.
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> Second Assignment of Error: The trial court erroneously refused to give a modified instruction on cause limited to overt acts and omitting language concerning the failure to act.
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> Third Assignment of Error: The evidence presented was legally insufficient to establish appellant knowingly caused the victim to suffer serious physical harm.
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> Fourth Assignment of Error: With respect to appellant's conviction for child endangerment, the evidence presented was legally insufficient to establish that he recklessly abused the victim resulting in serious physical harm.
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> Fifth Assignment of Error: With respect to both the felonious assault and child endangerment counts the trial court erroneously overruled appellant's motions for acquittal pursuant to Criminal Rule 29.
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> Sixth Assignment of Error: Appellant's convictions were against the manifest weight of the evidence.
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> Seventh Assignment of Error: The trial court erred by imposing consecutive sentences for felonious assault and child endangerment without making statutorily required findings in accordance with R.C. 2929.14(E)(4).
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> Eighth Assignment of Error: Felonious assault as charged in count two, and child endangerment as charged in count three, are allied offenses of similar import committed with a single animus. The court erred by imposing consecutive sentences for the two offenses when it should have directed the

> prosecutor to elect on which offense conviction would be entered and sentence pronounced.

{¶6} The following witnesses testified at trial as follows. Michelle Phillips, M.D., a physician at Children's Hospital, was working in the trauma center when Antwan arrived. Upon initially seeing Antwan, Dr. Phillips testified that he appeared lifeless, and all attempted resuscitation efforts were unsuccessful. Dr. Phillips obtained a history from Dumas about what occurred that morning. According to Dr. Phillips, Dumas told her that Antwan had spilled his cereal on the floor and after it was cleaned up he went to his bedroom. Dumas further told Dr. Phillips that because Antwan had urinated in his bed, Dumas put him in the shower. After Antwan complained of being cold, Dumas told Dr. Phillips that she got him out of the shower, at which time he began vomiting and collapsed on the floor. Not wanting him to go the hospital unclothed, Dumas told Dr. Phillips that she proceeded to dress Antwan. Because Antwan had "some unusual pattern of bruising that was noted on his chest," Dr. Phillips testified that abuse was suspected which resulted in a skeletal survey. (Tr. 46.) According to Dr. Phillips, the bruising pattern was consistent with the knuckles on a closed fist.

{¶7} Columbus Firefighter Harold Toops ("Toops"), responded to the call on Antwan. When they arrived, a man on the porch directed medics to a bedroom in the back of the house. Toops saw Antwan lying on the floor with a lady hovered over him screaming frantically. Antwan had no pulse, was very cold, had some vomit on his face, and was losing respiratory counts. When Antwan's shirt was removed, Toops noticed that Antwan had bruising on his chest. Toops also testified that the history given by

Dumas was that she had just gotten Antwan out of the shower after he urinated on himself and that the day before he had started vomiting.

{¶8} Columbus Firefighter David Katona ("Katona"), testified that when they arrived at the house, a man on the porch directed them inside where they found Antwan with no pulse, cold to the touch, and with agonal breathing. Upon removing Antwan's shirt, Katona immediately noticed bruising about the child's chest. Columbus Firefighter David Pence ("Pence"), also testified that Antwan had unusual bruising on his chest that indicated to him there was a potential for abuse. Therefore, Pence had another firefighter call the police about a possible abuse situation.

{¶9} Dumas testified that she began her relationship with appellant sometime in 2006 and that though the relationship was good at first, after a year "it got worse" and "his attitude changed." (Tr. 157.) Dumas also testified that in addition to Antwan, she has four other children. Because Antwan received a burn to his face, allegedly caused by his older brother and a lighter, Franklin County Children Services had placed the children with an aunt, and Dumas had gotten the kids back in her care just a few weeks prior to Antwan's death.

{¶10} According to Dumas, on the day of Antwan's death, Antwan woke up and was hungry so she fixed him some cereal. Thereafter, Antwan helped Dumas clean up and then went to his room to watch cartoons. Dumas knew that Antwan had urinated himself during the night because his pants were wet. Appellant then went in to watch cartoons with Antwan, and Dumas heard appellant asking Antwan questions such as if Antwan liked wetting his bed and "did he want to be a fag." (Tr. 176.) Dumas asked appellant to leave Antwan alone, and appellant did. Dumas then put Antwan in the

shower and during the time Antwan was showering, both Dumas and appellant went into and out of the bathroom. According to Dumas, appellant was putting cold water on Antwan and then appellant struck Antwan in the head causing him to fall. Dumas testified that appellant then threw Antwan at her and that Antwan was crying and scared. Dumas stated appellant struck Antwan in his chest at least three times and kicked him about his legs as he tried to crawl away. Noticing something was wrong with Antwan, Dumas testified she then called 911.

{¶11} Dumas said she initially lied about what happened because appellant threatened her while the medics were there working on Antwan. Dumas also testified that she was unaware of the bruising on Antwan until asked about it at the hospital. When talking to medical personnel at Children's Hospital about Antwan's status, Dumas told them that Child Protective Services was already involved with her and she "did not need this." (Tr. 254.)

{¶12} On cross-examination, Dumas testified that when asked by homicide detectives on March 8, 2007 whether appellant did anything to Antwan, Dumas replied that he did not. When asked if appellant ever harmed her children, Dumas replied, "[N]o, no, no. To be honest, no, no. I'm not going to sit here and take up for no man or whatever, no, because that's my damn baby. Okay." (Tr. 303.) Dumas testified that on March 9, 2007, she relayed the same version of events to detectives and told detectives that she never saw Antwan fall or fuss in the shower.

{¶13} Columbus homicide detective Anne Pennington spoke with appellant at the hospital, at which time appellant indicated he had been dating Dumas for about a year and had been living with her. Appellant told Pennington that after Antwan woke up that

morning, he had some cereal and was then put in the shower. On April 25, 2007, Pennington interviewed Dumas at her place of employment. Pennington testified that as a test for cooperation rather than for comparison, Dumas was asked to give a print of her knuckles which she did "without any hesitation." (Tr. 419.) Pennington also interviewed appellant on this date, and appellant denied ever hurting Antwan or ever seeing Dumas hurt Antwan. Pennington testified that when interviewed on May 7, 2009, Dumas's story changed, and after Dumas provided additional information that had not previously been given, Dumas was informed that Antwan's death had been ruled a homicide.

{¶14} Franklin County Coroner Jan Gorniak ("Gorniak"), testified that Antwan's autopsy showed a bruise on his forehead and multiple bruising around his chest that all appeared "recent, meaning within hours." (Tr. 468.) According to Dr. Gorniak, the bruising pattern on the chest was not consistent with CPR, but could be consistent with knuckles. The autopsy revealed Antwan had lung contusions as well, that to Gorniak indicated that the blows to Antwan's chest were inflicted with force. The official cause of Antwan's death was ruled a cardiac concussion due to blunt force trauma to the chest wall.

{¶15} The remaining witnesses testifying at trial were called by appellant. The first was Pamela Gripper ("Gripper"), appellant's mother, who testified that Dumas began a relationship with her son when he was only 17 years old. Gripper testified to seeing Dumas discipline Antwan on a prior occasion. According to Gripper, Antwan tried to get on Dumas's lap, but she pushed him away saying she could not be bothered. When Antwan began crying, Gripper testified that Dumas punched Antwan in the chest a couple of times and said, "You are going to be a punk just like your daddy." (Tr. 537.) Gripper

also testified that on the day of Antwan's funeral, Dumas came to Gripper's bar and drank with Gripper's daughter, Lakisha. Dumas also lived with Gripper for approximately two and a half months after Antwan's funeral. During this time, Gripper described an incident where Dumas punched her daughter in the back of the head and threw her down the stairs. Also, while Dumas was staying with her, Gripper testified she overheard a walkie-talkie conversation between Dumas and appellant where Dumas said, "If I can't have you, nobody going to have you." (Tr. 544.)

{¶16} Appellant's sister Roberta Overton ("Overton"), testified that on the night before Antwan's death, appellant had been at her house until Dumas called appellant to come over to Dumas's house. Overton then saw Dumas and appellant at the hospital the next day where Dumas was "screaming, [Antwan] tell me what happened. Tell mommy what happened." (Tr. 557-58.)

{¶17} Shiffon Pointer ("Pointer"), appellant's cousin, testified that Dumas called her on the morning of Antwan's death and that Dumas was "hysterical." (Tr. 580.) According to Pointer, Dumas told her the story about Antwan eating, spilling his milk, and taking a shower. Dumas told Pointer that, as she was drying Antwan after his shower, he started vomiting, his eyes rolled back, and he urinated on himself; therefore, Pointer told Dumas to call 911. Pointer arrived at Dumas's house as the ambulance was leaving and she saw Dumas in a police car screaming, "They think I killed my son. They think I killed my son Shiffon." (Tr. 583.)

{¶18} Because they are interrelated, appellant's first two assignments of error will be addressed together. In these assigned errors, appellant contends the trial court erred

by refusing to give supplemental and modified jury instructions in response to questions from the jury during their deliberations.

{¶19} It is within the sound discretion of the trial court to provide supplemental instructions in response to a question from the jury. *State v. Thompson* (Nov. 10, 1997), 10th Dist. No. 97APA04-489, citing *State v. Maupin* (1975), 42 Ohio St.2d 473, 486. The trial court's response, when viewed in its entirety, must constitute a correct statement of the law and be consistent with or properly supplement the jury instructions that have already been given. *State v. Hull*, 7th Dist. No. 04 MA 2, 2005-Ohio-1659, ¶45; *Sabina v. Kress*, 12th Dist. No. CA2006-01-001, 2007-Ohio-1224, ¶15; *State v. Letner* (Feb. 23, 2001), 2d Dist. No. 2000-CA-58. " 'A reversal of a conviction based upon a trial court's response to such a request requires a showing that the trial court abused its discretion.' " *State v. Young*, 10th Dist. No. 04AP-797, 2005-Ohio-5489, ¶35, quoting *State v. Carter* (1995), 72 Ohio St.3d 545, 553. An abuse of discretion connotes more than an error of law; it implies that the trial court's decision was unreasonable, arbitrary, or unconscionable. *State v. Widder,* 146 Ohio App.3d 445, 2001-Ohio-1521, ¶6.

{¶20} During deliberations, one of the questions submitted by the jury was: "If we observe harm occur and do not intervene (fail to act) or act effectively, is that cause?" (Tr. 705.) In response, appellant requested a supplemental instruction that mere approval or acquiescence without expressed concurrence or the doing of something to contribute to an unlawful act is insufficient of and in itself to sustain a conviction. Appellant argued this instruction was required because the jury was obviously "thinking on a failure to protect side of child endangering," which was not part of the case since the theory of the case was that either appellant was the actor or he was not. (Tr. 706.) Indicating that it would

not speculate as to the jurors' thoughts, the trial court denied appellant's request and instead referred the jury to the definition of cause as given in the original instructions, which stated: "Cause is an act or failure to act which in the natural and continuous sequence directly produces the injury, and without which it would not have occurred. Cause occurs when the injury is the natural and foreseeable result of the act or failure to act." (Jury Instructions at 5.)

{¶21} The following morning, appellant filed a written request to modify the jury instructions so the jury could be instructed that "[c]ause is an act which in the natural and continuous sequence directly produces the death and/or serious physical harm and without which it would not have occurred." (June 10, 2009 request to modify at 1.) The trial court, noting that both parties agreed to the original jury instructions prior to them being given, denied appellant's request to modify.

{¶22} With respect to appellant's argument that he was entitled to a supplemental instruction on "mere approval" we find no abuse of discretion in the trial court's denial of the same. As argued by appellee, this case did not concern a theory of aiding and abetting or any other form of complicity that would generally require an instruction on "mere presence" or "mere approval." Secondly, the evidence at trial established more than appellant's "mere approval" of an unlawful act. Instead, the testimony provided by Dumas, the only person other than appellant who was present at the time of the incident, demonstrated it was appellant who had punched and kicked Antwan. Therefore, there was evidence presented at trial that appellant was the sole actor. Indeed, Dumas gave prior statements to the police indicating that appellant did not cause harm to Antwan; however, Dumas admitted at trial that she had previously lied to the police on several

occasions and offered her reasons for doing so. Thus, the record does not contain evidence that would entitle appellant to a "mere approval" instruction. *State v. Peterson*, 10th Dist. No. 09AP-34, 2009-Ohio-5088 (no error in refusing to give a mere presence instruction where the evidence established more than the defendant's mere presence in the vicinity of contraband); *State v. Perkins*, 8th Dist. No. 83659, 2004-Ohio-4915, discretionary appeal not allowed by 105 Ohio St.3d 1441, 2005-Ohio-531 (jury instruction of mere presence not appropriate when evidence does not support the same); *State v. McClelland* (Apr. 21, 1999), 9th Dist. No. 18894; *State v. Hill* (Mar. 22, 1995), 7th Dist. No. 90-B-5.

{¶23} Regarding appellant's requested modification of the given jury instruction, we note, as did the trial court, that the parties agreed to the instructions, including the given definition of "cause" that is nearly identical to that found in Ohio Jury Instructions. Specifically, with respect to this issue, the trial court stated:

> I read both motions and did a little research of my own. Here's the issue, is that these jury instructions were submitted well ahead of time. Both sides reviewed the jury instructions. We worked through them, came to an agreement on what they were, and no one objected to the final product. So we used a standard jury instruction that was reviewed by counsel on both sides. It wasn't objected to upon review; and so, in my opinion, the objection was waived, because it wasn't made before the jury went back to deliberate, similar to an argument that the defense counsel made against the prosecution a couple days ago.

(Tr. 716.)

{¶24} Moreover, the Eleventh Appellate District entertained a similar issue in *State v. Head*, 11th Dist. No. 2001-L-228, 2005-Ohio-3407, reversed on other grounds by *In re Ohio Criminal Sentencing Statutes Cases,* 109 Ohio St.3d 313, 2006-Ohio-2109,

where the defendant, charged with complicity, argued that the addition of the words "or failure to act" in the jury instruction defining cause constituted reversible error. The court in *Head* stated:

> Where the jury is given a thorough instruction regarding the underlying offenses as well as the complicity requirements and the cause instruction included "act," the incorporation of "failure to act" when there is no duty to act rises only to harmless error where there is evidence before the jury that the defendant committed an overt act.

Id. at ¶39.

{¶25} Likewise, in *State v. Brown* (1994), 10th Dist. No. 94APA03-298, this court reviewed an appeal of a conviction for involuntary manslaughter based upon the underlying felony of felonious assault. On appeal, the defendant argued the given jury instruction that included "failure to act" language was improper. We stated, "[a]lthough the phrase 'failure to act' was arguably improper and objectionable as a definition of causation in this case, it was superfluous and non-prejudicial. Evidence was presented that defendant threw the fatal punch. The jury, therefore, could easily have concluded that appellant's 'act' [as opposed to any "failure to act"] caused the death." Id.

{¶26} As previously stated, in the case sub judice, it was never argued that appellant was guilty because of a "failure to act," as there was evidence that appellant indeed punched and kicked Antwan moments before his death. In fact, the record is devoid of any evidence that anyone other than appellant inflicted the injuries that ultimately resulted in Antwan's death. The instructions as given contained correct statements of law, and we, as this court did in *Brown*, find that the "failure to act" language is superfluous and non-prejudicial. Id.; *Head*, supra.

{¶27} Appellant suggests that because the jury asked the question, "If we feel there was a dual part in the abuse but only one person is on trial, does that constitute reasonable doubt?" it is clear that the jury did not find Dumas to be credible and that the focus of suspicion had become Dumas rather than appellant. (Tr. 690.) However, as we have stated on numerous occasions, "we will not speculate as to why the jury asked this question for purposes of its deliberations." *State v. Ford*, 10th Dist. No. 07AP-803, 2008-Ohio-4373, ¶64; *State v. Holloman*, 10th Dist. No. 06AP-01, 2007-Ohio-840; *State v. Martin*, 10th Dist. No. 07AP-555, 2007-Ohio-6603.

{¶28} Because we find the trial court did not abuse its discretion in either failing to supplement or failing to modify the given jury instructions, we overrule appellant's first and second assignments of error.

{¶29} Since they are interrelated, appellant's third, fourth, fifth and sixth assignments of error will be addressed together. These assigned errors challenge both the sufficiency and weight of the evidence and contend the trial court erred in denying appellant's motion for acquittal pursuant to Crim.R. 29.

{¶30} " 'Pursuant to Criminal Rule 29(A), a court shall not order an entry of judgment of acquittal if the evidence is such that reasonable minds can reach different conclusions as to whether each material element of a crime has been proved beyond a reasonable doubt.' " *State v. Seiber* (1990), 56 Ohio St.3d 4, 13, quoting *State v. Bridgeman* (1978), 55 Ohio St.2d 261, syllabus. In ruling on a Crim.R. 29 motion, a trial court must construe the evidence in a light most favorable to the state. *State v. Busby* (Sept. 14, 1999), 10th Dist. No. 98AP-1050. The standard of review applied to a denied motion for acquittal, pursuant to Crim.R. 29, is virtually identical to that employed in a

challenge to the sufficiency of the evidence. *State v. Turner,* 10th Dist. No. 04AP-364, 2004-Ohio-6609, ¶8, appeal not allowed (2005), 106 Ohio St.3d 1547, 2005-Ohio-5343, citing *State v. Ready* (2001), 143 Ohio App.3d 748, 759.

{¶31} When reviewing the sufficiency of the evidence, an appellate court must:

> [E]xamine 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.

State v. Jenks (1991), 61 Ohio St.3d 259, paragraph two of the syllabus.

{¶32} This test raises a question of law and does not allow the court to weigh the evidence. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52; *State v. Thomas* (1982), 70 Ohio St.2d 79, 80. Rather, the sufficiency of the evidence test "gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson v. Virginia* (1979), 443 U.S. 307, 319, 99 S.Ct. 2781, 2789. Consequently, when reviewing the sufficiency of the evidence, an appellate court must accept the fact finder's determination with regard to the credibility of the witnesses. *State v. Yarbrough,* 95 Ohio St.3d 227, 2002-Ohio-2126, ¶79; *State v. Worrell,* 10th Dist. No. 04AP-410, 2005-Ohio-1521, ¶41 ("In determining whether a conviction is based on sufficient evidence, we do not assess whether the evidence is to be believed, but, whether, if believed, the evidence against a defendant would support a conviction.").

{¶33} As opposed to the concept of sufficiency of the evidence, "[t]he weight of the evidence concerns the inclination of the greater amount of credible evidence offered

in a trial to support one side of the issue rather than the other." *State v. Brindley,* 10th Dist. No. 01AP-926, 2002-Ohio-2425, ¶16, citation omitted. In order for a court of appeals to reverse the judgment of a trial court on the basis that the verdict is against the manifest weight of the evidence, the appellate court must disagree with the fact finder's resolution of the conflicting testimony. *Thompkins* at 387. The 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 clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction. Id., quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

{¶34} A defendant is not entitled to a reversal on manifest weight grounds merely because inconsistent evidence was presented at trial. *State v. Raver,* 10th Dist. No. 02AP-604, 2003-Ohio-958, ¶21. The determination of weight and credibility of the evidence is for the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230. The rationale is that the trier of fact is in the best position to take into account inconsistencies, along with the witnesses' manner and demeanor and determine whether the witnesses' testimony is credible. *State v. Williams,* 10th Dist. No. 02AP-35, 2002-Ohio-4503, ¶58; *State v. Clarke* (Sept. 25, 2001), 10th Dist. No. 01AP-194. The trier of fact is free to believe or disbelieve all or any of the testimony. *State v. Jackson*, 10th Dist. No. 01AP-973, 2002-Ohio-1257; *State v. Sheppard* (Oct. 12, 2001), 1st Dist. No. C000553. Consequently, although an appellate court must act as a "thirteenth juror" when considering whether the manifest weight of the evidence requires reversal, it must give

great deference to the fact finder's determination of the witnesses' credibility. *State v. Covington,* 10th Dist. No. 02AP-245, 2002-Ohio-7037, ¶22; *State v. Hairston,* 10th Dist. No. 01AP-1393, 2002-Ohio-4491, ¶17.

{¶35} Appellant was charged with felonious assault in violation of R.C. 2903.11(A)(1), which provides that "[n]o person shall knowingly * * * [c]ause serious physical harm to another or another's unborn." According to R.C. 2901.22(B), "[a] person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist." Additionally, a defendant acts knowingly, when, although not intending the result, he or she is nevertheless aware that the result will probably occur. *State v. Edwards* (1992), 83 Ohio App.3d 357, 361. Therefore, felonious assault under R.C. 2903.11(A), combined with the definition of "knowingly" found in R.C. 2901.22(B), does not require that a defendant intend to cause "serious physical harm," but that the defendant acts with an awareness that the conduct probably will cause such harm. *State v. Lee* (Sept. 3, 1998), 10th Dist. No. 97APA12-1629.

{¶36} "Serious physical harm" is defined in R.C. 2901.01(A)(5) as meaning 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.

{¶37} Appellant asserts there is no evidence that he acted "knowingly," nor is there evidence of "serious physical harm." Though appellant asserts Dumas's testimony is "melodramatic" and "defies logic," an appellate court does not weigh credibility when considering an insufficiency of the evidence argument. *State v. Coit*, 10th Dist. No. 02AP-475, 2002-Ohio-7356, citing *Ruta v. Breckenridge-Remy Co.* (1982), 69 Ohio St.2d 66, 68-69. Rather, the test is whether the evidence, viewed in a light most favorable to the prosecution, if believed, would convince the average mind of a defendant's guilt beyond a reasonable doubt.

{¶38} Moreover, when a victim's injuries are serious enough to cause her to seek medical treatment, the jury may infer that the victim suffered serious physical injury. *State v. McCoy* (Sept. 7, 2000), 10th Dist. No. 99AP-1048, citing *State v. Winston* (1991), 71 Ohio App.3d 154; see also *State v. Sandridge,* 8th Dist. No. 87321, 2006-Ohio-5243; *State v. Witt*, 6th Dist. No. WM-04-007, 2005-Ohio-1379; *State v. Barnd* (1993), 85 Ohio App.3d 254. Moreover, "[u]nder certain circumstances, [even] a bruise can constitute serious physical harm[.]" *State v. Jarrell,* 4th Dist. No. 08CA3250, 2009-Ohio-3753, ¶14, citing *Worrell* at ¶47-51 (reversed on other grounds by *In re Ohio Criminal Sentencing Statutes Cases*, supra). See also *State v. Krull,* 154 Ohio App.3d 219, 2003-Ohio-4611,

¶23; *State v. Burdine-Justice* (1998), 125 Ohio App.3d 707, 715; *State v. Barbee,* 8th Dist. No. 82868, 2004-Ohio-3126, ¶60.

{¶39} Here, the evidence established that Antwan had recent bruising to his forehead and chest. According to the testimony, the bruising pattern on Antwan's chest suggested multiple blows, and the lung contusions suggested the blows were inflicted with force. Dumas's testimony established that it was appellant who inflicted these injuries on Antwan by punching Antwan several times in the chest. Thus, the evidence presented in the record before us when viewed in a light most favorable to the prosecution, as is required, could convince the average mind of appellant's guilt of felonious assault beyond a reasonable doubt.

{¶40} Appellant also contends there is insufficient evidence to support his conviction for child endangering in violation of R.C. 2919.22, which provides, in pertinent part, that "[n]o person shall do any of the following to a child under eighteen years of age * * *: [a]buse the child." R.C. 2919.22(B)(1). "If the violation is a violation of (B)(1) of this section and results in serious physical harm to the child involved," the offense is a felony of the second degree. R.C. 2919.22(E)(2)(d). Recklessness is the required mens rea under R.C. 2919.22(A). *State v. Carse*, 10th Dist. No. 09AP-932, 2010-Ohio-4513, ¶39, citing *State v. Dunn*, 4th Dist. No. 06CA6, 2006-Ohio-6550, ¶19, citing *State v. McGee* (1997), 79 Ohio St.3d 193, 195; *State v. Adams* (1980), 62 Ohio St.2d 151, 153; *State v. O'Brien* (1987), 30 Ohio St.3d 122, 124. A person acts recklessly when, "with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature." R.C. 2901.22(C). A person acts recklessly "with respect to circumstances when, with heedless indifference to

the consequences, he perversely disregards a known risk that such circumstances are likely to exist." Id.

{¶41} When recklessness is an element of an offense, knowledge or purpose is also sufficient culpability to establish this element. R.C. 2901.22(E); *State v. Villa-Garcia*, 10th Dist. No. 03AP-384, 2004-Ohio-1409, ¶28. Therefore, the finding that there was sufficient evidence for a reasonable jury to conclude that appellant acted knowingly is also sufficient for a jury to determine that appellant acted recklessly to support his convictions for child endangering. Id., see also *State v. Henry*, 10th Dist. No. 04AP-1061, 2005-Ohio-3931, ¶43. Accordingly, we find the record contains sufficient evidence to support appellant's conviction for child endangering.

{¶42} Similarly, we cannot find that appellant's convictions are against the manifest weight of the evidence. Appellant's manifest weight argument attacks Dumas's credibility and points to inconsistencies within her own testimony as well as inconsistencies between her testimony and that of other witnesses. A conviction, however, is " 'not against the manifest weight of the evidence simply because the jury believed the prosecution testimony.' " *State v. Moore*, 2d Dist. No. 20005, 2004-Ohio-3398, quoting *State v. Gilliam* (Aug. 12, 1998), 9th Dist. No. 97CA006757. The jury was aware that Dumas did not immediately implicate appellant, as she admitted in her testimony that she lied to detectives on several occasions. The weight to be given to the evidence and the credibility of the witnesses are issues primarily for the trier of fact. *DeHass*, supra. Further, the jury is free to believe *all*, or *any* of the testimony. *Jackson*, supra. Thus, the fact that the jury may or may not have found all of a particular witness's testimony to be credible is not a basis for reversal on manifest weight grounds. After

carefully reviewing the trial court's record in its entirety, we conclude that the trier of fact did not lose its way in resolving credibility determinations, nor did the convictions create a manifest miscarriage of justice. The trier of fact was in the best position to determine the credibility of the testimony presented, and we decline to substitute our judgment for that of the trier of fact. Consequently, we cannot say that appellant's convictions are against the manifest weight of the evidence.

{¶43} Finding that appellant's convictions are not only supported by sufficient evidence but also are not against the manifest weight of the evidence, we overrule appellant's third, fourth, fifth and sixth assignments of error.

{¶44} In his seventh assignment of error, appellant contends the trial court erred in imposing consecutive sentences without making findings in accordance with R.C. 2929.14(E)(4). In *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, the Supreme Court of Ohio declared that R.C. 2929.14(E)(4), which directed trial courts to make specified findings of fact before imposing consecutive sentences, was unconstitutional based on the United States Supreme Court's decision in *Blakely v. Washington* (2004), 542 U.S. 296, 124 S.Ct. 2531. Therefore, in *Foster*, the Supreme Court of Ohio severed R.C. 2929.14(E), resulting in the ability of trial courts to impose consecutive sentences without making any findings of fact. *State v. Houston*, 10th Dist. No. 06AP-662, 2007-Ohio-423.

{¶45} On appeal, appellant argues the United States Supreme Court's recent decision in *Oregon v. Ice* (2009), ___U.S.___,129 S.Ct. 711, effectively overruled *Foster*, resulting in a resurrection of R.C. 2929.14(E). As recently stated by this court in *State v. Nuh*, 10th Dist. No. 10AP-31, 2010-Ohio-4740, "[t]his court, acknowledging *Ice*, concluded that because the 'Supreme Court of Ohio has not reconsidered *Foster* * * * the

case remains binding on this court.' " Id. at ¶11, quoting *State v. Franklin*, 182 Ohio App.3d 410, 2009-Ohio-2664, ¶18. "Indeed, this court has recognized on several occasions that we are bound to follow *Foster* until the Supreme Court of Ohio directs otherwise." Id., citing *State v. Mickens*, 10th Dist. No. 08AP-743, 2009-Ohio-2554, ¶33; *State v. Russell*, 10th Dist. No. 09AP-428, 2009-Ohio-6420, ¶16; *State v. Crosky*, 10th Dist. No. 09AP-57, 2009-Ohio-4216, ¶8; *State v. Potter*, 10th Dist. No. 09AP-580, 2010-Ohio-372, ¶8. Accordingly, we find appellant's arguments unpersuasive, and overrule his seventh assignment of error.

{¶46} In his final assignment of error, appellant contends the felonious assault and child endangering counts are allied offenses of similar import and should have been merged for purposes of sentencing. We disagree. R.C. 2941.25(A) provides:

> 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.

{¶47} Whether two offenses will merge under R.C. 2941.25 requires a two-step analysis. The first step determines whether the two offenses charged are allied offenses of similar import. If the two offenses are allied offenses, the second step determines whether the offenses were committed separately or with a separate animus. If the allied offenses were committed separately or with a separate animus, the court may sentence the defendant on both offenses. *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, ¶14; *State v. Rance*, 85 Ohio St.3d 632, 1999-Ohio-291. In determining whether crimes are allied offenses of similar import, the Supreme Court of Ohio explained that under R.C. 2941.25(A), "courts should assess, by aligning the elements of each crime in the abstract,

whether the statutory elements of the crimes 'correspond to such a degree that the commission of one crime will result in the commission of the other.' " *Rance* at 638, quoting *State v. Jones* (1997), 78 Ohio St.3d 12, 14. The court explained that if the elements do correspond, the defendant may not be convicted of both "unless the court finds that the defendant committed the crimes separately or with separate animus." Id. at 638-39; R.C. 2941.25(B).

{¶48} As we stated in *Villa-Garcia*, supra, appeal denied by 103 Ohio St.3d 1406, 2004-Ohio-3980, "[f]elonious assault and child endangering as proscribed under R.C. 2919.22(A) are not allied offenses of similar import." Id. at ¶41. Specifically, we stated:

> Although the two offenses both have causation and the resultant serious physical harm in common, a conviction of felonious assault requires proof that appellant acted knowingly while the child-endangering conviction only requires proof that appellant acted recklessly. Although proof of knowledge may suffice to prove recklessness, proof of recklessness is not sufficient to prove knowledge. 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. Accordingly, because the statutory elements of the crimes do not correspond to such a degree that the commission of one crime will result in the commission of the other, the offenses are not allied offenses of similar import.

Id. at ¶41 (internal citations omitted).

{¶49} Pursuant to this court's holding in *Villa-Garcia* that felonious assault and child endangering are not allied offenses, we overrule appellant's eighth assignment of error.

{¶50} For the foregoing reasons, appellant's eight assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is hereby affirmed.

Judgment affirmed.

BRYANT and BROWN, JJ., concur.

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