[Cite as *State v. Cochran*, 2012-Ohio-5899.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 11AP-408 (C.P.C. No. 10CR-03-1333)
Gianna Y. Cochran,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on December 13, 2012

Ron O'Brien, Prosecuting Attorney, and *Barbara A. Farnbacher*, for appellee.

Sarah M. Schregardus, for appellant.

APPEAL from the Franklin County Court of Common Pleas

SADLER, J.

{¶ 1} Defendant-appellant, Gianna Y. Cochran, appeals from a judgment entry of conviction entered following a bench trial in the Franklin County Court of Common Pleas in which she was convicted of seven misdemeanor counts of child endangering and five felony counts of child endangering, and sentenced to a prison term of 25 years. For the reasons that follow, we affirm the findings of guilt and remand this matter for resentencing on Counts 2 and 3 of the indictment and to amend Counts 11 and 12 of the indictment.

I. BACKGROUND

{¶ 2} On April 26, 2010, appellant was indicted on 18 counts of child endangering involving five different children. The offenses were alleged to have occurred in appellant's home in New Albany, Ohio, between August 18 and September 25, 2009.

{¶ 3} On February 23, 2011, appellant executed a written jury waiver, waiving her right to a trial by jury and consenting to a trial before the judge. Plaintiff-appellee, the state of Ohio introduced the testimony of two witnesses: Jonathan Bickel (the father of appellant's two children), and Detective Richard Moore of the Columbus Police Department, Special Victims Bureau.

{¶ 4} Appellant and Mr. Bickel met in 2002 and began dating. In 2004, the couple had a daughter, M.B., who was six years old at the time of the trial. Appellant and Mr. Bickel had a second child, L.B., in 2007, and she was three years old at the time of the trial. The couple never married, but the four of them lived together as a family. Mr. Bickel's 11-year-old daughter from a previous relationship sometimes stayed with them as well.

{¶ 5} In 2009, the family lived in an apartment in New Albany, Ohio. Appellant earned money by babysitting children at the apartment. In addition to her own daughters (when M.B. was not in school), appellant cared for three to five other children at her apartment. In August 2009, Mr. Bickel became concerned after he witnessed appellant administering discipline he believed was excessive to M.B. As a result, he set up a hidden microphone to monitor appellant in their apartment. A short time later, he also installed a hidden wireless webcam to record video of the living room area. Mr. Bickel was able to listen to the audio recordings at work, but he was not able to view the video recordings for a couple of months. However, after he listened to the audio recordings, he concluded appellant was abusing M.B. In mid-November, a civil protection order ("CPO") was served against appellant on behalf of M.B. and L.B.

{¶ 6} Around Thanksgiving break, Mr. Bickel viewed the video recordings and forwarded them to the attorney representing him in the CPO proceedings. A few weeks

later, in December 2009, children's services and the police were contacted and alerted as to the content of the videos.

{¶ 7} The trial court admitted the audio/video recordings obtained from appellant's apartment. The parties stipulated that the recordings, state's exhibit No. 1, showed appellant in her apartment on the dates and times indicated. The parties also stipulated to the ages and identities of the children involved. The trial court then viewed the recordings. For purposes of this appeal, the relevant portions of those recordings show incidents which occurred on August 18, 2009 (as charged in Count 1 of the indictment), August 19, 2009 (Counts 2 and 3 of the indictment), August 31, 2009 (Counts 8 and 9 of the indictment), September 1, 2009 (Count 10 of the indictment), September 9, 2009 (Counts 11 and 12 of the indictment),[1] September 11, 2009 (Counts 13 and 14 of the indictment), and September 25, 2009 (Counts 17 and 18 of the indictment).

{¶ 8} Based on the audio/video recordings, on August 18, 2009, at approximately 3:16 p.m., appellant entered the living room carrying eight-month-old I.S. Appellant placed him on the floor and changed his diaper. After changing his diaper, appellant grabbed the clothing in I.S.'s diaper area and used it to slide his entire body up and back across the floor several times until he began crying.

{¶ 9} On August 19, 2009, at approximately 3:25 p.m., appellant entered the room carrying eight-month-old R.P., who was crying. Appellant told R.P. to "shut it." The recording shows appellant placed R.P. on the floor and picked up a cloth baby carrier/sling. R.P. continued to cry. Appellant leaned down and picked up R.P. by one arm. R.P. began to cry harder. Appellant told R.P., "I'm going to make you stop. Do you hear me? I will make you stop." While R.P. continued to cry, appellant held R.P. with her face pressed firmly against a cloth on appellant's chest and with appellant's arms wrapped around R.P.'s head in a "bear hug," as R.P. kicked and flailed her legs, which dangled near appellant's stomach. Appellant subsequently secured R.P. in the sling.

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[1] The indictment lists the offense dates of these two counts as August 9, 2009. However, the evidence introduced at trial indicates that the offense dates are September 9, 2009. This variance is the subject of appellant's fourth assignment of error. We shall reserve analysis of this issue until such time as we address the fourth assignment of error.

{¶ 10} On August 31, 2009, the recordings showed that at approximately 3:01 p.m., one-year-old J.P. was crying and asking for his father while appellant was attempting to put on his socks and shoes. Appellant picked up J.P., tossed him onto the couch on his back, and put on his socks and shoes. Afterwards, appellant grabbed a blanket or pillow, placed it over J.P.'s face, and pressed down on it while standing over him. J.P. kicked and flailed. When appellant removed the blanket or pillow after approximately 20 seconds, J.P. cried loudly and gasped for air. Appellant then sat him up on the couch and said, "You're going to listen." J.P. continued to cry intermittently for a few minutes.

{¶ 11} On September 1, 2009, the recording showed appellant yelling at her two-year-old daughter, L.B., and throwing one of her toys. Appellant spanked L.B., who then cried loudly. When L.B. refused to walk to the opposite side of the room, appellant picked up L.B. by one ankle and carried her upside down across the room. L.B. cried and screamed "mommy." Appellant held L.B. upside down by both ankles and swung her back and forth and around in circles while L.B. continued to cry, screaming "mommy" and "no." Appellant then put L.B. on the floor and asked her repeatedly, "Did you like that?" as L.B. cried.

{¶ 12} On September 9, 2009, at approximately 1:45 p.m., the audio recording revealed a baby crying loudly. The video recording then showed appellant entering the room carrying two-year-old A.M. with one hand and holding her upside down by one ankle. Appellant tossed A.M. on to the couch on her stomach. A.M. continued to scream and cry urgently. Appellant picked up A.M., flipped her over to her back, and used a blanket to muffle A.M.'s crying for several minutes. At one point, appellant's entire body was on the couch on top of the child, holding the blanket over the child's face. Eventually, appellant carried A.M. upstairs under her arm like a football, where her crying continued to be audible.

{¶ 13} On September 11, 2009, at approximately 12:09 p.m., the recordings show A.M. was lying on the floor when she started to cry. Appellant gave her a pacifier. The crying intensified. Appellant picked up A.M., tossed her onto the couch, and sat down

next to A.M. Appellant used a blanket to muffle A.M.'s cries for a couple of minutes. Appellant walked away and A.M. continued to gasp and sob for a while longer.

{¶ 14} On September 25, 2009, at approximately 1:25 p.m., the recordings showed three children on the floor in the living room and appellant lying on the couch. A.M. was crying on the floor. Appellant got up from the couch, picked up J.P. from the floor, and tossed him onto the couch. Next, appellant sat on the floor beside A.M., who was still crying. Appellant's back was to the webcam, but her arms were moving and A.M.'s cries became muffled. The recordings showed A.M. moving her arms and revealed sounds as if A.M. was gasping for air. Appellant repeatedly told A.M. to "stop" and also repeatedly asked A.M. if she was done crying. At one point, appellant was up on her knees, bending over A.M. and pressing down.

{¶ 15} Detective Moore testified his duties were to investigate physical abuse allegations against children. As part of his investigation, he reviewed the majority of the 41 days of audio/video recordings provided by Mr. Bickel and was involved in locating and contacting the families of the victims. After reviewing the recordings, Detective Moore concluded appellant's actions were cutting off the airways of the children and/or suffocating the children, thereby creating a substantial risk of serious physical harm to the children. Detective Moore testified that none of the children sustained visible physical injuries documented by medical records, but one family reported they observed red spots on their child's face and neck on the date of the incident and that the child had been crying a lot that day.

{¶ 16} Appellant presented the testimony of Sandra Booth and of her mother, Judianne Cochran. Ms. Booth testified she had been a friend of the family for many years and had witnessed appellant's interaction with appellant's daughters. She described appellant's relationship with her daughters as loving. The testimony of appellant's mother focused primarily on her interaction with the police and on the child custody matter with Mr. Bickel.

{¶ 17} Finally, appellant also testified on her own behalf regarding the seven specific incidents that occurred between August 18 and September 25, 2009.

{¶ 18} Appellant testified she was only playing with I.S. on August 18, 2009 when she pushed and pulled him after changing his diaper and she did not believe she was hurting him in any way. Appellant denied pushing R.P. directly into her chest on August 19, 2009, claiming R.P.'s face was turned slightly to the left. Appellant further testified R.P.'s airway was not obstructed and she had no reason to believe she was causing harm to R.P. Regarding the incident with J.P. on August 31, 2009, appellant admitted she got frustrated too quickly with trying to put on J.P.'s socks and shoes. She denied placing a blanket over his face and testified they had actually been playing "peekaboo" to calm him down. Appellant testified she picked up L.B. upside down by her ankle on September 1, 2009 because L.B. really liked being upside down and enjoyed being swung like an airplane. Appellant claimed L.B. was laughing and crying at the same time.

{¶ 19} Appellant also provided testimony regarding the three incidents involving two-year-old A.M. Regarding the September 9, 2009 incident, appellant acknowledged it was wrong to pick up A.M. by her ankle, but claimed she did not think about it at the time and did not intend to hurt A.M. As to the September 11, 2009 incident, appellant further stated A.M.'s cries were muffled due to her waffle-weave blanket and the over-stuffed couch. Finally, regarding the September 25, 2009 incident, appellant denied covering A.M.'s face. She further denied pressing her body weight on A.M., claiming she was stroking her from her chest down to her feet.

{¶ 20} After considering the evidence and the arguments from counsel, the trial court found appellant guilty of seven misdemeanor counts of child endangering, specifically Counts 1, 3, 9, 10, 12, 14, and 18 of the indictment. The trial court also found appellant guilty of five third-degree felony counts of child endangering, specifically Counts 2, 8, 11, 13, and 17 of the indictment. The trial court ordered a presentence investigation ("PSI") and scheduled the matter for sentencing.

{¶ 21} At the April 1, 2011 sentencing hearing, the trial court gave the state, as well as the families of the victims, the opportunity to make a statement. The trial court also heard statements from appellant's counsel and appellant herself. Prior to imposing

sentence, the trial court indicated it had considered the PSI, appellant's sentencing memorandum, the letters from the families of the victims, and the letters sent on behalf of appellant, as well as the evidence. The trial court ultimately imposed consecutive five-year sentences on each of the five third-degree felonies, and six-month sentences on the misdemeanors, which were ordered to run concurrently to each other and to the felonies, for a total sentence of 25 years.

II. DISCUSSION

{¶ 22} Appellant has filed a timely appeal and now raises five assignments of error for our review:[2]

> **[SUPPLEMENT TO] FIRST ASSIGNMENT OF ERROR**: The trial court violated Ms. Cochran's rights to due process and a fair trial when, in the absence of sufficient evidence and against the manifest weight of the evidence, the trial court found Ms. Cochran guilty.
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> **[SUPPLEMENT TO] SECOND ASSIGNMENT OF ERROR**: The trial court's sentence was clearly and convincingly contrary to law, was an abuse of discretion, and violated the proportionality requirement of Ohio Sentenc[ing] laws.
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> **[SUPPLEMENT TO] THIRD ASSIGNMENT OF ERROR**: The trial court erred in entering multiple convictions for offenses that were allied offenses of similar import.
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> **FOURTH ASSIGNMENT OF ERROR**: The trial court violated Ms. Cochran's Due Process rights when it found her guilty based on facts not in the indictment presented to the grand jury.
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> **FIFTH ASSIGNMENT OF ERROR**: The trial court violated the Sentencing-Package doctrine and therefore imposed a sentence contrary to law.

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[2] Counsel for appellant filed an initial merit brief on August 15, 2011, raising three assignments of error for our review. On November 10, 2011, new counsel entered an appearance and requested leave to file a supplemental brief. Said leave was granted. As a result, counsel for appellant supplemented the first three assignments of error and added the fourth and fifth assignments of error. Counsel for the state also filed a supplemental brief addressing the newly asserted issues and assignments of error.

{¶ 23} For ease of analysis, we will discuss some of appellant's assignments of error out of order.

A. First Assignment of Error

{¶ 24} In her first assignment of error, appellant contends she was deprived of due process of law because: (1) the prosecution failed to offer sufficient evidence to prove she committed the offenses of child endangering; and (2) her convictions for child endangering are against the manifest weight of the evidence.

{¶ 25} Sufficiency of the evidence is a legal standard that tests whether the evidence introduced at trial is legally sufficient to support a verdict. *State v. Thompkins*, 78 Ohio St.3d 380, 386 (1997). 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*, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus; *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, ¶ 78; and *State v. Williams*, 99 Ohio St.3d 493, 2003-Ohio-4396.

{¶ 26} 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); *Jenks* at 273. Whether the evidence is legally sufficient to sustain a verdict is a question of law. *Thompkins* at 386.

{¶ 27} 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, ¶ 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*, 162 Ohio St. 486 (1955) (although there is sufficient evidence to sustain a guilty verdict, a court of appeals has the authority to determine that such a verdict is against the weight of the evidence); *State v. Johnson*, 88 Ohio St.3d 95 (2000).

{¶ 28} "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*, 20 Ohio App.3d 172, 175 (1st Dist.1983).

{¶ 29} 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*, 10th Dist. No. 96APA04-511 (Feb. 6, 1997).

{¶ 30} In her first assignment of error, appellant makes both general and specific arguments as to why there is insufficient evidence to support her convictions and why the convictions are against the manifest weight of the evidence. Generally, appellant argues that although the child endangering statute does not require proof of serious physical harm, the lack of such proof as to any of the incidents, along with the inconclusiveness of the recordings and appellant's reasonable explanations for her actions, demonstrate the

state's failure to prove her guilt beyond a reasonable doubt. Specifically, appellant also addresses each incident and argues why the evidence is insufficient and the convictions are against the manifest weight of the evidence.[3]

{¶ 31} The relevant portions of R.C. 2919.22, the statute prohibiting child abuse, read as follows:

> (A) No 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. * * *
>
> (B) No person shall do any of the following to a child under eighteen years of age * * *:
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> * * *
>
> (2) Torture or cruelly abuse the child;
>
> (3) Administer corporal punishment or other physical disciplinary measure, or physically restrain the child in a cruel manner or for a prolonged period, which punishment, discipline, or restraint is excessive under the circumstances and creates a substantial risk of serious physical harm to the child;

{¶ 32} A violation of R.C. 2919.22(A) is a misdemeanor of the first degree, while violations of R.C. 2919.22(B)(2) or (3) are felonies of the third degree. In the instant case, appellant was found guilty of a combination of these charges. In order to properly analyze

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[3] Notably, appellant's arguments concerning manifest weight and sufficiency of the evidence focus on the two misdemeanor child endangering counts which stand alone (Counts 1 and 10) and on the felony child endangering counts, but not on the misdemeanor counts linked to the same event that precipitated the felony indictments. For example, appellant's initial merit brief specifically requests that appellant's "felony convictions" be reversed, without mentioning the misdemeanor convictions. (Appellant's Brief, 11.) Also, in her supplemental brief, with the exception of her discussion of the two misdemeanor offenses charged in Counts 1 and 10, appellant's arguments all dispute that appellant tortured or cruelly abused the children or that she physically restrained the children for a prolonged period of time, or that she created a substantial risk of serious physical harm. All of these elements are found within the felony section of the statute, not the misdemeanor section. Therefore, in addressing this assignment of error, we shall focus on the two misdemeanors in Counts 1 and 10, as well as the felonies in Counts 2, 8, 11, 13, 17.

appellant's claims that her convictions are not supported by sufficient evidence and are against the manifest weight of the evidence, we must consider each incident individually.

{¶ 33} The state was not required to prove serious physical harm in order to support any of the offenses charged in the indictment. Instead, the state was only required to prove that appellant created a *substantial risk* of serious physical harm in order to prove the felony offenses. In order to prove the misdemeanor offenses, the state was only required to prove a *substantial risk* to the health or safety of the child. A "substantial risk" is defined in R.C. 2901.01(A)(8) as "a strong possibility, as contrasted with a remote or significant possibility, that a certain result may occur or that certain circumstances may exist."

{¶ 34} Recklessness is the culpable mental state required for child endangering. *See State v. McGee*, 79 Ohio St.3d 193, 195 (1997); *State v. Adams*, 62 Ohio St.2d 151, 152 (1980). "Recklessness" is defined in R.C. 2901.22(C), which states:

> 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. A person is reckless with respect to circumstances when, with heedless indifference to the consequences, he perversely disregards a known risk that such circumstances are likely to exist.

1. Count 1

{¶ 35} Regarding the August 18, 2009 misdemeanor incident involving I.S. in which appellant pulls the eight-month-old child by his clothing back and forth along the carpet, appellant argues the evidence fails to demonstrate that I.S.'s health was in jeopardy or to identify the risk that he was facing, or that appellant acted recklessly. We disagree.

{¶ 36} Appellant repeatedly and recklessly slid the eight-month-old infant back and forth on the carpet by holding onto his clothing, which in turn caused the infant to cry. Appellant's actions created a substantial risk to the infant's health and safety and violated a duty of care in that her actions created a strong possibility that the child would be injured, such as by striking another person or object during the movements or by

sustaining carpet burns or any number of other injuries during the rapid sliding movements. Also, given that the child began crying when appellant began the sliding movements, it is apparent the child was suffering from the movements.

2. Count 2

{¶ 37} In the August 19, 2009 incident, appellant argues the state failed to prove she committed the felony offense of child endangering. Specifically, appellant disputes that she tortured or cruelly abused R.P. based upon her manner of holding the child. Appellant also disputes the trial court's finding that appellant restrained the child for a prolonged period, arguing the restraint only lasted 30 seconds, and further submits there is no evidence demonstrating appellant was aware of any risk involved with her conduct. We disagree.

{¶ 38} Appellant wrapped both of her arms around the child's head and pushed her face into a cloth on appellant's chest as the child was crying uncontrollably and kicking her legs, which were dangling near appellant's stomach. Appellant informed the child she would "make [her] stop," as she attempted to muffle the child's sobs by pressing the child's face into the cloth. Appellant's actions were smothering the child, thereby creating a substantial risk of serious physical harm. Appellant's actions were reckless and also constituted torture or cruel abuse or physical restraint in a cruel manner or for a prolonged period of time, though it lasted for no more than 30 seconds. Whether or not appellant intended to inflict pain and whether or not actual injury was inflicted are irrelevant, as neither one was required to be proven.

3. Count 8

{¶ 39} With respect to the August 31, 2009 incident, appellant was convicted of excessively physically restraining J.P. for a prolonged period and of creating a substantial risk of serious physical harm. Appellant claims the state failed to prove any of these elements.

{¶ 40} We believe the audio and video recordings of that incident demonstrate that appellant firmly pressed a blanket or pillow over J.P.'s face while he was crying as she stood over him, watching as he kicked and flailed. Upon removing the object, the child

sobbed and gasped for air. Like the trial court, in viewing this evidence in a light most favorable to the state, we find that this conduct demonstrates appellant recklessly tortured or cruelly abused the child or physically restrained the child in either a cruel manner or for a prolonged period of time and created a substantial risk of serious physical harm. As stated previously, smothering the child and muffling his cries clearly qualifies as creating a substantial risk of serious physical harm.

4. Count 10

{¶ 41} In the September 1, 2009 misdemeanor incident, appellant asserts she was simply playing with her daughter, which she contends is her obligation to do, when she carried her upside down and swung her around the room. Appellant disputes that her conduct violated a duty of care and argues that while her conduct may have been negligent or imprudent, it was not reckless. We disagree.

{¶ 42} During this incident, we find the evidence shows appellant yelled at her daughter, spanked her roughly, and then picked her up by one ankle and carried her upside down across the room when the child refused to walk to the other side of the room. Appellant continued to hold the child upside down by the ankles and swung her back and forth and around in circles while the child cried and yelled "mommy" numerous times. Afterward, appellant repeatedly asked L.B. if she "like[d] that" in a harsh tone of voice. There is more than enough evidence to demonstrate that appellant created a strong possibility of risk to L.B.'s health or safety by her actions and violated a duty of care, protection, or support to the child. The trial court was free to reject appellant's explanation of the incident.

5. Count 11

{¶ 43} Regarding the August/September 9, 2009 incident in which appellant carried two-year-old A.M. upside down by her ankle and covered her face with a blanket, appellant argues the state failed to present evidence of risk of serious physical harm. Appellant further submits that carrying the child by her foot is not torture, the child was not far off the ground, and it only lasted a few moments.

{¶ 44} We believe the evidence on this count is sufficient to support the conviction for felony child endangering and it is not against the manifest weight of the evidence. The evidence supports a finding that appellant recklessly tortured or cruelly abused A.M. or physically restrained her in a cruel manner or for a prolonged period, thereby creating a substantial risk of serious physical harm when she carried the child upside down by the ankle with one hand while the child cried loudly, tossed her on the couch, and used a blanket to smother the child and muffle her cries for several minutes. During a portion of this time, appellant's entire body was covering the child as the child lay on the couch as appellant pressed the blanket over her face. Smothering the child with a blanket for several minutes creates a substantial risk of serious physical harm and constitutes cruel abuse or physical restraint for a prolonged period or in a cruel manner.

6. Count 13

{¶ 45} As to the September 11, 2009 incident, appellant disputes the trial court's finding that she physically restrained A.M. for a prolonged period of time and cruelly abused her. While she admittedly did not gently place the child on the couch, appellant submits her conduct did not rise to the level of cruel abuse.

{¶ 46} During this incident, appellant roughly pulled a crying A.M. off the floor and tossed her onto the couch. Appellant sat down on the couch next to A.M. and used a blanket to muffle A.M.'s cries for a couple of minutes. After appellant walked away, A.M. continued to gasp and sob. Again, we find muffling the child's cries with a blanket and smothering her is more than sufficient to demonstrate appellant recklessly tortured or cruelly abused A.M. or physically restrained her in a cruel manner or for a prolonged period of time, and thereby created a substantial risk of serious physical harm.

7. Count 17

{¶ 47} Appellant argues the incident that occurred on September 25, 2009 does not support a finding that she physically restrained A.M. for a prolonged period of time and/or cruelly abused her. Appellant further argues that because her back is to the video camera and the child is not visible when appellant is sitting on the floor, the evidence is

insufficient to support a finding that she committed cruel abuse against A.M. We disagree.

{¶ 48} The evidence presented supports the finding that appellant recklessly tortured or cruelly abused A.M. or physically restrained her in a cruel manner for a prolonged period, thereby creating a substantial risk of serious physical harm. The evidence is sufficient to demonstrate appellant committed the felony offense of child endangering. Although appellant's back is to the video recorder, based upon the positioning of appellant's arms, it is apparent that appellant is pressing down on the child and the child's arms are moving as she struggles. It is also apparent that appellant is smothering the child, as the child grows quiet and then can be heard screaming and gasping while appellant asks her several times if she is done and complains that there is no reason for her crying. At one point, appellant's entire body is hunched over the child as she is pressing down on the child. As the trial court noted when it announced its verdict, in watching the video recordings in the situations where the child's face was covered or appellant is pressing against or down on the child, the natural conclusion is that appellant is suffocating the child. Coupled with the audio, where the child's cries are muffled and the child can be heard choking and gasping for air, the only reasonable conclusion was that appellant was smothering the child.

{¶ 49} Based upon the foregoing analysis, we find all of the essential elements of the crimes have been demonstrated and the evidence is legally sufficient to support appellant's convictions for child endangering. Furthermore, we cannot say, after reviewing the entire record, weighing the evidence and all reasonable inferences, and considering the credibility of the witnesses, as well as resolving any conflicts in the evidence, that the trial court clearly lost its way and created such a manifest miscarriage of justice that the convictions for child endangering must be reversed. Accordingly, we overrule appellant's first assignment of error.

B. Second and Fifth Assignments of Error

{¶ 50} Appellant's second and fifth assignments of error challenge the trial court's decision to impose maximum consecutive sentences. In her second assignment of error,

appellant contends that the trial court's imposition of maximum, consecutive sentences was clearly and convincingly contrary to law, an abuse of discretion, and in violation of the consistency and proportionality requirements in R.C. 2929.11(B). In her fifth assignment of error, she asserts that the trial court's imposition of maximum, consecutive sentences violated the "sentencing package doctrine." Because these challenges are interrelated, we will address them together.

{¶ 51} Appellant failed to object to her sentence on these grounds at sentencing and therefore has forfeited all but plain error. *See* Crim.R. 52(B); *State v. Worth*, 10th Dist. No. 10AP-1125, 2012-Ohio-666, ¶ 84. Under Crim.R. 52(B), "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." For an error to be "plain" within the meaning of Crim.R. 52(B), it " 'must be an "obvious" defect in the trial proceedings.' " *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, ¶ 16, quoting *State v. Barnes*, 94 Ohio St.3d 21, 27 (2002). We notice plain error " 'with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.' " *Barnes* at 27, quoting *State v. Long*, 53 Ohio St.2d 91 (1978), paragraph three of the syllabus. "The burden of demonstrating plain error is on the party asserting it." *Payne* at ¶ 17.

{¶ 52} "We review a trial court's sentence to determine if it is clearly and convincingly contrary to law." *State v. Green*, 10th Dist. No. 10AP-934, 2011-Ohio-6451, ¶ 7, citing *State v. Burton*, 10th Dist. No. 06AP-690, 2007-Ohio-1941, ¶ 19; R.C. 2953.08(G). In applying this standard, we 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.*, citing *State v. Carse*, 10th Dist. No. 09AP-932, 2010-Ohio-4513, ¶ 60; *Burton*. We are also cognizant of the two-step standard of review set forth by a plurality of the Supreme Court of Ohio in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, which asks (1) whether the trial court adhered to all applicable rules and statutes in imposing the sentence, and (2) whether a sentence within the permissible statutory range constitutes an abuse of discretion. In this case, however, we find under either standard of review, the trial court did not err when it imposed

maximum, consecutive sentences. *State v. Swanson*, 10th Dist. No. 10AP-502, 2011-Ohio-776, ¶ 18 (reviewing maximum sentences under both standards).

{¶ 53} In this case, appellant has not demonstrated that the trial court failed to properly consider and apply the appropriate sentencing criteria or that the trial court imposed a sentence not authorized by applicable law. At the sentencing hearing, the trial court expressly stated that it considered the PSI, appellant's sentencing memorandum, letters sent by the families of the victims, letters sent on behalf of appellant, and the evidence presented at trial. Then, after expressing its concerns regarding the magnitude of the offenses, the trial court stated it was "led to the inescapable conclusion that maximum, consecutive sentences are necessary to carry out the stated purposes of the sentencing statutes to punish and to protect." (Tr. 252-53.) The trial court's sentencing entry indicated that the court "considered the purposes and principles of sentencing set forth in R.C. 2929.11 and the facts set forth in R.C. 2929.12" and "weighed the factors as set forth in the applicable provisions of R.C. 2929.13 and R.C. 2929.14." (Sentencing Entry, 2.) Such language in a sentencing entry belies a claim that the trial court failed to consider statutory sentencing guidelines. *Green* at ¶ 8, citing *State v. Vaughn*, 10th Dist. No. 09AP-73, 2009-Ohio-4970, ¶ 21.

{¶ 54} Appellant asserts that none of the factors enumerated in R.C. 2929.12(B) indicated that her conduct was more serious than conduct normally constituting the offense. We disagree. In announcing the sentence, the trial court pointed to evidence supporting several of the seriousness factors in R.C. 2929.12(B). The trial court relied heavily on the fact that the victims were young children and that the instances of abuse occurred because of appellant's role as caretaker. *See* R.C. 2929.12(B)(1) (injury of victim exacerbated because of the victim's age); R.C. 2929.12(B)(6) ("The offender's relationship with the victim facilitated the offense."). Moreover, the trial court repeatedly referenced the apparent "horror" and "terror" displayed by each victim as they were "tortured" and "thrown around like a bag of laundry." (Tr. 251-52.) *See* R.C. 2929.12(B)(2) (serious psychological harm).

{¶ 55} Appellant also claims that her sentence violates the consistency and proportionality principles in R.C. 2929.11(B). In order to demonstrate a sentence is inconsistent, a defendant "must demonstrate the trial court failed to properly consider the statutory sentencing factors and guidelines found in R.C. 2929.11 and 2929.12." *State v. McMichael*, 10th Dist. No. 11AP-1042, 2012-Ohio-3166, ¶ 42, citing *State v. Hayes*, 10th Dist. No. 08AP-233, 2009-Ohio-1100, ¶ 9; *State v. Holloman*, 10th Dist No. 07AP-875, 2008-Ohio-2650, ¶ 19. As explained above, however, appellant has failed to make this showing given the statements made by the trial court at the sentencing hearing and in its entry.

{¶ 56} Finally, appellant argues that the trial court violated the sentencing-package doctrine because the trial court attempted "to package all of the offenses into one overall 25 year sentence." (Appellant's Supplemental Brief, 15.) We find this argument unpersuasive for several reasons. While appellant contends that the Supreme Court of Ohio adopted the doctrine in *State v. Saxon*, 109 Ohio St.3d 176, 2006-Ohio-1245, the *Saxon* court expressly *rejected* the sentencing-package doctrine, "a federal doctrine that requires the court to consider the sanctions imposed on multiple offenses as the components of a single, comprehensive sentencing plan." *Id*. at ¶ 5. Because "Ohio's felony-sentencing scheme is clearly designed to focus the judge's attention on one offense at a time[,]" the *Saxon* court concluded that "[t]he sentencing-package doctrine has no applicability to Ohio sentencing laws: the sentencing court may not employ the doctrine when sentencing a defendant, and appellate courts may not utilize the doctrine when reviewing a sentence or sentences." *Id*. at ¶ 8, 10. Here, because the trial court properly considered the purposes and principles of sentencing when imposing each individual sentence, appellant has failed to demonstrate plain error under Crim.R. 52(B).

{¶ 57} Accordingly, appellant's second and fifth assignments of error are overruled.

C. Third Assignment of Error

{¶ 58} Appellant's third assignment of error challenges the trial court's decision to impose concurrent sentences for each pair of felony and misdemeanor counts of child endangering (Counts 2 and 3, 8 and 9, 11 and 12, 13 and 14, and 17 and 18). Appellant

submits that Ohio's multiple counts statute, R.C. 2941.25, required the trial court to merge the felonies with the misdemeanors committed on the same date and impose a single sentence for each pair of offenses. Appellant did not raise a merger objection at sentencing and therefore has forfeited all but plain error on appeal. *See* Crim.R. 52(B); *State v. Rhodehamel*, 10th Dist. No. 11AP-96, 2011-Ohio-5618, ¶ 41.

{¶ 59} Whether multiple sentences may be imposed in the same proceeding for a single criminal act is a question of legislative intent: "With respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended." *Missouri v. Hunter*, 459 U.S. 359, 365 (1983); *see also State v. Moss*, 69 Ohio St.2d 515 (1982). Absent a more specific legislative statement, Ohio's multiple counts statute, R.C. 2941.25, is the primary indication of the General Assembly's intent to impose multiple punishments for a single criminal act. *State v. Miranda*, 10th Dist. No. 11AP-788, 2012-Ohio-3971, ¶ 8. "R.C. 2941.25 is a legislative attempt to codify the judicial doctrine of merger, i.e., the principle that 'a major crime often includes as inherent therein the component elements of other crimes and that these component elements, in legal effect, are merged in the major crime.' " *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, ¶ 42, quoting *State v. Botta*, 27 Ohio St.2d 196, 201 (1971).

{¶ 60} The defendant bears the burden of proving an entitlement to merger at sentencing pursuant to R.C. 2941.25. *State v. Mughni*, 33 Ohio St.3d 65, 67 (1987). The conditions required for merger are set forth in R.C. 2941.25(A): "Where the *same conduct* by defendant can be construed to constitute two or more allied offenses of *similar import*, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one." (Emphasis added.) Thus, a defendant cannot establish an entitlement to merger without demonstrating that the offenses result from the "same conduct" and share a "similar import." *See State v. Cooper*, 104 Ohio St.3d 293, 2004-Ohio-6553, ¶ 17, quoting *State v. Logan*, 60 Ohio St.2d 126, 128 (1979) (" '*In addition* to the requirement of *similar import* * * *, 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.' "). R.C. 2941.25(B) restates these requirements in the negative by prohibiting merger where the offenses are of "dissimilar import" or were "committed separately," but also identifies a third bar to merger where the offenses were committed with a "separate animus as to each."

{¶ 61} In the syllabus of *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, the Supreme Court of Ohio unanimously abandoned the standard for determining the "similar import" of offenses articulated in *State v. Rance*, 85 Ohio St.3d 632 (1999). The court could not, however, agree on *how* to consider the accused conduct, as the decision lacks a majority opinion articulating a replacement to the *Rance* standard. *See State v. Hopkins*, 10th Dist. No. 10AP-11, 2011-Ohio-1591, ¶ 5; *State v. Pore*, 5th Dist. No. 2011-CA-00190, 2012-Ohio-3660, ¶ 20. The lead opinion rejects the standard articulated in "*Rance* to the extent that it calls for a comparison of statutory elements solely in the abstract under R.C. 2941.25." *Johnson* at ¶ 44. The opinion also abandons the "will result" standard used in the years before *Rance*[4] by announcing a two-part inquiry that requires merger if the offenses (1) "can be committed by the same conduct" and (2) "were committed by the same conduct, i.e., 'a single act, committed with a single state of mind.' " *Johnson* at ¶ 49, quoting *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, ¶ 50 (Lanzinger, J., dissenting). The second inquiry is dispositive: if the offenses *were* committed by the same conduct under the second step, then the offenses necessarily *can be* committed by the same conduct under the first step. In applying this analysis, the three justices "decline[d] the invitation of the state to parse [the defendant's] conduct into a blow-by-blow in order to sustain multiple convictions for the second beating." *Id.* at ¶ 56.

{¶ 62} Whether a defendant has established the "same conduct" requirement of R.C. 2941.25(A) inherently depends on " 'the particular facts of each case.' " *Cooper* at ¶ 19, quoting *State v. Jones*, 78 Ohio St.3d 12, 14 (1997). As pertinent here, this court has

[4] In the years before *Rance*, the Supreme Court determined the "similar import" requirement by comparing the elements of the offenses to ascertain whether the commission of one offense "will result" in the commission of the other. *See, e.g.*, *Logan* at 129; *State v. Talley*, 18 Ohio St.3d 152 (1985), syllabus; *State v. Blankenship*, 38 Ohio St.3d 116, 117 (1988); *State v. Jones*, 78 Ohio St.3d 12, 13 (1997).

applied the Supreme Court of Ohio's holding in *Cooper* in the context of multiple instances of child abuse. *See State v. Overton*, 10th Dist. No. 09AP-858, 2011-Ohio-4204, ¶ 14. In *Cooper*, the Supreme Court reversed the court of appeals' holding that the offenses of child endangering and involuntary manslaughter (predicated on child endangering) were allied offenses of similar import under the then-valid standard in *Rance*. The court stated that *Rance* did not apply because the defendant failed to prove that the state relied on the same conduct to support both offenses. *Cooper* at ¶ 2, 29. After reviewing the record, the court found no indication that the defendant's convictions originated from a "single act" because "the state presented evidence at trial demonstrating that [the defendant] committed two separate acts, slamming [the victim] against a hard surface and shaking him[.]" *Id*. at ¶ 28. Without proof the state relied upon the "same conduct" to support both convictions, the court concluded that the defendant could be sentenced on each. *Id*. at ¶ 30.

{¶ 63} This court followed *Cooper* in *Overton*, recognizing that "*Cooper* remains a valid precedent despite the overruling of Rance[.]" *Overton* at ¶ 14. In *Overton*, the defendant was separately sentenced on counts of felonious assault and child endangering based on events resulting in the death of a four-year-old child. *Id*. at ¶ 2. At trial, the state presented evidence establishing that the defendant punched the child in the head while the child was in the shower, causing the child to fall down. *Id*. at ¶ 11. The defendant then removed the child from the shower and threw him into the arms of the defendant's girlfriend. *Id*. When the child became able to crawl away, the defendant kicked him in the legs and buttocks, picked him back up, and again threw him into the girlfriend's arms. *Id*. The defendant punched the child "at least three times" after the child had been removed from the shower. *Id*. The defendant's girlfriend called 911 when she saw the child's eyes roll back in his head. *Id*.

{¶ 64} Relying on *Cooper* and *Logan*, this court found that merger was inappropriate because the defendant "ha[d] not shown that both convictions were based on a single act of abuse." *Overton* at ¶ 15. While it was clear that the state relied on the blows to the child's chest as the basis for the felonious assault conviction, it was unclear

which blow the state relied on to support the child endangering conviction: the state's argument for child endangering "was only based on the fact that appellant struck [the victim], without indicating whether this was the blow to the head delivered in the shower or the later blows to the chest." *Id*. Because "[t]here was sufficient evidence for the jury to conclude that appellant committed child endangering through child abuse by striking [the child] in the head while he was in the shower[,]" we held that the defendant failed to establish that the offenses resulted from the same conduct. *Id*.

{¶ 65} As explained in more detail below, we find this case to be similar to *Cooper* and *Overton* in that appellant has failed to prove that the state relied on a single act of abuse to support the misdemeanor and felony counts of child endangering committed on August 31 (Counts 8 and 9), September 9 (Counts 11 and 12), September 11 (Counts 13 and 14), and September 25, 2009 (Counts 17 and 18). A review of the record of the bench trial, including each video presented by the state, reveals that the state presented evidence of multiple crimes and identified each as a distinct act of abuse.

1. Counts 8 and 9

{¶ 66} To prove the misdemeanor and felony violations in Counts 8 and 9, the state presented evidence of two distinct acts of abuse separated by a period of 40 seconds. The video from August 31, 2009, shows appellant grabbing a crying two-year-old boy, J.P., off the ground and throw him down on the couch. After appellant finished putting on J.P.'s shoes—30 seconds after J.P. had already finished crying—appellant grabbed a blanket from the couch and, with both arms fully extended, pressed it down into J.P.'s face smothering him for several seconds. The video shows J.P.'s legs and arms begin flailing at which point appellant leans the weight of her torso into J.P., further pressing J.P.'s head down into the couch.

{¶ 67} While it is clear that the state relied on appellant's act of smothering to support the felony (Count 8), it is less clear whether the state also relied on the smothering to support the misdemeanor (Count 9). The state's opening statement and closing argument separately identified the act of throwing J.P. on the couch. In its opening statement, the state told the trial court that the video would show appellant

grabbing the children and "throwing them down on the couch really violently." (Tr. 7.) Furthermore, the trial court referenced both acts—the throwing and the smothering—when it announced its verdict finding appellant guilty of the offenses.

{¶ 68} Similar to the facts in *Overton*, where it was unclear whether the offense of child endangering was based on the blow to the head or the later blows to the chest, the facts here do not show that the state relied on the act of smothering to support both the misdemeanor and felony offenses. Appellant's act of grabbing a crying two-year-old and throwing him down on the couch—like her act of sliding the crying infant on the ground in Count 1 and her act of carrying and swinging her crying daughter in Count 10—was sufficient to constitute a misdemeanor violation of R.C. 2919.22(B).

{¶ 69} Aside from the holdings in *Overton* and *Cooper*, this court has consistently recognized that separate crimes do not merge merely because they occurred during the same abusive episode. *See*, *e.g.*, *State v. Eal*, 10th Dist. No. 11AP-460, 2012-Ohio-1373, ¶ 93; *State v. White*, 10th Dist. No. 10AP-34, 2011-Ohio-2364, ¶ 67 (affirming separate sentences for multiple gunshots); *State v. Davic,* 10th Dist. No. 11AP-555, 2012-Ohio-952, ¶ 16 (separate sentences for multiple rapes). On this record, we cannot agree that the trial court committed plain error by imposing concurrent sentences for Counts 8 and 9.

2. Counts 11 and 12

{¶ 70} The state prosecuted Counts 11 and 12 by presenting evidence of separate crimes—indeed more than two—committed over the course of almost *seven* minutes. In the September 9, 2009 video, appellant is first seen walking through the living area with one hand holding a crying two-year-old girl, A.M., upside down by one ankle, her head hovering inches above the ground. Appellant takes A.M. to the couch, flings her upward, and releases her ankle causing her to drop face first onto the couch. Then, while on the couch, appellant flips A.M. on her back and smothers her with a blanket at least three separate times over the next six minutes, with intervals lasting as long as one and one-half minutes in between smotherings. Each smothering causes A.M.'s loud cry to become muffled, and A.M. can be heard gasping for air between smotherings until she resumes

crying. The video concludes with appellant placing A.M. (still crying) under her arm and taking her out of view.

{¶ 71} While these separate smotherings alone warrant the imposition of separate sentences, the record indicates that the state relied on appellant's act of carrying A.M. by the ankle as a distinct instance of abuse. During the cross-examination of appellant, the state specifically asked her whether the videos were fabricated to show her "dragging a kid by the ankle." (Tr. 200.) Moreover, the state's closing argument provided the following description of Counts 11 and 12: "Eleven being the felony, Twelve being the misdemeanor. This is when she's carrying [A.M.] by her leg, her ankle." (Tr. 210.) The state argued, "[i]t's not like she just picked her up. She picked up this two-year-old walking all around the room by her ankle." (Tr. 210.) The trial court also identified both acts before announcing its verdict on each count.

{¶ 72} To construe this seven-minute period of abuse as a single act for the purposes of sentencing would, in effect, create a multiple-offense discount that allows an offender to commit multiple criminal acts " 'for the penal price of one.' " *State v. Logsdon*, 7th Dist. No. 09CO8, 2010-Ohio-2536, ¶ 13, quoting *State v. Barnes*, 68 Ohio St.2d 13, 18 (1981) (Celebrezze, C.J., with four justices concurring). Just as a gunman cannot fire additional shots without facing additional punishment, *see White*, appellant should not be permitted to abuse and re-abuse A.M. at the cost of only one sentence. *See State v. Town*, 11th Dist. No. 2007-T-0120, 2008-Ohio-6878, ¶ 47 ("Simply because the three rape convictions arise from the same assaultive episode does not preclude the conclusion that separate crimes occurred.").

{¶ 73} As stated previously, it is appellant's burden to prove that the state relied on a single criminal act to support Counts 11 and 12. *See Cooper* at ¶ 29; Overton at ¶ 15. Appellant has failed to present any merger argument in the trial court, and she cites no authority allowing this court to speculate or assume that the state relied on a singular smothering theory to support both counts, especially when the record shows that the state presented evidence of separate crimes and differentiated the acts of smothering from the act of carrying and throwing A.M. by the ankle. Because appellant cannot prove that the

state relied on the same conduct to support these counts, we find no plain error in the imposition of concurrent sentences for Counts 11 and 12.

3. Counts 13 and 14

{¶ 74} Appellant also fails to establish plain error with regard to Counts 13 and 14. To prove those counts, the state relied on the video from September 11, 2009, which shows appellant grabbing a crying two-year-old girl, A.M., from the floor, throw her down onto the couch, and suffocate her at least once for the next two minutes. The state's opening statement and closing argument identified the throwing and smothering as separate acts of abuse and did not refer to both counts as based on only one smothering. (Tr. 7, 225.) In describing the video during closing arguments, the state argued that appellant "slammed [the child] onto the couch" before smothering her for several minutes. (Tr. 225.) The trial court also found that A.M. was "slammed onto the couch" when announcing its verdict. Because appellant's act of "slamming" a crying two-year-old girl onto the couch was—like the evidence supporting Counts 1, 9, and 10—sufficient to constitute a misdemeanor violation of R.C. 2919.22(B), and because appellant has failed to show that the state did not rely on that act to support the misdemeanor offense, we cannot agree that the trial court plainly erred by imposing concurring sentences for those offenses.

4. Counts 17 and 18

{¶ 75} Like Counts 8 and 9, the two counts based on the September 25, 2009 video were supported by evidence of separate acts of smothering (at least three) separated by breaks lasting as long as one and one-half minutes. After each smothering, A.M. can be heard gasping for air while appellant tells her to stop crying. When the crying resumes, appellant commits another act of smothering—at one point, using both hands and leaning her weight into A.M., who is flailing her feet and arms in the air.

{¶ 76} For the same reasons as those previously stated, appellant has not demonstrated that the state relied on the same conduct to support both offenses. Like Counts 8, 9, 11, 12, 13 and 14, the state specifically identified separate acts of abuse in each video, and appellant cannot show that the state relied on the same conduct to support

both offenses. Under these circumstances, appellant has failed to prove that the imposition of separate sentences rose to the level of "plain error" under Crim.R. 52(B).

{¶ 77} Finally, appellant contends that all of the counts at issue were based on the same conduct because the trial court did not attempt to separate the conduct in announcing its verdict and because the state described the misdemeanor counts as "alternative" or "back-up" counts to the felony offenses. However, the trial court was not required to specify which conduct supported the misdemeanor and which conduct supported the felony. *See* Crim.R. 23(C) (allowing general findings of guilt in cases tried to the bench). In fact, the absence of such findings only weighs against merger; it cannot constitute affirmative proof that the state relied on the same conduct to support each pair of offenses. Moreover, we do not find the state's description of the misdemeanors as "alternative" or "back-up" offenses to be a dispositive admission that the state relied on a single act of smothering to support each pair of offenses. The state identified separate acts of abuse supporting each pair of offenses and specifically asked the trial court to find appellant guilty of each felony *and* each misdemeanor during closing arguments. (Tr. 203, 215.) The state's description was, at best, contradictory and, in our view, insufficient by itself to constitute an "obvious defect" warranting notice of plain error under Crim.R. 52(B). *See Payne* at ¶ 16. As in *Cooper* and *Overton*, "appellant has not shown that both convictions were based on a single act of abuse." *Overton* at ¶ 15; *see also Cooper* at ¶ 29. Consequently, appellant has failed to demonstrate error, plain or otherwise, under R.C. 2941.25(A) and Crim.R. 52(B).

5. Counts 2 and 3

{¶ 78} This court does, however, believe that appellant has established plain error in the trial court's decision to impose separate sentences for Counts 2 and 3, because the record shows that the state expressly relied on a single act of smothering to support both counts. The state identified only the smothering in its opening statement and closing argument, and the trial court did not reference the initial grabbing of R.P. when it announced its verdict on Counts 2 and 3. Because the record shows that the state relied

on a single act of abuse to support both Counts 2 and 3, we find that the imposition of concurrent sentences for those counts constitutes plain error.

{¶ 79} Accordingly, we overrule appellant's third assignment of error in part and affirm the imposition of concurrent sentences for Counts 8 and 9, Counts 11 and 12, Counts 13 and 14, and Counts 17 and 18. However, we sustain appellant's third assignment of error to the extent we find plain error in the imposition of concurrent sentences for Counts 2 and 3. "In a remand based only on an allied-offenses sentencing error, the guilty verdicts underlying a defendant's sentences remain the law of the case and are not subject to review." *State v. Wilson*, 129 Ohio St.3d 214, 2011-Ohio-2669, ¶ 15, citing *State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2, ¶ 26-27. At the sentencing hearing, the state must choose which offense to pursue among allied offenses, and the trial court must "merge the crimes into a single conviction for sentencing, * * * and impose a sentence that is appropriate for the merged offense." *Whitfield* at ¶ 24. However, "only the sentences for the offenses that were affected by the appealed error are reviewed de novo; the sentences for any offenses that were not affected by the appealed error are not vacated and are not subject to review." *Wilson* at ¶ 15, citing *Saxon* at paragraph three of the syllabus.

D. Fourth Assignment of Error

{¶ 80} In her fourth assignment of error, appellant argues the trial court violated her due process rights by finding her guilty based upon facts which were not in the indictment. Appellant contends the trial court, in effect, sua sponte amended the indictment to change the date of the offenses in Counts 11 and 12 from August 9, to September 9, 2009. Specifically, appellant submits that because Counts 11 and 12 of the indictment state that the offenses occurred on August 9, 2009, but the evidence introduced at trial (including the audio/video recordings and her stipulation to the dates of the offenses) indicated that those offenses occurred on *September* 9, 2009, her convictions on those counts must be vacated.

{¶ 81} The state, however, argues that appellant stipulated to the dates of the offenses, and as a result, she must demonstrate plain error in order to prevail. Because

she cannot demonstrate plain error, and because she has not demonstrated or alleged prejudice, the state urges us to overrule this assignment of error.

{¶ 82} "In a criminal charge the exact date and time are immaterial unless in the nature of the offense exactness of time is essential. It is sufficient to prove the alleged offense at or about the time charged." *Tesca v. State*, 108 Ohio St. 287 (1923), paragraph one of the syllabus. Where the precise date and time of a violation of the statute are not essential elements of the crime, an indictment need not allege a specific date of the offense. *State v. Sellards*, 17 Ohio St.3d 169, 171-72. "The General Assembly, in declaring what shall be sufficient in an indictment, provided, among other things, that it shall be sufficient if it can be understood that the offense was committed at some time prior to the time of the filing of the indictment." *Id.* at 171, citing R.C. 2941.03(E). Proof of the offense on or about the alleged date is sufficient to support a conviction even where evidence as to the exact date of the offense is in conflict. *State v. Dingus*, 26 Ohio App.2d 131, 137 (4th Dist.1970). The exact date is not essential to the validity of the conviction, and the failure to prove that is of no consequence. *Id.* "An indictment or information is not made invalid, and the trial, judgment, or other proceedings stayed, arrested or affected: * * * [f]or stating the time imperfectly[.]" R.C. 2941.08(C); *Sellards* at 171.

{¶ 83} Crim.R. 7(D), which provides for the amendment of indictments, reads as follows:

> The court may *at any time before, during, or after a trial* amend the indictment, information, complaint, or bill of particulars, in respect to any defect, imperfection, or omission in form or substance, or of any variance with the evidence, provided no change is made in the name or identity of the crime charged. If any amendment is made to the substance of the indictment, information, or complaint, or to cure a variance between the indictment, information, or complaint and the proof, the defendant is entitled to a discharge of the jury on the defendant's motion, if a jury has been impaneled, and to a reasonable continuance, unless it clearly appears from the whole proceedings that the defendant has not been misled or prejudiced by the defect or variance in respect to which the amendment is made, or that the defendant's rights will be fully protected by proceeding with the trial, or by a

> postponement thereof to a later day with the same or another jury.

(Emphasis added.)

{¶ 84} In *State v. Koelling*, 10th Dist. No. 94AP-868 (Mar. 21, 1995), the defendant argued on appeal that the evidence was insufficient to support one of his convictions for rape because the state did not prove the act occurred within the time frame alleged in the indictment. However, this court determined that a variance between the indicted time frame and the time frame proven at trial did not require reversal of the defendant's conviction. We determined that because the variance in proof did not mislead or prejudice the defendant, since his defense theory was not affected by any change in the time frame during which the offense occurred, a new trial was not required. Instead, we determined the proper remedy was to remand the case to the trial court for the limited purpose of amending the indictment to conform to the evidence produced at trial.

{¶ 85} The circumstances in the instant case are similar to *Koelling*. Here, appellant's defense was not harmed by the failure to amend the date of the offenses alleged in Counts 11 and 12 of the indictment. The defense theory throughout the trial was that while she became too easily frustrated and sometimes acted inappropriately, appellant never intended to harm any of the children. Appellant further argued that her actions as displayed in the video did not demonstrate the acts the state submitted she had committed (i.e., appellant claimed she was trying to calm the children, stroking them, brushing their hair out of their eyes, etc., rather than muffling their cries). In short, while appellant never denied that it was her in the videos on the dates as stipulated, she simply claimed she did not commit the offenses with which she was charged; rather, she asserted her actions were mischaracterized by the state and did not amount to child endangering. Therefore, her defense was not impeded by any failure to amend the date of the offenses as alleged in Counts 11 and 12, and because she cannot demonstrate prejudice, she also cannot demonstrate plain error as we have previously defined it. *See Barnes,* 94 Ohio St.3d 21 (2002); *Long*.

{¶ 86} Furthermore, appellant stipulated to the dates of the offenses at trial. Specifically, appellant's counsel stipulated that the recorded scenes in state's exhibit No. 1 were the scenes that formed the basis of the indictment. (Tr. 45.) Appellant's counsel also stipulated that the dates and times on the recordings were accurate. Additionally, appellant did not request a bill of particulars to gain more specific information as to the time frames alleged. *See Sellards* at 171 ("the state must, in response to a bill of particulars or demand for discovery, supply specific dates and times with regard to an alleged offense where it possesses such information.").

{¶ 87} Accordingly, appellant's fourth assignment of error is not well-taken. Nevertheless, we remand this matter to the trial court to amend Counts 11 and 12 of the indictment to reflect the offense date of September 9, 2009. As amended, we find no due process violation here.

III. CONCLUSION

{¶ 88} In conclusion, we overrule appellant's first assignment of error challenging the sufficiency and the weight of the evidence. We also overrule appellant's second, third, and fifth assignments of error and affirm appellant's sentence except for the sentences imposed for Counts 2 and 3. Those counts are hereby vacated and remanded for a new sentencing hearing, at which the state must elect which offense to pursue for sentencing, the trial court must accept the state's selection and merge the offenses accordingly. However, only the sentences for the offenses that were affected by the appealed error are reviewed de novo. Finally, appellant's fourth assignment of error is overruled, but we remand this cause to the Franklin County Court of Common Pleas for the limited purpose of formally amending Counts 11 and 12 to reflect the offense dates of September 9, 2009. As amended, we affirm those judgments of conviction.

Judgment affirmed in part and
reversed in part; cause remanded.

DORRIAN, J. concurs.
CONNOR, J., concurs in part and dissents in part.

CONNOR, J., concurring in part and dissenting in part.

I. INTRODUCTION

{¶ 89} I concur with the majority's decision to overrule appellant's first and fourth assignments of error. However, because I believe the trial court was required to merge all five pairs of felony and misdemeanor child endangering counts, I concur in part with the majority's decision to sustain in part appellant's third assignment of error as it relates to Counts 2 and 3 of the indictment, but respectfully dissent from the majority's determination that the remaining counts are not subject to merger. Because I believe these paired counts are subject to merger, and therefore the sentences on these counts must be vacated and all ten counts remanded for resentencing, I believe it is unnecessary to address the issues raised in appellant's second and fifth assignments of error challenging the imposition of maximum consecutive sentences. Therefore, I believe the second and fifth assignments of error should be rendered moot.

{¶ 90} In holding that the trial court did not err in imposing concurrent sentences for four of the five pairs of felony and misdemeanor child endangering counts, the majority finds that appellant failed to prove the state relied on the same conduct to support each pair of offenses. Because the majority believes the state presented evidence demonstrating there were at least two separate, distinct acts of abuse for each pair of offenses, the majority takes the position that each pair of misdemeanor and felony convictions were not based upon a single act of abuse, and therefore the offenses were not subject to merger. The majority relies upon *State v. Cooper*, 104 Ohio St.3d 293, 2004-Ohio-6553, and *State v. Overton*, 10th Dist. No. 09AP-858, 2011-Ohio-4204, as support for its position. However, I believe the facts and circumstances in this case differ from those in *Cooper* and *Overton*.[5]

II. THIRD ASSIGNMENT OF ERROR—ALLIED OFFENSES OF SIMILAR IMPORT AND MERGER

{¶ 91} R.C. 2941.25 prohibits merger and allows cumulative punishment if the offenses: (1) lack a similar import/are of dissimilar import; (2) were committed

[5] In *Overton*, we followed the precedent set forth in *Cooper*.

separately; or (3) were committed with a separate animus as to each. These three bars to merger are disjunctive. *State v. Bickerstaff,* 10 Ohio St.3d 62 (1984). In order to obtain the protection of R.C. 2941.25(A), the offender must show that the state has relied upon the same conduct to support both offenses charged. *See State v. Logan*, 60 Ohio St.2d 126, 128 (1979). "After [*State v.*] *Johnson*, [128 Ohio St.3d 153, 2010-Ohio-6314], we look to the evidence and, 'if that evidence reveals that the state relied upon the "same conduct" to prove the two offenses, and that the offenses were committed neither separately nor with a separate animus to each, then the defendant is afforded the protections of R.C. 2941.25, and the trial court errs by imposing separate sentences for the offenses.' " *State v. Drummonds*, 1st Dist. No. C-110011, 2011-Ohio-5915, ¶ 6, quoting *State v. Strong*, 1st Dist. No. C-100484, 2011-Ohi0-4947, ¶ 67.

{¶ 92} The concept of merger is " 'the penal philosophy that a major crime often includes as inherent therein the component elements of other crimes and that these component elements, in legal effect, are merged in the major crime.' " *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, ¶ 11, quoting *State v. Botta*, 27 Ohio St.2d 196, 201 (1971). The Supreme Court of Ohio has "consistently recognized that the purpose of R.C. 2941.25 is to prevent shotgun convictions, that is, multiple * * * punishments heaped on a defendant for closely related offenses arising from the same occurrence. * * * When 'in substance and effect but one offense has been committed,' the defendant may be convicted of only one offense." *Johnson* at ¶ 43, citing *Maumee v. Geiger*, 45 Ohio St.2d 238, 242 (1976), and quoting *Botta* at 203.

{¶ 93} "If the multiple offenses can be committed by the same conduct, then the court must [next] determine whether the offenses were committed by the same conduct, i.e., 'a single act, committed with a single state of mind.' " *Johnson* at ¶ 49, quoting *State v. Brown,* 119 Ohio St.3d 447, 2008-Ohio-4569, ¶ 50 (Lanzinger, J., dissenting). Therefore, if the answer to this question is yes (after determining that the offenses are allied and of similar import), then the offenses must be merged.

{¶ 94} In my view, the record does not demonstrate that each of the misdemeanor child endangering offenses were committed separately from the felony child endangering

offenses or with a separate animus. Instead, I believe the state has relied upon the same conduct to support the paired felony and misdemeanor offenses charged. As explained below, I believe the five misdemeanors at issue were committed by the same conduct as their corresponding felonies and, as a result, each of the five misdemeanors should have been merged with their corresponding felony offenses. Consequently, I believe the trial court erred in imposing sentences for all of the offenses.

A. Counts 8 and 9

{¶ 95} In the August 31, 2009 incident, appellant tossed a crying child onto the couch and forcefully put on his socks and shoes. Immediately after accomplishing that task, appellant firmly pressed a blanket or pillow over his face as he cried. Appellant stood over the child as he struggled and kicked. When she removed the blanket or pillow, J.P. cried and gasped for air. Appellant sat the child upright and informed him that he was going to listen.

{¶ 96} The majority finds that the tossing of the child onto the couch and the forceful way in which appellant put on his socks and shoes constitutes a misdemeanor offense and a distinct act of abuse, separate from the felony offense of smothering the child. Because of this, the majority believes the facts here demonstrate that the state relied on two distinct acts, rather than simply the act of smothering, to support both the misdemeanor and felony offenses.

{¶ 97} In my view, the entire event was part of a continuous course of conduct. Although the majority disagrees with the position that a "continuous course of conduct" supports merger, I believe that rationale is supported by our prior decision in *State v. H.H.*, 10th Dist. No. 10AP-1126, 2011-Ohio-6660. In *H.H.*, we found the defendant committed the crimes of rape and forcible rape by moving the victim's body from the couch to the bed and by removing her clothes and having intercourse with her while she slept. We determined this "was all part of one continuous course of action," despite the fact that the victim awoke and tried to resist at one point, which required the application of additional force in order to restrain her and continue with intercourse. *Id*. at ¶ 13, 14. We further found this did not constitute a separate act and that the entire course of action

was committed with a single state of mind, which was to have intercourse without being discovered. Consequently, we determined the two rape convictions should merge for purposes of sentencing. *Id*. at ¶ 14.

{¶ 98} Even assuming, for the sake of argument, that the act of tossing the child onto the couch and forcing his socks and shoes onto his feet could constitute a misdemeanor offense in and of itself, I believe these acts were merely incidental to appellant's efforts to facilitate her primary act of smothering the child in an effort to stop his cries and teach him that he was going to listen to her.

{¶ 99} Separate conduct or a separate animus may exist where a court determines the "defendant at some point broke 'a temporal continuum started by his initial act.' " *State v. Nuh*, 10th Dist. No. 10AP-31, 2010-Ohio-4740, ¶ 16, quoting *State v. Roberts*, 180 Ohio App.3d 666, 2009-Ohio-298, ¶ 14 (3d Dist.). Additionally, separate conduct or a separate animus may exist where "facts appear in the record that distinguish the circumstances or draw a line of distinction that enables a trier of fact to reasonably conclude separate and distinct crimes were committed." *State v. Hines*, 8th Dist. No. 90125, 2008-Ohio-4236, ¶ 48.

{¶ 100} Here, the majority contends the two acts of abuse were separated by a period of 40 seconds. However, unlike the circumstances in *Overton*, where the act of punching the child in the head while in the shower was separated by other acts, such as throwing the child into his girlfriend's arms, before the defendant struck the child "at least three times" in the chest "[a]t some point after removing [the child] from the shower" (*see Overton* at ¶ 11), I find there was nothing in this case separating the act of yanking on the child's arm from the smothering of the child. Thus, there was no brief intervention between the two actions. Instead, appellant's actions were part of a continuous course of conduct and I believe the state relied upon the same conduct/evidence to support both offenses and did not differentiate between the two. *See State v. Washington*, 9th Dist. No. 11CA010015, 2012-Ohio-2117, ¶ 17.

{¶ 101} Notably, the Supreme Court of Ohio has previously declined to "parse [the offender's] conduct into a blow-by-blow in order to sustain multiple convictions."

Johnson at ¶ 56. Furthermore, the evidence suggests appellant's intent throughout this incident was to make the child stop crying, which she attempted to do by grabbing the child and pressing the child's face into a cloth on her chest and smothering her, thus evidencing a single state of mind. Therefore, I believe the State should be required to elect the count on which it wishes to proceed, and the trial court should merge these counts into one conviction upon which to impose sentence.

B. Counts 11 and 12

{¶ 102} In the September 9, 2009 incident, appellant carried a crying two-year-old child, A.M., by her ankle, upside down, with one hand. Appellant tossed the child on the couch on her stomach. The child continued to scream. Appellant flipped the child onto her back and used a blanket to muffle the cries for several minutes. At one point, appellant's entire body was on top of the child as appellant held the blanket over A.M.'s face.

{¶ 103} The majority determined that because this incident took place over the course of nearly seven minutes, and because the majority believes there were multiple smotherings with intervals of reprieve between smotherings (something that was not argued by the state), as well as a separate and distinct act of abuse committed by appellant based upon her manner of carrying the child and tossing her onto the couch, there were at least two separate acts of abuse here, and consequently, the offenses need not be merged. I disagree.

{¶ 104} In my view, this incident involving A.M. was one sustained, continuous act, committed with a single state of mind. Again, the evidence suggests appellant's intent, throughout the incident, was to make the child stop crying, which she attempted to accomplish by picking up the child, tossing her onto the couch, and muffling her cries and smothering her with a blanket. I find no intervening event or brief intervention between appellant's act of carrying the child upside down by one ankle and appellant's act of smothering the child. I disagree with the majority's position that construing this seven-minute period of abuse as a single act in effect creates a "multiple-offense discount." I do not believe the state relied upon appellant's act of carrying the child by the ankle as a

distinct instance of abuse, given the state's ongoing references throughout the proceedings to the misdemeanor offenses as "alternative" or "back-up" offenses to the felonies.

{¶ 105} In addition, in announcing its verdict on the felony count (Count 11), the trial court focused on appellant's act of carrying the child upside down and tossing her on the couch, as well as the fact that the child was crying off and on. The trial court did not specifically reference the smothering and did not cite to separate conduct when announcing its verdict on the misdemeanor offense (Count 12). (Tr. 225.) While I acknowledge that Crim.R. 23(C) only requires the court to make a general finding of guilt when announcing a verdict in a case tried without a jury, I believe some clarification of the conduct is required at the sentencing in these circumstances in order to find separate acts. The trial court did not provide this here.

{¶ 106} Furthermore, while the majority submits that there were at least three separate smothering incidents during the course of appellant's interaction with the child which support multiple incidents of abuse and multiple convictions, I disagree with the contention that a reviewing court can seek out alternative theories that the state might have, but did not pursue in order to avoid merger. *See Johnson* at ¶ 70 ("Although there may have been alternative theories that the state considered in pursuing Johnson for endangering and ultimately killing [the victim], we are constrained by the record before us and the legal arguments raised in the briefs.") (O'Connor, J., concurring); *Washington* at ¶ 16 ("the allied offense analysis must derive from the evidence introduced at trial, the record, and the legal arguments actually raised.").

C. Counts 13 and 14

{¶ 107} In the September 11, 2009 incident, two-year-old A.M. was lying on the floor crying. When giving her a pacifier did not stop her cries, appellant picked up A.M., tossed her on the couch, sat down next to her, and used a blanket to muffle her cries for a few minutes. Again, the majority finds merger of the misdemeanor and felony offenses is not required here, stating the state identified both the throwing and the smothering as separate acts of abuse in its opening and closing arguments, and therefore appellant has

not shown that the state relied on the same conduct to support both offenses. Like before, I disagree with the majority's position.

{¶ 108} In my view, appellant's act of picking up the child and throwing her onto the couch was merely incidental to her actions taken to muffle the child's cries and smother her. I believe these acts were all part of one sustained, continuous act, committed with a single state of mind, with the intent to make the child stop crying. Even if I believed there were two distinct acts, it is arguable that the manner in which the child was thrown onto the couch, standing alone, would not meet the elements necessary to establish a misdemeanor child endangering offense. Although the state and the trial court described the act as one where the child was "slammed" onto the couch, it is arguable that appellant's actual conduct did not recklessly create a substantial risk to the child's health or safety by violating a duty of care, protection, or support in these circumstances. I believe the offenses should be merged.

D. Counts 17 and 18

{¶ 109} Finally, in the September 25, 2009 incident, A.M. was crying on the floor. After tossing another child out of the way, appellant sat down next to A.M. Appellant bent over the child and smothered her for several minutes, telling her repeatedly to "stop." The majority believes the two counts at issue here were supported by evidence of at least three separate acts of smothering, separated by breaks lasting longer than one minute, and therefore there are at least two distinct acts of abuse warranting convictions and sentences for both offenses. I disagree.

{¶ 110} In this situation, I again find appellant's actions constituted one sustained, continuous act, and I point out that the state did not argue at trial that there was more than one act of smothering. The evidence suggests appellant's intent throughout the incident was to make the child stop crying, which she attempted to do by muffling the child's cries and smothering her. I believe appellant's acts here were part of the same course of action, committed with a single state of mind. Therefore, like I have done with respect to the other pairs of offenses, I respectfully dissent from the majority's position that these offenses should not be merged.

III. CONCLUSION

{¶ 111} Collectively, I believe it has been demonstrated here that each of the five felony convictions were based upon the same evidence or conduct upon which the corresponding misdemeanor convictions were premised. And, as noted above, the trial court did not attempt to parse out the conduct into separate, distinct acts at sentencing, nor did it designate certain conduct to constitute misdemeanor violations and other conduct felony violations at the sentencing hearing. I believe such clarification was necessary in these circumstances in order to impose sentences on all of the paired offenses.

{¶ 112} Furthermore, as previously stated, the prosecution indicated that the misdemeanor offenses had been indicted in the alternative, or essentially as "back-up" offenses in the event that the state was unable to prove the elements required for the higher-level felony offenses. Unlike the majority, I believe this does provide additional support for my position, as it is apparent the trial prosecutor did not attempt to argue separate acts with respect to these counts. Furthermore, I do not believe it would have been possible to support such an argument, had one been made. As a result, I believe appellant has demonstrated the state relied upon the same conduct to support each pair of convictions and I believe these offenses must be merged.

{¶ 113} In conclusion, I concur with the majority's decision to overrule appellant's first and fourth assignments of error. I concur in part and dissent in part with the majority's decision to sustain in part appellant's third assignment of error because I believe appellant's third assignment of error should be sustained in its entirety. As a result, I would render moot appellant's second and fifth assignments of error, due to my belief that this matter should be remanded for resentencing on Counts 2 and 3, 8 and 9, 11 and 12, 13 and 14, and 17 and 18.

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