[Cite as *State v. Carse*, 2010-Ohio-4513.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
		No. 09AP-932
v.	:	(C.P.C. No. 08CR-5620)
Joshua R. Carse,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on September 23, 2010

Ron O'Brien, Prosecuting Attorney, and *Steven L. Taylor,* for appellee.

Keith O'Korn, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

BRYANT, J.

{¶1} Defendant-appellant, Joshua R. Carse, appeals from a judgment of the Franklin County Court of Common Pleas finding him guilty, pursuant to jury verdict, of three counts of endangering children in violation of R.C. 2919.22. Because (1) defendant cannot demonstrate plain error from any alleged defect in his indictment; (2) the trial court did not err in admitting defendant's statement to police; (3) the trial court did not err in admitting defendant's statements to police after listening to a recording of a voicemail

message; (4) the sufficiency and manifest weight of the evidence support defendant's convictions; (5) the trial court's failure to merge defendant's convictions for sentencing did not violate double jeopardy or equal protection principles; (6) defendant's sentence is not contrary to law; (7) the trial court did not err in imposing consecutive sentences; (8) defendant's cumulative sentence does not amount to cruel and unusual punishment; and (9) defendant did not receive ineffective assistance of counsel, we affirm.

I. Facts and Procedural History

{¶2} On August 1, 2008, the Franklin County Grand Jury issued an indictment against defendant, charging defendant with three counts of felonious assault in violation of R.C. 2903.11, felonies of the second degree, three counts of endangering children in violation of R.C. 2919.22, felonies of the second degree, and one count of endangering children in violation of R.C. 2919.22, a felony of the third degree. The charges stemmed from injuries defendant's infant daughter, identified as KC, sustained between June 16 and July 10, 2008.

{¶3} Prior to trial, defendant filed a motion to suppress any statements defendant made during his interview with police. Defendant eventually withdrew his motion to suppress during a pretrial hearing. (Tr. 22.) Instead, defendant moved to redact portions of the interview tape, and the trial court granted his request.

{¶4} At trial commencing August 24, 2009, the state offered testimony from Dr. Jeremy Larson, the attending physician in pediatric emergency medicine at Nationwide Children's Hospital ("Children's"). Dr. Larson testified that on July 11, 2008 he rendered medical care to KC in the emergency room at Children's after KC's maternal grandmother brought her to the emergency room. At the time of the hospital visit, KC, born May 1,

2008, was just over two months old. When KC presented, she was irritable and cried with any movement, and her agitation increased with palpation or movement of any part of her body. (Tr. 74.) Dr. Larson's examination revealed bruises on KC's back and a scar on her chest.

{¶5} Dr. Larson ordered a series of x-rays. Some of the x-rays indicated several rib fractures on both sides of KC's chest, some reflecting more than one fracture per rib. The fractures were "subacute," meaning they were somewhere between seven and 14 days old and had started to heal. (Tr. 78.) Other x-rays revealed fractures in both of KC's femurs near the hip joint, a "corner fracture" in the femur near the knee of one leg, and a "corner fracture" of the fibula below the knee of the other leg. (Tr. 78-79.) Another x-ray showed a lesion of calcification in the soft tissue of KC's neck. Based on the findings, Dr. Larson ordered KC be admitted to the hospital where the trauma team placed both of her legs in traction to immobilize the fractures for healing and had KC wear a neck collar due to the possibility of neck injury.

{¶6} Dr. Frederick Long, a pediatric radiologist at Children's who participated in KC's treatment, testified he reviewed the initial skeletal survey of KC's body done through x-ray, which he later supplemented with CT scans of the head, abdomen, and pelvis, since a skeletal survey is the standard of care in cases of "suspected abuse." (Tr. 132.) Based on his review of these medical tests, Dr. Long testified KC had multiple rib fractures between seven and 14 days old, as well as fractures, known as "femoral neck" fractures, on both femurs near the hip joints. (Tr. 142, 144.) The femoral neck fractures were displaced and showed no signs of healing, indicating they were less than one week old. (Tr. 146.) Dr. Long also identified a fibula fracture and a corner fracture in the left

femur, usually a result of twisting injuries, and he pointed out the CT scan of the neck indicated a possible "fracture of the vertebral body." (Tr. 151, 158.) Dr. Long noted the sheer number of fractures in KC's body is "characteristic of abuse." (Tr. 148.)

{¶7} Dr. Philip Scribano, medical director of the Center for Child and Family Advocacy at Children's and board-certified in pediatric emergency medicine and in child abuse pediatrics, concluded KC had "a fracture of her spine, the fifth vertebra, or C-5" that was compressed, a status consistent with "severe whiplash phenomenon." (Tr. 238, 248.) He estimated the neck injury was between two and three weeks old. (Tr. 247.) In examining KC's ribs, Dr. Scribano determined her rib fractures were between 10 and 14 days old, and he noted these types of fractures are caused by "an excess of squeezing of the chest wall." (Tr. 274-75.)

{¶8} As to the femur fractures in both of KC's legs near the hip joint, Dr. Scribano testified "high energy force directed at the most resistant part of the femur bone" is needed to cause those fractures. (Tr. 275.) He explained that, for such a young child, "there's really no other explanation" for the cause of fractures in that area than they were "inflicted with a severe movement." (Tr. 276.) Dr. Scribano testified the femur fractures occurred when someone grabbed KC's legs, "creating a force and fulcrum mechanism, [with] that fulcrum see-saw * * * in that part of the femur bone causing a snap." (Tr. 277.) He noted no appropriate care-giving activity could cause that type of injury. Rather, he attributed the fibula fracture to "violent, significant forces," as KC had no history of a preexisting condition or some sort of car accident that could alternatively explain her injuries. (Tr. 278.) Based on all her injuries, Dr. Scribano diagnosed KC as having suffered "physical abuse" during "multiple episodes." (Tr. 280.)

{¶9} Detective Russell Weiner, a detective with the domestic violence department of the Columbus Division of Police, reported to Children's when KC was admitted to the hospital; he there spoke to both defendant and Marlo Trembley, KC's mother. Defendant told Detective Weiner he did not take KC to the hospital or to the doctor even though she was fussy because he "wrote it off as colicky." (Tr. 333.) He explained that when he was feeding KC, she was fine, but "when he would go to burp it, that it would cry as if it was dying." (Tr. 334.)

{¶10} Defendant also informed Detective Weiner he was the primary caregiver and was with KC between 20 and 22 hours, as Trembley "hardly did anything with the child." (Tr. 334.) Defendant indicated he never saw Trembley do anything inappropriate to KC. Defendant explained an incident to Detective Weiner that "may have the appearance of choking" KC, referring to the time he caught her by her neck and squeezed her with his knees, an incident he later also admitted to Detective Trent Taylor. (Tr. 339.) According to Detective Weiner, someone, but not defendant, took KC to St. Ann's Hospital nine days before the maternal grandmother brought her to Children's, but KC was released without a diagnosis of injury.

{¶11} Detective Taylor, a detective with the Columbus Division of Police, Special Victim's Bureau, was the lead detective assigned to KC's case. On July 24, 2008, Detective Trent interviewed defendant following defendant's arrest for the assault of his daughter. Defendant told Detective Trent he was not employed but was the primary caregiver for KC. During the interview, defendant "advised [Detective Trent] that he had caused [KC's] injuries." (Tr. 297.) Specifically, defendant "admitted to forcing her head back causing injury to her neck[.] * * * [H]e was feeding his daughter and had her on his

knee," but when defendant believed KC was going to fall, "he caught her around the neck" and "clenched her with his knee so that she wouldn't hit the floor." (Tr. 297-98.) In a separate incident, defendant "admitted to throwing her on to a table." (Tr. 298.) Defendant indicated he was frustrated with Trembley around the time KC suffered the injuries.

{¶12} Detective Trent recorded his interview with defendant, and the state played a redacted version of the videotape for the jury. In the interview defendant first denied hurting his daughter, but he then stated, "I'm so ashamed" and "I wanted to be better, but I didn't have no help." (DVD 9:13.) Defendant further stated, "[M]aybe I grabbed her too hard in changing her diaper." (DVD 9:16.) After Detective Trent told defendant Trembley did not cause KC's injuries, defendant replied, "[I]f she didn't, then I had to." (DVD 9:22.) Defendant then stated, "I'm sorry that I caused these injuries." (DVD 9:31.)

{¶13} Defendant called no witnesses at trial. In instructing the jury on the various charges, the trial court separated the counts in the indictment into distinct occasions of injury. Count one charging felonious assault and count two alleging endangering children together referred to KC's neck and rib injuries. Count three asserting felonious assault and count four alleging endangering children together referred to the right fibula fracture. Count five charging felonious assault and count six asserting endangering children together referred to the right and left femur fractures. Count seven alleging endangering children referred to defendant's duty of care owed to KC as her parent.

{¶14} Following deliberations, the jury returned guilty verdicts as to counts two, six, and seven. At a sentencing hearing held September 3, 2009, the trial court sentenced defendant to the maximum of eight years in prison for counts two and six alleging second-degree felony child endangering, as well as the maximum of five years in prison for count

seven charging defendant with the third-degree felony child endangering. After stating it had considered the purposes and principles of sentencing, the trial court ordered the sentences to be served consecutively to each other, resulting in an aggregate prison term of 21 years.

II. Assignments of Error:

{¶15} Defendant appeals, assigning the following errors:

> ASSIGNMENT OF ERROR #1
>
> APPELLANT'S INDICTMENT WAS DEFECTIVE UNDER ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION, AND HIS CONVICTION OF SECOND-DEGREE CHILD ENDANGERMENT IN COUNT SIX SHOULD BE CONVERTED TO A FIRST-DEGREE MISDEMEANOR
>
> ASSIGNMENT OF ERROR #2
>
> THE TRIAL COURT ERRED IN NOT SUPPRESSING THE APPELLANT'S INVOLUNTARY STATEMENT TO THE POLICE IN VIOLATION OF APPELLANT'S RIGHTS UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION, AND ARTICLE I, SECTIONS 10 AND 16 OF THE OHIO CONSTITUTION
>
> ASSIGNMENT OF ERROR #3
>
> THE TRIAL COURT ERRED IN ALLOWING ANY OF APPELLANT'S REACTION OR COMMENTS RELATING TO AN INADMISSIBLE AND UNAUTHENTICATED VOICEMAIL MESSAGE THAT WAS PLAYED DURING HIS INTERVIEW IN VIOLATION OF THE OHIO RULES OF EVIDENCE
>
> ASSIGNMENT OF ERROR #4
>
> APPELLANT'S CONVICTIONS WERE NOT SUPPORTED BY THE SUFFICIENCY OF THE EVIDENCE IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE 14TH AMENDMENT TO THE U.S. CONSTITUTION AND ARTICLE I, SECTIONS 1 & 16 OF THE OHIO CONSTITUTION AND

THE CONVICTIONS WERE ALSO AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE

ASSIGNMENT OF ERROR #5

THE COURT ERRED BY PERMITTING THE CONVICTION AND SENTENCING THE APPELLANT FOR THIRD-DEGREE FELONY CHILD ENDANGERING GIVEN HIS CONVICTIONS ON TWO COUNTS OF SECOND-DEGREE FELONY CHILD ENDANGERING IN VIOLATION OF THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT AND THE EQUAL PROTECTION CLAUSE OF THE 14TH AMENDMENT OF THE U.S. CONSTITUTION AND ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION AND OHIO'S MULTIPLE-COUNT STATUTE

ASSIGNMENT OF ERROR #6

THE SENTENCE WAS CONTRARY TO LAW

ASSIGNMENT OF ERROR #7

IN CONTRAVENTION OF RECENT U.S. SUPREME COURT PRECEDENT, *OREGON V. ICE*, AND THE RE-ENACTED SENTENCING CODE, THE TRIAL COURT ERRED BY IMPOSING CONSECUTIVE SENTENCES WITHOUT MAKING THE REQUIRED STATUTORY FINDINGS PURSUANT TO R.C. §§ 2929.14(E)(4), 2929.41(A)

ASSIGNMENT OF ERROR #8

THE SENTENCE WAS AN ABUSE OF DISCRETION AND VIOLATED THE APPELLANT'S RIGHT AGAINST CRUEL AND UNUSUAL PUNISHMENT AS GUARANTEED BY THE EIGHTH AND 14TH AMENDMENT TO THE U.S. CONSTITUTION AND ARTICLE I, SECTION 9 OF THE OHIO CONSTITUTION

ASSIGNMENT OF ERROR #9

TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE 6TH AMENDMENT TO THE U.S. CONSTITUTION AND ARTICLE I, SECTIONS 10 & 16 OF THE OHIO CONSTITUTION

III. First Assignment of Error – Defective Indictment

{¶16} In his first assignment of error, defendant asserts count six of his indictment was defective in failing to allege a necessary element.

{¶17} Contrary to Crim.R. 12(C)(2), defendant did not object in the trial court to any deficiency in the indictment. See Crim.R. 12(C)(2) (requiring a defendant to object to any alleged problem with the indictment at the trial court level). The " 'failure to timely object to the allegedly defective indictment constitutes a waiver of the issues involved.' " *State v. Schneider*, 9th Dist. No. 06CA0072-M, 2007-Ohio-2553, ¶20, quoting *State v. Biros* (1997), 78 Ohio St.3d 426, 436; *State v. Brady*, 8th Dist. No. 87854, 2007-Ohio-1453, ¶139. Defendant's failure to object to the indictment in the trial court thus waives all but plain error. *State v. Crosky*, 10th Dist. No. 06AP-655, 2008-Ohio-145, ¶87, citing *State v. Carnes*, 12th Dist. No. CA2005-01-001, 2006-Ohio-2134, ¶11. See also *State v. Horner,* ___ Ohio St.3d ___, 2010-Ohio-3830, paragraph three of the syllabus (stating that "[b]y failing to timely object to a defect in an indictment, a defendant waives all but plain error on appeal"). For a defect at trial to rise to the level of plain error, it clearly must have affected the outcome of the case. *State v. Long* (1978), 53 Ohio St.2d 91, paragraph two of the syllabus (stating that an error is plain when it is such that "but for the error, the outcome of the trial clearly would have been otherwise").

{¶18} "An indictment is sufficient if it (1) contains the elements of the charged offense; (2) gives the defendant adequate notice of the charges; and, (3) protects the defendant against double jeopardy." *Crosky* at ¶89, citing *Valentine v. Konteh* (C.A.6, 2005), 395 F.3d 626, 631, citing *Russell v. United States* (1962), 369 U.S. 749, 82 S.Ct.

1038. Pursuant to R.C. 2919.22(E)(2)(d), a felony of the second degree is committed if any person abuses a child under 18 years of age when that abuse "results in serious physical harm to the child involved." Count six of defendant's indictment states, in pertinent part, "[defendant] * * * in violation of section 2919.22 of the Ohio Revised Code, did recklessly abuse [KC], the said [KC] being a child under eighteen (18) years of age, to wit: eight to ten (8-10) weeks of age." (Indictment, 3.) Defendant argues that because count six of the indictment omitted the element of serious physical harm, his conviction on that count at most should have been a first-degree misdemeanor. See R.C. 2919.22(E)(2)(a).

{¶19} Although count six of defendant's indictment omitted the serious physical harm element, defendant is unable to demonstrate plain error. Defendant does not contend he received inadequate notice of the nature of the offense or that his counsel was unable to prepare a defense on his behalf. See *State v. Bell*, 2d Dist. No. 22448, 2009-Ohio-4783, ¶19 (finding no plain error where defendant did not allege inadequate notice of the offense charged). Nor does defendant allege comparable additional defects in other parts of the proceedings that would have misled the jury concerning the charges at issue, especially since the trial court "clearly instructed the jury regarding the elements of the offense" for which defendant was convicted, "and there is no showing that the jury did not understand its charge." Id.

{¶20} Because defendant is unable to demonstrate plain error resulting from any alleged defect in his indictment, we overrule defendant's first assignment of error.

IV. Second Assignment of Error – Suppression of Defendant's Statement to Police

{¶21} Defendant's second assignment of error asserts the trial court erred in admitting defendant's statement to the police because it was involuntary.

{¶22} Although defendant initially filed a motion to suppress his statements to police, defense counsel orally withdrew his motion prior to trial. (Tr. 22.) Defendant thus forfeited all but plain error with regard to the admissibility of his statements to police. See *State v. Douglas*, 10th Dist. No. 09AP-111, 2009-Ohio-6659, ¶24, citing *State v. Campbell*, 69 Ohio St.3d 38, 44, 1994-Ohio-492; Crim.R. 52(B).

{¶23} Using an involuntary statement against a defendant in a criminal trial is a denial of due process of law. *Mincey v. Arizona* (1978), 437 U.S. 385, 398, 98 S.Ct. 2408. "The voluntariness of a defendant's statement is determined from the totality of the circumstances." *Douglas* at ¶26, citing *State v. Frazier*, 115 Ohio St.3d 139, 2007-Ohio-5048, ¶112. "A defendant's confession is involuntary if it is the product of coercive police activity that overcomes the defendant's will and critically impairs his capacity for self-determination." Id., citing *State v. Copley*, 10th Dist. No. 04AP-1128, 2006-Ohio-2737, ¶30. In determining whether a pretrial statement is involuntary, a court " 'should consider * * * the age, mentality, and prior criminal experience of the accused; the length, intensity, and frequency of interrogation; the existence of physical deprivation or mistreatment; and the existence of threat or inducement.' " *Frazier* at ¶112, quoting *State v. Mason* (1998), 82 Ohio St.3d 144, 154, quoting *State v. Edwards* (1976), 49 Ohio St.2d 31, paragraph two of the syllabus.

{¶24} Defendant argues his statements in the recorded interview with Detective Taylor were involuntary because Detective Taylor "engaged in trickery" when he not only

represented to defendant that Trembley performed favorably on a polygraph test, but he misrepresented the evidence police had already gathered and implied police would help defendant if he confessed. (Defendant's brief, 11.) Defendant further contends Detective Taylor's use of profanity and vulgar language throughout the interview resulted in a coercive police interview.

{¶25} Detective Trent's misrepresenting the evidence police obtained and suggesting Trembley passed a polygraph test does not render defendant's statement involuntary. "A defendant's will is not overborne simply because he is led to believe that the government's knowledge of his guilt is greater than it actually is." *Douglas* at ¶27, citing *State v. Bays*, 87 Ohio St.3d 15, 23, 1999-Ohio-216. Likewise, "[a]ssurances that a defendant's cooperation will be considered or that a confession will be helpful do not invalidate a confession." Id. at ¶28, citing *Copley* at ¶32. Finally, defendant does not explain how Detective Taylor's occasional use of profane language amounted to threatening or coercive behavior; nor does he provide any authority to suggest such language renders a defendant's statements involuntary.

{¶26} Accordingly, defendant's statement to Detective Taylor was voluntary, and the trial court did not commit any error, much less plain error, in allowing the statement. Defendant's second assignment of error is overruled.

V. Third Assignment of Error – Defendant's Reaction to Voicemail Message

{¶27} In his third assignment of error, defendant asserts the trial court erred in admitting defendant's statements made during his police interview after police played a voicemail message for defendant.

{¶28} The admission or exclusion of evidence lies in the trial court's sound discretion. *State v. Hand*, 107 Ohio St.3d 378, 2006-Ohio-18, ¶92, citing *State v. Sage* (1987), 31 Ohio St.3d 173, paragraph two of the syllabus. The judgment of the trial court will not be reversed on appeal absent an abuse of discretion. *State v. Scott* (June 24, 1997), 10th Dist. No. 96APA04-492, citing *State v. Hymore* (1967), 9 Ohio St.2d 122, 128. *State v. Holloway*, 10th Dist. No. 02AP-984, 2003-Ohio-3298, ¶14, citing *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217 (concluding an abuse of discretion means the trial court's decision was unreasonable, arbitrary, or unconscionable).

{¶29} Defendant did not object to the prosecution's playing the portion of the police interview that included defendant's statement following the voicemail message. Rather, defendant objected to the admission of the voicemail message, and the trial court sustained that objection. Because defendant did not object in the trial court on the basis he raises on appeal, he waived all but plain error. See *Douglas* at ¶24; *State v. Pilgrim*, 10th Dist. No. 08AP-993, 2009-Ohio-5357, ¶19.

{¶30} Defendant contends the trial court erred in allowing into evidence the statements he made during the police interview immediately after the detective played an unauthenticated voicemail message. Because Evid.R. 901 requires authentication or identification prior to admissibility, defendant argues the trial court erred in allowing his statements following the inadmissible voicemail message. Defendant further argues the trial court, in allowing the statements, violated Evid.R. 403(A) because the danger of unfair prejudice, confusing the issues, or misleading the jury substantially outweighed the probative value of defendant's statements.

{¶31} Initially, defendant's authentication argument is not well taken. Although authentication or identification is a prerequisite to admitting evidence, the trial court did not admit the voicemail message. Detective Taylor authenticated the portions of the police interview the trial court actually admitted, including defendant's statement after hearing the voicemail message. That defendant's statements followed a piece of evidence the trial court determined to be inadmissible does not render defendant's later, properly authenticated statements inadmissible as well. See, e.g., *Columbus v. Bickis*, 10th Dist. No. 09AP-898, 2010-Ohio-3208, ¶16 (finding a police officer's observations during a field sobriety test are "admissible as lay evidence of intoxication even if the final results of the field sobriety tests are inadmissible at trial due to a lack of substantial compliance with accepted testing standards").

{¶32} Defendant's Evid.R. 403(A) argument similarly is unpersuasive. For a trial court to exclude evidence under Evid.R. 403(A), "the probative value must be minimal and the prejudice great." *State v. Morales* (1987), 32 Ohio St.3d 252, 257. Although the unadmitted voicemail message played during the police interview was largely unintelligible, defendant's statements following the message were clear and not misleading. Indeed, when defendant stated he was sorry, Detective Taylor specifically asked defendant for what he was sorry. Defendant replied, "I'm sorry that I caused these injuries." (DVD 9:31.) The probative value of defendant's statement is very high, and defendant does not suggest how defendant's comments confused or misled the jury.

{¶33} Finally, Detective Taylor during the interview played the voicemail message, which lasted less than one minute, at the 9:05 timestamp on the videodisk; defendant made his statement apologizing for causing KC's injuries at the 9:31 timestamp. Thus,

even defendant's argument that the jury might take his statements out of context without knowing what was said on the voicemail is unpersuasive in view of the amount of time that elapsed between the voicemail message and defendant's statement.

{¶34} Because defendant is unable to demonstrate plain error from the trial court's admitting defendant's statement, we overrule defendant's third assignment of error.

VI. Fourth Assignment of Error – Sufficiency and Manifest Weight of the Evidence

{¶35} In his fourth assignment of error, defendant asserts neither sufficient evidence nor the manifest weight of the evidence supports his convictions.

A. Sufficiency of the Evidence

{¶36} Whether the evidence is legally sufficient to sustain a verdict is a question of law. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386. Sufficiency is a test of adequacy. Id. We construe the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found the essential elements of the offense proven beyond a reasonable doubt. *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus; *State v. Conley* (Dec. 16, 1993), 10th Dist. No. 93AP-387.

{¶37} The jury found defendant guilty of two counts of second-degree felony child endangering under R.C. 2919.22, which provides "[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).

{¶38} The jury also found defendant guilty of one count of third-degree felony child endangering under R.C. 2919.22(A), which provides "[n]o 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 * * * shall create a substantial risk to the health or safety of the child, by violating a duty of care, protection, or support." R.C. 2919.22(A). "If the violation is a violation of division (A) of this section and results in serious physical harm to the child involved," the offense is a felony of the third degree. R.C. 2919.22(E)(2)(c).

{¶39} Because R.C. 2919.22 specifies no mental state, recklessness is the required mens rea under R.C. 2919.22(A) and (B). *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; R.C. 2901.21(B) (stating that when the section of a statute "neither specifies culpability nor plainly indicates a purpose to impose strict liability, recklessness is sufficient culpability to commit the offense"). 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.

{¶40} Thus, for the two second-degree felony counts under R.C. 2919.22(B)(1), the state had the burden to prove beyond a reasonable doubt "(1) that the child is under eighteen years of age * * *, (2) an affirmative act of abuse, * * * (3) which act was

reckless," and (4) the act resulted in serious physical harm to the child. *Newburgh Hts. v. Cole*, 166 Ohio App.3d 826, 2006-Ohio-2463, ¶8, quoting *State v. Burdine-Justice* (1998), 125 Ohio App.3d 707, 713, quoting *State v. Bogan* (June 14, 1990), 2d Dist. No. 11920 (internal quotation marks omitted); see also R.C. 2901.01(A)(5)(c) and (e) (defining "serious physical harm" to be "[a]ny physical harm * * * that involves some temporary, substantial incapacity" as well as "[a]ny 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"). Defendant argues the state presented insufficient evidence to find he abused KC because "the nature, manner and measure of actions [defendant] admitted to in his interview" with police do not constitute abuse. (Defendant's brief, 14.) Defendant does not dispute that KC's broken neck, broken ribs, and broken femurs constitute serious physical harm; instead, defendant argues the state did not present sufficient evidence to prove defendant caused the injuries. Defendant's argument is unpersuasive.

{¶41} Initially, defendant admitted to being with KC between 20 and 22 hours per day, admitted he may have been rougher than he intended, admitted he may have "grabbed her too hard in changing her diaper," and apologized for causing KC's injuries during his police interview. (DVD 9:16, 9:31.) Dr. Scribano testified regarding the various acts of abuse that could have caused KC's injuries. Although defendant did not specifically admit to conduct responsible for each of KC's fractures, a rational trier of fact reasonably could have concluded from the evidence presented that defendant perpetrated affirmative acts of abuse causing KC's broken neck, ribs, and femurs. See *State v. Gravely*, 10th Dist. No. 09AP-440, 2010-Ohio-3379, ¶43, quoting *Jackson v. Virginia* (1979), 443 U.S. 307, 319, 99 S.Ct. 2781 (stating that on a sufficiency of the

evidence review, the appellate court must "draw reasonable inferences from basic facts to ultimate facts").

{¶42} For the third-degree felony count under R.C. 2919.22(A), the state had the burden to prove beyond a reasonable doubt that (1) defendant was the parent of a child under 18 years of age, (2) defendant violated a duty toward that child, (3) defendant created a substantial risk to the health or safety of the child, (4) defendant acted with recklessness, and (5) the foregoing resulted in serious physical harm to the child. See *State v. Fretas*, 10th Dist. No. 07AP-1046, 2008-Ohio-4686, ¶12, citing *State v. Allen* (2000), 140 Ohio App.3d 322, 323, citing *State v. Caton* (2000), 137 Ohio App.3d 742.

{¶43} Here, defendant argues that even if he violated a duty of care to KC by failing to seek medical care, the state did not present sufficient evidence establishing that the failure to take KC to the hospital resulted in additional serious physical harm. In instructing the jury, the trial court, without objection from defendant, explained two possible findings that would support the third-degree felony child endangering charge: "(a) failing to obtain proper medical attention for [KC], and/or (b) causing serious physical harm to [KC]." (Tr. 438.) The verdict form did not require the jury to specify which, or both, of the two findings supported its verdict. As noted, the state presented sufficient evidence that defendant caused serious physical harm to KC through various affirmative acts of abuse. In addition, however, the state presented evidence that some of KC's injuries existed for some days before she was taken to the hospital for treatment, causing her to "cry as if" she were "dying." (Tr. 334.) See R.C. 2901.01(A)(5)(e). Because defendant did not take KC for medical care, KC suffered longer the pain of her injuries without alleviating care than had defendant not neglected a parental duty of care.

{¶44} Accordingly, sufficient evidence supports defendant's convictions for two counts of second-degree felony child endangering and one count of third-degree felony child endangering.

B. Manifest Weight of the Evidence

{¶45} When presented with a manifest weight argument, we engage in a limited weighing of the evidence to determine whether sufficient competent, credible evidence supports the jury's verdict to permit reasonable minds to find guilt beyond a reasonable doubt. *Conley*, supra; *Thompkins* at 387 (noting that "[w]hen a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a 'thirteenth juror' and disagrees with the facfinder's resolution of the conflicting testimony"). Determinations of credibility and weight of the testimony remain within the province of the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. The jury thus may take note of the inconsistencies and resolve them accordingly, "believ[ing] all, part or none of a witness's testimony." *State v. Raver*, 10th Dist. No. 02AP-604, 2003-Ohio-958, ¶21, citing *State v. Antill* (1964), 176 Ohio St. 61, 67.

{¶46} Defendant contends the jury "lost its way" because the conduct defendant admitted to in the police interview could not have caused KC's various injuries. Furthermore, defendant argues other people had access to KC who could have caused her injuries. Defendant in essence argues credibility, suggesting the jury lost its way in not believing defendant when he denied causing KC's injuries.

{¶47} Although defendant did not admit to specific, affirmative acts of abuse causing each one of KC's injuries, defendant apologized for causing "these injuries."

(DVD 9:31.) Defendant in the police interview also described various occasions in which he acted too roughly or improperly when caring for KC, actions which correspond to some of the injuries the prosecution's medical experts described. Further, even though other people, including Trembley, had access to KC, defendant told Detective Weiner he had never seen Trembley do anything inappropriate to KC. In the end, the jury had the opportunity to assess defendant's credibility during the interview and, as is the jury's province, "to determine where the truth probably lies." *State v. Haynes,* 10th Dist. No. 03AP-1134, 2005-Ohio-256, ¶24, quoting *State v. Lakes* (1964), 120 Ohio App. 213, 217. See also *Raver* at ¶21.

{¶48} Because sufficient evidence and the manifest weight of the evidence support the jury's verdict, we overrule defendant's fourth assignment of error.

VII. Fifth Assignment of Error – Double Jeopardy and Equal Protection

{¶49} Defendant's fifth assignment of error asserts the trial court violated the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution when it convicted and sentenced defendant for third-degree felony child endangering after having convicted and sentenced defendant for second-degree felony child endangering stemming from the same conduct. Defendant further asserts the trial court's failure to merge these offenses violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, Section 10, Article I of the Ohio Constitution, as well as Ohio's multiple-count statute.

A. Double Jeopardy and Allied Offenses

{¶50} In *State v. Hall*, 10th Dist. No. 05AP-957, 2006-Ohio-2742, this court addressed the interplay between state and federal constitutional protections against

double jeopardy and Ohio's multi-count statute, R.C. 2941.25, noting "[t]he federal and state constitutions' double jeopardy protection guards citizens against cumulative punishments for the 'same offense.' " Id. at ¶16, citing *State v. Moss* (1982), 69 Ohio St.2d 515, 518. "Despite such constitutional protection, a state legislature may impose cumulative punishments for crimes that constitute the 'same offense' without violating double jeopardy protections." *Hall* at ¶16, citing *State v. Rance* (1999), 85 Ohio St.3d 632, 635, citing *Albernaz v. United States* (1981), 450 U.S. 333, 334, 101 S.Ct. 1137. "Under the 'cumulative punishment' prong, double jeopardy protections do 'no more than prevent the sentencing court from prescribing greater punishment than the legislature intended.' " Id. at ¶16, quoting *Missouri v. Hunter* (1983), 459 U.S. 359, 366, 103 S.Ct. 673.

{¶51} "When a legislature signals its intent to either prohibit or permit cumulative punishments for conduct that may qualify as two crimes, the legislature's expressed intent is dispositive." *Hall* at ¶16, citing *Rance* at 635. "Therefore, when determining the constitutionality of imposing multiple punishments against a criminal defendant in one criminal proceeding for criminal activity emanating from one transaction, appellate courts are limited to assuring that the trial court did not exceed the sentencing authority the legislature granted to the judiciary." Id., citing *Moss* at 518, citing *Brown v. Ohio* (1977), 432 U.S. 161, 97 S.Ct. 2221.

{¶52} The Supreme Court of Ohio repeatedly has stated that application of Ohio's multiple-count statute, set forth in R.C. 2941.25, requires a two-tiered analysis. See *State v. Winn*, 121 Ohio St.3d 413, 2009-Ohio-1059, ¶10, citing *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, ¶18, citing *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, ¶14. " 'In the first step, the elements of the two crimes are compared. If the elements of

the offenses correspond to such a degree that the commission of one crime will result in the commission of the other, the crimes are allied offenses of similar import and the court must then proceed to the second step.' " *Brown* at ¶19, quoting *State v. Blankenship* (1988), 38 Ohio St.3d 116, 117. " 'In the second step, the defendant's conduct *is* reviewed to determine whether the defendant can be convicted of both offenses. If the court finds either that the crimes were committed separately or that there was a separate animus for each crime, the defendant may be convicted of both offenses.' " (Emphasis sic.) Id., quoting *Blankenship* at 117.

{¶53} In *Rance*, the Supreme Court held "that the first step for determining whether two offenses are allied offenses of similar import requires comparing the statutory elements in the abstract, rather than comparing the offenses as charged in a particular indictment." *Winn* at ¶11, citing *Rance* at 637-38. More recently, however, the Supreme Court cautioned against applying *Rance* too narrowly. "[N]owhere does *Rance* mandate that the elements of compared offenses must exactly align for the offenses to be allied offenses of similar import under R.C. 2941.25(A). To interpret *Rance* as requiring a strict textual comparison would mean that only where *all* the elements of the compared offenses coincide *exactly* will the offenses be considered allied offenses of similar import under R.C. 2941.25(A)." (Emphasis sic.) Id., quoting *Cabrales* at ¶22 (internal quotation marks omitted). Rejecting a "strict textual comparison," the Supreme Court stated the proper approach is "[i]nstead, 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 the commission of the other, then the offenses are allied offenses of similar import.

Cabrales at ¶26. The elements need not be identical for the offenses to be allied. *Winn* at ¶12.

{¶54} In that context, we note a violation of R.C. 2919.22(A), involving violation of a duty of care, protection or support, does not automatically result in a violation of R.C. 2919.22(B)(1), involving abuse that results in serious physical harm. Stated another way, commission of one will not result in the commission of the other because "only a certain, defined group of people who violate a duty of care, protection or support can violate R.C. 2919.22(A)," while a person "not in that class of people can violate R.C. 2919.22(B)(1) without violating R.C. 2919.22(A)." *State v. Garcia*, 10th Dist. No. 03AP-384, 2004-Ohio-1409, ¶36. Similarly, a person can "recklessly abuse a child in violation of R.C. 2919.22(B)(1) without violating a duty of care as required by R.C. 2919.22(A)." Id., citing *State v. Smathers* (Dec. 20, 2000), 9th Dist. No. 19945; *State v. Cherry*, 9th Dist. No. 20771, 2002-Ohio-3738, ¶80. R.C. 2919.22(B)(1) and 2919.22(A) thus are not allied offenses of similar import. See *Garcia* at ¶40 (finding R.C. 2919.22(A) is not a lesser included offense of 2919.22(B)(1), and the two offenses are not allied offenses of similar import); *State v. Carroll*, 12th Dist. No. CA2007-02-030, 2007-Ohio-7075, ¶112 (concluding R.C. 2919.22(B)(1) and 2919.22(A) "are not allied offenses of each other, as each requires proof of an element that the other do[es] not require").

{¶55} As R.C. 2919.22(B)(1) and 2919.22(A) are not allied offenses of similar import because commission of one will not result in commission of the other, defendant cannot satisfy the first prong of this two-prong analysis. Such a conclusion is particularly apt here where not only did the trial court base the duty-of-care charge in R.C. 2919.22(A) in part on alternative theories of either causing serious physical harm to the child through

abuse or of failing to seek medical care for the child, but the evidence supported both. The trial court thus did not err in failing to merge the offenses for sentencing purposes.

B. Equal Protection

{¶56} Defendant also contends his conviction and sentence violated his right to equal protection because the trial court convicted Trembley of permitting child abuse and third-degree felony child endangering but merged those convictions for sentencing purposes. The state indicted defendant and Trembley in a joint indictment, but the state tried the two separately.

{¶57} Defendant's equal protection contentions are unpersuasive, as we are unable to conclude Trembley was similarly situated to defendant. The trial court convicted Trembley of different offenses than defendant, and the details of the trial court proceedings for Trembley are not part of this record on review. Defendant's equal protection argument is not well taken.

{¶58} Based on the foregoing, we overrule defendant's fifth assignment of error.

VIII. Sixth Assignment of Error – Sentence Contrary to Law

{¶59} Defendant's sixth assignment of error asserts his sentence is contrary to law.

{¶60} Pursuant to R.C. 2953.08(G), an appellate court may modify a sentence or may remand for resentencing if the court clearly and convincingly finds the sentence is contrary to law. *State v. Webb*, 10th Dist. No. 06AP-147, 2006-Ohio-4462, ¶11, citing *State v. Maxwell*, 10th Dist. No. 02AP-1271, 2004-Ohio-5660, ¶27. This court held that R.C. 2953.08(G) requires us, in cases decided after *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, to continue to review sentences under the standard of clearly and

convincingly contrary to law. *State v. Burton*, 10th Dist. No. 06AP-690, 2007-Ohio-1941, ¶19. "In applying the clear and convincing as contrary to law standard, we would 'look to the record to determine whether the sentencing court considered and properly applied the [non-excised] statutory guidelines and whether the sentence is otherwise contrary to law.' " Id., quoting *State v. Vickroy*, 4th Dist. No. 06CA4, 2006-Ohio-5461, ¶16.

{¶61} After *Burton*, the Ohio Supreme Court issued its decision in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912. In it, the plurality opinion decided an "appellate court must ensure that the trial court has adhered to all applicable rules and statutes in imposing the sentence." Id. at ¶14. Thus, "[a]s a purely legal question, this is subject to review only to determine whether it is clearly and convincingly contrary to law, the standard found in R.C. 2953.08(G)." Id. Although *Kalish* suggests the actual term of imprisonment imposed in the trial court should be reviewed under an abuse of discretion standard, defendant's argument raises an issue of law in challenging whether the trial court was required to make statutory findings pursuant to R.C. 2929.14(E)(4) before sentencing defendant to consecutive sentences. Accordingly, we determine if the trial court's decision was clearly and convincingly contrary to law. *Kalish* at ¶14.

{¶62} Defendant contends his sentence not only is clearly and convincingly contrary to law but is void because the trial court, in imposing three maximum and consecutive prison terms, relied on the provisions of R.C. 2929.14 declared unconstitutional in *Foster*. See *Foster* at paragraph two of the syllabus (severing R.C. 2929.14(C) because it is unconstitutional and stating after severance, "judicial fact-finding is not required before a prison term can be imposed within the basic ranges of R.C. 2929.14(A) based upon a jury verdict or admission of the defendant").

{¶63} During the sentencing hearing, the trial court noted it considered the purposes and principles of sentencing and then stated: "I find that this is the most serious offense, and I'm not required to make these findings any more due to the *Foster* case, but without question if any case cries out for the maximum sentence, this does." (Sentencing Tr. 21.) Based on the court's statement, defendant argues his sentence is void because the trial court improperly relied on R.C. 2929.14(C) after *Foster* severed the section from the statute as unconstitutional. See, e.g., *State v. Adams*, 4th Dist. No. 04CA2959, 2009-Ohio-6491, ¶11 (vacating a sentence after the trial court improperly relied on R.C. 2929.14(B) and (E)(4)); *State v. Profanchik*, 7th Dist. No. 06-MA-143, 2007-Ohio-6430, ¶34 (finding defendant's sentence contrary to law where the judgment entry specifically stated it sentenced defendant "pursuant to" the portions of the sentencing statute excised by *Foster*).

{¶64} Here, nothing in the judgment entry indicates the trial court sentenced defendant "pursuant to" R.C. 2929.14(C), which permits the longest prison term authorized for the offense "only upon offenders who committed the worst forms of the offense." Rather, the judgment entry states the court "weighed the factors as set forth in the *applicable* provisions of R.C. 2929.13 and R.C. 2929.14." (Emphasis added.) (Judgment Entry, 1.) Moreover, the trial court's statement during the sentencing hearing demonstrates the trial court understood *Foster* no longer required it to make the finding under R.C. 2929.14(C) before imposing the maximum sentence. Courts may consider a variety of factors in imposing a sentence within the statutory range of sentences. See *State v. Silverman*, 10th Dist. No. 06AP-1278, 2007-Ohio-6498, ¶37, quoting *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, ¶25-26 (stating "[s]ince *Foster*, trial courts

no longer must navigate a series of criteria that dictate the sentence and ignore judicial discretion," but "nothing in the record would hinder the trial court from considering the same factors it previously had been required to consider").

{¶65} Because the trial court not only did not erroneously sentence defendant pursuant to R.C. 2929.14(C) but imposed a sentence within the statutory range of permissible sentences, defendant's sentence is not clearly and convincingly contrary to law. Defendant's sixth assignment of error is overruled.

IX. Seventh Assignment of Error – Consecutive Sentences

{¶66} In his seventh assignment of error, defendant asserts the trial court erred in imposing consecutive sentences without making the required statutory findings contained in R.C. 2929.14(E)(4) and 2929.41(A).

{¶67} As an alternative argument to his sixth assignment of error, defendant in effect challenges *Foster*. In *Foster*, "the Ohio Supreme Court held that, under the United States Supreme Court's decisions in *Apprendi v. New Jersey* (2000), 530 U.S. 466, 120 S.Ct. 2348, and *Blakely v. Washington* (2004), 542 U.S. 296, 124 S.Ct. 2531, portions of Ohio's sentencing scheme were unconstitutional because they required judicial fact finding before a defendant could be sentenced to more than the minimum sentence, the maximum sentence, and/or consecutive sentences." *State v. Houston*, 10th Dist. No. 06AP-662, 2007-Ohio-423, ¶3, appeal not allowed, 114 Ohio St.3d 1426, 2007-Ohio-2904. To remedy the situation, "the Ohio Supreme Court severed the offending sections from Ohio's sentencing code. Thus, pursuant to *Foster*, trial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make

findings or give their reasons for imposing maximum, consecutive or more than minimum sentences." Id., citing *Foster* at ¶100.

{¶68} Though defendant acknowledges *Foster* and indeed relies on it for his sixth assignment of error, defendant nonetheless argues the United States Supreme Court's recent decision in *Oregon v. Ice* (2009), 129 S.Ct. 711, controls here. Defendant argues that application of *Ice* to Ohio sentencing laws reveals the Ohio Supreme Court wrongly excised portions of R.C. 2929.14, including R.C. 2929.14(E)(4) and 2929.41(A). Defendant thus contends the statutory findings are a valid and necessary prerequisite to consecutive sentencing.

{¶69} The state responds, first, that defendant waived his argument by failing to raise it at sentencing. Even if, despite defendant's failing to object, we consider defendant's argument, the argument is unpersuasive. This court has addressed and rejected defendant's argument regarding *Ice* and has declined to depart from *Foster* until the Supreme Court of Ohio so directs. See, e.g., *State v. Mickens*, 10th Dist. No. 09AP-993, 2010-Ohio-2852, ¶12; *Houston* at ¶7; *State v. Potter*, 10th Dist. No. 09AP-580, 2010-Ohio-372; *State v. Franklin*, 182 Ohio App.3d 410, 2009-Ohio-2664 (noting this court acknowledged *Ice* but concluding *Foster* remains binding upon this court until the Supreme Court of Ohio directs otherwise); *State v. Russell*, 10th Dist. No. 09AP-428, 2009-Ohio-6420; *State v. Anderson*, 10th Dist. No. 08AP-1071, 2009-Ohio-6566; *State v. Crosky*, 10th Dist. No. 09AP-57, 2009-Ohio-4216.

{¶70} As the prior decisions of this court dictate, *Foster* controls the resolution of defendant's argument. Defendant's seventh assignment of error is overruled.

X. Eighth Assignment of Error – Cruel and Unusual Punishment

{¶71} In his eighth assignment of error, defendant asserts the trial court abused its discretion and violated defendant's right against cruel and unusual punishment by imposing the maximum sentence for each count and for ordering those sentences to be served consecutively.

{¶72} " '[C]ases in which cruel and unusual punishments have been found are limited to those involving sanctions which under the circumstances would be considered shocking to any reasonable person.' " *State v. Weitbrecht* (1999), 86 Ohio St.3d 368, 371, quoting *McDougle v. Maxwell* (1964), 1 Ohio St.2d 68, 70. " '[T]he penalty must be so greatly disproportionate to the offense as to shock the sense of justice of the community.' " Id., quoting *McDougle* at 70. "The gross disproportionality principle reserves a constitutional violation for only the extraordinary case." *Lockyer v. Andrade* (2003), 538 U.S. 63, 77, 123 S.Ct. 1166. "Furthermore, 'Eighth Amendment analysis focuses on the sentence imposed for each specific crime, not on the cumulative sentence.' " *State v. Hairston*, 10th Dist. No. 06AP-420, 2007-Ohio-143, ¶38, quoting *United States v. Aiello* (C.A.2, 1988), 864 F.2d 257, 265. A reviewing court must treat every sentence separately, rather than cumulatively, for purposes of determining whether the punishment is cruel and unusual. Id., citing *Pearson v. Ramos* (C.A.7, 2001), 237 F.3d 881, 886.

{¶73} Defendant contends his 21-year maximum, consecutive sentence violates the proportionality requirement of R.C. 2929.11(B). Noting he was convicted of three offenses with recklessness as the requisite scienter, defendant argues his sentence more than doubles the maximum sentence he would have received had he recklessly killed his

daughter as a result of either voluntary or involuntary manslaughter. See R.C. 2929.14(A) (providing the maximum sentence for first-degree felony conviction is 10 years).

{¶74} Defendant's argument does not attack the length of any one sentence for any specific offense; rather, defendant contests his aggregate 21-year prison sentence. The severity of defendant's aggregate sentence resulted, in part, from the number of crimes defendant committed, but "it was not the result of the imposition of one or more grossly disproportionate sentences." *Hairston* at ¶39, judgment affirmed, 118 Ohio St.3d 289, 2008-Ohio-2338 (finding defendant's aggregate 134-year sentence did not violate defendant's right against cruel and unusual punishment). We cannot say the individual sentences here are grossly disproportionate or shocking given the injuries KC sustained. Moreover, each of defendant's sentences falls within the statutory range of permissible sentences for his offenses. "In general, 'a sentence that falls within the terms of a valid statute cannot amount to a cruel and unusual punishment.' " *State v. Small*, 10th Dist. No. 01AP-1007, 2002-Ohio-3320, ¶40, quoting *McDougle* at 69. See also *State v. Brown*, 6th Dist. No. WD-09-058, 2010-Ohio-1698, ¶63 (concluding an aggregate prison term of 34 years was not cruel and unusual punishment where the individual sentences imposed are within the statutory range the legislature established).

{¶75} Because defendant's sentence is neither grossly disproportionate nor shocking to the community's sense of justice, his sentence does not amount to cruel and unusual punishment. Defendant's eighth assignment of error is overruled.

XI. Ninth Assignment of Error – Ineffective Assistance of Counsel

{¶76} In his ninth and final assignment of error, defendant asserts he received ineffective assistance of counsel.

{¶77} To prove ineffective assistance of counsel, defendant must demonstrate that his counsel's performance was deficient. *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052. Defendant thus must establish his counsel made errors so serious that counsel was not functioning as the "counsel" the Sixth Amendment guarantees. Id. Defendant also must establish that his counsel's deficient performance prejudiced him, demonstrating that counsel's errors were so serious as to deprive defendant of a fair trial, a trial whose result is reliable. Id. Unless defendant makes both showings, it cannot be said that the conviction resulted from a breakdown in the adversary process that renders the result unreliable. Id.

{¶78} Here, defendant argues his trial counsel was ineffective in failing to object to the errors set forth in defendant's first, second, third, fifth, sixth, seventh, and eighth assignments of error. Defendant's assignment of error thus "recasts" the substantive arguments of his second, third, fifth, sixth, seventh, and eighth assignments of error "into an ineffective-assistance claim." *State v. Hale*, 119 Ohio St.3d 118, 2008-Ohio-3426, ¶233. Because we concluded defendant demonstrated no error in his second, third, fifth, sixth, seventh, and eighth assignments of error, defense counsel's failure to object on the grounds set forth in those assignments of error does not render counsel's assistance ineffective. Id., citing *State v. Holloway* (1988), 38 Ohio St.3d 239, 244 (pointing out that " '[t]he failure to object to error, alone, is not enough to sustain a claim of ineffective assistance of counsel' ").

{¶79} Defendant's ineffective assistance argument regarding his trial counsel's failure to object to count six of his defective indictment, as outlined in his first assignment of error, presents a more difficult question. Defendant acknowledges the trial court's jury

instruction on the element of serious physical harm properly stated the law for third-degree felony child endangering. Defendant nonetheless argues that had his trial counsel objected to the indictment for omitting the necessary element of serious physical harm, the trial court would have had no alternative but to either dismiss that count of the indictment or instruct the jury defendant could only be convicted of a first-degree misdemeanor on that count. Moreover, because "[t]he prejudice required for ineffective assistance of counsel is somewhat less than that required for plain error," resolution of defendant's first assignment of error against him does not resolve his claim of ineffective assistance of counsel regarding the allegedly defective indictment. *State v. Richmond*, 2d Dist. No. 2005-CA-105, 2006-Ohio-4518, ¶163.

{¶80} The state responds that had defendant's counsel objected, the result would have been an amendment to the indictment expressly adding serious physical harm to the count. See *State v. Pepka*, 125 Ohio St.3d 124, 2010-Ohio-1045, syllabus (stating "[a]n indictment that charges a defendant with child endangering in violation of R.C. 2919.22(A) as a third-degree felony but does not contain language that the victim suffered serious physical harm adequately informs the defendant of the charge against which he must defend and is sufficient"). Accordingly, the state argues, defendant suffered no prejudice as a result of defense counsel's failure to object.

{¶81} Defendant asserts *Pepka* is distinguishable, as the body of the indictment in *Pepka* specifically stated the offense of child endangering "constitutes a Felony of the Third Degree." Id. at ¶23. Defendant notes the body of his indictment does not indicate count six is a third-degree felony; only the caption and the index of offenses of the indictment do so. Instead, the text of count six lists the elements of R.C. 2919.22(B),

neither referring to the degree of the offense nor alleging a serious physical harm element. Defendant argues that, absent either of those elements, the text of count six may be construed only to charge first-degree misdemeanor child endangering. By contrast, defendant notes, counts two and four include within the text the element of serious physical harm, making explicitly clear that those offenses charge second-degree felonies.

{¶82} Defendant further asserts that had his trial counsel properly objected to the insufficiency of the indictment, the trial court would have been unable to amend the indictment to include the element of serious physical harm, because an amendment would have changed "the name or identity of the crime charged." Id. at ¶15 (stating "[u]nder Crim.R. 7(D), a court may amend an indictment 'at any time' if the amendment does not change 'the name or identity of the crime charged' "), quoting *State v. Davis*, 121 Ohio St.3d 239, 2008-Ohio-4537, ¶1. See also *State v. Abdullah*, 10th Dist. No. 05AP-1316, 2006-Ohio-5412, ¶23. Defendant's arguments requires that we determine whether, in considering the sufficiency of an indictment, a court can look to the indictment as a whole, including the caption and index, or whether we must examine only the text of the count at issue.

{¶83} Defendant primarily relies on *State v. Fairbanks*, 172 Ohio App.3d 766, 2007-Ohio-4117 to argue the body of the indictment must contain the elements of the offense. In *Fairbanks*, the Twelfth District held the defendant's indictment was insufficient where, even though "the caption or heading of the indictment listed the felony subsection and indicated that the charge was a felony of the third degree," the "body of the indictment did not list the level of the offense or the specific statutory subsection, and

most importantly, contained no 'force or unlawful threat of harm' element to constitute the felony charge." Id. at ¶24, citing *State v. Lewis* (Feb. 7, 1994), 5th Dist. No. 9393 (finding the designation in the heading or caption of the indictment "insufficient standing alone" to give rise to a charge of the higher degree).

{¶84} Many Ohio cases suggest the caption, the index, or both, is properly considered in construing the whole of the indictment. See, e.g., *State v. Hughes*, 4th Dist. No. 08CA19, 2010-Ohio-2969, ¶22-23 (concluding defendant could not demonstrate prejudice from an error in the caption of the indictment where the body of the indictment is correct); *State v. Kittle*, 4th Dist. No. 04CA41, 2005-Ohio-3198, ¶16 (determining no error was committed in allowing amendment to indictment where caption of indictment stated second-degree felonious assault but body of the indictment contained "surplusage" that did not accurately reflect the statute); *State v. Grove*, 3d Dist. No. 3-04-26, 2005-Ohio-2894, ¶13-14 (concluding defendant suffered no prejudice where the wrong name appeared in the body of the indictment, the grand jury foreperson crossed out the error and initialed it, and defendant's correct name appeared in the caption of the indictment); *State v. Fields* (1992), 84 Ohio App.3d 423, 426 (holding indictment sufficient even though the body of the indictment alleged "physical harm" rather than "serious physical harm" where the caption correctly labeled the count "aggravated menacing" and listed the correct statute).

{¶85} Cases outside of Ohio also look to the caption of the indictment as one step in determining the sufficiency of the indictment as a whole. See, e.g., *State v. Means* (2005), 367 S.C. 374, 384, 626 S.E.2d 348, 354 (stating that, "[w]hile the court should focus primarily on charging language in the body of the indictment, a caption or title which

is consistent with the language in the body of the indictment may be considered in conjunction with the body in determining the sufficiency of the indictment as a whole"); *Kirkpatrick v. State* (Tex.Crim.App. 2009), 279 S.W.3d 324, 329 (stating "the notation [in the heading] that the offense was a third-degree felony clearly indicated that the state intended to charge a felony offense").

{¶86} Moreover, the circumstances here are different than those in both *Fairbanks* and *Lewis*. In *Fairbanks*, the entire indictment consisted of what the caption called two counts of intimidation of a witness, "each a felony of the third degree," in violation of R.C. 2921.04(B). *Fairbanks* at ¶5. The text of each count of the indictment was identical, neither including the "force or unlawful threat of harm" language necessary to elevate the offense from a first-degree misdemeanor to a third-degree felony. Id. at ¶6-8. In *Lewis*, the indictment consisted of two counts of gross sexual imposition and one count of endangering children; the jury returned a guilty verdict only on the child endangering charge. *Lewis*, supra. The caption of the indictment reflected one count of child endangering as an "(F4)," but the body of the indictment containing that count did not state the degree of the offense or allege one of the additional elements necessary to elevate the offense from a first-degree misdemeanor to a fourth-degree felony. Id. Thus, in *Fairbanks* and *Lewis*, the caption and the body of the indictments directly conflicted, making it impossible to determine which was correct. Further, in *Lewis*, nothing in the record indicated the trial court actually tried defendant as if the endangering children charge were a felony rather than a misdemeanor.

{¶87} By contrast, defendant's indictment consisted of what both the caption and index referred to as three counts of "F-2" felonious assault, three counts of "F-2"

endangering children, and one count of "F-3" endangering children. As defendant notes in his argument, counts two and four, alleging child endangering, contain the necessary element of serious physical harm to charge second-degree felony child endangering; count six does not. Unlike *Fairbanks* and *Lewis*, where the indictment presented no basis for comparison within the indictment itself, here count six can be compared to counts two and four. Except for the element of serious physical harm, they are identical to the pertinent parts of count six in setting forth the offense. The indictment, taken as a whole, thus suggests the lack of serious physical harm language in count six was an internal inconsistency rather than a fatal flaw. See *State v. Gondek* (Jan. 26, 2000), 9th Dist. No. 2928-M, appeal not allowed, 88 Ohio St.3d 1513 (concluding that where the caption of the indictment listed the offense as "F-2" felonious assault but the body of the indictment contained the mens rea of recklessly rather than knowingly, the trial court acted properly in allowing an amendment to the indictment because the "inclusion of 'recklessly' in an indictment which clearly charged the defendant with felonious assault was in the nature of an 'internal inconsistency' " rather than an indictment on the lesser charge of assault for which recklessly is the correct mental state), citing *State v. Earle* (1997), 120 Ohio App.3d 457, 467.

{¶88} Thus, even had defendant's trial counsel objected to the indictment for failure to allege the element of serious physical harm in count six, the state could have sought an amendment to correct the "internal inconsistency" contained in count six when compared not only to the caption and index, but also to counts two and four. An amendment that corrects an internal inconsistency does not "change the name and identity of the offense." *State v. Martin*, 12th Dist. No. CA2003-09-011, 2004-Ohio-4309,

¶23 (allowing amendment to indictment for child endangering and involuntary manslaughter to reflect the correct mental state for those offenses did not change the name and identity of those offenses), citing *Gondek*.

{¶89} Beyond the likelihood that the trial court would have allowed an amendment to the indictment on such grounds, the record does not indicate defendant was unaware of the nature of the charges against him or was unable to prepare a proper defense to all the elements of the second-degree felony charge. Indeed, nothing indicates surprise when the trial court reviewed the jury instructions with counsel prior to so charging the jury and explained it would instruct the jury that the jury would need to find serious physical harm in order to make each of the three child endangering offenses a felony of the second degree. (Trial Tr. 377.) See *State v. Smith*, 2d Dist. No. 19370, 2003-Ohio-903, ¶16 (concluding defendant suffered no ineffective assistance of counsel because defendant could not demonstrate prejudice even if the indictment were defective as defendant "was aware of the nature of his theft offense and the conduct underlying the offense" and defense counsel "expressed no surprise" when the trial court provided the jury with the pertinent instruction). See also *State v. Hous*, 2d Dist. No. 02CA116, 2004-Ohio-666, ¶29 (determining defendant was not deprived of the effective assistance of counsel where, had trial counsel objected to indictment, re-indictment might have followed).

{¶90} Because defendant failed to establish he received ineffective assistance of counsel, we overrule defendant's ninth and final assignment of error.

XII. Disposition

{¶91} Having overruled defendant's nine assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

KLATT and SADLER, JJ., concur.

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