**[Cite as *State v. Overton*, 2011-Ohio-4204.]**

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

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

D E C I S I O N

Rendered on August 23, 2011

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

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

APPEAL from the Franklin County Court of Common Pleas.

DORRIAN, J.

**{¶1}** This case is before us pursuant to *State v. Overton*, 128 Ohio St.3d 353, 2011-Ohio-740, ¶2, in which the Supreme Court of Ohio vacated our prior judgment with respect to defendant-appellant, Robert R. Overton's ("appellant"), eighth assignment of error. The court remanded the matter with instructions to apply its decision in *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314.

**{¶2}** Appellant was convicted of felonious assault, in violation of R.C. 2903.11, and endangering children, in violation of R.C. 2919.22, based on events resulting in the death of four-year-old Antwan Bowman ("Antwan"), the child of appellant's girlfriend,

Monica Dumas ("Dumas"). The trial court sentenced appellant to a six-year term of incarceration on each charge, with the sentences to be served consecutively. Appellant appealed his conviction, arguing eight assignments of error for this court's review. We overruled each of appellant's eight assignments of error and affirmed the trial court's judgment. *State v. Overton*, 10th Dist. No. 09AP-858, 2010-Ohio-5256.

**{¶3}** In the eighth assignment of error, appellant argued that felonious assault and child endangerment were allied offenses of similar import committed with a single animus and that the trial court erred by imposing consecutive sentences rather than merging the convictions and requiring the prosecutor to elect on which offense appellant would be sentenced.

**{¶4}** Ohio law provides that "[w]here the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one." R.C. 2941.25(A). By contrast, "[w]here the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them." R.C. 2941.25(B).

**{¶5}** Our prior decision relied on the doctrine set forth in *State v. Rance*, 85 Ohio St.3d 632, 1999-Ohio-291, now overruled by *Johnson*. In *Rance*, the Supreme Court of Ohio declared that, in determining whether crimes are allied offenses of similar import, " 'courts should assess, by aligning the elements of each crime in the abstract, whether the statutory elements of the crimes "correspond to such a degree that the commission of

one crime will result in the commission of the other." ' " *Overton*, 2010-Ohio-5256, at ¶47, quoting *Rance* at 638, quoting *State v. Jones* (1997), 78 Ohio St.3d 12, 14. Under this "abstract comparison" standard, we had previously determined that felonious assault and child endangering were not allied offenses of similar import because a conviction of felonious assault required proof that the defendant acted knowingly, while a conviction of child endangering only required proof that a defendant acted recklessly. Thus, an individual could recklessly commit an act constituting child endangering, yet lack the knowledge element required to establish felonious assault. Id. at ¶48, citing *State v. Villa-Garcia*, 10th Dist. No. 03AP-384, 2004-Ohio-1409, ¶41. In accordance with this precedent, we overruled appellant's eighth assignment of error. Id. at ¶49. We now revisit that decision in light of the Supreme Court's instruction to apply the *Johnson* decision.

**{¶6}** As noted, in *Johnson*, the Supreme Court "overrule[d] *Rance* to the extent that it call[ed] for a comparison of statutory elements solely in the abstract under R.C. 2941.25." Id. at ¶44. There was no majority opinion in *Johnson*, but the plurality opinion and concurring justices emphasized the importance of considering the defendant's conduct. *State v. Hopkins*, 10th Dist. No. 10AP-11, 2011-Ohio-1591, ¶5, citing *Johnson* at ¶44, 68, 78. "Under the holding [of the plurality opinion] in *Johnson*, '[i]n determining whether offenses are allied offenses of similar import under R.C. 2941.25(A), the question is whether it is possible to commit one offense and commit the other with the same conduct, not whether it is possible to commit one without committing the other. * * * If the offenses correspond to such a degree that the conduct of the defendant constituting commission of one offense constitutes commission of the other, then the offenses are of

similar import.' " *State v. White*, 10th Dist. No. 10AP-34, 2011-Ohio-2364, ¶62, quoting *Johnson* at ¶48.

**{¶7}** If the offenses can be committed by the same conduct, then we must " 'determine whether the offenses *were* committed by the same conduct, i.e., "a single act, committed with a single state of mind." * * * If the answer to both questions is yes, then the offenses are allied offenses of similar import and will be merged.' " (Emphasis sic.) Id. at ¶63, quoting *Johnson* at ¶49-50. "Conversely, if the court determines that the commission of one offense will *never* result in the commission of the other, or if the offenses are committed separately, or if the defendant has separate animus for each offense, then, according to R.C. 2941.25(B), the offenses will not merge." (Emphasis sic.) *Johnson* at ¶51.

**{¶8}** In applying *Johnson*, therefore, we begin by determining whether it is possible to commit both offenses of which appellant was convicted with the same conduct. Appellant was convicted of felonious assault, in violation of R.C. 2903.11. That statute provides, in relevant part, that no person shall knowingly cause serious physical harm to another or to another's unborn. R.C. 2903.11(A)(1). Appellant was also convicted of child endangering, in violation of R.C. 2919.22. That law prohibits several types of acts against a child less than 18 years of age, including abusing the child. R.C. 2919.22(B)(1). The statute does not specifically define what constitutes abuse of a child, and this determination must be made on a case-by-case basis. *Lumley v. Lumley*, 10th Dist. No. 09AP-556, 2009-Ohio-6992, ¶20, citing *In re Horton*, 10th Dist. No. 03AP-1181, 2004-Ohio-6249, ¶16. Recklessness is the required mens rea under R.C. 2919.22(B). *State v. Carse*, 10th Dist. No. 09AP-932, 2010-Ohio-4513, ¶39, citing *State v. Dunn*, 4th

Dist. No. 06CA6, 2006-Ohio-6550, ¶19, citing *State v. McGee* (1997), 79 Ohio St.3d 193, 195; *State v. Adams* (1980), 62 Ohio St.2d 151, 153; *State v. O'Brien* (1987), 30 Ohio St.3d 122, 124.

**{¶9}** "When recklessness suffices to establish an element of an offense, then knowledge or purpose is also sufficient culpability for such element." R.C. 2901.22(E). Thus, when there is sufficient evidence to conclude that a defendant acted knowingly, that is also sufficient to establish that he acted recklessly. Accordingly, when an individual violates R.C. 2903.11 by knowingly performing an act that causes serious physical harm, and the victim suffering serious physical harm is a child under the age of 18, then the act could also constitute child endangering. Because it is possible to commit felonious assault and felony child endangering with the same conduct, they are offenses of similar import. *White* at ¶62. See also *State v. Craycraft*, 12th Dist. No. CA2009-02-013, 2011-Ohio-413, ¶15 ("We conclude that it is possible to commit the offenses of felonious assault, second and third-degree child endangering, and domestic violence with the same conduct.").

**{¶10}** Next, we must determine " 'whether the offenses *were* committed by the same conduct, i.e., "a single act, committed with a single state of mind." ' " (Emphasis sic.) *White* at ¶63, quoting *Johnson* at ¶49, quoting *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, ¶50 (Lanzinger, J., dissenting). In *State v. Logan* (1979), 60 Ohio St.2d 126, the Supreme Court of Ohio held that "[i]n addition to the requirement of similar import of the crimes committed, the defendant, in order to obtain the protection of R.C. 2941.25(A), must show that the prosecution has relied upon the same conduct to support both offenses charged." Id. at 128. We review the evidence presented at trial to

determine whether the prosecution relied on the same conduct to support both convictions.

**{¶11}** At trial, Dumas testified that she placed Antwan in the shower to clean him up because he had wet the bed the night before. While Antwan was in the shower, both Dumas and appellant went in and out of the bathroom. Dumas testified that, while Antwan was in the shower, appellant struck Antwan in the head with his fist, causing Antwan to fall down. Appellant removed Antwan from the shower and threw him into Dumas's arms. Appellant then took Antwan out of Dumas's arms. Antwan got out of appellant's arms and tried to crawl away; appellant kicked him in the legs and buttocks as he crawled away. Appellant then picked Antwan up, threw him into Dumas's arms again, and then took him from Dumas and lifted him high in the air. Dumas testified that she saw Antwan's eyes roll back in his head and realized something was wrong, so she called 911. At some point after removing Antwan from the shower, appellant struck him in the chest "at least three times." (Tr. 183.)

**{¶12}** The state presented evidence that Antwan had an external bruise on his forehead and subgaleal hemorrhage, or bleeding underneath the scalp, due to a blunt trauma. Antwan also had bruising on his chest and lung contusions indicating blunt trauma to the chest. The external bruising on his chest was consistent with knuckles, and the number and location of the bruises indicated multiple blows to the chest. The coroner concluded that Antwan died as a result of cardiac concussion due to blunt force trauma to the chest. Thus, at trial, the state presented evidence that appellant committed at least two acts of violence against Antwan that caused serious physical harm—striking him in the head while Antwan was in the shower, which resulted in the bruise on his head, and

striking him in the chest after he was removed from the shower, which resulted in the bruises on his chest and death.

**{¶13}** Appellant argues that, under *Johnson*, appellant's conduct should be considered the same act committed with a single state of mind. In *Johnson*, the convictions arose from the following conduct:

> In the incident at issue, Johnson was in a room alone with Milton while the boy's mother was in a different room watching television. The mother heard Johnson yelling, heard a "thump" or "stomping," and went to investigate. She found Johnson yelling at Milton for mispronouncing a word while reading, and she observed Johnson push Milton to the floor. The mother left the room. Shortly thereafter, she heard another loud "thump" or "stomp." When she went to the room she saw Milton shaking on the floor.

Id. at ¶54. The plurality opinion in *Johnson* noted that "there were arguably two separate incidents of abuse, separated by time and a brief intervention by [the victim's] mother." Id. at ¶56. The Supreme Court found that Johnson was convicted of child endangering, in violation of R.C. 2919.22(B)(3), for administering excessive discipline based on the first incident and was convicted of child endangering, in violation of R.C. 2919.22(B)(1), for abuse causing serious physical harm based on the second incident of abuse. This latter conviction formed the basis for Johnson's conviction for felony murder under R.C. 2903.02(B). Id. Thus, the two charges found to be allied offenses of similar import, child endangering by abuse causing serious physical harm and felony murder, were both based on the "second sequence of abuse." Id. The *Johnson* plurality stated that it would not "parse [the defendant's] conduct into a blow-by-blow in order to sustain multiple convictions for the second beating." Id. However, this did not mean that all convictions

arising from both incidents were subject to merger but merely that the court would not further subdivide the second incident into discrete acts to avoid merger.

**{¶14}** We find the present case to be more analogous to *State v. Cooper*, 104 Ohio St.3d 293, 2004-Ohio-6553. The defendant in *Cooper* was convicted of involuntary manslaughter with child endangering as the predicate felony offense and child endangering in violation of R.C. 2919.22. The trial court found that the convictions were allied offenses of similar import and only sentenced the defendant for one conviction; the intermediate appellate court affirmed the trial court's ruling. Id. at ¶8. The Supreme Court of Ohio reversed, holding that the convictions were not allied offenses of similar import because they were not based on a single act. Id. at ¶29. The Supreme Court found that the state presented evidence at trial of two acts of violence against the child—slamming his head against a hard surface and shaking him. Id. at ¶27. The involuntary manslaughter conviction arising from the underlying offense of child endangering was based on slamming the child's head against a hard surface, while the other conviction of child endangering was based on shaking the child. Id. at ¶29. Because the state had not relied on the same conduct to support the two convictions, the defendant could be convicted of both crimes and sentenced on each of them. Id. at ¶30. *Cooper* remains a valid precedent despite the overruling of *Rance* because, as the *Cooper* majority noted, "*Rance* is not implicated by the facts of this case." Id. at ¶29.

**{¶15}** In this case, as in both *Cooper* and *Johnson*, there were two separate incidents of abuse, the strike to the head and the blows to the chest. The incidents were separated in time during the period when appellant removed Antwan from the shower and threw him into Dumas's arms. However, unlike *Johnson*, where the two convictions found

to be allied offenses were both based on the second incident, in this case, appellant has not shown that both convictions were based on a single act of abuse. The state clearly relied on the blows to the chest as the basis for the felonious assault conviction, with the prosecutor explicitly making that connection in closing argument. The argument for child endangering, by contrast, was only based on the fact that appellant struck Antwan, without indicating whether this was the blow to the head delivered in the shower or the later blows to the chest. There was sufficient evidence for the jury to conclude that appellant committed child endangering through child abuse by striking Antwan in the head while he was in the shower. Appellant has not established that the state relied on the punches to the chest to support both the felonious assault charge and the child endangering charge, as required under *Logan*.

**{¶16}** Despite the fact that the two crimes of which appellant was convicted can be committed by the same conduct, in this case they were not committed by the same conduct. Because the " 'offenses [were] committed separately * * * the offenses will not merge.' " *White* at ¶63, quoting *Johnson* at ¶51.

**{¶17}** Accordingly, appellant's eighth assignment of error is overruled. The judgment of the Franklin County Court of Common Pleas is hereby affirmed.

*Judgment affirmed.*

BRYANT, P.J., and BROWN, J., concur.

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