[Cite as *Columbus v. Montgomery*, 2011-Ohio-1332.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

City of Columbus,	:	
Plaintiff-Appellee,	:	
v.	:	No. 09AP-537 (M.C. No. 2007 CR B 019976)
Cloris Montgomery,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on March 22, 2011

Richard C. Pfeiffer, Jr., City Attorney, *Lara N. Baker,* City Prosecutor, and *Melanie R. Tobias*, for appellee.

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

APPEAL from the Franklin County Municipal Court

CONNOR, J.

{¶1} Defendant-appellant, Cloris Montgomery ("appellant"), appeals from a judgment of the Franklin County Municipal Court, entered upon a jury verdict convicting her of one count of obstructing official business. For the reasons that follow, we affirm that judgment.

{¶2} Appellant's conviction arises from an incident which occurred during the investigation of a complaint alleging sexual abuse against two children. During the course of the investigation, police came into contact with appellant, who was never a suspect, but who is the grandmother of the two children who were the subject of the

complaint. Several Columbus police officers approached appellant's residence and inquired about the welfare of the two children. The police eventually asked to come inside to see the children. Appellant was unwilling to permit the police to enter her residence. A confrontation ensued, which eventually resulted in appellant's arrest. Subsequently, a complaint was filed on August 10, 2007, charging appellant with one count of obstructing official business, a violation of Columbus City Code 2321.31(A), a misdemeanor of the second degree.

{¶3} Appellant entered a not guilty plea and later filed a motion to suppress the arrest due to lack of probable cause. On February 26, 2008, a hearing was held on the motion to suppress due to lack of probable cause, as well as on an oral motion to suppress any evidence seized. The only witness to testify at the hearing was Officer Deanna Brewer ("Officer Brewer").

{¶4} During testimony provided at the hearing, Officer Brewer testified that while working her evening midwatch shift, she was dispatched to the home of Cradecia Williams ("Ms. Williams"). Upon arrival at the residence, Ms. Williams advised the officer she believed her three-year old niece and five-year old nephew had been sexually assaulted by two of their maternal uncles. Ms. Williams indicated that while babysitting the two children, they complained of pain. Ms. Williams checked the genital area of her niece and discovered severe tears, swelling and redness. Based upon her observations, Ms. Williams believed there had been penetration. Ms. Williams also informed Officer Brewer that her nephew indicated he had been touched inappropriately and that his uncles had touched him. Ms. Williams further advised that the two children, who were potty trained, were experiencing uncontrollable urination and bowel movements.

{¶5} Officer Brewer testified she was advised that Ms. Williams had contacted the mother of the two children and instructed her that she needed to take the children to the hospital immediately for medical treatment, but that the mother refused to do so. Instead, Ms. Williams reported the mother picked up the children and stated she was taking them to the home of their two uncles who would watch them while she got "her drink on." (Motion Tr. 16.)

{¶6} Upon speaking with Ms. Williams, Officer Brewer testified she contacted Franklin County Children's Services ("FCCS"), who advised her that they had an "open" case on the children, and that she should attempt to locate the children in order to get them medical treatment and place them in a safe environment until the FCCS case was investigated. Because Ms. Williams indicated she knew where the uncles lived, Officer Brewer testified she followed Ms. Williams to the uncles' apartment on Oakland Park Avenue. Upon arrival at the apartment, Officer Brewer observed numerous people outside and spoke with one of the two uncles, who allowed her to search the apartment. Neither the two children nor the second uncle were located.

{¶7} Upon returning to Ms. Williams' car to report that she had not located the children, Ms. Williams advised Officer Brewer she had witnessed appellant taking the children to appellant's apartment, which was located about 40 feet from the apartment of the two uncles. As a result of this information, Officer Brewer testified she proceeded to appellant's apartment, where appellant was sitting outside on a chair in front of the door to the apartment. The door to the apartment was open. She advised appellant she was investigating the well-being of the children due to some allegations and she needed to make sure the children were okay. Appellant told Officer Brewer the children were not present and were with their mother. Officer Brewer testified she informed appellant she

had a witness who had recently observed appellant taking the children into the apartment. Appellant responded by telling Officer Brewer that she needed a warrant if she wanted to search her apartment.

{¶8} Officer Brewer testified she then asked Ms. Williams to call out the names of the children, since the front door was open and she had observed movement upstairs inside the apartment. Upon doing so, Officer Brewer was able to partially observe the five-year old boy. As she stepped forward in order to enter the open door to the apartment, appellant informed Officer Brewer that she would not get to the children. Appellant, who was sitting in a chair in front of the open door, got up and pushed Officer Brewer in an attempt to keep her from getting to the children. At that point, the other officers who were with Officer Brewer arrested appellant and Officer Brewer entered the apartment and located the two children, as well as their mother, who was intoxicated.

{¶9} When asked specifically why she wanted to get inside to see the children, Officer Brewer testified that, based upon Ms. Williams' description of her observation of the children, she knew the children needed medical treatment right away and the mother had refused to have the children evaluated or treated. Officer Brewer also testified she was seeking to prevent further abuse, since they did not know where the second uncle (the other alleged abuser) was at that time. Officer Brewer testified she was concerned that the second uncle might be at appellant's (his mother's) residence with the children.

{¶10} Upon cross-examination, Officer Brewer admitted that all of her information regarding the condition of the children was presented to her by Ms. Williams, and that she herself had not observed the children prior to appearing at appellant's apartment. She also testified that she had contact with FCCS several times throughout the night, including two different times while she was at the apartment complex. Finally, Officer Brewer

acknowledged that upon inquiring about the children, she did not ask appellant about the whereabouts of the second uncle, but stated her primary concern was locating the children and getting medical treatment for them.

{¶11} Immediately following the hearing, the trial court overruled the motion to suppress the arrest and also overruled the motion to suppress any evidence obtained as a result of police entry into the residence. The trial court noted the officer acted reasonably in investigating the allegations and was justified in taking the actions that she took.

{¶12} On February 26, 2008, the trial court issued a written entry, specifically finding that the officers who had approached appellant had received information believed to be credible which asserted that the two children had been sexually abused, were in need of treatment, and may be at risk of further abuse. The trial court further found that exigent circumstances warranted police investigation and provided justification for entry into the residence without a warrant, due to the safety concerns about the children, and the lack of sufficient time to seek and obtain a warrant. (R. 41.)

{¶13} A jury trial commenced on May 4, 2009. During the presentation of its case, plaintiff-appellee, City of Columbus ("appellee" or "the City"), introduced the testimony of two Columbus police officers: Officer Ryan Chrysler ("Officer Chrysler") and Officer Brewer.

{¶14} During the jury trial, Officer Brewer's testimony was substantially similar to the testimony that she provided at the suppression hearing, except that the trial court limited her testimony with respect to the details of the sexual abuse allegations. She also provided additional, detailed information about her encounter with appellant.

{¶15} Officer Brewer informed the jury she was dispatched to the home of Ms. Williams on the night of August 9, 2007. Upon speaking with Ms. Williams, Officer Brewer was advised that Ms. Williams believed two children had been sexually abused by two of their maternal uncles. Officer Brewer was also advised the mother of the children had refused to take them to the hospital and had instead taken them to the home of their two uncles, the alleged abusers. As a result of this information, Officer Brewer was concerned about the well-being of the children and sought to get them medical treatment. Officer Brewer called the mother and asked her to bring the children to the hospital, but the mother refused.

{¶16} At that point, Ms. Williams directed Officer Brewer to the home of the two uncles, who lived in a nearby apartment building. Officer Brewer located one of the uncles, who allowed her to search his apartment. She did not find the children there. Upon reporting this to Ms. Williams, Ms. Williams advised her she had just recently witnessed appellant running with the children and they had all entered appellant's apartment. Officer Brewer then went to appellant's apartment and advised appellant she was looking for the children to check on their well-being. Appellant told Officer Brewer the children were not there, but were with their mother. When Officer Brewer asked if she could check the apartment to be sure, appellant informed her she was not going inside without a warrant. Appellant did not reference an investigation by FCCS involving allegations of abuse.

{¶17} Officer Brewer testified the front door to the apartment was wide open and she could see movement upstairs, so she asked Ms. Williams to call out the names of the children, at which time the five-year old boy appeared at the top of the stairs. Officer Brewer then took a step toward the open door to step into the apartment. Appellant stood

up from the chair in which she had been seated and pushed Officer Brewer away from the door, causing Officer Brewer to lose her balance and almost fall. After regaining her composure, Officer Brewer went into the apartment to locate the children in order to get them medical treatment while the other officers took control of appellant.

{¶18} Officer Brewer further testified FCCS had an "open" case on the family and that she had contact with FCCS several times that night. Officer Brewer turned the children over to the person designated by FCCS and appellant was cited for obstruction of official business.

{¶19} On cross-examination, Officer Brewer admitted that all of the information she obtained about the condition of the children was obtained from Ms. Williams. Upon questioning, she stated she did not recall unholstering her gun as she began to enter appellant's apartment.

{¶20} Officer Chrysler testified he responded to a call to assist Officer Brewer during her quest to locate and check on the welfare of the children. He and the other officers approached appellant's apartment and saw appellant was sitting outside in a lawn chair near the open door of her apartment. Officer Chrysler listened as Officer Brewer explained they wanted to look for the children to check on their well-being. However, appellant refused to allow the police inside her apartment without a warrant. Officer Chrysler also attempted to explain why they wanted to check on the well-being of the children, but was equally unsuccessful in gaining appellant's cooperation.

{¶21} Officer Chrysler testified the police did not know who was present in appellant's apartment and they were concerned that one of the uncles might be present in appellant's apartment. He also indicated they were concerned that the children might be hidden from them.

{¶22} During the discussion with appellant, Officer Chrysler testified he and the other officers were standing within three feet of the door and could look up the steps into the apartment. He heard Officer Brewer asked Ms. Williams to call out the name of the little boy, who responded by appearing at the top of the steps. At that point, Officer Brewer took a step towards the door and appellant got up from her lawn chair and stood in front of the door. Officer Chrysler testified appellant and Officer Brewer were lined up face-to-face and he was standing behind Officer Brewer. He saw both women's arms come up. Then he saw Officer Brewer move to try to get around appellant through the doorway, and as she did so, appellant grabbed Officer Brewer's arm. Officer Chrysler explained that citizens should never touch a police officer.

{¶23} After witnessing the physical contact, Officer Chrysler grabbed appellant, but appellant still had one arm free and was reaching towards Officer Brewer as Officer Brewer was going up the stairs. Officer Chrysler testified he restrained appellant because she was keeping Officer Brewer from locating and checking on the children. Officer Chrysler then placed appellant under arrest for obstructing official business.

{¶24} On cross-examination, Officer Chrysler acknowledged that he and the other officers had not been accompanied by FCCS that night. He testified he did not recall appellant advising them of an investigation conducted by FCCS. Officer Chrysler also identified several acts by appellant that he believed constituted obstructing, which included standing up to block Officer Brewer, "a jostling and kind of a movement side to side for [Officer Brewer] to get around her," and grabbing Officer Brewer's arm. (Trial Tr. 174.) He testified he never observed Officer Brewer pull out her gun as she entered the residence.

{¶25} In the defense case, appellant testified on her own behalf. Appellant testified that Ms. Williams and appellant's daughter, Lynchella Montgomery ("Lynchella") (the mother of the children at issue), were involved in a dispute and that Ms. Williams brought the police to appellant's apartment complex. When the police approached her apartment and advised her that they wanted to check on the well-being of her grandchildren, appellant believed the issue had already been resolved.

{¶26} Appellant stated that earlier in the day and several hours prior to the arrival of the police at appellant's apartment, a FCCS representative came to Lynchella's apartment to investigate allegations of sexual abuse involving the two children, but determined the allegations were unsubstantiated. However, appellant was not present during the investigation and only had limited information about it, based upon a phone conversation she had with a caseworker she believed was named Shelly Barker or Shelly Baker.

{¶27} Appellant testified she told the police the issue had already been resolved by FCCS. When the officers asked for documentation to back-up this assertion, appellant advised them the paperwork was at her daughter's residence, but the officers refused to take her there. Appellant refused to let the police enter without a warrant and initially denied the children were present, but eventually called out their names and the children appeared at the top of the steps but were only partially visible. Then, Officer Brewer asked Ms. Williams to call out to the children. When one of them appeared, Officer Brewer began to unholster her gun. At that point appellant blocked Officer Brewer from entering the apartment.

{¶28} Appellant testified that she placed her hand across the wall and blocked the doorway with her right arm to prevent Officer Brewer from entering, but denied pushing

Officer Brewer. She testified Officer Brewer tripped over her leg and lost her balance. Officer Brewer recovered and ran upstairs with her gun in her hand. Another officer grabbed appellant's arm and appellant put up her leg to block it. Appellant was upset that Officer Brewer entered the apartment with her gun. Soon thereafter she heard her grandchildren screaming and heard Officer Brewer swearing. Then Officer Brewer came back downstairs, swearing and spitting in her face.

{¶29} On cross-examination, appellant admitted she had not known that her daughter was inside her apartment at that time. She also admitted it was possible that one of her sons could have also been inside the residence, although in reality, he was not there.

{¶30} On May 6, 2009, the jury returned a verdict finding appellant guilty of one count of obstructing official business. On May 7, 2009, the trial court imposed a one-year period of community control and ordered appellant to pay a $150 fine and court costs. Appellant filed a timely notice of appeal and now raises the following eight assignments of error for our review:

> First Assignment of Error: The court erroneously overruled appellant's motion to suppress evidence.
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> Second Assignment of Error: The evidence was legally insufficient to support appellant's conviction for obstructing official business.
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> Third Assignment of Error: The court erroneously overruled appellant's motion for acquittal pursuant to Criminal Rule 29.
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> Fourth Assignment of Error: The trial court erroneously barred the defense calling as a witness an employee of Franklin County Children Services to testify as to the timing of that agency's investigation into unsubstantiated allegations of child abuse.

> Fifth Assignment of Error: The court erroneously sustained the city's motion in limine excluding mention of the defendant's constitutional rights.
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> Sixth Assignment of Error: The court erroneously instructed the jury that whether or not the officers acted properly when entering appellant's apartment had already been determined by the court, thus intruding upon their assessment whether the element of privilege or lack thereof, had been proven beyond a reasonable doubt.
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> Seventh Assignment of Error: The defense was erroneously denied the opportunity to impeach the credibility of Cradecia Williams using her prior felony conviction.
>
> Eighth Assignment of Error: Appellant's conviction for obstructing official business is against the manifest weight of the evidence.

{¶31} For ease of discussion, we shall address some of appellant's assignments of error out of order. Additionally, because several of the assignments of error are intertwined, some of them shall be discussed together.

{¶32} In her first assignment of error, appellant challenges the trial court's decision to overrule her motion to suppress, as well as its finding that the warrantless entry into the residence was lawful due to the presence of exigent circumstances. Appellant claims the prosecution failed to prove, by a preponderance of the evidence, that Officer Brewer's actions fell within a recognized exception to the general requirement that a warrant is needed before police can enter a person's home. Essentially, appellant argues her Fourth Amendment right to be free of unreasonable searches and seizures was violated because the circumstances here did not amount to exigent circumstances or constitute an emergency aid exception to the warrant requirement. Appellant further submits she had a constitutional right to refuse this unlawful entry.

{¶33} Appellate review of a motion to suppress presents a mixed question of law and fact. When considering a motion to suppress, the trial court assumes the role of trier of fact, and therefore is in the best position to resolve factual questions and evaluate the credibility of witnesses. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, ¶8. As a result, an appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence. Id. Then, the appellate court must independently determine whether the facts satisfy the applicable legal standard, pursuant to a de novo review and without giving deference to the conclusion of the trial court. Id.

{¶34} The Fourth Amendment to the United States Constitution and Section 14, Article I of the Ohio Constitution prohibit unreasonable searches and seizures. See *State v. Moore*, 90 Ohio St.3d 47, 2000-Ohio-10. In order for a search or seizure to be reasonable under the Fourth Amendment, it must be based upon probable cause and executed pursuant to a warrant, unless an exception to the warrant requirement is applicable. Id. at 49. "Because the Fourth Amendment's ultimate touchstone is 'reasonableness,' the warrant requirement is subject to certain exceptions." *Brigham City, Utah v. Stuart* (2006), 547 U.S. 398, 126 S.Ct. 1943, syllabus. One such well-established exception is a search based upon exigent circumstances. *State v. Applegate*, 68 Ohio St.3d 348, 1994-Ohio-356. Absent exigent circumstances, searches conducted without a warrant are per se unreasonable. *Mincey v. Arizona* (1978), 437 U.S. 385, 390, 98 S.Ct. 2408; 2412. Furthermore, "[o]ne exigency obviating the requirement of a warrant is the need to assist persons who are seriously injured or threatened with such injury." *Stuart* at 403, 1947.

{¶35} " 'The need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency.' " *Mincey* at 392-

93; 2413, quoting *Wayne v. United States* (C.A.D.C.1963), 318 F.2d 205, 212, certiorari denied (1963), 375 U.S. 860, 84 S.Ct. 125. In *Wayne*, the court explained the reasoning behind the exigent circumstances exception, stating: "The business of policemen and firemen is to act, not to speculate or meditate on whether the report is correct. People could well die in emergencies if police tried to act with the calm deliberation of the judicial process." Id. at 212.

{¶36} The principle of the emergency doctrine was recognized by the Supreme Court in *Mincey*: "We do not question the right of the police to respond to emergency situations. Numerous state and federal cases have recognized that the Fourth Amendment does not bar police officers from making warrantless entries and searches when they reasonably believe that a person within is in need of immediate aid." (Footnotes omitted.) Id. at 392; 2413.

{¶37} Appellant argues the perceived gravity of child abuse does not, by itself, give rise to exigent circumstances. Appellant asserts Officer Brewer was not responding to a call for help and there was no reason to believe that the children, at that very moment, were suffering abuse at the hands of their uncles, particularly given that the whereabouts of at least one uncle were known to police. Appellant submits that the information conveyed by Ms. Williams did not indicate the children were in need of urgent medical care and, further argues, that Ms. Williams herself failed to seek treatment for them when they had been in her care. Appellant also argues the police could have simply guarded the entrances and exits to the apartment until a warrant or court order was obtained.

{¶38} "Exigency" is defined as " 'a situation where the inevitable delay incident to obtaining a warrant must give way to an urgent need for immediate action.' " *United*

States v. Keys (C.A.6, 2005), 145 Fed.Appx. 528, quoting *United States v. Morgan* (C.A.6, 1984), 743 F.2d 1158, 1162. The United States Supreme Court has held that the doctrine of exigency applies under two different sets of circumstances: (1) in order to prevent "the imminent destruction of vital evidence" (*Wong Sun v. United States* (1963), 371 U.S. 471, 484, 83 S.Ct. 407, 415); and (2) where the police encounter the "need to protect or preserve life or avoid serious injury[.]" *Mincey* at 392; 2413. See *State v. Stanberry*, 11th Dist. No. 2002-L-028, 2003-Ohio-5700, ¶15. Here, we analyze the circumstances of the instant case under the second category. We also note the burden is on the government to demonstrate that exigent circumstances justify a warrantless entry into a residence. *Welsh v. Wisconsin* (1984), 466 U.S. 740, 750, 104 S.Ct. 2091, 2098; *State v. Smith*, 124 Ohio St.3d 163, 2009-Ohio-6426, ¶25. In addition, a court of appeals reviews de novo a court's legal conclusions with respect to a motion to suppress, but disturbs its factual findings as to the existence of exigent circumstances only if the findings are clearly erroneous. *United States v. Watson* (C.A.6, 2003), 63 Fed.Appx. 216.

{¶39} The Fourth Amendment does not require police officers to delay in the course of an investigation if doing so would gravely endanger their lives or the lives of others. *State v. Myers*, 3d Dist. No. 9-02-65, 2003-Ohio-2936, ¶9, citing *Warden, Maryland Penitentiary v. Hayden* (1967), 387 U.S. 294, 299, 87 S.Ct. 1642. As a result, the exigent circumstances exception to the warrant requirement applies where police have a reasonable basis to believe someone inside the premises requires immediate aid. *Myers* at ¶9, citing *Parma v. Jackson* (1989), 58 Ohio App.3d 17, 18. "Exigent circumstances is synonymous with an emergency, whether it be actual or ongoing." *State v. Scales*, 5th Dist. No. 01-CA-00110, 2002-Ohio-2506, ¶13, citing *Mincey*. " 'The right of the police to enter and investigate in an emergency without accompanying intent to

either search or arrest is inherent in the very nature of their duties as peace officers * * *.' " *State v. Hyde* (1971), 26 Ohio App.2d 32, 34, quoting *United States v. Barone* (C.A.2, 1964), 330 F.2d 543, 545.

{¶40} Therefore, when officers have reasonable grounds upon which to believe that an emergency exists, they have a duty to enter the premises and investigate, provided that the warrantless search is " 'strictly circumscribed by the exigencies which justify its initiation.' " *Myers* at ¶9, quoting *Applegate* at 350, quoting *Terry v. Ohio* (1968), 392 U.S. 1, 26, 88 S.Ct. 1868, 1882. A reasonable belief is determined based upon the facts and circumstances known to the officers and from their point of view. *State v. Robinson* (1995), 103 Ohio App.3d 490, 496; *Myers* at ¶9. "An action is 'reasonable' under the Fourth Amendment, regardless of the individual officer's state of mind, 'as long as the circumstances, viewed *objectively*, justify [the] action." (Emphasis sic.) *Stuart* at 404; 1948, quoting *Scott v. United States* (1978), 436 U.S. 128, 138, 98 S.Ct. 1717, 1723.

{¶41} The primary issue to be determined here is whether or not the circumstances at issue gave rise to exigent circumstances and/or the need for emergency aid, thus justifying the warrantless entry into appellant's home. The trial court determined that such exigent circumstances existed and we find no error in that determination.

{¶42} We begin by noting that this determination could arguably be considered a close call. Some of the typical indicia of injury and violence, such as blood or an ongoing fight or ongoing violence, were not readily visible to police upon their approach. However, "[o]fficers do not need ironclad proof of 'a likely serious, life-threatening' injury to invoke the emergency aid exception." *Michigan v. Fisher* (2009), ___ U.S. ___, 130 S.Ct. 546, 549.

{¶43} Here, Officer Brewer was advised by Ms. Williams, who had been with the two young children in the hours prior to the search, that the three-year old girl had gone to the restroom and was crying in pain. Upon checking the young girl's genital area, Ms. Williams observed severe tears, swelling, and redness and believed someone had penetrated the little girl. The girl's five-year old brother had alleged he also had been touched inappropriately on his genital area and both children were unable to control their bodily functions. Ms. Williams reported she had contacted the mother of the children, advising her that they needed to take the children to the hospital immediately, telling her that the little girl looked horrible and that the kids needed help and medical treatment. Instead of taking the children to the hospital as one might expect, the mother reportedly picked up the children and took them to the home of the two men who allegedly abused them. Then, when Officer Brewer contacted the mother and asked her to bring the children to the hospital, she again refused.

{¶44} While Officer Brewer was able to locate one of the alleged abusers and confirm that the children were not presently in his care, she was not able to locate the second alleged abuser. At the same time, she learned that Ms. Williams had observed appellant running with the children to appellant's apartment. Still concerned about the welfare of the children, who purportedly needed medical treatment due to their physical conditions, Officer Brewer was also now concerned that the second alleged abuser might be at the home of his mother (appellant) and thus have access to the children. Officer Brewer was unwilling to rely upon appellant's assertions that the children were not present, and they were soon found to be present in the apartment, along with their mother, who was highly intoxicated, and thus presumably unable to provide protection or care for the children.

{¶45} Based upon the foregoing, the totality of these circumstances indicate the existence of exigency. See *United States v. Wicks* (C.A.10, 1993), 995 F.2d 964, 970 (there is no absolute test for the presence of exigent circumstances; rather, such a determination is dependent upon the unique facts of each situation).

{¶46} While appellee has not cited to any cases finding exigent circumstances in the context of sexual abuse allegations involving children, and our independent research has failed to reveal the same, there are some cases from other jurisdictions supporting exigent circumstances and the need for emergency aid in the context of physical abuse of children. See *Schreiber v. Moe* (C.A.6, 2010), 596 F.3d 323 (preventing imminent or ongoing physical abuse within a home qualifies as an exigent circumstance; no Fourth Amendment violation for warrantless entry because no reasonable person could conclude that the officer did not have an "objectively reasonable basis for believing" the individual was in imminent danger when the officer was advised by the dispatcher that a caller heard the individual screaming and believed she was being beaten and the officer heard screaming and profanities upon approaching the home); and *State v. Boggess* (1983), 115 Wis.2d 443 (warrantless entry into the home to determine the safety and welfare of the children was justified under the emergency rule exception; under the totality of the circumstances, a reasonable person would believe immediate entry was necessary to render aid and assistance, based on the caller's specific information about the family and the injuries, which provided an indicia of reliability).

{¶47} In addition, welfare checks for adults who have also purportedly been the victims of domestic abuse have also been deemed justified pursuant to exigent circumstances. See *State v. Burgess* (Nov. 4, 1999), 5th Dist. No. 99CA00035.

{¶48} In the instant case, the reporting person, Ms. Williams, was identified and even accompanied officers to the scene. She also claimed to have first-hand knowledge of the injuries to the children, based upon her own personal observations, and gave a detailed description of the injuries to the children. Given this information, along with the unknown whereabouts of one of the alleged perpetrating uncles, as well as appellant's lies about the location of the children and her uncooperative attitude at a time when most grandparents would be concerned about the welfare of their grandchildren, and considering there was also evidence the children had been shuttled from one place to another, thereby supporting the likelihood that they would be removed again, Officer Brewer had reasonable grounds to believe that emergency aid might be warranted.

{¶49} Accordingly, we overrule appellant's first assignment of error.

{¶50} In her fourth assignment of error, appellant argues the trial court erred by restricting her right to put on a defense when it precluded her from calling a FCCS witness to testify as to the timing of the agency's sexual abuse investigation. Appellant submits this evidence was relevant to her state of mind, since, at the time officers came to her residence to investigate the allegations, appellant believed FCCS had already investigated the same allegations and found them to be unsubstantiated. Appellant asserts she was further prejudiced by appellee's statements in closing arguments, during which the City commented that appellant had produced no documentation or witnesses from FCCS to bolster her claim that the abuse allegations had been investigated prior to the events leading to her arrest.

{¶51} Pursuant to Evid.R. 103(A), error may not be predicated upon a ruling that excludes evidence unless (1) a substantial right of the party is affected, and (2) the substance of the evidence was made known to the court by offer. Evid.R. 103(A); *State*

v. Conway, 108 Ohio St.3d 214, 2006-Ohio-791; *Elkins v. Veolia Transp., Inc*., 10th Dist. No. 10AP-203, 2010-Ohio-5209. Therefore, "absent a proffer or questioning that makes the substance of the excluded evidence apparent, a party cannot argue before an appellate court that the trial court erred in the exclusion of evidence." *Ellinger v. Ho*, 10th Dist. No. 08AP-1079, 2010-Ohio-553, ¶34, citing *State v. Gilmore* (1986), 28 Ohio St.3d 190, 191-92.

{¶52} The admission or exclusion of evidence rests within the sound discretion of the trial court. *State v. Robb*, 88 Ohio St.3d 59, 68, 2000-Ohio-275; *State v. Sage* (1987), 31 Ohio St.3d 173. "The trial court has broad discretion in the admission and exclusion of evidence and unless it has clearly abused its discretion and the defendant has been materially prejudiced thereby, this court should be slow to interfere." *State v. Hymore*, 9 Ohio St.2d 122, 128. "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, quoting *State v. Adams* (1980), 62 Ohio St.2d 151.

{¶53} Prior to the start of trial, appellee made a motion in limine, asking the court to preclude appellant from introducing the testimony of any FCCS representative with respect to the results of the investigation into the sexual abuse allegations, which were found to be unsubstantiated. Appellant's counsel opposed the motion, arguing that appellant wished to present the testimony of Mr. Wehr, an employee of FCCS, whom counsel claimed was involved in the investigation.

{¶54} Counsel argued that the testimony of Mr. Wehr was relevant to appellant's state of mind in believing that the abuse allegations had already been resolved, and thus, in believing that the officers had no authority to enter her residence. Counsel asserted

that appellant had been advised by FCCS on August 9, 2007, that the sexual abuse allegations were unsubstantiated. Appellant's counsel claimed appellant was initially made aware of this by a female FCCS caseworker, Ms. Shelly Barker, but that counsel had been unable to make contact with Ms. Barker and wished to instead offer the testimony of Mr. Wehr, a co-worker.

{¶55} The record here reveals that the trial judge conducted an in camera review of various FCCS records subpoenaed by counsel for appellant. The trial judge advised both counsel that the records he reviewed reflected that an assessment was conducted by FCCS on August 10, which was *after* the confrontation between appellant and the police. The trial judge further indicated that the records he reviewed reflected activity in 2005 and 2006, but the only reference in 2007 to an assessment was on August 10, between 1:00 and 3:00 p.m. Thus, there were no records which corroborated appellant's claim that an FCCS investigation was initiated prior to appellant's encounter with police, which took place in the late hours of August 9 and the early morning hours of August 10. Evidence regarding an assessment conducted after appellant's encounter with the police was clearly not relevant to appellant's state of mind at the time of her encounter with the police.

{¶56} Counsel for appellant asserted the defense did not know if records pertaining to an examination on August 9 existed and furthermore, did not intend to submit any FCCS records as evidence. Appellant's counsel simply proffered Mr. Wehr as a defense witness for purposes of testifying that there was an investigation on August 9, 2007, prior to appellant's encounter with police. However, the record reflects that Mr. Wehr was not the person with whom appellant spoke about the purported investigation on August 9, 2007.

{¶57} We find it significant that appellant was attempting to introduce the testimony of a witness whom had not advised her that the sexual abuse allegations were unsubstantiated, and that there were no records available to support her proposition that an FCCS investigation took place on August 9, 2007 and that she was advised of the same. Given that Mr. Wehr did not speak with appellant about the outcome of the investigation and that there are no records reflecting an August 9 investigation, it is unknown how Mr. Wehr could testify on this subject. In addition, appellant did not proffer that Mr. Wehr would have testified that appellant had been advised on August 9, 2007 that the sexual abuse allegations were unsubstantiated. In fact, appellant never proffered how or when Mr. Wehr was involved in the investigation.

{¶58} Furthermore, without an offer of proof, we cannot evaluate and determine whether exclusion of this testimony was prejudicial to a substantial right. See *Ellinger* at ¶35. Thus, any purported error in excluding this evidence was waived because any prejudicial effect cannot be demonstrated. Id. We also note that the evidence which appellant sought to be put before the jury—that she believed the sexual abuse allegations had already been resolved based on a conversation with a caseworker from FCCS—was in fact presented to the jury as a result of appellant's own testimony. Appellant testified during trial that she had spoken to Ms. Barker on the telephone on the afternoon of August 9, 2007, and at that time, Ms. Barker advised her that the FCCS investigation into the sexual abuse allegations revealed that the allegations were untrue. (Trial Tr. 200-01.)

{¶59} Additionally, appellant has also argued that the City improperly commented in closing arguments upon appellant's failure to produce documentation or witnesses from FCCS to support her assertions that the abuse allegations had been investigated prior to the events leading to her arrest. We disagree with the assertion that this comment was

exploitive, given that appellant had been permitted to testify as to her own state of mind regarding why she attempted to prevent the officers from entering her home, that being because she had been advised by FCCS that the sexual abuse allegations were untrue. There was nothing improper about the City referencing the fact that appellant's testimony on that subject was not supported by any evidence from FCCS.

{¶60} Based upon the foregoing, we overrule appellant's fourth assignment of error.

{¶61} Next, we address appellant's fifth and sixth assignments of error together.

{¶62} In her fifth assignment of error, appellant argues the trial court erroneously sustained appellee's motion in limine to exclude reference to appellant's constitutional rights. Appellant submits she had a Fourth Amendment constitutional right to prevent the officers from entering her home without a warrant and argues the trial court's actions invaded the province of the jury as the trier of fact, who should have been the one to determine whether appellant acted within her privilege. In addition, appellant submits the court confused an individual's constitutional privileges as set forth in the context of a search and seizure claim and the lack of privilege that must be proven as an element of the offense of obstructing official business. While conceding that the issues overlap, appellant argues the two are not identical and notes the differing burdens of proof between the suppression hearing and the trial.

{¶63} In her sixth assignment of error, appellant makes an overlapping argument, arguing the trial court acted improperly by giving the jury an instruction which advised that the trial judge had already determined that the police did not need a warrant to enter appellant's apartment. Appellant submits this advisement relieved the prosecution of its burden of proof with respect to the element of lack of privilege and essentially amounted

to a directed verdict in favor of the prosecution. Appellant again argues that this was a matter to be decided by the jury.

{¶64} In the instant case, the prosecution made an oral motion in limine at trial to exclude any reference to the need for a warrant to enter appellant's home and to exclude any discussion regarding appellant's constitutional rights, arguing that issue had already been decided by the trial judge as a result of the court's ruling on the motion to suppress. We note that the motion to suppress was filed on appellant's behalf and essentially required the trial court to make a determination as to whether the warrantless search of appellant's apartment, and the subsequent "seizure" of the children, was constitutional and proper. At appellant's request, a hearing was held and the trial court determined that the warrantless search was constitutional due to the existence of exigent circumstances, as a result of the safety concerns about the children and the lack of sufficient time to seek and obtain a warrant. Appellant cannot now claim it was error to remove this determination from the jury, as he invited any alleged error which may have resulted. See *State v. Frazier*, 115 Ohio St.3d 139, 2007-Ohio-5048; *State v. Bey*, 85 Ohio St.3d 487, 1999-Ohio-283; *Hal Artz Lincoln-Mercury, Inc.v. Ford Motor Co., Lincoln-Mercury* (1986), 28 Ohio St.3d 20.

{¶65} Moreover, we find no error here, in that the issue involving the constitutionality of this warrantless search is a legal question, which is properly a matter for the trial judge, rather than the jury. See generally, *Steele v. United States* (1925), 267 U.S. 505, 511, 45 S.Ct. 417, 419; *Gila Valley Ry. Co. v. Hall* (1914), 232 U.S. 94, 103, 34 S.Ct. 229, 232; *Ford v. United States* (1927), 273 U.S. 593, 605, 47 S.Ct. 531, 535.

{¶66} Appellant has also asserted that the granting of appellee's motion in limine improperly restricted her right to put on a defense and infringed upon the jury's duty to

determine the issue of privilege with respect to the elements of the obstructing official business charge. Appellant further argues the trial court's curative instruction to the jury, which was given in light of the ruling on the motion in limine and in response to comments made by counsel for appellant during closing arguments, also restricted and infringed upon these same rights and duties. We disagree.

{¶67} " 'A jury instruction is proper when it adequately informs the jury of the law.' " *State v. Conway*, 10th Dist. No. 03AP-585, 2004-Ohio-1222, ¶24, quoting *State v. Moody* (Mar. 13, 2001), 10th Dist. No. 98AP-1371. A trial court has broad discretion in instructing the jury. *State v. Crawford*, 10th Dist. No. 03AP-986, 2004-Ohio-4652, ¶13. A trial court is required to provide the jury with all instructions that are relevant and necessary in order for it to weigh the evidence and discharge its duty as fact finder. *State v. Comen* (1990), 50 Ohio St.3d 206, paragraph two of the syllabus. See also *State v. Watson*, 3d Dist. No. 14-09-01, 2009-Ohio-6713 (trial court did not err in sustaining prosecution's objection to defense counsel's closing argument regarding constitutional rights; court had previously determined its ruling on suppression issue was dispositive and counsel was attempting to depart from evidence adduced at trial and attempting to argue the law of the case to the jury).

{¶68} The curative jury instruction given here was prompted by comments from appellant's counsel implying that the police acted improperly in entering appellant's residence without a warrant. The instruction was given as follows:

> It's been argued throughout this case by the defense that [appellant] requested to see a warrant, and I believe factually it has been established that she did request of the officer whether they had a warrant or to produce a warrant, and they did not have a warrant.

> Whether or not the officers acted properly in terms of going in, in terms of absence of a warrant, was a legal question that the Court addressed prior to this hearing, and it was determined during that hearing that the officers did not need to go in with a warrant in this instance. * * *

(Trial Tr. 264.)

{¶69} This instruction was an accurate statement of the law, and as noted above, addressed a legal question which was properly before the trial judge. As noted in *State v. Gordon* (1983), 9 Ohio App.3d 184, in a criminal case, "the existence of a privilege to act or speak or refrain from acting or speaking will most often be a matter of law (such as a constitutional right 'to be secure in their persons, houses, papers, and effects')." Id. at fn. 5.

{¶70} Furthermore, we do not find that the issue of privilege, as it relates to the elements of the obstructing official business charge, was essentially determined by the trial court, rather than by the jury. It is important to note that "the absence of privilege is not an essential element of obstructing official business which the state must prove beyond a reasonable doubt." *State v. Stevens*, 5th Dist. No. 07-CA-0004, 2008-Ohio-6027, ¶35, citing *Gordon* at 187. The *Stevens* court, relying on *Gordon*, found "that privilege is more of an affirmative defense or a mitigating circumstance that if shown to exist would prevent an accused from being convicted of obstructing official business." *Stevens* at ¶35.

{¶71} In the case sub judice, appellant was permitted to argue that she was privileged to hamper or impede the warrantless entry into her home. There was testimony from appellant that she demanded to see a warrant before the officers came into her residence and that she tried to prevent the officer from going inside because she was worried her grandchildren would be hurt or scared by the officer's gun. Appellant

also argued that she had a right to demand to see a warrant. In addition, the jury was given the following instruction on privilege: "Privilege means an immunity, license, or right conferred by law, or bestowed by express or implied grant, or arising out of status, position, office, or relationship, or growing out of necessity."

{¶72} Based upon the foregoing, we overrule appellant's fifth and sixth assignments of error.

{¶73} In her seventh assignment of error, appellant submits she should have been permitted to impeach the credibility of Ms. Williams by introducing Ms. Williams' prior felony conviction through the testimony of Officer Brewer. Although Ms. Williams herself did not testify, Officer Brewer testified about some of the statements Ms. Williams provided to her, in order to explain the course of the police investigation. Appellant argues Evid.R. 806 permits her to attack the credibility of Ms. Williams in this manner. Appellant further argues that because a nontestifying defendant is vulnerable to an attack on his or her credibility (see *State v. Dickess*, 174 Ohio App.3d 658, 2008-Ohio-39), a nontestifying witness whose statements have been received by the jury should also be vulnerable to such an attack. We disagree.

{¶74} As we previously stated, the admission or exclusion of evidence rests within the sound discretion of the trial court. *Robb* at 68. See also *Sage*. Additionally, trial courts have broad discretion regarding the admission and exclusion of evidence and we review such decisions under an abuse of discretion standard. *Hymore* at 128.

{¶75} Appellant is correct in claiming that, if Ms. Williams had actually testified, she would have been subject to impeachment, pursuant to Evid.R. 609, as a result of a purported forgery conviction. However, Ms. Williams did not testify at the trial or at the motion hearing. Therefore, appellant attempts to rely upon Evid.R. 806 to support her

position that she was entitled to impeach Ms. William's credibility using the testimony of Officer Brewer.

{¶76} Evid.R. 806, which provides for attacking and supporting the credibility of a declarant, reads, in relevant part, as follows:

> (A) When a hearsay statement, or a statement defined in Evid.R. 801(D)(2), (c), (d), or (e), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence that would be admissible for those purposes if declarant had testified as a witness.
>
> (B) Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain.

{¶77} In the instant case, in order to attack the credibility of Ms. Williams in this fashion, it must be shown that Ms. Williams' statements are hearsay pursuant to Evid.R. 801. In order to constitute hearsay under Evid.R. 801(C), the statement at issue must be an out-of-court statement *and* must be offered to prove the truth of the matter asserted. If either element is not present, then the statement is not hearsay. *State v. Maurer* (1984), 15 Ohio St.3d 239, 262.

{¶78} The statements offered by Officer Brewer regarding the information provided by Ms. Williams were not hearsay because they were not offered to prove the truth of the matter asserted. Statements which are not offered to prove the truth of the matter asserted but instead to explain an officer's conduct while investigating a crime are not hearsay. *State v. Jones*, 10th Dist. No. 07AP-977, 2008-Ohio-3765, ¶24; *State v. Blevins* (1987), 36 Ohio App.3d 147, 149; *State v. Thomas* (1980), 61 Ohio St.2d 223, 232.

{¶79} Here, the statements made by Ms. Williams were offered to explain why Officer Brewer was concerned about locating the children immediately and why the officer went to the residence of appellant. The trial court admitted the statements with this intention. This is demonstrated in part by an instruction provided by the trial court, in which the trial judge advised the jury as follows:

> THE COURT: * * * [T]here may be occasions where I will attempt to give you a cautionary instruction of one sort or another in terms of the evidence as it's being presented.
>
> * * * [A]ny allegations of abuse and the specifics of those allegations are not for your consideration, * * * and we are going to focus in on what prompted the officer to take whatever actions she took as a result of what she was told by Ms. Williams or whomever else.

(Trial Tr. 67-68.)

{¶80} Furthermore, appellant's reliance upon *Dickess* is unpersuasive, as that case is inapposite. Ms. Williams is not the accused, but is, instead, a witness to the event at issue who did not actually testify at trial or at the motion hearing and, as stated above, Ms. Williams' statements were not hearsay.

{¶81} Accordingly, we overrule appellant's seventh assignment of error.

{¶82} Finally, we address appellant's second, third, and eighth assignments of error together. In her second and third assignments of error, appellant contends the evidence was legally insufficient to support her conviction and that the trial court erred in overruling her Crim.R. 29 motion for acquittal. In her eighth assignment of error, appellant argues her conviction is against the manifest weight of the evidence.

{¶83} A Crim.R. 29 motion challenges the legal sufficiency of the evidence and whether the prosecution has presented adequate evidence on each element of the offense to allow the case to go to the jury. *State v. Thompkins*, 78 Ohio St.3d 380, 1997-

Ohio-52. Sufficiency of the evidence is a legal standard that tests whether the evidence introduced at trial is legally sufficient to support a verdict. Id. at 386. We examine the evidence in the light most favorable to the state and conclude whether any rational trier of fact could have found that the state proved, beyond a reasonable doubt, all of the essential elements of the crime. *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus; *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, ¶78; *State v. Williams*, 99 Ohio St.3d 493, 2003-Ohio-4396.

{¶84} In determining whether a conviction is based on sufficient evidence, an appellate court does not assess whether the evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction. See *Jenks*, paragraph two of the syllabus; *Thompkins* at 390 (Cook, J., concurring); *Yarbrough* at ¶79 (noting that courts do not evaluate witness credibility when reviewing a sufficiency of the evidence claim). We will not disturb the verdict unless we determine that reasonable minds could not arrive at the conclusion reached by the trier of fact. *State v. Treesh*, 90 Ohio St.3d 460, 484, 2001-Ohio-4; *Jenks* at 273. Whether the evidence is legally sufficient to sustain a verdict is a question of law. *Thompkins* at 386.

{¶85} While sufficiency of the evidence is a test of adequacy regarding whether the evidence is legally sufficient to support the verdict as a matter of law, the criminal manifest weight of the evidence standard addresses the evidence's effect of inducing belief. *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, at ¶25, citing *Thompkins* at 386. Under the manifest weight of the evidence standard, a reviewing court must ask the following question: whose evidence is more persuasive - the state's or the defendant's? Id. at ¶25. Although there may be legally sufficient evidence to support a judgment, it may nevertheless be against the manifest weight of the evidence. *Thompkins* at 387; See

also *State v. Robinson* (1955), 162 Ohio St. 486; *State v. Johnson*, 88 Ohio St.3d 95, 2000-Ohio-276.

{¶86} "When 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 factfinder's resolution of the conflicting testimony." *Wilson* at ¶25, quoting *Thompkins* at 387. In determining whether a conviction is against the manifest weight of the evidence, the appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses and determine whether, in resolving any conflicts in the evidence, the jury clearly lost its way and thereby created such a manifest miscarriage of justice that the conviction must be reversed and a new trial must be ordered. *Thompkins* at 387, citing *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

{¶87} A conviction should be reversed on manifest weight grounds only in the most " 'exceptional case in which the evidence weighs heavily against the conviction.' " *Thompkins* at 387, quoting *Martin* at 175. Moreover, " 'it is inappropriate for a reviewing court to interfere with factual findings of the trier of fact * * * unless the reviewing court finds that a reasonable juror could not find the testimony of the witness to be credible.' " *State v. Brown*, 10th Dist. No. 02AP-11, 2002-Ohio-5345, ¶10, quoting *State v. Long* (Feb. 6, 1997), 10th Dist. No. 96APA04-511.

{¶88} Obstructing official business as a violation of Columbus City Code 2321.31(A) states as follows:

> No person, without privilege to do so and with purpose to prevent, obstruct, or delay the performance by a public official of any authorized act within his official capacity, shall do any act which hampers or impedes a public official in the performance of his lawful duties.

{¶89} This provision is nearly identical to R.C. 2921.31(A), which has five essential elements: "(1) an act by the defendant, (2) done with the purpose to prevent, obstruct, or delay a public official, (3) that actually hampers or impedes a public official, (4) while the official is acting in the performance of a lawful duty, and (5) the defendant so acts without privilege." *State v. Kates*, 169 Ohio App.3d 766, 2006-Ohio-6779, ¶21.

{¶90} To prove the crime of obstructing official business, there must be proof of an affirmative act that hampered or impeded the performance of the lawful duties of a public official. *State v. Grooms*, 10th Dist. No. 03AP-1244, 2005-Ohio-706, ¶18. The appellant's intent to obstruct, delay, or prevent a public official from carrying out his duties may be inferred from her actions. Purposely obstructing official business is determined from the manner in which it is done, the means used, and all other facts and circumstances introduced into evidence. Id. at ¶18.

{¶91} Here, there was testimony that appellant pushed Officer Brewer, causing her to lose her balance and nearly fall, as well as testimony from a second witness that appellant grabbed Officer Brewer's arm and continued to reach towards Officer Brewer as she ascended the stairs, even as she was being restrained by a second officer. These acts constitute an affirmative act and meet the first element of the obstructing official business charge. See *State v. Gau* (Mar. 17, 1995), 11th Dist. No. 94-A-0031 (testimony concerning the alleged push was sufficient, in and of itself, to establish a violation of R.C. 2931.21); *State v. Wildman*, 2d Dist. No. 22255, 2008-Ohio-3706 (defendant's efforts to stop police from arresting his girlfriend, which included pushing an officer into a wall and lunging at a detective, were sufficient to prove the elements of obstructing official business); *State v. McCoy*, 2d Dist. No. 22479, 2008-Ohio-5648 (passive resistance is

more likely to be privileged than a physical attack); and *State v. Flickinger*, 4th Dist. No. 06CA44, 2007-Ohio-3233 (by grabbing the officer's wrist and refusing to let go once the investigation was underway, the defendant committed obstruction by delaying the investigation).

{¶92} We also must address the element of acting in the performance of a lawful duty. Due to the existence of exigent circumstances, we find Officer Brewer was acting in the performance of her lawful duty in entering the residence to determine whether emergency assistance was necessary. Officer Brewer testified she sought to check on the well-being of two young children and to obtain medical treatment for them, which she described as typical in an investigation involving child sexual assault allegations.

{¶93} As to the privilege element, appellant disputes that exigent circumstances existed here and contends she was privileged to resist the officer's warrantless entry into her home under these circumstances. We disagree.

{¶94} Generally, when police have reasonable grounds to believe that an emergency exists, they have a legal duty to enter the premises and investigate. See *State v. Myers*, 3d Dist. No. 9-02-65, 2003-Ohio-2936, ¶9; *Lakewood v. Simpson*, 8th Dist. No. 80383, 2002-Ohio-4086, ¶1. Furthermore, the existence of exigent circumstances overcomes the presumption of unreasonableness in a warrantless entry. *State v. May*, 4th Dist. No. 06CA10, 2007-Ohio-1428, ¶14. Therefore, the existence of exigent circumstances authorizes the police to make a warrantless entry and, in turn, removes the Fourth Amendment privilege to resist entry. *Simpson* at ¶15. If the police have a duty to enter a home to determine whether emergency assistance is needed, that duty would be rendered meaningless if someone is privileged to resist that entry. *May* at ¶14.

{¶95} In our analysis of appellant's first assignment of error, we determined that exigent circumstances existed to justify entry into appellant's residence without a warrant. Based upon the law cited above, we find appellant was without privilege to resist entry into her residence.

{¶96} However, even assuming, arguendo, that the warrantless entry was unlawful, appellant's conduct in resisting that entry was not privileged. "Privilege," as applicable here, is defined as "an immunity, license, or right conferred by law, bestowed by express or implied grant, arising out of status, position, office, or relationship, or growing out of necessity." R.C. 2901.01(A)(12).

{¶97} While appellant argues she was permitted to use "token resistance" to prevent unlawful entry into her apartment and also submits that her conduct was de minimus, we find the evidence describing her conduct in pushing and/or grabbing Officer Brewer, if believed, was not de minimus and went beyond "token resistance." Admittedly, appellant has a limited right to resist entrance and would likely be permitted to use "passive resistance," such as by locking or closing a door or by physically placing herself in the officer's way, but not a physical attack. See *City of Middleburg Heights v. Theiss* (1985), 28 Ohio App.3d 1; *State v. Howard* (1991), 75 Ohio App.3d 760. See also *McCoy* (finding a body-check of the officer strayed too far from the passive resistance spectrum, going beyond the right to resist, and therefore was without privilege). Here, there was testimony describing appellant's actions as a physical struggle with the police and thus, she acted without privilege.

{¶98} Furthermore, while an unlawful entry can result in the exclusion of evidence, " 'absent bad faith on the part of a law enforcement officer, an occupant cannot obstruct the officer in the discharge of his duty, whether or not the officer's actions are lawful under

the circumstances.' " *State v. Burns*, 2d Dist. No. 22674, 2010-Ohio-2831, ¶19, quoting *State v. Pembaur* (1984), 9 Ohio St.3d 136, 138; see also, *State v. Stevens*, 2d Dist. No. 07-CA-0004, 2008-Ohio-6027, ¶37.

{¶99} Here, the officers described their reasoning for entering the residence was to check on the well-being of the children. Even if Officer Brewer's entry was unlawful under these particular circumstances, absent evidence of bad faith, appellant was not justified in obstructing her efforts. See *Burns* at ¶19. See also *Stevens* at ¶37, and *Pembaur* at the syllabus.

{¶100} Next, we analyze whether appellant's conduct was committed with purpose to prevent or obstruct the officer and whether it actually hampered or impeded the officer. Appellant argues this element has not been proven, as the officer was undeterred and was able to access the children inside the apartment.

{¶101} Intent to impede may be inherently found in the affirmative words and actions of the accused. *City of Avon Lake v. Charles*, 9th Dist. No. 07CA009117, 2008-Ohio-998. Under R.C. 2921.31 (which is virtually identical to the ordinance at issue here), if an individual specifically intends a particular obstructing effect and accomplishes that purpose, a violation has occurred. *Flickinger* at ¶9. However, a violation does not require the accused to be successful in her efforts to prevent the officers from doing their job. Id. See also *State v. Daily* (Jan. 15, 1998), 4th Dist. No. 97CA25; *State v. Hagstrom* (June 21, 1999), 12th Dist. No. CA98-07-157; *State v. Wellman*, 173 Ohio App.3d 494, 2007-Ohio-2953.

{¶102} In addition, where an individual takes affirmative action to hamper or impede the police, she may be found guilty of obstructing official business. *State v. Harris*, 10th Dist. No. 05AP-27, 2005-Ohio-4553, ¶14. "Hamper" is defined as "to hold

back; hinder; impede" or "to interfere with; curtail." Webster's Encyclopedic Unabridged Dictionary (Random House 1997). "Impede" is defined as "to retard in movement or progress by means of obstacles or hindrances; obstruct; hinder." Webster's Encyclopedic Unabridged Dictionary (Random House 1997).

{¶103} It is evident that appellant's physical actions against Officer Brewer did interfere with the officer's entrance into the residence and clearly impeded the officer from moving forward into the apartment. Thus, we find the evidence sufficient for the trial court to have concluded that appellant's physical attack on Officer Brewer disrupted her performance of her duties.

{¶104} As a result, we find there is sufficient evidence to show that appellant's conduct of pushing Officer Brewer, causing her to lose her balance and nearly fall, and/or her conduct of grabbing Officer Brewer's arm, constituted an affirmative act that was committed with the purpose of preventing or obstructing Officer Brewer from entering the residence and checking on the well-being of two young children as part of her lawful duties as a police officer, and that such conduct did hinder or impede her progress. Furthermore, there is sufficient evidence to demonstrate that appellant was without privilege to resist the entry into her residence. Because we conclude that appellee's evidence is legally sufficient to support a guilty verdict on the charge of obstructing official business as a matter of law, we overrule appellant's second assignment of error. Likewise, because we find there was sufficient evidence to support the conviction, we find the trial court did not err in overruling appellant's motion for acquittal, pursuant to Crim.R. 29. Thus, we also overrule appellant's third assignment of error.

{¶105} Finally, we consider appellant's claim that the conviction was against the manifest weight of the evidence. This test is much broader and requires us to review the

entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, and determine 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 must be ordered. Upon doing so, we find appellant's claim is without merit, based upon the reasoning and analysis as set forth above.

{¶106} Although appellant testified and provided evidence which was contradictory to that provided by the two officers, the jury obviously found the City's witnesses to be more credible and accepted their version of events. In addition, we have overruled appellant's other assignments of error relating to the motions in limine, the jury instructions, the exclusion of certain evidence, and the restrictions placed upon the defense in the presentation of its case, and therefore, we find appellant's claims regarding these issues do not contribute favorably to her manifest weight argument. Thus, we cannot say that the jury clearly lost its way and created a manifest miscarriage of justice. Accordingly, we overrule appellant's eighth assignment of error.

{¶107} In conclusion, we overrule all eight assignments of error presented by appellant. The judgment of the Franklin County Municipal Court is affirmed.

Judgment affirmed.

KLATT and FRENCH, JJ., concur.

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